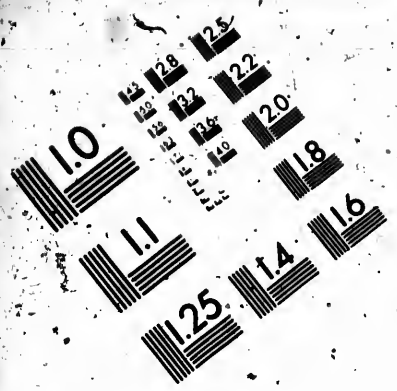

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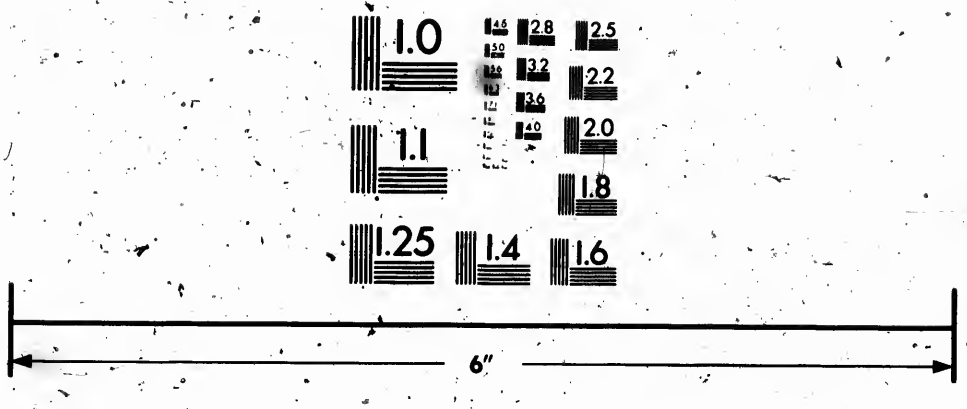

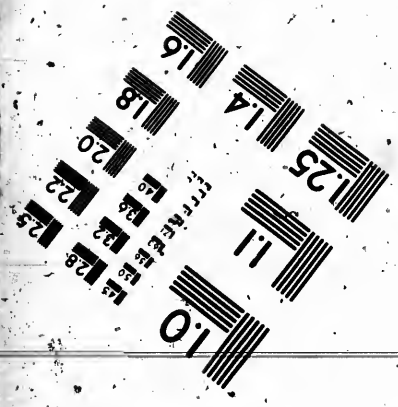

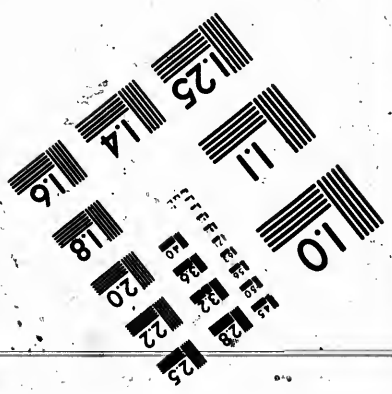

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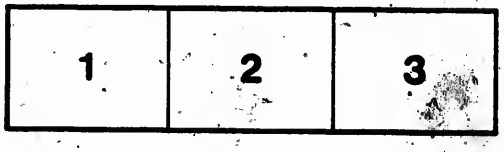

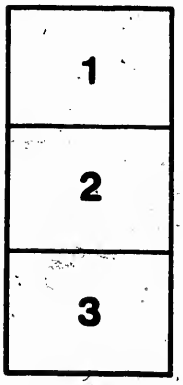

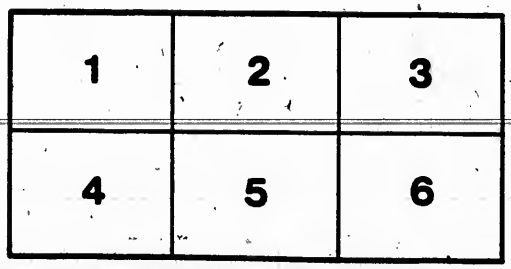

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

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VOL. XIII.

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TABLE OF CONTENTS.

	PAGE.
Names of Contributors	iii.
Index to Cases	v.
Report of Cases	1—336
Index to principal matters in Reports	i—xiii.

ERRATUM.—In report *Mackay* v. *Cook*, p. 825, the last paragraph of Mr. Perkins' argument, beginning "The respondent," should be placed as the last paragraph of Judge Badgley's remarks.

INDEX

TO CASES REPORTED IN THE THIRTEENTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q.C.

	PAGE.
Aimbault and *vir* vs. Bates et al.	139
" " vs. Dunlop	140
Allard vs. Wilcot	28
" vs. Legault et al., and E. contra	80
Austin et al. vs. Bertram	157
Baile vs. Whyte	130
Baltzar et al. vs. Grewing et al., and Hutchison and *vir*, opposants	297
Bank of Toronto vs. The European Assurance Society	63
Beauchêne vs. Pacaud	135
Beaudry vs. Workman	15
Beland vs. Dionne et al.	204
Belle vs. Côté	26
Bénard et al. vs. Bourdon	233
Benning, appellant, and Grange, respondent	153
Blais *vs.* Blais, and Blais plaintiff *en gar.* vs. Larochelle	277
Booth vs. Lawton and Lawton, opposant	59
Bowie, (in the matter of), Ins., and Rooney, respondent	101
Brown, appellant, and Douglas, respondent	29
" *es qualité*, vs. Smith	288
Campbell, appellant, and The Liverpool and London Fire and Life Ins. Co., respondent.	309
Chapleau, appellant, and Debien, respondent	194
Chapman et al. vs. The Lancashire Ins. Co. and Fraser et al. plaintiffs, *par reprise d'instance*	36
Chaudière Gold Mining Co. of Boston vs. Desbarats et al.	182
Clement vs. Moore	163
Cochrane et al. vs. Bourne et al.	168
Currier vs. Lafrance	329
Davis et al. (in the matter of) Ins., and Muir, clmt., and Chamberlin et al., crs. contesting	184
Desormeaux vs. Cadotte	211
Doolan vs. The Corporation of Montreal	71

PAGE.

Dorwin et al., appellants, and Thomson, respondent 262
Doutre vs. Gagnier 305
Duhaut vs. Lacombe et al., and Morrison, opposant 230
" " " , and Tranchemontagne et ux., opposants 308
Eastern Townships Bank, appellant, and Humphrey et al., respondents 156
Ellice vs. Renaud 164
Ex parte Kennedy, for *habeas corpus*, and Barlow, respondent 57
" Stephen and Stephen 140
" The Mayor, &c., of Montreal, and Bonaventure St., and Guy et al., proprietors, and Papineau, *mis en cause* 281
" Morrison, for *certiorari*, and De Lorimier, magistrate 295
Fitts vs. Piton et al., and H. M. Principal Secretary of State, for the War Department, et al., T. S 165
Forgie et al. vs. The Royal Ins. Co 9
Forsyth et al. vs. Charlebois 328
Fournier vs. Ledoux 332
Fulton vs. Stevenson et al 112
Gault et al. vs. Wright et al 60
Génier vs. Woodman et al 201
Goudreault vs. Poisson et al 235
Grange vs. Benning 120, 290
Graves vs. Dennison et al 178
Hall, appellant, and Brigham, respondent 252
Harris vs. Fontaine 336
Hoppock et al. vs. Demers 224
Hurtubise et al. vs. Leriche 83
Johnson vs. Rimmer and Lockwood et al., int. parties 131
" vs. Gauthier 163
Lalonde dit Latreille vs. Parent, and Bourbonnais, opposant, and Parent *es qualité* et al., contesting 231
Landry vs. Migneault et al 325
Lefebvre vs. Murdoch 328
Lyman et al. vs. Dyon et al 160
Lynch vs. Bertrand 189
McDonald et al. vs. Molleur 189
" vs. Lalonde 331
McFee vs. Bowie and Brown, int. party 335
McKay, appellant, and Cook, respondent 321
McLennan, appellant, and Dewar, respondent 102
McShane vs. Jordan 61
Mathewson vs. The Royal Ins. Co 6, 229
Mayor (The) &c., of Montreal vs. Ranson 234
Mills vs. The Granby Red Slate Company 166
Molson vs. The Molsie Co., and Dufresne, opposant, and the plaintiff contesting 255
Moore vs. Luce 113
Morel de la Durantaye vs. La Société St. Ignace de Montréal 1
Morgan (in the matter of), Ins., and Whyte, assignee, and Biron, contesting 187
Morland et al. vs. Torrance 197
Morley vs. Massue 85
Munro vs. Lalonde 128
Notman and The Queen 255
Patton vs. Corporation of St. André d'Acton et al 21
Pinsonneault, appellant, and Valade et al., respondents 169

	PAGE.
Pollico *es qualité* vs. Elvidge	333
Prevost, appellant, and Perrault et al., respondents	106
Provost et ux, appellants, and Jackson et al., respondents	170
Quebec Bank vs. Steers et al., and Seymour et al., T. S., and defendants petitioners.	75
" " vs. Paquet	122
" " vs. Cook	253
" Marine Ins. Co., appellant, and The Commercial Bank of Canada, respondent.	267
Regina vs. Downey	193
" vs. Lacombe	259
" vs. Bathgate et al	299, 303
Renaud vs. Walker, and E. contra	180
Robert et al., appellants, and Bean, respondent	225
Rodgers et al, appellants, and Laurin, respondent	175
Rogers et al. vs. Morris et al	20
Rousseau vs. Trudeau et al	138
Rousson vs. Gauvin et vir	82
Sargent vs. Johnston et al	298
Sauvageau vs. Larivière	210
Saxton vs. Sheppard and Peloquin et al., opposants	308
Sénécal vs. Lemoine	56
Serrurier vs. Lagarde et al	252
Speiman, plaintiff in error, and The Queen, defendant in error	154
Syndics (Les) de la Paroisse des Saints Anges de Lachine vs. Lefebvre	185
Tuckett et al. vs. Forester et al	179
Turgeon et al. vs. Taillon and Taillon, petitioner	19
Vautier vs. La Compagnie de Navigation de Beauharnois, &c., and Lynch, opposant.	52
Verdon vs. Verdon	223
Voyer vs. Richer	213
Wiggins, appellant, and the Queen Ins. Co. of Liverpool and London, respondent.	141
Wilson vs. Demers	24
" vs. Ibbotson	186
" vs. Leblanc, and Leblanc *es qualité*, opposant	201
Winning et al. vs. Fraser	167

THE

LOWER CANADA

Jurist.

SUPERIOR COURT, 1869.

MONTREAL, 16TH JANUARY, 1869.

IN CHAMBERS.

No. 2286.

Coram TORRANCE, J.

Alfred Morel de la Durantaye, petitioner, vs. *La Société St. Ignace de Montréal*, *defendants.*

The petitioner obtained admission to a society for aiding members during sickness, on representations that he was in good health, and by suppression of the fact that he was laboring under a pulmonary complaint. It appearing subsequently that the petitioner was not in good health at the date of his admission, he was expelled from the society on his refusal to submit to a medical examination.

HELD:—(on a petition for writ of mandamus to replace petitioner on list of members) that the admission to membership was null, and that the expulsion was justified by the facts.

TORRANCE, J.—This is an application by petition for a writ of mandamus against the defendants under the 1022nd article of the Code of C. Procedure. The petition was presented on the 5th September last and allowed by Mr. Justice Mondelet. The defendants are a corporation having for its object to secure to its members and their families by means of monthly contributions, pecuniary assistance in case of sickness, accident or death.

The petition sets forth that on the 19th February, the petitioner was admitted member of the society, possessing then and since all the qualifications required for membership; that since then he has fulfilled all his duties as member: that since July last, the defendants have refused to receive the contributions of the petitioner, and on the 7th August last, without cause expelled him from the membership, depriving petitioner of all his advantages as member. The conclusion of the petition was that a judge of this court would be pleased to order the issue of a writ of mandamus enjoining the defendants to replace the petitioner among their members within such delay as might be appointed, and in default of the defendants doing so, that the defendants be condemned to pay to petitioner $1000. (Art. of C. of C. P. 1025.)

Alfred Morel de la Durantaye vs. La Société St. Ignace de Montréal.

The defendants pleaded to the petition by an *exception péremptoire* that every person seeking to be admitted as member had to answer truthfully to the following questions among others:

Are you exempt from all hereditary or incurable sickness?

Will you be faithful to the regulations?

And that by the constitution and rules of the society, no one could become a member unless the applicant were known to enjoy good health. That the petitioner on the 19th February, before his admission as member, answered affirmatively that he was exempt from all hereditary or incurable disease, and declared that he was known to enjoy good health. That the petitioner after making said declaration was on the said 19th February admitted a member. That petitioner knew at the time that he could not become a member unless he were exempt from such hereditary or incurable disease, and unless he were known to enjoy good health. That petitioner in order to procure his election had recourse to fraud and dissimulation, and in answering and affirming as he did on the 19th February acted *par dol* and fraudulently. That he knew well that at that date he had bad health and was suffering from an incurable pulmonary complaint known as consumption, and that he was sick for a long time, and did not have the character of enjoying good health and did not enjoy it.

That the risk incurred by the defendants in admitting the petitioner as member in his then state of health was much greater than if the petitioner had then been well. That petitioner has for several years enjoyed bad health, and for more than four years has had consumption. That five or six days after his admission as member he applied to the society known by the name of L'Union St. Joseph de Montréal, of which he had been a member for several years, in order to obtain assistance; alleging that he was ill and unable to work. That on the 8th of June last, two of the defendants' members delegated for that purpose, requested the petitioner to submit to the examination of two medical men in order to ascertain whether he had consumption and how long he had had it, and in order to ascertain the state of his health, and petitioner refused to submit to such examination. That before the date of his admission, to wit, on the 12th February, the petitioner was examined by Dr. O'Leary, physician nominated on behalf of the defendants, and then fraudulently and with fraudulent intent answered the physician that he enjoyed and always had enjoyed good health and was free from any incurable disease. That within the last six years, petitioner has admitted that he had lost one of his lungs, which fact the petitioner before his said admission should have made known to the defendants and to the said O'Leary. That petitioner by his false representations deceived the said O'Leary who on the said 12th February delivered to him a certificate that he was then exempt from sickness, and this certificate was produced by the petitioner before the defendants in order to his admission. That on the 8th July last, the defendants by the instrumentality of Maitre Jobin, N. P., reiterated their grievances against the petitioner and required him to submit to a medical examination as to his state of health, and notified him that in default of his so doing, he should be expelled from the society. That petitioner anew refused to submit to said examination, and on the 7th August by resolution of the society was expelled.

The conclusion of the plea prayed that it might be declared that on the 19th February, 1868, date of election of the petitioner as member, he was suffering from an incurable pulmonary disease known as consumption; that he did not enjoy good health, that he was not qualified to become a member of the society, that he only procured his election by false representations and by suppression of facts which it was important that the defendants should know; that it be adjudged that said certificate of Dr. O'Leary was obtained by such representations and suppressions and by *dol* and fraud; that said certificate be declared null and void; that it be declared that the said pretended contract between the defendants and petitioner, be rescinded, broken, annulled and declared null, broken and set aside; that the petitioner was on the 19th of February, disqualified from being elected member of the society, and finally that petitioner be declared *déchu* deprived of all right to claim from defendants the contributions that he paid them for several months, and that it be declared that petitioner is unfounded in his present *demande*.

The facts of the case appear from documentary evidence and the testimony of fourteen witnesses. Certain facts are not called in question. On the 12th February last, the plaintiff submitted to a medical examination by Dr. Patrick O'Leary acting on behalf of the defendants. On the 19th February, petitioner was admitted member of the society after answering in the affirmative the question "êtes-vous exempte de toute maladie héréditaire ou incurable?" and the question "serez-vous toujours fidèle aux règlemens?" It was then also among the qualifications of a member "that he be known to enjoy good health." A question put on this occasion by the president the petitioner also answered in the affirmative as to his then enjoying good health. Further, one of the rules Art. 15, 3°, says: "la société aura toujours le droit de le faire visiter par un ou "plusieurs médecins si elle a quelque doute sur le membre." The petitioner also declares in his examination that he knew the rules of the society before his admission. It is also in evidence that the defendants deputed two of the members to visit the petitioner and get his consent to a medical examination, and that after first consenting he finally refused on advice of his lawyer and doctor. It is also in evidence that the defendants formally put the petitioner *en demeure* to submit to a medical examination by protest of date the 8th July, and on the 7th August he was expelled.

The main question before me is as to the health of the petitioner on the 19th of February last, "qu'il soit connu pour jouir d'une bonne sante." Art. 2, 3°. There was no medical examination that day nor after the 12th of February, but we have a letter from the petitioner to the president of the Union St. Pierre of date the 25th February, six days after his admission to the society St. Ignace, in these words:

MONSIEUR:—"Etant arrêté des mes travaux depuis le 18 Février par cause "de maladie je fais application pour bénéfices."

Louis Calixte Garnier, the collector treasurer of the defendants, says that two days after his admission, that is on the 21st February, petitioner bought tobacco from him. He was buttoned up, and had a thick comforter on. He was pale. The witness said to him, you seem sick, "vous me paraissez malade."

Alfred Morel de la Durantaye, vs. La Société St. Ignace de Montréal.

He answered "oui, je suis revenu des Etats dernièrement, et j'ai eu les fièvres aux Etats," and two or three days afterwards he made application for aid to the Union St. Joseph.

It is next necessary, to look at the previous history of the petitioner. He resided in the United States at two different times for seven years since 1853. In 1861, he received assistance, from the Union St. Joseph for nearly four months during a sickness caused by a strain in lifting. He then spat blood and people thought him consumptive. In 1866, he was sick three weeks and had aid for five weeks from the Union St. Joseph, and the Union St. Pierre. He was then in the States. Six days after his election by the defendants, he asked the Union St. Joseph for aid in sickness. He had a fever caused by cold. He was then sick in bed for three weeks, and since he has always been *débile*. Since the 24th or 25th February, he had aid from these societies and could not work.

Joseph Gannell, witness, says he has known petitioner for eight or nine years —worked in the same shop with him for two or three years. At first his health there was good enough, then he fell sick and was away three or four months. The witness paid him a visit, and says Morel told him "son médecin lui avait dit qu'il avait craché un des poumons." He then returned to work and was there one or one and a half years, but was not so well as before and he complained now and again.

Joseph Senecal knew him five or six years, worked with him at Jones' one or one and a half years five years ago. He then was sick two months, came back but not to work, came back to work in a month, and then "il travaillait assez bien, mais il avait l'air d'un homme maladif."

Antoine Poulet says he knew him ten years, worked with him at Jones'. He then complained from time to time of being sick—said he suffered "dans "l'estomac:" "son apparence n'était pas celle d'un homme de santé."

Stanislas Papineau says he too knew petitioner at Jones', knew him seven years. He then fell "bien malade," for several weeks was so, and remained at home. Before stopping work "il toussait et il crachait." After this illness, petitioner told him his doctor said he had only one lung "et qu'il achevait de le cracher." Le demandeur me dit cela dans un moment où il toussait sur l'observation que je lui fis alors qu'il toussait beaucoup." Papineau adds that after this illness petitioner was not so strong as before.

André Moses says he had known him for twenty years—had always known him as "un homme ayant une faible santé." When he returned last winter "il m'a paru bien faible."

A word more as to the history of the petitioner since the 19th of February, 1868.

Dr. Desjardins treated petitioner for a fever in February. When he left him, the fever had left him, but he was feeble. Since then petitioner had come to him again, and the physician prescribed cod liver oil. Dr. Desjardins was under the impression that he had consumption from his appearance at this time. He did not examine him, but told him his illness would be hard to cure. I think it right here to remark on the refusal of the petitioner to submit to an

examination of his person. By the rule already referred to, "la société aura toujours le droit de le faire visiter par un ou plusieurs médecins si elle a quelque doute sur le membre." It would be hard for me to say that this did not imply such an examination by the physician of the person of the sick man as would enable the medical man to express a decided opinion on the case. That examination was refused. We have also the fact that the petitioner has been receiving aid from the Union St. Joseph, from the 25th February to the 5th October last, a period of thirty-two weeks.

So much for the facts of the case. Now for the application of the law. A corporation such as the defendants, is in the position of an insurer, and such a contract as has been entered into here on the 19th February required on the part of the applicant for insurance and admission to membership, the utmost good faith, *uberrima fides*. There was a contingency to be met by the defendants if the case should arise; namely, ill health or death in the future, but on the other hand, the contract undoubtedly required that the petitioner should be on the 19th February, free from hereditary and incurable disease, and also that he be then known to enjoy good health. It is impossible for me to take the conclusion that the petitioner, at that time, was either known to enjoy good health, or did in fact enjoy good health. His reputation was otherwise, and his letter to the Union St. Pierre on the 25th February, that he had been ill since the 18th, and his confession to Garnier when buying tobacco two or three days after his admission to membership, that he was ill and had lately returned from the States where he had had fever, confirm me in the opinion that his state on the 19th February was not such as to justify his admission to membership in the Union St. Ignace, and whether he was in good faith or bad faith, the contract between them should be annulled and declared null. The petition is therefore dismissed with costs.

The following is the judgment:—

"I, the undersigned Judge, etc., * * * Considering that the rules of the admission of members with the defendants required that the petitioner on the 19th February last (which rules the petitioner admits himself to have been cognizant of) should be known to enjoy good health; considering that the petitioner was not then known to enjoy good health; and did not, in fact, then enjoy good health. Considering that the petitioner was only admitted to the membership of the defendants on false representations, and the suppression of facts which it was important that the defendants should have known, do maintain the *exception péremptoire* of the defendants, and do rescind and annull, and declare null and void the contract between petitioner and defendants, of date the 19th of February 1868, by which he was admitted to the membership of the defendants, and do dismiss the petition of the petitioner with costs."

Petition dismissed.

J. Doutre, Q.C., for petitioner.
Leblanc & Cassidy, for defendants.
(J..)

MONTREAL, 30TH NOVEMBER, 1868.

Coram BERTHELOT, J.

No. 470.

Mathewson vs. *The Royal Insurance Company.*

HELD:—That when the verdict and findings of the jury are, in the opinion of the Court, contrary to the evidence adduced at the trial, the Court will set aside the verdict and findings and grant a new trial.

This was a motion by the defendant for a new trial, on the ground that the verdict and findings of the jury, and more especially, in answer to the first and second questions submitted to them, were contrary to the evidence adduced at the trial, and because said verdict and findings were manifestly unjust and contrary to law and the evidence adduced at the trial.

A motion was also made by plaintiff for judgment in his favour on the verdict, not for the amount found by the jury, but for a lesser amount, to which plaintiff declared he reduced his demand?

PER CURIAM :—Le demandeur, comme cessionnaire des droits de John Mathewson & Co., poursuit l'assurance pour le recouvrement de $2,150, valeur de certaines quantités d'huiles détruites par le feu du 18 août 1867, dans les hangards de Léon Middleton et désignées en la Police d'assurance du 9 juillet 1867 comme suit, "on refined coal oil, petroleum oil, and lubricating oil, the "*property* of assured, contained in Middleton No. 1 oil shed."

La déclaration affirme que le 19 août 1867, toute la quantité d'huile mentionnée en la police d'assurance, savoir, 87 *barrels of refined coal oil*, 50 *barrels lubricating oil and* 20 *barrels of petroleum oil, then being in the said store or warehouse mentioned in said* policy, a été consumée et détruite par le feu, et que la perte en a été totale pour les assurés Mathewson & Son.

La défenderesse en admettant la police, excipe que les quantités d'huiles qui avaient fait le sujet du contrat d'assurance du 9 juillet 1867, lui avaient été représentées par les assurés comme devant arriver par le chemin de fer le Grand Tronc, et que le contrat d'assurance n'a eu pour objet que telles quantités d'huiles récemment alors arrivées dans le dit hangard ou sur le point d'y arriver, tandis que par les documents produits par le demandeur et sur lesquels la réclamation est faite et fondée il paraîtrait que ces quantités d'huiles étaient dans le dit hangard des défendeurs le 6 de novembre 1866, tout en protestant cependant qu'il n'était rien admis par ce plaidoyer.

La contestation a été référée à un jury de marchands et aux deux premières questions comme suit, il a été répondu dubitativement à la première, et formellement à la seconde.

No. 1. "Were John Mathewson & Son, named in the plaintiff's declaration, on and prior to the 19th August last, proprietors of the quantity of oil referred to, in the plaintiff's declaration, and in the policy plaintiff's exhibit No. one, or of some and what portion thereof?

Answer—We *believe* they were proprietors of the whole quantity.

No. 2. "Was the said oil and what portion thereof destroyed by fire at Montreal on or about the 19th of August last, as alleged in plaintiff's declaration,

and if so, what was the value of the said oil so destroyed by fire at the time of its destruction ?

Answer—All destroyed, value thereof $2,150.

Il est intéressant de constater que ni le demandeur ni la défenderesse n'ont été satisfaits de la charge du Juge, lors du procès.

Le demandeur, par sa motion à cet effet, a excipé à cette partie de la charge du juge par laquelle il a informé le jury qu'il n'y avait point de preuve que la quantité d'huile dont le demandeur réclamait la valeur fut dans le hangard de Middleton au temps du feu, le 19 août.

La défenderesse, par sa motion au même effet, a excipé à cette partie de la charge du juge par laquelle il a informé le jury qu'il y avait preuve évidente de la vente faite à Messrs. Mathewson & Co. de la quantité d'huile en question.

Je puis remarquer que c'est un cas rare, et qui dénote combien la preuve était incertaine et insuffisante.

Le procès par jury a eu lieu le 14 avril dernier et le verdict du jury avait pour effet d'accorder au demandeur $2,150, mais ce dernier, dès le 23 avril, sentant qu'il n'était pas possible de justifier ce verdict par la preuve, a demandé à la cour acte de son désistement du verdict jusqu'à concurrence de $398, et réduisant sa demande à $1752, suivant un certain état par lui filé ce jour là, qui ne correspond guère avec les différentes pièces de la preuve.

C'est dans cet état de la procédure que le 24 avril dernier, la cour a été saisie de la motion du demandeur pour jugement sur le verdict en sa faveur et selon son désistement pour $1752, et aussi de la motion de la défenderesse pour que le verdict et les réponses du jury fussent mis de côté et pour nouveau procès, 1o. parce que le verdict et les réponses du jury, surtout aux deux premières questions à eux fournies, étaient contraires à la preuve, 2o. parce que le dit verdict et les dites réponses étaient parfaitement injustes, contraires à la loi et à la preuve faite.

Avant d'aller plus loin, il est bon de citer ici ce que l'on trouve au 3me volume de Graham, *on new trials*, sur la discrétion et le devoir des juges et des cours d'accorder un nouveau procès en certains cas, Ch. 15, verdict against evidence, edition of 1855, p. 1207.

" The authority vested in Courts of Law, to order new trials, was not intend-
" ed to be a mere formal, barren and inoperative power. It was intended, on the
" contrary, to supply a salutary guard against the mistakes, passions, prejudices
" and ignorance of juries. The judge was not designed to be a mere automaton,
" to register the verdict of juries in all cases, against the manifest justice of the
" case, and against his own convictions of right. The law supposes that he will
" exercise an effective, scrutinizing and controlling judgment. Nor does the fact
" that there has been evidence submitted to the jury, on both sides of the points
" at issue, exclude the exercise of this beneficial power of supervision."

Again, same page :—" If the judge conscientiously believes that the verdict is
" against the truth of the case, that is, contrary to the weight of evidence, he is
" *bound* to grant a new trial. His conscience and his duty should not be satis-
" fied by ingenious speculations on the possible mode by which the jury arrived
" at the conclusions which they reached, but require of him to ascertain if those

Mathewson, vs. The Royal Insurance Co.

"conclusions are the natural, probable and logical conclusions from the testi-
"mony."

Page 1208 :—"Where verdicts are without or against evidence, a power
"should reside in judges, to give relief; otherwise irreparable injustice would
"be inflicted. Cases frequently occur in which juries, from haste, inadvertence,
"miscalculation or defect of judgment, decide wholly wrong."

1 vol. Graham, same edition, p. 355 :—"In all cases, however, much stress is
"laid on the opinion of the judge who tried the case, if he is satisfied with the
"verdict upon reflection, although against his charge, a new trial will generally
"be refused. But if the judge who presided at the trial expresses his dissatis-
"faction with the finding of the jury, it will induce the Court, at least
"in doubtful cases, to direct the cause to be sent to another jury for reconsider-
"ation."

C'est d'après ces autorités que la cour doit être guidée. Nous avons le fait que ni l'une ni l'autre des parties n'est satisfaite de la charge du juge.

De plus, il est également acquis que l'Hon. Juge Monk, présidant au procès, avait, dans sa charge aux jurés, énoncé son opinion qu'il n'y avait pas de preuve que les quantités d'huiles réclamées étaient au jour du feu dans le hangard de Middleton.

Je puis ajouter que je ne trouve pas moi-même qu'il y ait aucune preuve suffisante sur ce point. J'irais plus loin même que l'honorable juge et je dirais qu'il n'y avait pas de preuve non plus que les quantités d'huiles dont le demandeur réclame la valeur étaient réellement sa propriété ou celle de ses cédants, pas plus que je n'y voie la preuve que ce sont ces quantités mêmes qu'ils ont eu l'intention d'assurer le 9 juillet 1867.

Il paraît au contraire par la preuve que les quantités d'huiles que le demandeur ou ses cédants entendent réclamer la valeur, sont des quantités d'huiles qu'ils auraient acheté dès Novembre 1866, et que par conséquent il n'y a pas de preuve sur l'identité des choses assurées et des choses perdues par le feu, preuve qu'il était essentiel de faire.

Il me paraît également que les quantités d'huiles mentionnées au *retraxit*, ou désistement du demandeur du 23 avril ne correspondent pas entièrement, avec les quantités assurées au moins en partie, ou avec celles qu'il est prétendu par le demandeur avoir été achetées par ses cédants dès novembre 1866.

Sur toutes ces quantités et espèces d'huiles achetées, assurées ou perdues par le feu, et dont le demandeur demande le recouvrement, il y a une *vague incertitude* pour ne rien dire de plus qui ne peut suffire pour assurer un verdict des jurés ou un jugement de cette cour. Il n'y a pas un témoin sur le témoignage duquel on puisse s'arrêter qu'il y avait là, le jour du feu, telle ou telle quantité d'huile appartenant au demandeur ou à ces cédants.

Le demandeur s'est beaucoup reposé sur la déposition de Middleton examiné en vertu d'une commission rogatoire émanée à New York, mais il me suffira de dire que son témoignage est en contradiction avec celui donné par lui devant le Juge Coursol peu de temps après le feu. L'on peut croire que ses souvenirs étaient plus exacts quelques jours après le feu, qu'ils n'ont pu l'être dix mois après, à New York le 31 Mars 1868.

Mais il y a plus, ce dont il a témoigné à New York est en contradiction avec ce qui a été prouvé devant le jury et par les documents produits.

Sur le tout il est impossible d'en venir à une autre conclusion que le verdict du jury a été rendu sans preuve suffisante et légale, et que la motion de la défenderesse pour nouveau procès doit être accordée, et la motion du demandeur pour jugement renvoyée avec dépens.

Motion for new trial granted.

Rose, Ritchie & Rose, for plaintiff.
Strachan Bethune, Q. C., for defendant.
(S. B.)

MONTREAL, 31st DECEMBER, 1868.

Coram TORRANCE, J.

No. 768.

Forgie et al. vs. *The Royal Insurance Company.*

HELD:—That the sale of property insured does not convey to the purchaser the Policy of Insurance, without a transfer of the Policy and by mere operation of law.

This was an action on a fire policy, in which the plaintiffs sought to recover from the defendants the sum of $15,000 cy.

The facts and circumstances as well as the pleadings in the case sufficiently appear in the remarks of the Honourable Judge, in rendering judgment.

PER CURIAM:—This case presents for decision a question which the Court believes comes before the tribunals of Lower Canada for the first time. One main question of law is as to the effect of the sale of property insured against fire on existing policies of insurance in the hands of the vendors, and how far the transfer without consent of the insurer invalidates the insurance as regards the purchaser—in other words: does the sale of the property insured convey to the purchaser the policy of insurance without a transfer of the policy and by mere operation of law.

The chief facts are not disputed.

On the 18th of August, 1865, the trustees of the estate of the late John Egan, of Aylmer, namely, David Davidson, Henry Thomas, and Edwin H. King, effected an insurance against fire on the Pontiac Mills with the defendants for $20,000.

On the 19th September, 1866, the plaintiffs bought from the trustees the Pontiac Mills for $15000, payable ¼ down, say $3750 cash.

On the 3rd of November, 1866, a memorandum in writing was made between the plaintiffs and Henry Thomas as trustee, acknowledging the payment of $3750 the first instalment, and containing the following clauses bearing upon the litigation in question: "The deeds and transfers of insurances shall be completed at the first demand of the trustees."

"The pro-rata rate of the premiums on the insurances now on the property to be repaid by Messrs. Forgie & O'Connor to the trustees from this date."

Thereupon Henry McKay, as agent of the trustees, addressed a letter of the

Forgie, vs. The Royal Insurance Co.

same date to H. L. Routh, Esq., agent of the defendants, in the following words:

"Sir:—Please to take notice that the trustees have sold to Messrs. O. F. O'Connor and John Forgie the Pontiac Mills on which you have issued policies of insurance.

When the documents are made out it is the intention of the trustees to convey the property to the above named gentlemen, as also the policies of insurance, and they (O'Connor and Forgie) will reconvey to the trustees the policies to cover the payment due upon the property.

Messrs. O'Connor & Forgie will at once enter upon repairs to the dams and mills, but the mills will not be worked until next spring.

Please to inform me in writing if this is in order and that you will hold the trustees covered."

I am, &c.

The Insurance Company replied by the following letter addressed to Mr. McKay.

"Your favour of the 3rd instant is at hand and contents duly noted. Regarding the insurance with this office upon the Pontiac Mills under figure No. 480,688 for $20,000, the trustees are held covered until they convey their interest by transfer.

Meanwhile it is necessary that they pay carpenter's risk $27.50 per month during the time the mills are under repair."

On the 9th of January, 1867, a fire occurred by which the property was destroyed.

On the 17th January, the plaintiffs procured two sworn certificates to the effect that the loss by fire exceeded $20,000.

On the 21st January, they fyled a claim and affidavit in support with the defendants, and gave as a reason that it was in order to preserve the recourse of the said purchasers against the trustees and the company, and as it might be necessary that formal notice be again given of the said fire, and of the loss sustained thereunder.

On the 16th March, 1867, the plaintiffs by the instrumentality of W. F. Lighthall, N. P., notified the defendants not to pay to the trustees more than the balance remaining due on the sale, deducting a rebate of interest for the time yet to run, before the instalments yet to be paid became due, and further the *pro rata* rate of the premium of insurance, under said policy from the third day of November last, for the renewal of said policy; and the plaintiffs further notified the defendants by the same *acte* to pay the plaintiffs the balance of the insurance money.

On the 28th March, 1867, the trustees made a claim upon the defendants for $11,982.58 as the balance due them under the sale to the plaintiffs, and in the concluding clause of their claim were the following words: "the said trustees making no claim upon the said company (the defendants) for the remainder of the amount for which the said mills were insured under the said policy; leaving such claim (if any such there be) to be made by whomsoever the same may concern."

On the 6th May, 1867, the defendants paid the trustees $11,833.11 in discharge of their claim, and received a discharge therefor.

It was only on the 9th of January, 1868, that the trustees gave the plaintiffs a formal notarial deed of the mills, and then also acknowledged anew to have received from the plaintiffs the first instalment of $3,750, and the balance of $11,833.11 from the defendants.

By this deed also the trustees acknowledged to have received from the plaintiffs $308 as and for the *pro rata* of the premium of insurance, which it will be remembered was part of the undertaking of the plaintiffs, by the memorandum of the 6th of November, 1866.

The deed of the 9th of January, 1868, contains the following clauses, which it is well to consider in connection with this litigation.

"And the said parties of the first part (the trustees) in consideration of the premises do further hereby sell, transfer, assign and make over to the parties of the second part (the plaintiffs) all rights, interests, claims and demand, which they have or might exercise in the said Insurance policy, or which they can legally transfer of, in and to the said policy of Insurance, No. 480,688, or in the moneys due, or to accrue thereunder.

Provided, however, that nothing herein contained shall be held to be a waiver by the said parties of the second part of any rights, which they may now have or which may hereafter accrue to them, as against the said parties of the first part by reason of the claim made by them upon the said insurance company, or of the discharge executed by them as hereinbefore stated, which rights shall continue and may be exercised by the said parties of the second part, should it appear that they have been unjustifiably deprived of any remedy against the said insurance company by such claim or discharge; or be met with pleas or pretension by the insurance company, grounded upon such claim or discharge, in which latter case any right, which the said parties of the second part may possess as against the said parties of the first part, shall be preserved and may be urged by all legal means, subject to the right of the parties of the first part to all grounds of defence, which they now have and shall retain notwithstanding these presents; the said parties of the second part hereby declaring their pretension to be that under the terms of the sale to them, they were entitled to be and were at once subrogated to the said trustees' rights under the said policy, the said pretension, however, not being admitted by the said parties of the first part."

This being the case the plaintiffs brought their action to recover from the defendants the balance of the insurance money, deduction made of $11,833.11 paid to the trustees. The declaration set up among other necessary allegations, the sale of the 19th September, 1866, of the Pontiac Mills, and averred that the trustees also sold and undertook and promised to transfer all the rights of them, the said trustees, by virtue of any insurances on said sold premises, &c. The declaration then set forth the memorandum of the 3rd of November, 1866, and averred that "by reason of the said sale and memorandum, the said trustees became bound to give the now plaintiffs a valid transfer of said real estate, machinery, moveables, and effects, and of the insurances aforesaid, and by reason of the said sale, the plaintiffs became entitled to be and were subrogated in the rights of the said trustees in and under the policy of insurance."

Forgie, vs. The Royal Insurance Co.

Further on, after alleging the agreement of the 9th of January, 1868, the declaration averred that the "trustees did further for divers good and valid considerations in said agreement mentioned, thereby assign, transfer, convey and make over to the said plaintiffs the said policy of assurance, and moneys payable thereunder, by the defendants, under said policy, and all and every the rights created by said policy, or by the renewal thereof, and the said plaintiffs were by said transfer and agreement, and by reason of the premises, vested with the said property and rights so transferred and assigned, and were moreover by law, and by virtue of the said purchase of said property by them and the said sale thereof, and notice of said sale given to the said defendants, vested with the right to the said policy, and the rights, interest, and monies, secured and payable by the said policy and the renewal thereof as aforesaid, and have a right to ask, demand, and recover from the said defendants, the balance unpaid on said policy and insurance."

The defendants pleaded to the action to the effect that their agreement to insure was with the trustees alone, and no other persons for their insurable interest; namely, $11,833.11 which had been duly paid the trustees on the 6th of May, 1867, and then discharged; and that long previous to the 9th of January, 1868, the trustees had ceased to have any legal rights under the policy, and that by the transfer of that date, the plaintiffs did not acquire any right to the sum mentioned in the policy or any part thereof.

The issues between the parties may be summed up in the following questions:

First: Was there an agreement or a promise to assign, or an assignment by the trustees to the plaintiffs of the balance of the insurance policy: namely, $8,166.89, as alleged by plaintiffs, by the sale, of date, the 19th of September, 1866, the memorandum of date the 3rd of November, 1866, and the Notarial *acte* of the 9th of January, 1868.

Second: Are the defendants well founded in their pretention, as set forth in their first plea, that the contract of insurance contained in the policy was a personal contract with the trustees only, which could not be assigned without the consent of the defendants.

Third: Did the purchase by the plaintiffs of the Pontiac Mills vest in them the insurance as an accessory of the purchase by mere operation of law, and without any assignment of the policy.

The Court will now shortly answer these questions in order.

There is no evidence of any promise as alleged in the declaration of the plaintiffs made by the trustees at the auction sale on the 19th of September, 1866, to transfer the rights of the trustees by virtue of any insurance.

The memorandum of date the 3rd November, 1866, which next presents itself, contains these words with reference to the insurance: "the *pro rata* rate of the premium on the insurances now on the property to be repaid by Messrs. Forgie and O'Connor to the trustees from this date." This is certainly a stipulation by the trustees for their own benefit, that the plaintiffs should be bound to return to the trustees so much of the premium of insurance as applied to the excess of the amount of the insurance over their insurable interest, which had

then been reduced to $11,250, apart from interest on the purchase money. The return of this premium may have been regarded by the trustees as a part of the consideration of the sale, and though the trustees would probably have assigned the balance of the insurance on being refunded the premium as stipulated by them, yet there is no promise here by the trustees to make an assignment of the insurance.

Further on indeed we see that the trustees intended to assign the policy by the deed of sale to be passed;—for Mr. Mackay, in his letter to the defendants on the 3rd of November, writes, "when the documents are made out, it is the intention of the trustees to convey the property to the above named gentlemen, as also the policies of insurance." What was the object of that letter?

Mr. Mackay asks "please to inform me in writing if this is in order, and that you will hold the trustees covered."

What does Mr. Routh for the defendants answer?

"The trustees are held covered until they convey their interest by transfer?"

What was that interest?

It was not the value of the mills, for they were sold. The insurable interest of the trustees was $15,000 less $3,750, or $11,250, and a little accrued interest.

So far we see no agreement or promise to assign and no assignment of the policy to the plaintiffs, and there had certainly been no payment of a rateable proportion of the premium by the plaintiffs.

We come now to the agreement and transfer of the 9th of January, 1868, a year after the fire. There is in it a clause already cited, in which the trustees transfer to the plaintiffs all rights which they possess or can legally transfer under the policy, and then only do the plaintiffs pay their rateable proportion of the premium, a sum of $308, but there is a careful reserve by the trustees of all grounds of defence which the trustees then had and should retain notwithstanding said presents.

It is worthy of note that the concluding part of this clause declares the pretension of the plaintiffs to be in effect, what is to be considered in answering the first question above put. The plaintiffs in that clause affirm their pretension to be that under the terms of the sale to them they were entitled to be, and were at once subrogated to the said trustees' rights under the said policy.

This first question therefore is answered in the negative.

The second question to be answered by the Court is, whether the defendants are well founded in their pretension that their contract as contained in the policy, was with the trustees only, and limited and restricted to them, and incapable of assignment by them. The Court sees no conditions or terms in the policy, which would have prevented the trustees from assigning it if they had chosen so to do.

It is well to add here that the Commissioners for codifying the laws in their report say that there is no difficulty in the right of the insured to transfer, p. 242, and the 2576th Art. of the C. C. prepared by the Commissioners in so many words, says: "The insured has in all cases a right to assign the policy, with the thing insured, subject to the conditions therein contained."

The third and remaining question is purely a question of law. Did the purchase by the plaintiffs of the Pontiac Mills vest in them the insurance as an

Fargie, vs. The Royal Insurance Co.

accessory of the purchase by mere operation of law, and without any assignment of the policy.

The plaintiffs and defendants are at issue *toto cælo* on this question. So likewise are the French and English authorities, and each litigant has resorted to that system, which has borne out his pretensions. Boudousquié, Quesnault, Drun and Joliat, De Villeneuve, and Pardessus, support the pretension of the plaintiffs that the sale of the thing insured *ipso jure* operates a transfer of the insurance binding on the insurer. On the other hand, the English authorities such as Angell and Ellis, sustain the pretension of the defendant.

Where is the solution of the question? The commissioners for the codification of our laws have expressed their opinion on the subject. They say in their report that "the transfer of the thing insured does not carry with it the rights under the policy, without a formal transfer of the latter," and they add, "such undoubtedly is the rule of the English, Scotch and American law. The rule seems, however, to be different in modern France, and is sustained by Emerigon under the ancient law. There is no textual provision on the subject. The opinion of the writers in France is based on the assumption that the insurance is an incident of the thing insured, and therefore necessarily follows it. The correctness of this assumption may be doubted, and is contrary to the opinion found in the English and American books. The contract of insurance is there held to be a contract on the part of the insurer to indemnify a particular person (the party insured) from loss, and not to indemnify any one who may afterwards acquire the thing. The contrary construction of the contract is pushing very far the imputation of liability in favour of persons between whom and the original parties there is no privity of contract whatever, and the sounder view of the subject seems to be that of the English Courts."

More than this. The Civil Code of Lower Canada has given us two positive rules on the subject. Art. 2483 says, "In the absence of any consent or privity on the part of the insurer, the simple transfer of the thing insured does not transfer the policy. The insurance is thereby terminated subject to the provisions contained in article 2576."

If we now turn to Art. 2576, we find the following words: "The insurance is rendered void by the transfer of interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer."

The Court is of opinion that the transfer of the property insured has been without the consent and privity of the defendants [illegible] as to the insurable interest of the trustees, which is not in question, [illegible] that the transfer was without the consent or privity of the insurers as regards the plaintiffs.

Whence has arisen the difficulty in this case? There was laches and negligence on the part of the plaintiffs in not looking after their insurable interest as the trustees looked after theirs.

Why did the plaintiffs not pay the trustees the $308 of premium before the [illegible] got a transfer from them, and notify the insurance company, and put the [illegible] the trustees did "are we covered?" and have an answer in the [illegible] or insured elsewhere? "Vigilantibus non dormientibus subveniunt

The Court sees nothing here to justify the fastening of a liability upon the defendants in favour of the plaintiffs. The action should therefore be dismissed.

The following was the judgment of the Court:

The Court * * * * * * * *

Considering that by Article 2483 of the Civil Code, in the absence of any consent or privity on the part of the insurer, the simple transfer of the thing insured does not transfer the policy; that the insurance is thereby terminated subject to the provisions contained in the Article 2576:

Considering that by Article 2576 the insurance is rendered void by the transfer of interest in the object of it from the insured to a third person, unless such transfer is with the consent or privity of the insurer:

Considering therefore, that the pretension of the plaintiffs, as set forth in the Notarial *acte* of date the 9th of January, 1868, J. S. Hunter N.P., to wit, that under the terms of the sale to them they were entitled to be and were, at once, subrogated to the rights of the trustees of the estate of John Egan, under the said policy, is not well founded in law, and cannot be sustained:

Considering that the insured the said trustees of the estate of the late John Egan, did not with the sale of the Pontiac Mills on the 19th of September, 1866, or at any time before the date of the fire mentioned in the declaration in this cause, to wit, the 8th January, 1867, assign the policy referred to in the said declaration, and did in fact assign the same until the 9th of January, 1868, long after the said insurance policy ceased to be of avail for the purpose of an assignment:

Considering that the plaintiffs have failed to prove the material allegations of their said declaration, doth dismiss the action and *demande* of said plaintiffs, with costs.

Plaintiffs' action dismissed.

A. & W. Robertson, for Plaintiffs.
Strachan Bethune, Q.C., for Defendants.
(S. B.)

MONTREAL, 6TH OCTOBER, 1868.

No. 1168.

Coram TORRANCE, J.

Requête Libellée of Jean Louis Beaudry vs. *William Workman.*

HELD:—That a petitioner complaining of the election to the Mayor of Montreal, cannot by the same *requête*, allege that the election for the mayoralty was null and void, and pray that it be so declared; and allege that the sitting Mayor was disqualified, and pray that the Petitioner be declared duly elected; such allegations and conclusions being incompatible within the meaning of the provisions of the Code of Procedure.

The facts appear from the remarks of the Hon. Judge in rendering the judgment.

TORRANCE, J.—This case comes before me on an *exception dilatoire* pleaded to the *requête*.

The *requête* alleges *inter alia* that the petitioner and the defendant were both candidates for the office of Mayor of Montreal on the 12th February last, and

Beaudry vs. Workman.

a poll was granted to be open on the 26th, 27th, 28th and 29th February; that the voting took place on the 26th February, contrary to law, this day being Ash Wednesday, and non-juridical, and that the election was therefore null.

Then follow allegations that the petitioner on the days in question was a person qualified to be a candidate: that W. W. was incompetent and disqualified to be a candidate or elected, inasmuch as he then had or was interested in a law suit, or judicial process, with the corporation of the City, in an amount exceeding $100, (fully explained in the information) and though on the 11th February, the defendant had nominally discontinued the process so far as he was concerned, yet until he paid the amount for which the corporation could issue execution against him, the law suit or judicial process was in reality pending.

There is a further allegation "that of the persons qualified to be elected at said election for Mayor (supposing it valid as held, which petitioner does not admit) the petitioner was the only one qualified and entitled to be elected, and the one who, being so entitled, received the greatest number of legal votes, to wit, who had given for him at said election the greatest number of votes, within the true intent and meaning of the law, and he was therefore duly elected to be Mayor of the City of Montreal, to hold said office for one year, to wit, from the first Monday of March, present month, supposing said election valid, the polling or voting at it held as aforesaid on a non-juridical day, Ash Wednesday, and carried on on the three last juridical days of February, and on the twenty-sixth February a non-juridical day, whereas it ought, by law, to have been carried on on the four last juridical days of last February."

That the council of the City had refused to declare irregular or void, the said election, or to declare the petitioner duly elected if the election were valid.

That W. W. illegally exercises the office of Mayor, contrary to the will and right of petitioner who alone is entitled to the office if the election is formal or held legal, that W. W., has procured himself to be declared by the council of the city, to have been elected Mayor, &c. &c.

Then follows another allegation of informant's qualifications, and his conclusion is in the following words: "Wherefore informant prays that a writ be ordered by your Honour to issue commanding the said W. W. to be summoned to appear before your Honour, judge of the Superior Court, Montreal, upon the seventeenth day of March instant, to answer this declaration, petition and information, and to show by what authority he assumed to hold or exercise, or holds and exercises said office of Mayor, of and for said City of Montreal, and informant and requerant prays that said election for Mayor, held in Montreal in February last as aforesaid be declared illegal, informal, null and void, for the causes hereinbefore stated; and informant further prays that said W. W. be declared guilty of using and unlawfully holding said office of Mayor of the City of Montreal, and that he be ousted and excluded from said office; and if said election be declared formal or legal, informant, requerant, prays that the said informant Jean Louis Beaudry be declared to have been and to be rightfully entitled to said office to hold the same up to the first Monday of March, eighteen hundred and sixty-nine, and until his successor in said office of Mayor be elected and

sworn in, and that the Mayor, Aldermen and citizens of the City of Montreal, and the council of the said City of Montreal, be ordered to admit him, said Jean Louis Beaudry to the said office of Mayor, as duly elected to said office by the result of the election before referred to, if legal, and formal, and that such other orders be made as to right and justice may appertain; with costs &c."

The defendant has fyled three preliminary pleas to the information, an exception déclinatoire, à la forme, and *dilatoire*, and the last of them is before me on its merits. It alleges in substance:

That the defendant cannot at this time be in any manner compelled to answer the information, because the requerant in the first place alleges that the election of which he complains is null and void, and therefore prays that it be declared void and annulled, and in the same information he further alleges in effect that the said W. W. was disqualified and was not eligible as Mayor of the said city, and that the said complainant was duly qualified and eligible for the said office, and prays that he be declared to have been rightfully elected at the said election and entitled to the said office of Mayor.

"That the said election is either good and valid, or is illegal and null; and that the said Honorable Jean Louis Beaudry has therefore pleaded and joined in his said information two several grounds and causes of action which are contradictory to and incompatible with one another; and which seek judgments contradictory, and incompatible with each other, the whole contrary to the code of procedure and to the practice of this Honorable Court.

"Wherefore the said William Workman, humbly prays that for the causes aforesaid it be ordered and adjudged that all proceedings in this matter or cause be stayed until the said complainant has declared his option as to which of the said two grounds of complaint set forth in his said petition, to wit, illegality of the election or disqualification of the said defendant, he intends to proceed upon; and as to which of his said conclusions, namely, that the election for the said city therein referred to be wholly annulled; or that the said William Workman be declared disqualified and he the said petitioner be declared duly elected in the place of the said William W., he intends to persist in; and that he be ordered to declare such option within such time as may be ordered and adjudged in that behoof, failing which that the present information and complaint be dismissed, &c."

The exception has been fyled in conformity with the Art. 120, S. S. 6 of the C. C. P. which enacts that the defendant may stay the suit by dilatory exception where the plaintiff has joined in his action several claims, which are incompatible, or susceptible of different modes of trial; and in such case, the defendant cannot be bound to defend the action until the plaintiff has declared his option. And Article 15, declares that "several causes of action may be joined in the same suit, provided they are not incompatible or contradictory, that they seek condemnations of a like nature."

The three following questions may be put in the present case, and the answers appear to be by no means difficult. 1. Is the allegation that the election is a nullity inasmuch as it was held on Ash Wednesday, incompatible with the allegation that the same election was a good one, and that the petitioner was duly

Beaudry vs. Workman.

elected? 2. Are these two allegations contradictory of each other? 3. Does the allegation that the election is void because held on Ash Wednesday, induce the same prayer as the allegation that the petitioner was elected and is the proper person to fill the office of Mayor? The petitioner contends that the one cause of action or conclusion is accessory or subsidiary to the other. The words he has used to my mind make clearer the necessity I am under of deciding against him, on the words of the code. If a conclusion is accessory or subsidiary to a principal cause or conclusion, it must in some way be allied or ancillary to or dependent upon the first. Can I for a moment say that the grievance, that the election is good and that the petitioner and not the defendant Workman is the proper person to hold the office of Mayor of the city of Montreal, is accessory or subsidiary to the grievance that the election as held on Ash Wednesday is null and void? Is not the one allegation that the election is void, contradictory of, and antagonistic to the allegation that the election of Mr. Beaudry is good? I have no hesitation in saying that the one allegation is incompatible with and contradicts the other, and the conclusion sought by the petitioner, that the election is void is an entirely different one from what he seeks if the election be held good. I am therefore of opinion that the petitioner should make option between the two causes of action set forth in his information, and I give the order accordingly.

I may remark in conclusion that there are reasons of propriety which should induce the informant to abandon one of his two grounds of contestation. It would, I think, be unseemly for him, supposing the litigation should give him the office now occupied by Mr. W., to hold it by a tenure, which to judge by his allegations, he must believe to be an illegal tenure.

The judgment is *motivé* as follows:

Having heard the defendant W. W. in support of his exception dilatoire fyled in this cause, and the complainant J. L. B., in reply thereto and in support of his information in this cause, and examined the pleadings and duly deliberated;

Considering that in and by the said information the said J. L. Beaudry alleges in effect in the first place that the election whereof he complains, wherein the said W. W. was elected Mayor of the city of Montreal, is illegal, null and void for the reasons and upon the grounds therein stated, and prays in consequence thereof that the said election be declared void and annulled; and in the same information he further alleges in effect that the said W. W. was disqualified and was not eligible as Mayor of the said city, and that the said complainant was duly qualified and eligible for the said office, and prays that he (the complainant) be declared to have been rightfully elected at the said election, and entitled to the said office of Mayor:

Considering that the said J. L. B. has therefore pleaded and joined in his said information two several grounds and causes of action, which are contradictory to, and incompatible with one another, and which seek judgments contradictory and incompatible with each other, the whole contrary to the 15th article of the Code of Civil Procedure of Lower Canada:

I, the undersigned judge, do order and adjudge that all proceedings in this

matter or cause be stayed until the said J. L. B. has declared his option as to which of the said two grounds of complaint, set forth in his said information to wit; illegality of the election or disqualification of the said defendant, he intends to proceed upon: and as to which of his said conclusions, namely: That the election for the said city therein referred to, be wholly annulled; or that the said W. W. be declared disqualified, and he the complainant be declared duly elected in place of the said W. W., he intends to persist in; and I do order and adjudge that the said J. L. B. do declare such option within eight days from the date hereof, the whole with costs of the said exception *dilatoire* to the defendant W. W.

Exception maintained.

H. W. Austin, for the Petitioner.
J. J. C. Abbott, Q.C., for defendant.
(J. J. C. A.)

MONTREAL, 4TH FEBRUARY, 1869.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 1051.

Turgeon et al. vs. Taillon, & Taillon, Petitioner.

HELD:—That on a joint demand by two creditors for over $500 under S. 3 S. S. 2 of the Insolvent Act of 1864, against a debtor to make an assignment under the Act, the one creditor cannot make proof for the other under Art. 251 of the C. C. P.

HELD:—That the claim of one of the two creditors being based upon a transfer made to him by a third party, which was only signified upon the debtor several days after the demand of an assignment, cannot avail in support of the demand.

TORRANCE, J. On the 8th of January, the firm of Turgeon & Gratton and Eusèbe Gratton made a joint demand upon Charles Taillon under the Insolvent Act of 1864 S.3 S.S.2, for an assignment.

On the 13th of January, the defendant presented a petition to have the proceedings on the demand stayed and set aside on several grounds, and among others on the ground that the defendant was not debtor for $500 of the said creditors. It appeared in evidence that the claim of Eusèbe Gratton was a sum of $35 which he had transferred to Louis Benjamin Durocher on the 1st of October, 1866, by a transfer signified to the defendant on the 22nd January, 1869. That Durocher re-transferred the amount to Grattan who only gave signification of the same to Taillon on the 22nd January, 1869. One of the witnesses in support of the demand was the creditor Turgeon. The evidence of this witness cannot avail in the case which is his own. The 251st Art. of the C. C. P. is sufficiently explicit on the subject to compel me so to rule.

As regards the claim for $35, Taillon could not know on the 8th of January when the demand of assignment was made upon him, of the transfer by Durocher to Gratton which was only signified on the 22nd January. The demand therefore is not sustained.

(J. K.) Petition granted.

MONTREAL, 30TH JANUARY, 1869.

Coram TORRANCE, J.

No. 1936.

Henry Rogers et al., vs. *John Morris* et al.

HELD:—That a settlement of accounts between the creditor and the principal debtor, and the taking by the creditor of a note payable on demand for the balance due by the debtor, does not oporate a novation of the debt, so as to discharge a surety to the original obligation.

TORRANCE, J.—This is an action by a firm of fish dealers in Boston, to recover from the defendants jointly and severally, a sum of $932.45.

The declaration sets up a Notarial agreement of date the 8th November, 1867, between the plaintiffs of the one part, and Morris and Penk, two of the defendants, of the other part, whereby the plaintiffs agreed to furnish the said Morris and Penk with fresh fish at Montreal, at cost price, the profits after deduction of certain charges to be divided equally between them. That John Scott, the third defendant became surety jointly and severally with the said Morris and Penk, renouncing the benefits of fidejussion for the execution by them of the agreement, making the same his own and personal affair, as principal to the extent of $1000, and no more. That the plaintiffs furnished the fish, and on a settlement of accounts between them and the said Morris and Penk, there was a sum of $932.45, found to be due and owing by the said Morris and Penk to the plaintiffs, which they neglected to pay.

The defendant John Scott, the surety, was the only one who pleaded to the action.

By a first plea, the said John Scott set up that after the close of the season, to wit, on the 28th May last, the plaintiffs made a settlement with the said Morris and Penk, and accepted from them a note in settlement for $932.45, payable to order on demand, that in making this settlement and receiving the note, the plaintiffs admitted that the said Morris and Penk had fulfilled on their part their contract.

That consequently the suretyship of the said John Scott was at an end.

The second plea of John Scott, set up that he was only liable to the extent of $1000 under the agreement, and that the defendants Morris and Penk, had remitted to the plaintiffs in deduction of their liabilities, a sum of $5054.52, which was more than sufficient to extinguish the liability of the defendant John Scott.

The parties are agreed as to the facts, and the only question between them is whether by the settlement of accounts and the giving of the note on the 28th May last, there was a novation of the debt, and an extinguishment of the liability of John Scott.

The defendant cited an arrêt of the Court of Paris, 7th December, 1814. In that case one Leblond acknowledged himself debtor of Bizet, for 8000 fr., and gave a hypotheque, which was registered. Subsequently Bizet accepted for his claim 10 notes of 700 fr., each, payable at different times, and bound himself to return his first title to Leblond, whose wife signed the notes, and bound herself jointly and severally. When the fourth became due, Leblond refused

payment till the removal of the hypotheque. The creditor Bizet, contested the novation, and was defeated.

It will be observed that in that case there was a distinct acceptance of the second security in place of the first, which was to be given up. There was therefore a novation there by the agreement. This authority is cited by Toullier, 7th vol. No. 272.

But further on at No. 276, Toullier says: Lorsqu'ils passent entre eux un nouvel acte, les changements, les modifications qu'ils conviennent de faire à l'ancienne obligation, ne sont pas censés faits pour l'éteindre, parce que le créancier n'est pas facilement présumé renoncer aux droits qui lui sont acquis.

Or la novation contient une renonciation aux droits acquis par l'ancienne obligation, une extinction de ces droits. La novation ne doit donc pas être facilement présumée, etc.

This principle was applied in the case of Macfarlane vs. Patton, 1 L. C. R. 250, in Jones v. Lemesurier, 2 Rev. de Leg. 317, Noad and Lampson, 11 L. C. R. 29, Noad v. Bouchard, 10 L. C. R. 476.

In the present case, the Court does not see any novation. There was a settlement of accounts and a note given in acknowledgment of the debt payable on demand. That was all.

The exceptions of the surety John Scott, should therefore be dismissed, and judgment go against all the defendants.

Judgment for plaintiffs.

A. & W. Robertson, for plaintiffs.

Cartier, Pominville & Betournay for defendants.

(J. K.)

ST. HYACINTHE, DECEMBRE, 1868.

Coram SICOTTE, J.

No. 931.

Dame Jane Patton, demanderesse, vs. *Corporation de St. André d'Acton, et al., défenderesses.*

JUGE:—1. Que dans une action en rescision d'un contrat octroyé à l'adjudicataire d'un immeuble vendu pour taxes municipales, il n'est pas nécessaire de mettre en cause la corporation du comté, si les vices invoqués contre la validité du contrat sont exclusivement attribués à la corporation locale ou à son secrétaire.

2. Qu'un rôle d'évaluation est nul si les estimateurs ne possèdent pas la qualification foncière requise ; s'ils n'ont prêté le serment voulu ; s'ils n'ont signé le rôle.

3. Que la réquisition de paiement voulue par le par : 13 de la sect. 59 de l'acte municipal doit être faite pour rendre exigible la cotisation, et autoriser la vente municipale, soit de meubles soit d'immeubles.

4. Que l'avis requis de la confection du rôle de perception est une formalité indispensable.

5. Que le réglement municipal, fixant le montant de l'impôt à prélever, doit spécifier d'une manière exacte et précise l'objet et la fin de tel impôt.

6. Que l'impôt doit porter sur le montant exact de la valeur des propriétés imposables.

7. Que dans une telle action (en rescision) c'est à la municipalité défenderesse à établir que toutes les formalités de la loi ont été observées pour parvenir à telle vente.

La demanderesse est propriétaire depuis le 9 avril 1862 du lot No. 4 dans le 1er rang du Township d'Acton. Elle l'a acquis d'un certain Tonnancour.

Patton vs. Corp. de St. André d'Acton.

Le 9 février 1863 ce lot qui vaut au-delà de $2000 est vendu en la manière ordinaire (chap. 24 sect. 61) pour une somme de $16 réclamé par la municipalité locale pour taxes.

Deux années s'écoulent et le 20 février 1865 un contrat est octroyé à l'adjudicataire au nom du comté de Bagot) par le secrétaire-trésorier du conseil municipal de ce comté.

La demanderesse qui avait ignoré cette procédure jusque dans les derniers jours de la période de deux ans accordée par l'acte 27 Vict. c. 9 sect. 11 pour se pourvoir contre de telles ventes, intente une action contre les municipalités locales de St. Théodore d'Acton, et de St. André d'Acton, en lesquelles la corporation du Township d'Acton avait été divisée dans l'intervalle, et contre Pierre Bachand, l'adjudicataire.

Elle se plaint d'un trouble de droit et demande pour diverses raisons la rescision du contrat de vente octroyé au dit P. Bachand. Elle ne met pas en cause la corporation du comté dont le secrétaire a fait la vente, et octroyé le contrat attaqué. Mais les raisons de nullité invoquées contre ce contrat proviennent exclusivement du fait de la municipalité locale d'alors représenté par les deux défenderesses.

Ces moyens de nullité sont en partie ceux qui se trouve énumérés dans le jugement de la cour.

La défense s'appuyait presqu'entièrement sur un défaut de procédure. Elle prétendait que la corporation du comté devait être mise en cause aussi bien que l'adjudicataire et la défenderesse; vû que c'est cette corporation qui avait vendu et avait octroyé le titre. Elle mettait de plus en avant certaines autres exceptions, et maintenait que toute la procédure antérieure à la vente, était régulière et la vente elle même légale.

La cour après avoir commenté longuement toutes les questions soulevées par les plaidoiries, et passé en revue d'une manière approfondie toutes les dispositions de la loi municipale sur le sujet, a rendu le jugement suivant:

La cour après avoir entendu les parties sur le mérite, le défendeur Bachand n'ayant pas plaidé, et étant duement forclos, après avoir examiné la procédure, les écritures, les pièces produites, et la preuve; attendu en fait que la demanderesse était et est propriétaire et en possession de l'immeuble et terre, numéro quatre, dans le premier rang du Township d'Acton, comté de Bagot, de la contenance de deux cent acres, qu'elle revendique, et de la manière qu'elle le dit, qu'elle demande à faire déclarer nulle la vente qui en a été faite par l'autorité municipale; attendu en fait que cette vente s'est faite sur la demande de la municipalité du Township d'Acton par la transmission faite par son secrétaire-trésorier de l'état des taxes dues et non payées dans la municipalité, le 15 novembre 1862, que la vente a eu lieu, comme il est dit dans les écritures des parties par le ministère du secrétaire-trésorier de la municipalité du comté de Bagot, que Pierre Bachand, l'un des défendeurs, s'est rendu adjudicataire pour la somme de seize piastres et vingt centins, et que contrat et titre lui en a été donné par le secrétaire-trésorier du comté au nom de la municipalité du comté tel que prescrit par le statut; attendu en fait que depuis la transmission de cet état des taxes, la mise en vente et l'adjudication, la municipalité du Township

d'Acton a été divisée et démembrée en deux municipalités, par dispositions législatives, et que les deux municipalités érigées pour le même territoire par le statut sont la municipalité de St. André d'Acton et celle de St. Théodore d'Acton, qui sont poursuivies par la présente action ; qu'en fait les deux municipalités sont la représentation et la continuation, de la corporation du Township d'Acton ; attendu en fait que les évaluateurs qui paraissent avoir fait le rôle d'évaluation pour la municipalité du Township d'Acton en 1861, et sur lequel on a basé les taxes et cotisations réclamées en 1862, ne possédaient pas la qualification foncière requise, sans laquelle leur nomination était nulle, qu'il n'y a pas même de preuve de leur nomination, qu'ils n'ont pas prêté le serment requis, qu'ils n'ont pas signé le rôle pour lui donner authenticité, il suit que le rôle d'évaluation a été fait par des personnes sans autorité, et que tel rôle ne pouvait servir de base à l'imposition d'aucune taxe; attendu en fait qu'il n'y a aucune preuve que demande de la taxe a été faite, par la signification à personne ou à domicile, d'un état des taxes et sommes dues tel que prescrit par le statut, non plus que de la saisie des meubles de la personne obligé au paiement ; attendu en fait que l'avis du dépôt du rôle de perception, tel que le veut le statut, n'a pas été donné, il suit que les contribuables n'ont jamais été mis en demeure et en défaut de payer, attendu en fait, que l'ordonnance de l'impôt n'a pas pour objet, des fins certaines limitées et définies, non plus que pour des éventualités et dans des conditions prescrites et prévues par le statut; attendu en fait que l'imposition ne repose pas sur toute la valeur cotisable déterminée par le rôle d'évaluation ;

Attendu en fait que le secrétaire-trésorier du comté est l'officier préposé par la loi pour faire les ventes pour les taxes municipales réclamées comme dues et non payées le 15 novembre chaque année, par les différentes municipalités locales ; attendu en fait que la loi enjoint à cet officier de donner un titre à l'adjudicataire au nom de la municipalité du comté; attendu en fait que la demande est basée sur l'illégalité des actes et procédés adoptés par la municipalité locale d'Acton, avant même la mise en vente, que la demande de faire vendre procède du fait de la municipalité locale d'Acton, pour des taxes imposées par cette dernière et pour son utilité seule, que les deniers provenant de la vente lui ont été payés, il suit de tout ce que dessus, que la corporation du comté de Bagot, n'a aucun intérêt dans la cause, ne s'est nullement immiscé dans les actes relatifs à la vente, et ne pouvait en aucune manière contrôler l'exécution de la mise en vente réclamée par les municipalités locales de l'officier désigné et préposé par la loi seule pour faire ces ventes, et partant qu'il n'y avait pas lieu de mettre en cause la corporation du comté de Bagot ;

Considérant que les seules parties interessées sont en cause et que l'action est bien dirigée à toutes fins contre les parties assignées ;

Considérant qu'il incombait aux défenderesses de faire la preuve de la régularité des procédés de l'autorité municipale, relatifs à l'imposition de la taxe, et que faute de preuve de la part des autorités municipales, que les formalités prescrites par la loi avaient été observées, elles ne justifient aucun droit à l'imposition comme au paiement d'aucune taxe ;

Considérant que la demanderesse a constaté que les formalités substantielles et essentielles pour valider l'imposition des taxes réclamées sur et contre l'héritage de

Patton vs. Corp. de St. André d'Acton.

la demanderesse, n'ont pas été observées; considérant que la demande par la municipalité locale du Township d'Acton, de vendre l'héritage de la demanderesse, ainsi que la mise en vente et l'adjudication, ont été faites sans cause et sans droit, que cet héritage, non plus que le propriétaire ne devait alors aucune taxe; déclare les défenderesses mal fondées dans leurs exceptions et défenses, et les en déboute; déclare la mise en vente et la vente de l'héritage de la demanderesse par l'officier municipal, à la demande de la municipalité locale du Township d'Acton, en février 1863 illégale et nulle; déclare le contrat et titre octroyé à l'adjudicataire Bachand le vingt février 1863 par le secrétaire-trésorier de la municipalité du comté de Bagot, nul et de nul effet quant à la demanderesse; ordonne à l'adjudicataire et défendeur Bachand de remettre et livrer à la demanderesse la jouissance et possession de cet héritage, et qu'il pourra y être contraint par toutes voies que de droit; fait défense aux défendeurs de troubler à l'avenir la demanderesse dans la libre jouissance et possession de son héritage et propriété, condamne les défendeurs aux dépens distraits à M. Fontaine, avocat de la demanderesse.

R. Fontaine, pour la demanderesse.

Chagnon, Sicotte & Lanctot, pour les défendeurs.

(MAG. L.)

IN REVIEW FROM THE SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1868.

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

No. 289.

Wilson vs. *Demers.*

PROMISSORY NOTE—PRESCRIPTION.

HELD:—(MONDELET, J., dissenting) That the prescription of a promissory note made in a foreign country and payable there, is not governed by the *lex loci contractus*, but by the *lex fori*.

The facts of this case and the decision of the Superior Court, will be found reported, 12 L. C. Jurist, p. 222. The defendant inscribed the case for review.

MONDELET, J., dissenting, observed that he had examined the case again, but had seen no reason to alter his opinion. His reasons for dissenting were fully set forth in the judgment rendered by him in the Superior Court, (12 L. C. Jurist, 222).

MACKAY, J.—The defendant is sued on a promissory note for $1773.80, made in 1857, in New York, payable in Wisconsin, four months after date.

The plaintiff in his declaration alleges that as defendant was, after the making of the note, always absent from the States, the note has not become prescribed there, and the defendant can be charged here now upon it.

The plaintiff's pretensions have been maintained by the judgment of Mr. Justice Mondelet, which defendant now seeks to have revised. The defendant has pleaded the prescription of five years, under 12 Vict. (1849), and of six years, under 10 and 11 Vict. (1847).

The 10th Volume of the L. C. Jurist may be referred to as showing the pretensions of the parties. The plaintiff contends that his case is not to be governed by the *lex fori*; but by the law of New York, or that of Wisconsin.

It is proved that in New York, and in Wisconsin, absence interrupts prescription in cases like the present. The judgment of Mr. Justice Mondelet has over-ruled the pleas of prescription, and has condemned the defendant as prayed.

This Court is now going to reverse that decision. This Court (that is, the majority of this Court) thinks the plea of prescription of five years by force of the 12th Vict. a good enough defence, of itself. Objections to it are answered by Story, Confl. of Laws, §580, and note on p. 485 of the second Edition.

The plaintiff contends that the 12th Victoria operates only against notes due and made payable in Lower Canada; and that it has no force in this case, because the note here is not made payable in Lower Canada. But the expression of the 12th Victoria is not due and "made payable," but due and "payable," i. e., just the equivalent of "due," if nothing more had been said. "Due and payable" involves no more than "due," or "due and exigible;" so the Court holds. This note might have been sued upon in 1859. Suppose Wilson had sued in 1859, would not his suit have been on a note due and payable in Lower Canada? And it is so now.

The Court holds the plea of prescription of six years, under 10 and 11 Vict. good also and fatal to the plaintiff's case. "No action shall be maintainable," says that Act, "after six years." The Act makes no *atteinte to titre*. The contract is good; but action is denied, that is all. This Act is one concerning the *mode* of proceeding, and must govern this case. [Story, Conflict of Laws, §§576, 577; also p. 530, 1, Boullenois, Ed. of 1766.]

The plaintiff says that 10 and 11 Vict. has been superseded and vacated by 12th Vict., and cannot avail to the defendant, and that 12th Vict. cannot avail to him, because the note sued upon is not made payable here. The Court is against plaintiff on both points. Both Statutes were pleaded in Fisher and Russell, years ago. It is true that the 10 and 11 Vict. was not allowed to affect that case, but this was because of its having been held not to be retroactive. Whatever the law of the place of the contract, whatever the law of the place where the note is made payable, the *lex fori* is to control this case. [§581, Story.] There is no reason for making an exception of this case from the general rule. Diversities of opinions have prevailed, and always will, on such subjects. Volumes have been written on the domicile of the debtor, as affecting the remedy, or suit; about his domicile, at the time of the contract, at the time of the suit; on the place of the contract, the place for payment, &c. The Bar is familiar with the reasonings *pro* and *con*. As many authors are on one side as on the other. The old ones were divided, and so are the new. *Pothier* has been attacked for his opinions by *Troplong*, and lastly *Troplong* by *Marcadé*. A refuge can be found only in the old general rule, that the *lex fori* must prevail in cases of personal action such as the present one.

TORRANCE, J., concurred.

The following was the judgment of the Court:—The Court now here sitting as a Court of Review, having heard the parties by their respective counsel, upon the judgment rendered in the Superior Court for the District of Montreal, on the 28th day of March, 1868, having examined the record and proceedings had in this cause and maturely deliberated:

Wilson vs. Demers.

Considering that no suit or action was brought on the promissory note mentioned in plaintiff's declaration within five years next after the day on which said note became due and payable, and that in consequence thereof, and by law, the said note must be held to be absolutely paid and discharged, and to have been so as contended by defendant in his first plea of peremptory *exception au fonds en droit*, and therefore, that in the judgment complained of, to wit; the judgment of the said 28th day of March, 1868, which has disregarded the said first exception pleaded by defendant, and condemned the said defendant to pay the said plaintiff the amount of said promissory note with interest and costs, there is error:

Considering further the grounds of this action, and that it has been brought in respect of commercial matters for recovery of the amount of a promissory note made by Demers Bros. in favor of plaintiff, dated 12th September, 1857, to wit, the promissory note in plaintiff's declaration mentioned, and that the said present action was not commenced within six years next after the cause of it, and that by reason of the premises, and by law it was and is not maintainable, and that the defendant has proved and established the plea *autre exception péremptoire en droit* secondly pleaded by him in this cause, and that said plea is well founded, and ought to have been maintained, and that in the judgment complained of, to wit; the said judgment of the 28th March, 1868, in so far as it has disregarded said plea, there is error:

This Court revising said judgment, reverses and annuls the same, owing to said errors, and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth maintain said two exceptions of defendant, and doth dismiss plaintiff's action and demand with costs against plaintiff, as well in the Superior Court, as in this Court; the Hon. Mr. Justice Mondelet dissenting.*

J. Popham, for the plaintiff.
D. Girouard, for the defendant.
(J. K.)

Judgment reversed.

COUR DE CIRCUIT.

MONTREAL, 31 DECEMBRE, 1868.

Coram BEAUDRY, J. A.

No. 1554.

Joseph Belle, demandeur, vs. *Paul Côté*, défendeur.

JUGE:—Que celui qui a donné au Shérif son cautionnement pour un défendeur arrêté en vertu d'un *capias ad respondendum*, est une caution judiciaire passible de la contrainte par corps.

Le 13 janvier 1868, le demandeur fit arrêter, au moyen d'un mandat d'arrêt, *capias ad respondendum*, émané de la Cour Supérieure, un nommé Louis

* This judgment has proceeded upon the law of the time before our Civil Code.—*Reporter's Note.*

Asselin, endetté envers lui en une somme de $76.67 pour arrérages de loyer, cet individu ayant enlevé et caché ses meubles dans l'intention de le frauder. Le défendeur Côté donna pour lui un cautionnement au shérif en la manière ordinaire. Asselin comparut, mais fut forclos de plaider et le 28 fév. 1868, le demandeur obtint jugement contre lui déclarant le *capias* bon et valide et le condamnant à payer le montant de la poursuite. Les conditions du cautionnement précité n'avaient pas été remplies. Belle vs. Côté.

Asselin n'ayant pas payé, le demandeur se fit transporter le cautionnement donné par le défendeur Côté au shérif, et poursuivit Côté devant la Cour de Circuit pour $102.66, montant de la condamnation en principal et frais contre Asselin, concluant, en même temps à la contrainte par corps contre le défendeur comme caution judiciaire. Le 16 juin 1868, après contestation, jugement fut rendu contre le défendeur, mais ce jugement ne prononça pas sur la demande en contrainte. Le demandeur fit émaner une exécution *de bonis* qui fut rapportée avec un retour de *Nulla Bona*. Alors le demandeur présenta à la cour la motion suivante:

"Motion de la part du demandeur, en autant que par jugement rendu par "cette cour, à Montréal, dit district, le 16 juin dernier, le défendeur a été con- "damné, comme caution judiciaire, à payer au demandeur la somme de $102.66, "avec intérêt sur celle de $76.67, à compter du 13 de janvier dernier et les "dépens, taxés depuis à $41.20; en autant qu'une exécution *de bonis* a été "émanée contre le défendeur pour le recouvrement des sommes susdites et que "cette exécution a été rapportée avec un retour de *nulla bona*, ce qui a occa- "sionné des frais au montant de $4.07; en autant que le défendeur, quoique "requis, refuse et néglige de payer au demandeur les dites sommes formant réu- "nies un total de $147.93, avec intérêt sur $76.67, comme susdit; en autant "que le demandeur par sa déclaration en cette cause a requis la contrainte par "corps contre le dit défendeur; en autant que ce dernier est contraignable par "corps comme caution judiciaire; que cette cour, par règle émanée en la forme "ordinaire, ordonne qu'un bref de contrainte par corps émane en cette cause "pour arrêter la personne du dit défendeur et l'incarcérer dans la prison com- "mune de ce district et l'y détenir jusqu'à ce qu'il ait payé au demandeur la "dite somme de $147.93, avec intérêt sur celle de $76.67, à compter du 13 de "janvier dernier, et les frais des présentes; à moins que cause au contraire ne "soit montrée par le défendeur, cour tenante, le 11 de novembre prochain, à dix "heures du matin.

La règle ayant été accordée et émanée, le défendeur comparut et obtint la permission d'y répondre par écrit. Il contesta, par son plaidoyer, la légalité de la règle et prétendit que le demandeur n'avait pas le droit de le faire incarcérer, sans alléguer cependant d'autre raison que le fait que le jugement n'avait pas accordé la contrainte par corps.

En décembre 1868, les parties furent entendues sur la règle et la réponse en question et le 31 de ce mois, cette règle fut déclarée absolue, la cour ordonnant l'émanation du bref de contrainte par corps.

Autorités citées par le demandeur.

Code civil, art. 2272.

Belle vs. Côté.

Code de procédure civile, art. 796.
Pothier, Traité des obligations, Nos. 386, 402.
Ferrière, dict. de droit, vo. caution judiciaire.
Arrêt du 7 sept. 1618.
Dict. de jurisprudence, vo. caution judiciaire.
Prévost de la Jannès, Principes de la jurisp. Tit. 21, No. 583.
Ordonnance 1667, Tit. 28.
Règles du Droit français, p. 475, chap. VII. sec. XII.
J. A. A. Belle, avocat du demandeur.
J. Duhamel, avocat du défendeur.
(J. A. A. B.)

COUR DE CIRCUIT.

ST. HYACINTHE, JANVIER, 1869.

Coram SICOTTE, J.

No. 5758.

Paul Allard, demandeur vs. *Joseph Wilcot*, défendeur.

JUGE:—Qu'un mineur n'a pas droit de poursuivre en son nom pour ses gages, quand l'engagement a été fait par le père sous la puissance et le contrôle duquel est le mineur.

Action pour gages. Le demandeur est agé de 16 ans. Il vit avec son père. Le défendeur nie le droit d'action au mineur vû que ce n'est pas celui-ci qui s'est engagé lui-même, mais que c'est son père qui a fait cet engagement. Il prétend que l'action devrait être portée au nom du père. Les faits étant prouvés suivant les allégations du défendeur, la cour adjuge :

Que le droit de poursuite pour recouvrement de ses gages accordé au mineur par l'article 304 du code, tiré de la sect. 35 du chap. 82, B. C., ne change rien aux règles ordinaires de droit et de la raison qui veulent que les conventions s'exécutent entre les contractants. La loi confère au mineur au-dessus de quatorze ans le droit du majeur, elle le considère comme majeur, quant au droit d'action pour le recouvrement de ses gages. Mais il ne peut user du privilége que dans le cas où c'est lui seul qui a contracté son engagement, et non son père.

Action déboutée.

U. Mercier, pour le demandeur.
Chagnon, Sicotte & Lanctot, pour le défendeur.
(MAG. L.)

COURT OF QUEEN'S BENCH.

IN APPEAL.

MONTREAL, 9TH DECEMBER, 1868.

Coram DUVAL, C. J., CARON, BADGLEY, DRUMMOND, AND JOHNSON, JJ.

No. 37.

THOMAS S. BROWN,

(Opposant in the Court below,)

APPELLANT,

AND

JAMES DOUGLAS,

(Plaintiff in the Court below,)

RESPONDENT.

HELD:—Under the insolvent acts in force, an insolvent may validly make a voluntary assignment of his estate and effects, to any official assignee, whether resident within the district or county wherein such insolvent has his place of business or not.

CARON, J.—*(dissentiens.)* Cet appel est d'un jugement de la Cour de Circuit, district de Sorel, renvoyant une opposition faite par l'appelant Brown, dans laquelle il réclame, en qualité de syndic officiel pour le district de Montréal, les meubles et effets saisis à la poursuite de l'intimé Douglas sur le nommé Wright, résidant à Sorel. Les faits sont, en substance, comme suit: Wright étant en banqueroute, a fait cession volontaire de ses biens pour le bénéfice de ses créanciers à Brown, qui a pris l'administration de ces biens et était sur le point d'effectuer une décharge de la part des créanciers de son failli, lorsque fut faite la saisie susdite de certains effets mobiliers appartenant au failli, pour empêcher la vente de ces effets. Brown en sa dite qualité, a réclamé de la part des créanciers de Wright les dits effets cédés à ses créanciers; le demandeur a contesté cette opposition prétendant que la nomination de Brown comme syndic à la dite faillite était nulle pour la raison que la cession par Wright aurait dû être faite à un syndic officiel résidant dans le district du failli, tandis qu'elle avait été faite à Brown, qui n'était syndic officiel que pour le district de Montréal, et le contestant ajoutait que le nommé Barthe, de la ville de Sorel, était duement nommé syndic officiel pour ce district, et que c'est à lui qu'aurait dû être faite la dite cession. La Cour de Sorel (Loranger, Juge) a été de cet avis et a, en conséquence, renvoyé pour cette raison l'opposition de Brown. Ce jugement soumis à la cour de revision y a été confirmé. C'est de ces deux jugements qu'est le présent appel.

La cour de revision était composé des juges Mondelet, Berthelot et Monk; ce dernier a différé, et la cause avec les raisons de chacun d'eux est rapportée dans le 11 Jurist, page 310.

La simple question posée et que nous avons à décider, est de savoir si "une "cession volontaire par un failli peut être faite valablement à un syndic résidant "dans, et nommé pour un district autre que celui où réside le failli." Cette question très intéressante, paraît diviser les jurisconsultes et les tribunaux. Sa décision cependant dépend entièrement de l'interprétation à donner à la clause 4 de l'acte des faillites de 1864, et de la clause 2 de l'acte de 1865, ch. 18, amendant le premier.

Brown vs. Douglas.

Outre les juges Loranger, qui a rendu le premier jugement, et Mondelet et Berthelot qui l'ont confirmé, le juge en chef Draper a rendu une même décision, sur les mêmes clauses, qu'il a interprétées de la même manière, mais de l'autre côté on a les juges Monk et Short qui se sont fortement prononcés contre la doctrine énoncée au jugement.

Nul doute que d'après la clause 4 de l'acte de 1864, citée plus haut, la cession faite à l'appelant serait nulle, vû qu'elle n'était pas faite à un syndic officiel, résidant dans le district dans lequel l'insolvable avait la place principale de ses affaires, aux termes de la dite clause, lesquels sont clairs et susceptibles d'une seule interprétation; sur ce point tous sont d'accord, mais ceux qui sont pour la validité et la légalité de la cession fondent cette opinion sur la 2e clause de l'acte de 1865, citée plus haut en second lieu. Cette clause qui dispense le failli, qui fait une cession volontaire à ses créanciers, de la faire précéder des publications et autres formalités exigées par la dite 4e section de l'acte de 1864, déclare que sans ces formalités la cession pourra être faite "*to any official assignee appointed under "the said act*" (the act of 1864). Contre le jugement il est prétendu que l'omission des mots "*resident within the district*," qui se trouvent dans le premier acte, indique suffisamment que le législateur a voulu, par cet amendement, faire disparaître cette restriction, et que depuis la passation du second acte, il n'est plus nécessaire de faire la cession à un *syndic officiel résidant dans le district*, qu'elle peut être faite à tout tel syndic, quelque soit l'endroit où il réside. Ceux qui défendent le jugement soutiennent au contraire que l'amendement en question ne touche et ne comprend que les formalités antérieures à la cession, l'exemption est décrétée, mais ne s'étend pas à la qualité du syndic, qui reste comme ci-devant *à être nommé sous les dispositions du premier acte*, et ne peut, par suite, servir que pour les faillis résidant dans le district pour lequel il est nommé. C'est là l'interprétation donnée à cette clause par le juge Draper dans la cause dont il a été parlé plus haut, et aussi par les différents juges qui ont concouru dans les jugements dont est appel. Sans être très-certain que cette interprétation est correcte, je suis, pour le moment, disposé à l'adopter, et dans ce cas peu importe qu'il y ait ou qu'il n'y ait pas un syndic officiel pour le district de Richelieu; quand il n'y en aurait pas la nomination de l'appelant n'en serait pas moins vicieuse, et alors il serait sans qualité pour soutenir l'opposition qu'il a produite.

Je suis donc pour confirmer le jugement.

DUVAL, C. J.—No doubt, in the interpretation of all laws, where the terms of the law are clear and fairly susceptible of no doubtful interpretation, the letter of the law must be followed, the legislator must be obeyed regardless of any evil consequences which may result. If the law calls for reform, let the legislator intervene; but so long as it remains in force, the will of the legislator is supreme and cannot be questioned.

In the present case the question turns on the interpretation of two Statutes, the one, 27 & 28 Vic. C. 17, the other, 29 Vic. C. 18.

With reference to the first, that is, the 27 & 28 Vic. C. 17, no doubt can be entertained, that under sub-section 4 of section 2, the present nomination cannot be sustained. The clause provides for two distinct cases; the one, the nomination of an assignee by the creditors, the other, in default of such nomina-

tion, or in case the assignee named, refuses to act, then by the insolvent of one of his creditors, resident within the Province, or of any official assignee named by the Board of Trade in the District or County in which the insolvent has his place of business; or if there be no Board of Trade therein, then by the Board of Trade nearest thereto, such official assignee being resident within the District or County above mentioned. In this case the assignee named did not reside within the District or County in which the insolvent carried on his business. The nomination was, therefore, so far as that Act is concerned, illegal; and the person so named could not be recognised by a Court of Justice.

If therefore this case were to be decided on the Statute first referred to, I would unhesitatingly declare the nomination to have been made contrary to law.

That Statute is, however, not the only Statute we have to refer to on the subject. It has been amended by the 29 Vic. C. 18, the second Section of which is in the following words:

"A voluntary assignment may be made to any official assignee appointed under the said Act, without the performance or the publication of any of the notices required by subsections 1, 2, 3, and 4 of section two of the said Act."

This Section must be interpreted, carefully distinguishing the first from the latter part.

As to the latter part, it dispenses with the formalities and notices required by the first act, and has no bearing on the question now before us.

The first part, in its wording, appears to me not susceptible of doubt, in its application to this case; although alleged, we have no evidence of the nomination of an official assignee for either the District or county of Sorel. Nor does it appear that there is a Board of Trade there. What says the second Section just referred to? That the voluntary assignment may be made to *any* official assignee appointed under the Act 27 & 28 Vic. C. 17. Nothing is said about residence. How can we impose a condition, a place, a limit, where the law has not done so? The enactment may be very unwise: It has been stated that it will cause constant and endless delays, that it will not afford that protection to the insolvent, and to his creditors to which they are entitled; that in some instances it will be found almost impracticable; but these are matters to be submitted to the Legislature; the judicial authority has no power to remedy these defects, if defects there be in the law; our duty is to obey it. The judgment must therefore be reversed.

BADGLEY J.—This contention turns upon the construction of the insolvent acts; the facts are not contested. They are as follows:

On the 6th September, 1866, the insolvent, a trader at Sorel in the district of Richelieu, made a voluntary assignment of his estate and effects, to the appellant, an official assignee resident at Montreal. A regular schedule of his creditors as required by law was attached to the assignment.

The mass of the creditors, the respondent included, were of Montreal.

By the mere effect and operation of the insolvent law, his estate and effects forthwith from the date of the assignment were divested from him and vested in the assignee. On the 7th November following, the respondent had judgment against Wright for a sum less than $100, and on the 19th December also following

Brown vs. Douglas.

issued execution fi. fa. de bonis against him and seized the effects set out in the *procès verbal de saisie*, as being in his, Wright's, possession, and which are admitted to exceed $100 in value.

It is not denied or contested that the effects seized formed part of the insolvent estate.

The appellant claims them as such and as vested in him under the voluntary assignment long previous to their seizure, from which by his opposition he prays that they may be relieved.

The grounds of contestation by the respondent of the opposition, although detailed and argumentative upon certain provisions of the original act of 1864, having reference to compulsory liquidation, are nevertheless simply,

1st. Because a voluntary assignment can only be made to an official assignee resident at the place of business of the insolvent; and

2nd. Because the voluntary assignment made in this cause, as stated in the opposition was made by a trader of the district of Richelieu to an official assignee at Montreal, and therefore it is prayed that the opposition be dismissed.

This is the sole conclusion of the contestation.

The appellant completed the issue by his replication, stating in effect that the voluntary assignment had been duly and legally made under the provisions of the original insolvent act of 1864 and of its amending act of 1865.

The actual contention therefore is restricted to the right of the appellant, an official assignee at Montreal, to receive legally a voluntary assignment from the insolvent trader having his place of business at Sorel, in another district. To determine this right, it is essential to examine the insolvent acts themselves. By the original act of 1864, it is enacted at sec. 2 sub. sec. 1, that any insolvent desirous of making an assignment of his estate and effects, must observe the following formalities, &c., set out in the act, namely:

By the said 1 sub. sect. to call a meeting of his creditors at his place of business, or at some other place convenient for them, by advertisement, and there to exhibit to them attested schedules of his creditors &c., together with his books of account and vouchers.

By the 2 sub. sect. The creditors are to be notified of the meeting by post.

By the 3 sub. sect. The creditors at the meeting, are by particular vote to nominate an assignee to whom the assignment is to be made, and

By the 4 sub. sect. On default of the meeting to make the nomination, or of the nominated assignee refusing to act, the insolvent might himself act, and nominate as assignee 1st, any of his creditors within the province, or, 2nd, Any official assignee resident at his place of business.

By the amending act of 1865, it is enacted at section 2, "A voluntary assign-"ment may be made to any official assignee appointed under the act of 1864, "without any of the formalities &c. required by the sub-sections 1, 2, 3, 4, of "section 2 above cited."

Now the foregoing excerpts of the act of 1864, from section 2, in these sub-sections contained, plainly contemplate a meeting of the insolvent's creditors and the results and consequences of their action or default, because, the nomination of assignee to whom the voluntary assignment is to be made is primarily the act

of the creditors' meeting; and it is only upon the meeting refusing to nominate an assignee or their nominee refusing to act, that the insolvent as the consequent of the meeting and of these results, or either of them, may by the act make a voluntary assignment to a creditor within the province or to an official assignee resident within the district of his place of business.

But the amending act does not contemplate such meeting or its results and consequences, or any of the legal requirements for or connected with such a meeting, but enables and authorizes the insolvent at once *de plano* to make a voluntary assignment direct to any official assignee.

The effect of this enactment in the act of 1865, is *of itself* to do away with the meeting of creditors and all the requirements of the above cited sub-sections rendering them unnecessary by the mere force of this enactment; and as if to prevent any possible misconception as to its intent, the enactment dispenses expressly and absolutely with those requirements. This exemption moreover of calling meeting of creditors &c. naturally followed from the power given to make the voluntary assignment direct *de plano*, by the insolvent to the official assignee without intermediate formality. *Cessante ratione legis cessat ipsa lex, or cessante causa cessat effectus.*

Having stated these particulars of the two acts of 1864 and 1865, they may be considered together, either as original and amending acts, or the latter may be considered independently of the former.

If they are taken together as an original enactment amended by the subsequent act, it will be observed that as regards the insolvent desirous to make a voluntary assignment,

The original act requires him to observe the requirements of the sub-sections, 1, 2, 3, 4.

But the amending act provides that a voluntary assignment may be made without the performance of any of them. The effect then in this respect is to dispense with them altogether.

Again taking the two acts as before as original and amending with reference to the official assignee only mentioned in both, then

The original act, has the following: "to any official assignee resident within "the district within which the insolvent has his place of business."

The amending act has the following: "to any official assignee appointed un- "der the said act" (1864).

By the former act the nomination of the official assignee is localized as it were to the insolvent's place of business and requires him to be resident in the district of that business, but by the latter act, the nomination is free and unqualified, "any official assignee duly appointed."

Bringing then, finally, the two acts together, the former as amended by the latter so as to be read together in respect of the official assignee to whom the voluntary assignment may be made, the reading would be as follows: "Any "person unable to meet his engagements and desirous to make an assignment of "his estate and effects may make a voluntary assignment thereof to any official "assignee duly appointed."

The effect of the amendment would therefore be to strike out of the original

Brown vs. Douglas.

act the words "resident within the district within which the insolvent has his "place of business," and leaving the official assignee unrestricted and free from all qualification, except his due appointment as such official. This is therefore the plain and evident result of the juxtaposition of these acts and their enactments when treated as original and amending statutes. But the act of 1865 must also be considered in so far as the voluntary assignment is concerned and *pro hac vice* only as an independent enactment. It has been observed that the act of 1864, predicates the making of a voluntary assignment by the insolvent, upon the fact of the meeting of creditors and of their action and nomination of an assignee, and gives authority to the insolvent to make such assignment only upon the meeting taking place, and their non nomination of an assignee or his refusal to act. The power of the insolvent to make such assignment to a creditor within the province or to a resident official at his place of business is a consequent of the creditors' meeting, and hence it is plain, that where that preliminary required by the original act has not had an existence, the power given to the assignee as a consequent of it cannot have effect.

The abrogation then by the enactment of 1865 of the requirements of the meeting and its results and consequences, in so far as the insolvent and his power to make a voluntary assignment are concerned, would have left him under the common law, without power to make a voluntary assignment, but here the act of 1865 comes to his relief, and by an independent enactment, abolishing the sub-sections above cited and their requirements, enacts plainly and simply that "a voluntary assignment may be made by the insolvent direct to any duly "appointed official assignee without qualification or limitation."

Words could not be more general or precise than those used in this enactment, and the *fait accompli*, that is, the voluntary assignment being so made, the assignment becomes absolute to the official assignee by the mere effect of the statute, and the estate and effects of the insolvent are forthwith divested from him and vested in the official, see sub sect. 7 of sect. 2, without any distinction, and therefore it follows in principle, that where the law makes no distinction, it is not for courts of justice to raise them, much less for individual creditors whose particular interests by the law are subordinated to the general interest of the mass of the creditors.

It must be borne in mind that the insolvent acts are co-extensive and apply generally to all mercantile and trading insolvencies in the province, and that without the general enactment of the act of 1865, in this particular above referred to, the original act of 1864 would have been of uneven operation in districts wherein no resident official assignee had been appointed under the act, and the benefit and operation of the general insolvent law to traders doing business in such unprovided districts, might have been of no avail. The 2 section of the act of 1865 has prevented such an anomaly and has effectually removed all possible difficulty on that score. From an examination of the act of 1865 it is evident, that the 2 section thereof applies only to voluntary insolvencies and assignments, and does not interfere with the proceedings for compulsory liquidation under the original act, except in some particulars which have no reference to this contention; but it should be stated that the object and purpose of insolvent and bank-

rupt laws is to secure the insolvent estate and effects, actual and possible, as expeditiously as may be, for the benefit of the creditors generally.

This object is attained absolutely and forthwith by the effect of the voluntary assignment which from its date by the mere effect of the statute, divests the insolvent and vests in the official assignee, the entire estate. His official position is recognized by law, he is the representative of the mass of the creditors for their participation in the proceeds of the estate, whilst power is conferred upon him for all useful and necessary purposes for securing and winding up the estate. This is the immediate result of the voluntary assignment.

On the other hand, stringent preliminary proceedings in the interest of the insolvent as well as of the creditors are required by the act for compulsory liquidation before the issue of the writ of attachment and the consequent seizure of the effects of the insolvent which, being necessarily in the district where the insolvent has his place of business, must of course be attached by the sheriff of the district of his place of business, in like manner as they would be upon a creditor's judgment obtained against him in a civil court in another district. But even then, the sheriff's possession is merely formal and temporary and passes to a guardian, who upon the subsequent appointment of an assignee by the creditors, not by the insolvent, also passes and transmits the seized effects to that assignee. Then only the divesting of the insolvent takes effect and only then, after considerable delay under the compulsory process. The very urgency of the proceedings for compulsory liquidation and their summary character casts upon the local judge the necessary jurisdiction for reaching the object of the proceedings, the possession by the assignee.

With reference to the contestation of this respondent, it may be remarked that it makes no complaint against the appellant individually or *ès qualité*, except that he is not an official assignee resident in the district of Richelieu, nor does it contain any allegation of the existence of an official assignee resident in that district. Finally it takes no conclusion against the voluntary assignment itself made in this case, or that it may be set aside. The court cannot go out of the record to ascertain the fact of the existence of a district official in Richelieu even if the allegation were essential, nor can it undertake to set aside an assignment *proprio motu* when that object is not asked for.

The judgment of the judge for the district of Richelieu upon this contestation, and which was confirmed in revision by a majority of the three presiding judges, Mr. Justice Monk, dissenting therefrom, was as follows:

"Considérant qu'en vertu des lois qui régissent la faillite et cession de biens en force en ce pays pour être valable une cession de biens doit être faite au syndic nommé pour le district où réside le débiteur insolvable,

"Considérant que le défendeur en la présente espèce était résidant en la ville de Sorel lors de la cession par lui faite à l'opposant, qu'il y avait alors un syndic nommé et en exercice pour le district de Richelieu dans la circonscription duquel se trouve la dite ville de Sorel, et que cette cession faite au dit opposant est nulle, et de nul effet, qu'en vertu d'icelle il ne peut revendiquer les meubles et effets saisis sur le défendeur qui lors de la saisie en était encore en possession; a débouté et déboute le dit opposant de son opposition et moyens d'opposition."

Brown vs. Douglas.

It will be seen that the terms of the judgment in the first *considérant* are not quite precise according to the act of 1864 upon which the judgment rests. The act says "an official assignee resident in the district in which the insolvent has his place of business." The judgment in this *considérant* has "un syndic nommé pour le district ou réside le débiteur insolvable," the qualification of residence is attached to the official assignee, not to the insolvent who may not *reside* at his place of business. The judgment is also incorrect as to matter of fact in the second *considérant* in the following "qu'il y avait alors un syndic nommé et en "exercice pour le district de Richelieu," inasmuch as such an allegation is not made in the respondent's contestation, nor is any proof of that fact to be found in the record.

It must not be forgotten that this cause and the contention therein as well as the judgment rendered are all civil matters decided upon by the court for the district of Richelieu and not proceedings in insolvency. The errors in the judgment are serious of themselves and sufficient to set it aside, because the judgment rests mainly upon the *unalleged and unproved* fact stated in the judgment which dismisses the appellant's opposition. Upon the whole the judgment appealed from apart from the above mentioned errors, is repugnant to the plain, precise and unqualified enactment of the act of 1865 which governs this matter, and therefore must be set aside.

DRUMMOND, J., and JOHNSON, J., concurred in the judgment of the majority of the court.

J. J. C. Abbott, Q.C., for the appellant.
LaFrenaye & Armstrong, for the respondent.
(J. J. C. A.)

Judgment reversed.

SUPERIOR COURT, 1868.

MONTREAL, 31st OCTOBER, 1868.

Coram MACKAY, J.

No. 632.

Henry Chapman, et al., Plaintiffs, vs. *The Lancashire Insurance Company, defendants*, and *Hugh Fraser, assignee, plaintiff par reprise d'instance*, and *Henry Chapman, plaintiff par reprise d'instance.*

HELD:—1. Where a reference to arbitrators allowed the parties *two* days to produce papers, &c., and the award was made by the arbitrators on the day following the reference, without their having had any communication with the defendants, that such award was premature and null.

2. Where the plaintiffs effected insurance on premises described as being occupied by them as a bonded warehouse, and by other tenants as offices, and subsequently sub-let part of the premises to a common warehouseman, to be used for storage of goods, and also effected additional insurance upon the property insured, without giving notice of either fact to the insurers as required by the conditions endorsed on the back of the policy, *held*, that there was breach of warranty on the part of the insured, and the policy was void and of no effect.

The pleadings and facts in this case are fully stated in the remarks of the Honorable Judge.

Chapman vs. The Lancashire Insurance Co.

MACKAY, J. This was an action brought by the firm of H. Chapman & Co., of this city, against the defendants, to recover a sum of $11,981.12, alleged to be due upon a policy of insurance.

The declaration sets out that on the 12th November, 1864, a policy was issued by the defendants, covering goods to the value of $15,000, contained in the basement and third story of a building known as "Western Chambers," occupied by the assured as a bonded and general warehouse, and by other tenants as offices. The condition of the policy is then set out; requiring, in the event of loss by fire, notice thereof in writing to be forthwith given to the Company and as soon after as possible, as particular an account of the loss as the nature of the case will admit, supported by affidavit,—mentioning also any other insurances on the same subject—the total cash value of the property insured—in what manner and by whom the building was occupied at the time of the fire; in case of partial damage, the assured to put the property in as good condition as the case will allow, separating the damaged from the undamaged,—after which the damage to be ascertained by the appraisement of two or three competent persons, (not interested in the loss as creditors or otherwise, nor connected with the insured or sufferers) mutually chosen,—the report of such appraisement to be made in writing under oath—the assured to submit to examination under oath if required, and *to answer all questions touching his knowledge of anything relating to such loss or damage or to his claim thereupon, and to produce, if required, his books of account and other vouchers.* In case of differences arising concerning such loss or damage, the matter might, by mutual consent, be referred to arbitrators indifferently chosen, whose award in writing, *as to the amount of such loss and damage,* shall be binding on both parties.

The declaration then goes on to allege that on the 7th December, 1864, a fire occurred by which a part of the goods insured was destroyed and the remainder injured, that notice was forthwith given to the Company, and that plaintiffs also *furnished all statements, oaths and declarations required by the conditions of the policy, and that defendants waived any further information or preliminary proof;* that the loss occasioned by the fire amounted to $23,962.25; that there was in existence at the time of the fire another policy for $15,000 issued by the London and Lancashire Insurance Company, covering the same goods, and that the loss was thereby divided in equal proportions between the two companies; that afterwards Hugh Fraser and Thomas Rimmer were appointed appraisers, with the consent of all concerned, to value the loss and damage to the goods in the free cellar; that after examination they were of opinion that the loss could not be ascertained, except by bringing the goods to auction. That on the 21st December, 1864, the plaintiffs and defendants and the London and Lancashire agreed to submit to arbitration the extent and value of the loss and "damage,"—and that by a written memorandum then and there signed, Messrs. Fraser and Rimmer were appointed arbitrators *and amiables compositeurs, to value such loss and damage, and to estimate the extent thereof, and to adjust the same,* the said parties binding themselves "*to produce and lay before the said*

Chapman vs. The Lancashire Insurance Co.

"*arbitrators, without delay and within two days from the date of the said memorandum, all facts, documents, matters and things relative to their said loss and damage,*" the award to be made on or before the 24th December,—the parties binding themselves in a penal sum of $5,000 to abide by the award; that a similar memorandum was at the same time executed between the plaintiffs and the London and Lancashire Insurance Company—the plaintiffs alleging that it was understood and agreed that the award should be binding on all parties, and should finally settle and determine the amount of plaintiffs' claim, and adjust the proportion thereof payable by each Company. That on the 22nd December the arbitrators made their award in writing which is set out at length in the declaration—declaring that "*having received from the said parties communication of all facts, documents, matters and things* relative to the said loss and damage and examined the same—*having heard the said parties regarding their several pretensions,* &c.," having examined the claim of H. C. & Co., and the policy of the London and Lancashire Insurance Company, "the said parties declaring that the question of abandonment of the "whole or any portion of the effects injured by the said fire, formed part of the "matters comprised within the said reference," they award as follows :—

1. They *value the loss and damage* to the effects covered by the said policies and *fix and adjust* the same at $23,962.25.

2. They award and determine that the effects enumerated in papers B. & C., thereto annexed, be abandoned by H. C. & Co. to the said Companies, or sold for their joint benefit, in equal proportions as they may see fit.

3. That the Lancashire Insurance Company do pay in cash to H. C. & Co., $11, 981. 12½ for their proportionate share of the loss.

4. That the said parties do each pay one-half the cost of the present award.

The declaration then sets out that on the same day the arbitrators made a similar award as between H. C. & Co. and the London and Lancashire Insurance Company.

That the plaintiffs thereupon delivered over to defendants and to the London and Lancashire Insurance Company the said damaged goods, as required by the award, which were afterwards sold by the said Companies for their joint benefit.

That in truth and in fact the loss caused by the said fire to the goods and effects, covered by the said policy of the defendants, amounted to $23,962.25, for one-half of which, viz., $11,981. 12½, the defendants are liable.

The declaration concludes (reserving the right to take further conclusions in respect of the penalty stipulated in the case of refusal to abide by the award) for a condemnation against the defendants in the sum of $11,981.12½ cy.

The defendants' first plea sets up in effect that the policy sued on contained a warranty, that the premises containing the goods insured *were occupied by plaintiffs* as a bonded and general warehouse, and the rest of the building by other tenants as offices; that this was untrue, and that in point of fact the said premises and more particularly the third story, *were under lease to and were occupied by one A. M. Bradford* as a common warehouseman, for the storage of goods and granting of warehouse receipts thereon,—that this fact did not be-

come known to defendants until about the 5th January, 1865, and that they cannot more particularly describe the case because, though plaintiffs have always been in possession of a duplicate or copy thereof, they have refused to communicate the same or the particulars thereof to defendants; that the said warranty not having been complied with by plaintiffs, the said policy is inoperative, null and void.

The 2nd plea sets up the same warranty, and that representations were made to the same effect by plaintiffs at the time of applying for the policy; that the warranty had not been complied with, and that the representations were false and the policy therefore inoperative, null and void; that the award set up by plaintiffs was inapplicable to the matters in question and wholly inoperative, null and void; that, according to the terms of the contract of insurance between plaintiffs and defendants, there could be *no abandonment* of the subject insured to the insurers; also that in case of partial loss, appraisers were to be named to estimate the same and make their report in writing under oath; that the submission to arbitration, agreed to by defendants, was intended to be in furtherance of the conditions of their policy, and for the purpose of valuing the loss and damage and estimating the extent thereof and adjusting the same; that the arbitrators named did not comply with the conditions of the policy or with the terms of the submission, but pretended to value the whole of the amount of goods in said basement and 3rd story, whether insured or not, and without any authority pretended to award an abandonment of the said goods to defendants and to the London and Lancashire Insurance Company, and condemned defendants to pay a specific sum of money, viz. $11,981.12½, as a proportionate share of the loss, none of which matters were ever submitted to the said arbitrators, and were wholly beyond the authority given them, and were in contravention of the conditions of said policy,—and the said award was made without observance of formalities required by law, or by the submission and *without notice to the parties or requiring their attendance, hearing or proof*, and the arbitrators were, moreover, at the time creditors of the plaintiffs—a fact then unknown to defendants and which disqualified them from acting; conclusion, that the policy and the award, in so far as necessary, may be quashed, set aside, and declared inoperative, null and void.

The 3rd plea sets up a condition of the policy requiring that—"if the interest "of the insured be a leasehold, trustee, mortgagee, or reversionary interest, *or* "*other interest not absolute*, it must be so represented to the Company and ex- "pressed in the policy in writing, otherwise the insurance shall be void."

That as regards the goods in the 3rd story, the interest of plaintiffs therein was not absolute, but only reversionary, *they having sold and pledged them by warehouse receipts and otherwise*—which fact was not represented to the Company nor expressed in the policy.

That the pretended award was wholly irregular, inoperative, null and void—for the causes mentioned in the last plea.

That plaintiffs have never furnished defendants with statement of loss on goods in basement, or in respect of goods in which their interest was absolute and not reversionary.

Chapman vs. The Lancashire Insurance Co.

That plaintiffs were, before the institution of the action, over-paid by the defendant and the London and Lancashire Insurance Company, for all loss covered by defendants' policy, and more especially for all loss on goods in the basement, and on goods in which plaintiffs' interest was absolute and not reversionary. Conclusion, that policy and award be declared inoperative, null and void—more especially as regards goods in which plaintiffs' interest was not absolute but only reversionary.

The 4th plea sets up the condition, requiring *goods on storage to be separately and specifically insured*, and alleges that plaintiffs had another insurance for a like amount ($15,000) with the London and Lancashire Insurance Company, covering the same goods, but covering also *goods on storage*, to which defendants' policy did not apply; that all the goods in the 3rd story at the time of the fire, were goods on storage, and that since the award and before the institution of the action, plaintiffs were paid for all loss, except loss on goods on storage, and that defendants had paid their ratable proportion of the loss on goods covered by their policy. The same grounds of nullity are invoked against the award as set up in the 2nd plea, the defendants alleging that the reference to arbitration was merely for the purpose of determining the amount of loss, and not to decide any question of law or render the liability of defendants greater, or settle the proportion of loss to be paid by each Company under policies which differed materially from each other. Conclusion, that policy and award be declared inoperative, null and void.

The 5th plea alleges that since the issuing of the policy and before the fire, *the plaintiffs' interest in the goods insured was changed by sales, pledges, conveyances and removals*, and that defendants' policy became inapplicable, except as to a small quantity not exceeding $4,000; that plaintiffs had subsequently applied to defendants to have their policy transferred to cover such other interests, but defendants refused; that thereupon plaintiffs, their agents, and vendees, caused other insurance to be effected to cover such other interests in place of defendants' policy, which it was intended should cease except as regards the quantity above mentioned; that plaintiffs have been paid by the London and Lancashire Insurance Company and by defendants as well the said sum of $4,000 as an amount in excess. Conclusion similar to 4th plea.

The 6th plea sets up conditions requiring notice of previous or subsequent insurance to be given to the Company and endorsed on the policy, and alleges that before the happening of the loss the goods insured were covered by another policy issued by the London and Liverpool Insurance Company, for about $12,000 and upwards, and for divers other sums and by divers other policies, of which no notice was ever given to defendants. Conclusion, that defendants' policy be declared to have ceased and to be of no effect.

The 7th plea is a *défense en fait* or general denial. On the 17th December, 1866, the defendants moved to be allowed to file a supplementary plea setting up the policy issued by the Liverpool and London Insurance Company *to plaintiffs on 28th May*, 1864, and the condition requiring notice of previous insurances to be given, and alleging that no notice was given of this previous insurance, and that defendants did not become aware of its existence until the examination

of G. F. C. Smith at *enquête* on the 7th December, 1866. This motion was supported by the affidavit of Mr. Hobbs.

The policy of insurance mentioned in this plea is the same as that referred to in the 6th plea, but the defendants allege that they had always supposed that the policy *had been issued to Stanton direct*, and that they only became aware on the 7th December, 1866, that it had been issued to plaintiffs, and only transferred to Stanton on the 22nd November, 1864.

The supplementary plea was allowed to be filed.

The special answer to the 1st plea denied the lease to Bradford and the occupation by him as a common warehouseman, and alleged that said 3rd story was occupied by plaintiffs as a customs bonded warehouse; that the pretended lease to Bradford was not intended to give him any right to use the premises for his own purposes, and that he never did use them for any purpose whatever; that the said lease was made for the purpose of ultimately giving him control over certain goods belonging to plaintiffs, in order to secure an advance of $12,053, made to them by O. W. Stanton, but that at the time of the fire the said bond *had not been transferred to Bradford*, nor the remainder of plaintiffs' goods separated from those on which the advance had been made; that Bradford had no independent control over said goods or premises, and could not obtain access thereto except by consent of plaintiffs, and upon their requisition to the customs department; that defendants were aware of the said advance and all the circumstances connected therewith, including the said pretended lease, *long before the agreement of arbitration of 21st December, 1864; that plaintiffs never refused to communicate the said lease and were never requested so to do*, but that the defendants after being furnished with all the information to which they were entitled and after submitting the matters in issue to arbitration, afterwards "with the intent fraudulently to evade submission to the said award," feigned ignorance of the arrangements respecting said advance and continued to submit inquiries, and at length requested the particulars of said lease, which plaintiffs at once gave, though not bound so to do, and though defendants were aware of the said lease and advance and every material fact connected therewith before the reference to arbitration. That defendants *have repeatedly admitted that the only question in dispute was whether the goods in 3rd story were goods on storage, and defendants have waived all other objections to plaintiffs' claim.*

The special answer to 2nd plea contains the same allegations in reference to the lease to Bradford and circumstances connected therewith, and the knowledge of facts by defendants previous to the 21st December, and pretended ignorance afterwards,—and further alleges that the reference to arbitration was made under the 10th condition of the policy providing that in case of differences arising, the matter may, by mutual consent, be referred to arbitrators, whose award as to the amount of such loss shall be binding, and that it was not a mere appraisement;—that the arbitration was agreed to on the basis of an abandonment of the damaged goods, and that defendants afterwards waived all objections to the abandonment and to the award on that ground, and waived all objections except to the goods *being on storage*. That defendants acted conjointly with the London and Lancashire Insurance Company in causing said goods to be sold and

Chapman vs. The Lancashire Insurance Co.

realized for their joint benefit. That the said award was legal, just and well founded in fact and in law.

The special answer to 3rd plea alleges that plaintiffs claim by their action the value of their right of property in the said goods, after deduction from their total value of the amount advanced, and that their interest therein, after said deduction, was direct and absolute and not reversionary. That the award was regular and valid, and that defendants have repeatedly waived all objections, excepting regarding goods on storage.

The special answer to 4th plea alleges that by the usage and custom of trade, the phrase "goods on storage" in a policy of insurance means goods belonging to one person stored in the premises of another; that the goods in question were the property of plaintiffs, and at time of fire were stored in their own premises, and that the difference between the two policies does not therefore have any effect as regards said goods; that the reference to arbitration was made under the condition of policy referred to in the special answer to second plea, and was not a mere appraisement, and that defendants consented to abandonment of damaged goods and subsequent sale thereof.

Special answer to 5th plea alleges that the application and a transfer of insurance was to secure the party by whom the advance of $12,053 was made, and that upon defendants' refusal to consent to transfer, *an insurance was procured for the said party elsewhere*, which is the policy referred to in said 5th plea, and that plaintiffs' claim is exclusive of the amount covered by said policy; that defendants *were aware of the existence of said policy and of its nature and purport previous to 21st December*, 1864, and waived all objections except in regard to goods on storage.

Special answer to 6th plea alleges that the policy referred to (Liverpool and London) was *procured by and issued to the party by whom the said advance was made*, and that defendants were always and especially at the time of fire and previous to the 21st December, 1864, well aware of its existence and waived all objections thereto.

Special answer to supplementary plea alleges that defendants were well aware at the time of the issuing of their policy, and also before the reference to arbitration, *that plaintiffs were insured under the policy of the London and Liverpool Insurance Company*, and that the omission to endorse the same was owing to the negligence of defendants themselves, who have also waived all objections on this ground. On the 18th September, 1868, the defendants moved, at the final hearing, for leave to amend the 2nd plea to make it conform to the proof, by adding an allegation that the award was made without notice to the parties, and without requiring their attendance, hearing or proof, and that the arbitrators were at the time creditors of the assured—a fact of which defendants were then ignorant. This allegation has been already mentioned in the analysis of the pleadings.

Having stated the issues let us look now at the evidence adduced. The policy covered "goods, wares and merchandize, hazardous and not hazardous, "whether their own property, held in trust, or on consignment, contained in the "basement and 3rd story of a house known as "Western Chambers," occupied

"by the assured as a bonded and general warehouse, and by other tenants as "offices." The policy contains on its face mention of the policy issued by the London and Lancashire Insurance Company for a similar amount.

The 3rd story appears from the evidence to have formed part of the Custom House bond "No. 5,"—which included also part of the 3rd flat and the basement of the adjoining building, occupied by H. Chapman & Co. as a warehouse. This warehouse was separated from "Western Chambers" by a party wall, through which access was obtained by means of iron doors. There was in existence at the time of the issuing of the defendants' policy another policy of the London and Liverpool Insurance Company, issued on the 28th of May, 1864. The latter policy was not acknowledged or noticed on the former. This policy of the Liverpool and London Insurance Company was afterwards, on 22nd Nov., 1864, transferred by H. C. & Co. to O. W. Stanton, who is described in the endorsement as holding "the within described goods, whether for himself, in trust, or on consignment." On the 24th of November, 1864, H. C. & Co. leased the 3rd flat of "Western Chambers" to Bradford. The lease was partly in writing and partly printed, and was signed by the parties and contained the ordinary clauses, and purported to be made for six months, from 1st November then instant; the rent stipulated was $1, payable on demand. By this lease H. Chapman & Co. leased to Arthur N. Bradford "that certain flat being the "third story in a certain building in St. John and St. Alexis Streets, in the "City of Montreal, known as "Western Chambers,"—the lessee undertaking among other things to make all tenantable customary repairs, and "to pay all "extra premium of insurance which may be exacted in consequence of the busi-"ness or works done or carried on by the said lessee." In case of damage occurring to said leased premises by fire, the said lease to be cancelled, the lessee agreeing not to demand compensation or damages therefor.

On the 7th December the fire occurred. On the 15th a statement of loss was furnished to the defendants, in which the total value of goods in "bond No. 5" was stated to be $31,666.90, from which was to be deducted the goods covered by Stanton's insurance. This statement was accompanied by the affidavit of H. Chapman, in which he states that "the total cash value of the goods and effects "contained in said bonded warehouse No. 5 was $31,666.90, upon a portion of "which, viz., to the extent of $12,053, cy., the said firm had no insurance." "Soon after the fire, the parties, *i.e.*, H. C. & Co., and the two Insurance Companies agreed to appoint H. Fraser and T. Rimmer appraisers to appraise the damage to goods in the free cellar or basement. These gentlemen reported that no appraisement could be made, and advised a sale of the goods as the only mode of ascertaining the damage. On the 21st December a reference to arbitration was agreed upon "to value the loss and damage, and to estimate the extent thereof and to adjust the same"—the parties binding themselves to produce and lay before the arbitrators without delay and *within two days* from date thereof all facts, documents, &c.

The following day, 22nd December, an award was made, in which the arbitrators declare that they *fix and adjust the loss and damage* at $23,962.25, and condemn the defendants to pay in cash $11,981.12½, as their proportion (one

Chapman vs. The Lancashire Insurance Co.

half) of the loss. The award also decrees an abandonment to the Insurance Companies of the goods specified in statements marked B. & C., thereto annexed.

The defendants from the time they heard of the award seem to have treated it as of no force. A correspondence had in the meantime commenced between H. C. & Co. and Mr. Hobbs, the defendants' agent in Montreal, which was continued through some weeks, and another was opened by H. C. & Co. with Mr. Stewart, the general manager in England: On 6th March, 1865, the plaintiffs' action was taken out; the parties subsequently went to proof, and the plaintiffs contend that they have proved everything necessary to support their action, while the defendants say the contrary.

The 1st point to be decided is as to the award—the defendants contend that it was made prematurely. The submission was signed on the 21st December, and *two* days allowed the parties for producing and laying before the arbitrators all facts, documents, &c., yet the award was made the following day, 22nd December,—and although it sets forth that the arbitrators had "received from the said parties communication of all facts, documents, matters and things relative to the said loss and damage, and examined the same," and had "heard the "said parties regarding their several pretensions," it is proved by the evidence "of record that this statement is untrue, and *that they had no communication "with the defendants from the time the submission was signed until after the award was made.* It was further contended that the arbitrators having been appointed merely "to value the loss and damage and to estimate the extent thereof "and to adjust the same," had no authority to decree an abandonment of the damaged goods to the Insurance Companies, the more especially as this was in direct contravention of one of the conditions of defendants' policy. I think the award must be treated as a nullity, as having been prematurely made, pending the delay fixed by the submission for the parties to produce facts, documents, &c. The plaintiffs' action, however, does not necessarily fail because the award is set aside. There remains the substantive question whether the plaintiffs sustained the loss alleged, and whether they are entitled to recover the amount claimed from the defendants. Before deciding this question it will be necessary to consider other points, upon the decision of which plaintiffs' right of action depends. 1st, As to the lease to Bradford, the existence of which the defendants say did not become known to them till about the 5th January, 1865, and which they allege the plaintiffs always refused to communicate to them, although having a copy or duplicate in their possession. This lease was produced for the first time at the examination of Mr. Cowan, the plaintiffs' clerk, on the 22nd May, 1866. It is dated 24th November, 1864, and purports to be a lease for 6 months, from 1st November then instant, from H. C. & Co. to A. N. Bradford, of the 3rd story of the building known as "Western Chambers."

Mr. Lewis of the Custom-House describes the premises by reference to a plan produced. His evidence and that of Allard and Barry, explain what took place between H. C. & Co., A. N. Bradford, and the Custom-House authorities, in regard to this part of the building after the granting of the lease. It appears that Mr. Bradford made an application to the Custom-House about the 20th October, 1864, to have the 3rd flat of Western Chambers created a separate bond

in his own name. The application was granted and the new bond was called "112." On the 2nd December, 1864, application in writing was made by H. C. & Co., A. N. Bradford and O. W. Stanton, each separately, to transfer goods from "bond No 5" to "112." The Custom-House gave one key of "bond No. 112" to Bradford and kept the other themselves. H. C. & Co. could not and did not afterward enter except by B's permission. There has been an attempt made to shew that the lease was merely *pro formâ*, and that the $1 rent was never paid. Mr. Cowan says there was no change of occupation or control in consequence of the lease; but Bradford says the plaintiffs could not, after the lease, get access without applying to him and requiring his presence, with the key. It is said also on the part of the plaintiffs that B. could not enter except through their warehouse, but what difference does this make? So long as he had control of the 3rd flat, of what consequence is it through what entrance he had access to it? Stanton must have been satisfied that the 3rd flat was under B's control, before he would advance to H. C. & Co. so large a sum as $12,000 on goods there, as he did, upon Bradford's warehouse receipt. The pledge to him could only have effect by *tradition* or delivery. If the plaintiffs had not dispossessed themselves of the goods, Stanton's security would have been worthless. When H. C. & Co. failed in May, 1865—supposing no fire had ever occurred—would those goods, and the room thus held by Bradford under lease have passed to their assignee as being in their reputed ownership and possession? No. Chapman's statement, therefore, in the particulars of loss furnished to the Company after the fire, in which he describes the premises as occupied by the assured as a bonded and general warehouse, in the same terms as used in the policy, is inaccurate; for the lease to B. had supervened. The statement would only have been accurate had it set forth the lease and mentioned B. as the occupant of that part of the building. When in the policy occupation is mentioned, it means that the place and goods are held and cared for by H. C. & Co. This is a statement material to the risk.—(See ruling in *Campbell vs. Liverpool and London*, L. C. Law Journal, Vol. 2, p.224,—verdict for plaintiff notwithstanding change of occupation, but afterwards judgment for defendants *non obs. vered.*) Suppose goods insured in a dwelling-house occupied by A, is it of no importance to the insurers whether it continue to be occupied by A, or be occupied by C or D, to whom A chooses to abandon it? The name of the occupant is as material as is the name of the Captain of a ship in maritime insurance. If there is no clause in the policy allowing a change of master, no change can be made except in case of necessity and on the voyage. (See *Boulay-Paty*, p. 325) In the present case the insurance was after a visit and inspection, and seeing how the goods insured were in the possession and occupation of H. Chapman & Co. *Leases and pledges such as shewn in this case are edged-tools in insurance matters.* I do not think the particulars of loss and statement as furnished by H. C. & Co. were a compliance with the 9th condition of the policy; for they did not state accurately who were the occupiers of the premises in which were the goods insured.

Next as to the question raised by the supplementary plea in regard to the *previous insurance* with the Liverpool and London Insurance Company, which the defendants say was not notified to them. The 5th condition requires that

Chapman vs. The Lancashire Insurance Co.

"notice of all previous insurances upon property *insured* by the Company shall "be given to them and endorsed on the said policy or otherwise acknowledged by "the Company in writing at or before the time of making insurance thereon, "otherwise the policy subscribed shall be of no effect." We have nothing to do "with the reasons for this condition. It is enough that the parties have made it a condition of their contract. But there is no difficulty in finding reasons.

Claims for contribution may arise between different Companies, where there are several insurances.

Some Companies wish to make the assured stand their own insurers for part of the property; as it makes them peculiarly interested in protecting it against fire.

Frauds have been perpetrated by means of several insurances kept secret from the various insurers.

Highly insured propertyis more hazardous than less highly insured property; as vacant property is said, in insurance circles, to be peculiarly liable to fire.

The defendants here might not have liked to see H. C. & Co insure for $40,000. Had they known the total amount, they might have declined the risk. No notice, however, was given of the Liverpool and London policy. Chapman's affidavit attached to the statement of loss states that "to the extent of $12,053 cy. the said firm had no insurance." The statement would only have been accurate had it made mention of the Liverpool and London policy as existing in favour of H. C. & Co. at the date of defendants' policy, and that it had been transferred later to O. W. Stanton, who got paid $10,000 under it as substituted in H. C. & Co.'s place. I am of opinion that the 5th condition was clearly not complied with by plaintiffs. In this connection we may again, ask—were the particulars and statement of loss, as furnished after the fire, a compliance with the conditions of the policy? I do not think they were; there having been other insurance effected by plaintiffs on the same property, and no mention of it made in the statement or particulars of loss, as required by the 9th condition. But, it is said, all objections founded upon the alleged non-compliance with the conditions of the policy have been waived. Before going into this question of waivers it will be well to see what knowledge of the facts the defendants or their agent had at different periods. It is said by plaintiffs that Mr. Hobbs always knew of the Liverpool and London policy, and that he early (before the award) knew of the Bradford lease. The correspondence will throw some light on this matter. Let us refer to it.

[Here the Hon. Judge went into a long analysis of the correspondence between H. C. & Co. and Hobbs, and H. C. & Co and Mr. Stewart—commencing 15th Dec. 1864, and ending April 28, 1865. He blamed H. C. & Co for not stating about other insurance and about this Bradford lease, and its exact nature, to Hobbs, as they ought to have done, in his, the Judge's, opinion.]

The action was taken out on the 6th March 1865, and the defendants were free to plead all that they have pleaded in their defence.

Had Mr. Hobbs knowledge before the fire of the other insurance under the Liverpool and London policy?

There is a good deal of contradictory evidence on this and other points. Mr.

Brooke, one of the original plaintiffs, and who went to England after their insolvency, has been examined. He says positively that Mr. Hobbs had such knowledge on the 14th Nov. 1864; that he, (B.) took him into his private office and showed him the policy. Mr. H. on the other hand denies this with equal positiveness, and says he did not go into the plaintiffs' office at all on that day. Hébert says he was sent by Mr. H. at the time of the issuing of defendants' policy to inquire if there was any other insurance, in order that it might be inserted in the policy, and that Mr. B. sent him away, telling him it was quite unnecessary to ask for such information. H. Hobbs says that B. (answering him as to other insurances) said:—"The London and Lancashire, the same as yourselves, that's all."—This was about two weeks before the fire, and before the policy was actually delivered. Wm. Hobbs swears to having, in conversation with Brooke between the doors of H.'s office about a week to a fortnight before the fire, alluded to his, (B.'s,) refusal to give information to Hébert, and B. said—"well, it's no matter now."—B. denies Hébert's statement. He denies also H. Hobbs', and appears to deny that visit to Hobbs' office about a week to a fortnight before the fire;—visit spoken of by H. Hobbs, Hébert, and Wm. Hobbs. Brooke says that on 14th Nov. he himself adverted to the necessity of having the existence of other policies endorsed upon the policy of defendants, and that H. Hobbs stated that this was "unusual and quite unnecessary."

This was not natural speech for an insurance agent to make, and not consistent with the fact of Hobbs saying to Brooke later (a week to a fortnight before the fire) that he had sent to his office for particulars of other insurances. H. Hobbs swears to hearing Wm. Hobbs so saying to Brooke. Hébert saw Brooke at H.'s office at that time and saw him talking with H Hobbs. The evidence of Brooke is not confirmed, but Hobbs' is by the fact that another insurance, viz. that of the London and Lancashire, was specially mentioned on the face of the policy, and that there was a condition requiring previous insurances to be endorsed or acknowledged in writing.

I prefer H. Hobbs, Hébert and Wm. Hobbs on this part of the case. It has been said that the latter is interested and has been the cause of this suit;—but has Brooke no interest? Is he to be held perfectly free from bias? He was one of the insured firm of H. C. & Co., and but for several events and transactions that have happened since the institution of the present suit—among which is the insolvency of the firm, he might have been still interested against the defendants. I cannot but say that the evidence of the three witnesses against him more than counterbalances his testimony. Wm. H., as I have said before, contradicts point blank B.'s statement that he,(H.) had been with him, (B.) in his private office on 14th Nov. I note this merely to say that H. here exposed himself to be contradicted by others, clerks or storemen of H. C. & Co., if his statement was false. Not a witness but B. says one word to lead us to believe that before the fire Wm. H. knew of the Liverpool and London policy. Upon the conflict of testimony which there is on the subject I find that Wm. H. before the fire, was not aware of that policy.

How soon, and when after the fire had he knowledge of it? Brooke says that about the time of the signing of the arbitration bond on 21st Dec. Hobbs was aware of the Liverpool and London policy.

Chapman vs. The Lancashire Insurance Co.

Smith, the agent of that Company, swears to H.'s getting pretty exact information from the books in his office within a week or ten days after the fire.

Bethune says that he and H. had an interview with Smith shortly after the fire, and is positive that H. and himself became aware that one of the policies in the Liverpool and London office was in the name of H. C. & Co., originally.

Wm. Hobbs swears he had no knowledge of that policy having been issued to H. C. & Co., until Smith was examined as a witness. He swears he has no recollection of Smith having told him *of other insurance to H. C. & Co. direct, and by them transferred.* He would have us believe that he had no knowledge of the policy as spoken to by Bethune. But though he may not actually have had by himself the handling of Smith's registers, I find, as Smith and Bethune state, and that H. must be charged with knowledge of said policy within a week or ten days from the fire.

Had Wm. Hobbs knowledge, before or at the time of reference to arbitration, of the lease to Bradford?

Mr. Rimmer says that the *pro formâ* lease was talked of by H. and himself before the reference, and the question was whether it vitiated the policy.

We have H.'s statement to the contrary. He says he does not think that he knew anything of the lease at that time. He states that it was only after the award that he obtained some information of the existence of a lease. Being pressed, he says he believes he did not inform Rimmer of the existence of the lease before the award.

It is not proved that Rimmer spoke to Brooke, Fraser, Chapman, Cowan, Simpson, or Bethune, about the lease, or that any one of them spoke to him about it.

Brooke swears to conversations between the time of the fire and the reference, between H. and himself, *but not to a word by either of them about lease.* H. Chapman & Co in their letter of 4th January, 1865, charging H. with knowledge of the lease, *say Mills told him (Hobbs) "fully of it."* They even say H. was informed of its *character* by Mills,—not a word as to admission of it to Rimmer. *Mills has been examined and proves not a word of lease, or character of it,* to support this statement of H. Chapman & Co.

I believe that H. C. & Co. early saw the influence that the lease to Bradford might have on their case. Their correspondence is most vigorous and improves all points in their favour. It invites to discussion of many things, but nowhere to consideration of the lease to Bradford.

Rimmer had *seen* no lease apparently. There is no proof of his ever having seen any lease. There is not a tittle of evidence to establish that Rimmer knew or spoke of this Bradford lease. From what he says there was a necessity always for any such lease being kept private. Such leases and pledges as those to Bradford and Stanton cannot become known without loss of credit.

We have no proof that Hobbs, *before or at the time of the reference, knew of the lease to Bradford.* How could he have learned about it? How much did he know about it? Bradford has been examined, but says not one word on this subject. Up to 1865, had H. C. & Co. mentioned this lease to anybody? It is not proved. Did Cowan mention it? It is not proved.

The lease itself is not produced by H. C. & Co. until 22nd May, 1866, when Cowan was examined!

Suppose some *pro formâ* lease to have been spoken of by Rimmer and Hobbs—*non constat* that it was the lease to Bradford. We can imagine, seeing the pledge of goods to Stanton, that a lease may have been *supposed* to him, while this lease to B. was unknown to both R. and H.

I find that the lease to B. is not proved to have been known to Hobbs till he saw it, and that he appears not to have known about it, before or at the time of the reference.

As to Mr. Stewart, in Manchester, he was less informed than H. on all these points.

Mr. Cowan in producing the lease says there was no change of occupation or control in consequence. But Mr. Bradford's evidence contradicts this. He says *he had the key of the room* and that H. C. & Co. could not have access without sending for him, Mr. Brooke used to go for him when he or H. C. & Co. wanted to get into the room. As to plaintiffs' pretension that all objections founded on the lease or change of occupation must be considered as waived, because not raised in the first instance, the answer is *that W. Hobbs was not aware of the facts and that he was kept in ignorance by the fault of the plaintiffs, who were bound to communicate full information.* As to the previous insurance, I have found that Mr. H. had no knowledge of it before the fire; and as to his knowledge of it after the fire, this cannot be allowed to avail as plaintiffs pretend. Knowledge by H. was and is not equivalent to the *notice* that plaintiffs undertook to give, and the *endorsement*, without which defendants were not to be bound. On this point I will cite the opinion of Judge Day in Atwell vs. Western Assurance Company (1 L. C. J., p. 279.); "The "policy in the present case not only requires that *notice shall be given of all other* "*insurances*, but that such notice shall be *endorsed on the policy or otherwise* "*acknowledged by the Company in writing*, otherwise that the contract shall be "null; and the pretension of the plaintiff is *that this condition has been* "*waived by the acts of the defendants' own agent subsequent to the fire.* There "are two points which present themselves in the discussion of the subject presently under consideration,—1st, as to the power of the agent, (Gault) to waive "such a condition, and 2nd: as to the fact of whether or not there has been any "waiver whatever proved. It cannot be denied that all the transactions between "the plaintiff and defendant in relation to the insurance in question, were carried "out by the Company's agent, but can it be said that an insurance agent, who "is merely empowered to insure, is by necessary intendment also empowered "to waive all or any of the conditions of the policy of insurance after it has been "once completed? I hold not. He is only empowered to insure according to "the conditions of the policy, and although he has power also to adjust claims, "he undoubtedly has *no power to alter the conditions which are essential ingredients of the contract.* One can understand that preliminary proofs of loss may "be readily waived, and that there is an incidental power in every insurance agent "to make such a waiver, but this has nothing to do with a *condition* such as the "one involved in the present discussion—*a condition affecting the very validity* "*of the contract itself.* Here at the time of the fire *there was no contract.*

Chapman vs. The Lancashire Insurance Co.

"Can a mere agent *revive that contract*, by pretending to waive *after the fire* "the necessity of the performance of something required to be done *before the* "*fire*, in order to preserve the contract itself intact?"

This opinion of Judge Day was afterwards sustained in appeal, (see *Western Assurance and Atwell*, 2 *L. C. J., p.* 181) and the judgment in appeal stands to guide us.—See also *Lampkin vs. Western Insurance Co., U. C. Q. B. Rep. Vol.* 13, *and* 2 *Amer. Lead. Cases, p.* 625.

At the time of the fire there was (by the contract) no subsisting insurance. How then can it be allowed that Hobbs' conduct after the fire shall make a contract?

Was there a waiver by the award? No. For the reasons I have stated, no act of Hobbs, in the ignorance and under the disabilities under which I find him, and under the fact proved that the endorsement of other insurance had not been made as required, could make a waiver as claimed by plaintiffs. His agreeing to a reference under the circumstances as they now appear—in other words, in ignorance of important facts—cannot prejudice the defendants. "It is plain that "the proof of a waiver will be wholly inadequate, unless it be shewn that the insur- "ers knew of the forfeiture at the time of doing the act which is alleged to have "deprived them of the power to enforce it; because waiver is essentially a question "of intention and *cannot arise* out of an act done in ignorance, or without a full "knowledge of all the material circumstances."—2 Amer. Lead. Cases, p. 625.

This agrees with our law. We do not presume renunciations. *On ne peut "pas renoncer à un droit que l'on ignore."—"Juri ignoto non possum renunti- "are, et error facti, re nondum decisâ, non nocet."* (*Brunneman.*)

Was there a waiver by part payment of the loss?

No. The defendants were not fully informed, even then, of the Bradford lease. This part payment need not have been made. It amounts to a liberality; that's all. So long as the whole has not been paid, the Company may resist the demand for any part which remains unpaid. 1 *Camp.* 134,274. The $2,000 was paid for loss on goods in the free cellar. It might have been said,—had defendants not paid, that several subjects had been insured; as has been said in like cases before now. How can payment of this $2,000, by Hobbs, the agent, make a contract to bind the Company, free before and at the *time of the fire*, to pay $11,000 more, to plaintiffs?

A very important clause occurs at the end of the 1st condition of policy. "If "during this insurance, the risk be increased, ... or *if for any other cause, the "Company shall so elect, it shall be optional with the Company to terminate "the insurance*, after notice given to the insured or his representatives of their "intention so to do, in which case the Company shall refund a rateable propor- "tion of the premium."

This right to cancel is a most valuable one; hence the necessity that the Company should be informed of change of occupation, or of other insurances, in order that they may be in a position to exercise their right if they think proper; and this information in regard to the facts the insured were bound to give them by the terms of their contract, but did not do so. When we consider the change of occupancy before referred to, and the previous insurance never mentioned, can

we doubt that the defendants would have used this clause of the first condition had they had information?

The existence of the lease to Bradford having been, as it seems to me, kept secret, and the lease itself withheld from defendants unreasonably, the policy is avoided; it always was void on the principles ruled in *Atwell* vs. *Western Assurance*, and it is not too late to say so now.

Finding, as I do, the award of the arbitrators null, as being made prematurely, without allowing the required delay for the production of facts, and documents, finding also that the plaintiffs have violated the conditions of their contract with defendants, by the change of occupation effected by the lease to Bradford, and also by their failure to give notice of the previous insurance in the Liverpool and London office; which violations of contract are not covered or cured by the pretended waivers, I must conclude that the plaintiffs' action fails. The case being disposed of on these grounds, it is unnecessary to enter into a discussion of the other points raised.

The following is the judgment:

"The court having heard the parties by their counsel as well upon defendants' motion of the 18th September 1868, to amend their second plea as upon the merits of this cause, &c., &c.

Doth grant the said motion, and considering that the award of the two arbitrators dated 22nd December 1864, and mentioned in plaintiffs' declaration, was prematurely made, pending the delay fixed by the reference of 21st Dec. 1864, (the only reference proved), for the parties to make their proofs and productions, to wit, before said arbitrators,— doth vacate and annul said award, and further,

Considering that in the policy granted by defendants on 12th Nov. 1864, to the original plaintiffs, the place or premises, in and upon which were the goods insured, were stated and described by plaintiffs and defendants as occupied by the assured as a Bonded and General Warehouse, and by other tenants as offices,— considering that the said statement and description were material to the risk, and that the occupation, at date of said policy, was afterwards changed by the assured without the knowledge of defendants, the plaintiffs having on the 24th Nov. 1864 leased a portion of said place or premises and given possession thereof to one Bradford as *per* lease fyled and the evidence of record,— considering that such change of occupation ought to have been by plaintiffs, before the fire of 7th December, 1864, notified to the defendants, particularly seeing the condition No. 1 on the back of the policy granted to plaintiffs; Considering that the said policy description, in connection with the facts proved, involved and involves a warranty that the goods insured were, and should continue to be, in the place occupied by the assured,—warranty which was not observed by them, but broken by their leasing and giving possession to Bradford in manner and form proved. Considering the condition No. 5 endorsed upon the defendants' policy granted to the original plaintiffs to the effect that, as to previous insurance on property insured by defendants, notice thereof should be given to defendants and endorsed on the policy (to wit of defendants), or otherwise acknowledged by the Company (defendants) in writing, at or before the time of making insurance thereon, (to wit, on such property insured by defendants) in default of which notice and en-

Chapman vs. The Lancashire Insurance Co.

dorsement or acknowledgment in writing, it was agreed between the parties to said policy, that said policy should be of no effect; Considering that the assured, the original plaintiffs, infringed the said condition, having effected on 28th May, 1864, with the Liverpool and London Insurance Company, insurance upon the property insured by defendants by their policy of 12th Nov., 1864, without giving notice thereof to defendants, and without having it endorsed on the policy granted by defendants, or otherwise acknowledged by defendants in writing, at or before the time of making insurance with defendants, by reason of which infringement the defendants' policy became void and was and is of no effect; Seeing that performance of said condition was not by defendants waived as pretended by plaintiffs' answers, and that the several pretended waivers by agents of defendants' Company set up by plaintiffs, even if proved, which they are not, were beyond the power of any such agents, and could not operate against defendants; Seeing further that plaintiffs have not proved the allegations of their declaration, and particularly that they did fulfil the conditions of their policy;

Doth maintain the pleas pleaded by defendants, and declare null and void the said policy sued upon, granted by defendants to plaintiffs, and doth dismiss plaintiffs' action with costs."

Action dismissed.

J. J. C. Abbott, Q. C., for plaintiffs.
Cross & Lunn, for defendants.
(J. K.)

COUR DE CIRCUIT.

MONTREAL, 10 DECEMBRE, 1868.

Coram TORRANCE, J.

No. 1593.

Vautier vs. *La Compagnie de Navigation de Beauharnois, Chateauguay et Huntingdon, et Lynch*, Oppt.

HYPOTHÈQUE SUR VAISSEAUX.

Jugé:—Que la vente d'un bateau-à-vapeur, par voie d'hypothèque—ou l'hypothèque par voie de vente, est nulle à l'égard des tiers, si elle n'est pas enregistrée, suivant les dispositions de l'art. 2360 du Code Civil.

Le demandeur ayant obtenu jugement contre la défenderesse pour réparations faites au steamboat *Salaberry*, naviguant dans les eaux intérieures, fit saisir ce steamboat en exécution de ce jugement ainsi que d'autres effets.

L'opposant Lynch réclama la propriété du steamboat, dans les termes suivants:—

That by deed of sale, duly executed at Montreal on the 8th day of May, 1867, before T. Doucet and Colleague, Notaries Public, Joseph Meloche, the president of the defendants, for and in the name of the said defendants, under and by virtue of the resolutions passed and adopted by the stockholders and directors, duly certified copies thereof having remained attached to the said

deed, declared that whereas the said Company was indebted to the said opposant in the sum of $3500, and for the further consideration of the sum of ten shillings then paid, did bargain, sell and transfer, and make over to the opposant present thereto, sixty-four parts or shares in and of the said steamer *Salaberry*, together with all her machinery, tackle, apparel, anchor, chains, cables, boats, and all appurtenances generally, whatsoever, to the said steamer or vessel, which said vessel was registered at the said port of Montreal, the certificate of which registry is fully detailed in the deed of sale aforesaid, and herewith fyled, the registry thereof having been duly made according to law. That on the back of the said certificate the following entry was made, to wit:

Names of the several owners within mentioned.	Number of sixty-four shares, held by each owner,
Company of Navigation of Salaberry and Montreal.	

Signed, T. BOUTHILLIER.

To have and to hold the said sixty-four shares or parts of said steamer or vessel called the *Salaberry* and all appurtenances thereby bargained and sold, and intended so to be to the said opposant as his own property forever, provided always that if the said Company should pay the said sum of $3500 in nine months from the date of sale with interest at the rate of 7 per cent, then and in that case the said sale should be rescinded, as appears by an authentic copy of the said deed herewith fyled.

That the said opposant did upon the execution of the said sale obtain the certificate of ownership of the said steamer, which was delivered to him, and the said sale was duly registered at the port of Montreal, at the Custom House, on the 8th of May, 1867, in the Book of Registry and endorsed on the certificate of ownership, as the whole will appear by the said certificate of ownership herewith fyled.

That the said opposant is the only registered owner of the said vessel or steamer *Salaberry* seized in this cause.

That the said defendants never did pay the said sum of $3500 at the time specified.

That the said plaintiffs cannot proceed to seize and attach the said steamer, and sell the same before the payment of the said sum of $3500, as aforesaid.

That the said opposant is by virtue of the premises the lawful owner and proprietor of the said steamer and all its appurtenances seized in this cause, and is well founded in opposing the seizure and sale of the same.

Wherefore the said opposant prays that he be declared the sole lawful owner and proprietor of the goods and chattels and steamer mentioned above and detailed in the procès verbal of seizure as follows, to wit: un bateau à vapeur portant le nom de *Salaberry* avec tous ses agrés et mouvements, un sofa bourré couvert en cuir, une table de centre et un tapis en laine, un poële et son tuyau, un pupitre à trois tiroirs, un safe en fonte, un comptoir à 8 tiroirs. That all proceedings be suspended on the seizure and sale of the said goods and steamer, and that the bailiff entrusted with the writ of execution be ordered to suspend all his proceedings on the same until further order of this Court, and that he do make his return accordingly, and that the seizure made in this cause be declared

Yautier vs. La Compagnie de Navigation de Beauharnois, etc.

null and set aside and of no effect, and the said opposant restored to the possession of the same, the whole as the legal owner and holder thereof, the whole with costs distraits to the undersigned.

Le demandeur contesta cette opposition, niant tous les faits allégués dans l'opposition, affirmant de plus que lors de la dite saisie le bateau-à-vapeur *Salaberry*, avec tous ses agrès, étaient la propriété de la défenderesse, que la vente alléguée dans l'opposition n'avait jamais eu de valeur légale à l'égard du demandeur, qui avait obtenu jugement pour travaux et réparations faits au dit steamer, et dont la réclamation était en conséquence privilégiée sur le steamer; que postérieurement à la prétendue vente invoquée par l'opposant, le demandeur avait fait partie des travaux dont il poursuivait le recouvrement, à la réquisition même de l'opposant, qui avait de tout temps connu la créance du demandeur et sa nature privilégiée; qu'il apparaissait à l'acte même invoqué par l'opposant que la défenderesse était insolvable lors de cette prétendue vente, et que, dans cette condition de déconfiture, elle n'avait pas le droit de disposer de son actif au détriment d'une partie de ses créanciers, en conséquence le demandeur demandait qu'il fut déclaré que cette prétendue vente était nulle et ineffective à l'égard du demandeur, et que l'opposition fut déboutée avec dépens.

La preuve établissait que postérieurement à cette vente, la défenderesse avait continué à posséder le vaisseau et l'avait mis en vente, comme sa propriété, à la connaissance et sans opposition de l'opposant.

A l'audition au mérite, l'opposant soumit un mémoire contenant les raisons suivantes:

Les faits de l'opposition sont prouvés. L'opposant a acquis la propriété du vaisseau, et il en était seul en possession lors de la saisie pratiquée par le demandeur.

L'insolvabilité de la compagnie à l'époque de la vente n'est établie en aucune manière.

Qu'importe que Lynch eut été présent lorsque les directeurs de la compagnie auraient nonobstant la vente antérieure à lui faite proposé de vendre de nouveau le vaisseau? Lynch, dit-on, était présent et n'a rien dit. Qu'est-ce que cela établirait sinon qu'étant convaincu de l'inutilité d'une telle tentative, il n'y faisait aucune attention, et le résultat démontre qu'il avait raison de ne pas s'en occuper, car l'on ne pouvait procéder à la vente et l'on ne l'a pas fait?

Le demandeur a tenté de prouver que ces réparations ont été faites sur le vaisseau même subséquemment à la vente, à la connaissance de l'opposant et à sa réquisition. Si tel était le cas il devrait poursuivre l'opposant qui en était alors le seul débiteur, mais le jugement qu'il a obtenu repousse une semblable présomption, car il y a reconnu qu'il n'avait d'action que contre la compagnie.

Mais le demandeur admet lui-même qu'il n'y a qu'une partie de son compte qui a rapport à des réparations subséquentes, et cela n'est qu'une faible partie de sa réclamation, et il ne pourrait à tout événement même vis-à-vis de la défenderesse avoir de privilége que pour cette partie, aux termes de l'art. 2383 du Code Civil.

Toutes les formalités voulues pour le transport de la propriété du vaisseau ont été remplies, et en supposant que la vente n'eut été faite que pour la garantie du paiement d'une somme d'argent, un créancier ordinaire tel que le demandeur

en cette cause ne peut en évincer le possesseur qu'en lui remboursant le montant pour lequel il le détient à titre de gage; mais dans le cas actuel la vente était faite conditionellement au paiement dans un délai fixé, et ce délai passé la vente devenait absolue. En exécution de cette convention formelle l'opposant s'est mis en possession du gage et il l'était à l'époque de la saisie.

A tout événement le demandeur ne pouvait procéder contre le vaisseau que après avoir fait condamner l'opposant à vendre le gage et avoir fait déclarer par une action régulière intentée contre lui qu'il avait un privilége sur icelui.

La seule partie de la saisie sur laquelle le demandeur peut avoir quelque droit est celle qui concerne les meubles, saisis en dehors du vaisseau.

Le demandeur soumit un mémoire, dans lequel les faits et le droit sont exposés de la manière suivante:

L'opposant a produit deux témoins: James Lynch, neveu et associé de l'opposant, et C. C. McFall, capitaine actuel du *Salaberry*, et le demandeur invoque ces deux témoignages comme établissant tout ce qui est nécessaire pour faire maintenir sa contestation. Les difficultés, ou pour parler nettement, l'insolvabilité de la défenderesse ont inspiré toutes les transactions dévoilées par cette preuve pour frauder les autres créanciers de la défenderesse et garantir le dit opposant. Depuis la formation de la défenderesse, comme société incorporée, l'opposant a été et est encore l'un des directeurs. En mars 1868, il prétend avoir pris possession du vaisseau et donné effet à la vente du 8 mai 1867. Quand le vaisseau a été saisi le 11 avril 1868, le témoin McFall a signé le procès-verbal comme représentant la compagnie. McFall dit que dans le mois de juin 1868, à une assemblée des actionnaires de la compagnie défenderesse, *à laquelle l'opposant était présent*, il a reçu ordre de mettre le *Salaberry* en vente pour le compte de la compagnie, et c'est en obéissance à cet ordre qu'il (McFall) a donné instructions l'encanteur Arnton de vendre le vaisseau, et c'est là-dessus qu'Arnton a publié l'avis, exhibit du demandeur marqué D. Il ne paraît pas que l'opposant ait opposé la moindre résistance à la vente que la compagnie ordonnait de faire du vaisseau pour son compte. McFall fait tout ses efforts pour servir la cause de l'opposant, au service duquel il dit être, en même temps qu'il est encore secrétaire-trésorier de la défenderesse. Mais les faits sont plus forts que lui et il tombe, sans presque aucune transition, dans les plus grossières contradictions. Il est évident qu'il ne sait plus qui est propriétaire du vaisseau, tant les transactions du dit opposant et de la défenderesse ont jeté de confusion dans ses idées. Ainsi il lui est demandé qui payait son salaire, quand il a donné instruction à Arnton de vendre en juin 1868, et il répond: "My salary is not yet paid. I expect the company to pay me. *I had the payment in my own hands, from the receipts of the boat, being the secretary-treasurer.* Puis s'apercevant qu'il vient de dévoiler toute la fraude, il se reprend et il dit que c'est en décembre 1867 qu'il avait dans les mains les revenus du vaisseau; tandis que sa réponse avait catégoriquement fixé cette époque au temps où il avait donné ordre à Arnton de vendre, savoir juin 1868,—c'est-à-dire dans le temps même où l'opposant faisait son opposition. D'après toutes les prétentions de l'opposant son titre à la propriété est le *bill of sale* du 8 mars 1867,—or il est prouvé par McFall lui-même, dans la déposition qu'il a donnée dans la cause originaire, Exhibit A du

Vautier vs. La Compagnie de Navigation de Beauharnois, etc.

demandeur, que deux des comptes du demandeur sont postérieurs à cette date. McFall va plus loin; il dit: "The bill of sale in question is anterior to all the "accounts, in my opinion." Il résulterait de là que l'opposant aurait fait travailler le demandeur à *son* vaisseau comme s'il eut été la propriété de la défenderesse, afin d'essayer ensuite de rejeter cette dette sur le compte d'une compagnie insolvable.

La défenderesse et l'opposant n'ont observé aucune des formalités requises par le chapitre du Code Civil concernant les batiments marchands; et en supposant qu'ils en auraient observé quelques-unes le privilége garanti par l'art. 2383 au demandeur n'en serait pas affecté.

Sur les autres articles saisis, l'opposant n'a fait aucune preuve quelconque.

Sur le tout le demandeur soumet humblement que l'opposant a failli en tous points et que la contestation doit être maintenue avec dépens. La vente du vaisseau est au reste exigée sous l'opération de l'art. 2371, et l'opposant ne peut l'empêcher, en vertu du titre sur lequel il se fonde.

Judgment: "Considering that the bill of sale by way of mortgage, opposant's Exhibit number one, has never been registered, as required by the 2360th article of the Civil Code of Lower Canada.

"Considering that the defendants at the date of the said seizure were still in possession of the said boat, as proprietors, doth maintain the said contestation and dismiss the said opposition with costs."

Opposition déboutée.

Doutre & Doutre, pour le demandeur.
R. & G. Laflamme, pour l'opposant.
(J. D.)

SUPERIOR COURT, 1869.

MONTREAL, 27TH FEBRUARY, 1869.

Coram TORRANCE, J.

No. 509.

Senecal vs. *Lemoine.*

HELD:—That a plaintiff cannot increase the amount of his demand by a motion to amend his declaration to that effect.

Cassidy, Q.C., for the plaintiff, moved the Court to be allowed to amend his declaration by changing the amount of the demand from £82 to £87.

Pagnuelo for the defendant resisted the application, arguing that the change was not such an amendment as the Code of Procedure contemplated; that the plaintiff by the 149th Art. C. C. P. could fyle an incidental demand and so rectify any error he might have made.

The motion was dismissed with costs.

Motion dismissed.

Leblanc & Cassidy, for plaintiff.
Barnard & Pagnuelo, for defendant.
(J. K.)

SUPERIOR COURT.

DISTRICT OF ST. FRANCIS.

SHERBROOKE, 26TH FEBRUARY, 1869.

Coram SHORT, J.

Ex parte Michael Kennedy, petitioner for writ of Habeas Corpus, and *William Barlow*, respondent.

MINOR—CUSTODY.

HELD:—1st. That a contract to permit a minor child to be received, fed, clothed, educated, and brought up by another, may be made by a father, a widower, and such contract being proved, must be enforced, and the father making the same is not at liberty to repudiate such contract, and demand the restoration of the child to him, after he has allowed the part execution of the contract by permitting the child to remain with the person taking it four years and more.

2nd. That the admission of the fa[illegible] he was ready to put out his child, and that the other party was ready to receive [illegible] the terms exacted by the father, is sufficient commencement de preuve par[illegible] he admission of parol evidence to prove the contract, if commencement d[illegible] is necessary in such a case.

3rd. That the interests of the m[illegible]ts of the father and his domestic relations, are to be considered, and par[illegible] minor is a female, when the father demands the custody of the minor after hav[illegible] to the care of another for a length of time.

4th. That the fact of the party ta[illegible] the child being of a different religious faith from the father is no ground of itself for declaring the contract void.

5th. *Semble*. There is no necessity of written proof of such a contract when the question is raised under Habeas Corpus, under C. C. P., Art. 1046.

SHORT, J.—The petitioner here asks that his minor child, Mary Margaret Kennedy, who he avers is detained from him by William Barlow, the respondent, be delivered to him. The respondent has answered to the Writ of Habeas Corpus that petitioner, something over four years ago, placed his child in Barlow's family under an agreement, which he promised, on request, to reduce to writing, that the child should remain in his, Barlow's family, and be instructed and educated, clothed and fed and cared for as if she were Barlow's child till the age of her majority, and upon Barlow's undertaking to perform these duties towards the child, she was received by him at the age of a little more than two years, and had remained with him something more than four years, and that he, Barlow, had fulfilled faithfully all the obligations assumed by him with respect to said child; and that petitioner Kennedy [illegible] right, without any just cause of complaint, to repudiate his agreement and require the child to be restored to him.

The Court ordered proof upon the following issues:

1. Is Kennedy the father of said child?
2. Was the contract set forth by respondent actually entered into?
3. Are Kennedy's habits of life and means such as to render it proper to order the restoration of said child to him?

The parties have adduced evidence upon these issues. The paternity of the child has been established. Respecting the second issue, the circumstances have been proved under which the child came into Barlow's family. When this child was about two years old, its mother died. Kennedy was in indigent circumstances, in fact in extreme poverty. He was then at work for the Grand Trunk Railway Company, as a common laborer, and his habits of intemperance were such as to have forfeited him several times his situation. Barlow was

Kennedy and Barlow.

engaged as a wood contractor on the road. He had only one child and was in good circumstances, and he was urged to take this child as an act of charity and bring her up. The father desired to procure some person to take the child and bring her up, desired any one capable of doing so to take the child. The child was taken with Kennedy's consent. It is said there is no contract proved; that it requires a contract in writing or a commencement of proof in writing to admit of oral evidence to establish this contract. If a commencement of proof in writing is necessary, I think we have it here. Kennedy is examined upon facts and articles, and admits that he was willing the child should be taken into Barlow's family and brought up by him; but he says he stated to Mrs. Barlow, respondent's wife, that if she took the child, she must bring her up in the Roman Catholic religion, which Mrs. Barlow refused to do; and upon this he says he told her she knew where she got the child and she could return her. This is Kennedy's account of the matter. Still, it appears that on this very occasion to which he refers he delivered the child to Mrs. Barlow and she carried it home, where it has remained more than four years. Kennedy has visited the child on different occasions at Barlow's. It is urged that a contract cannot be made out of a negative. Suppose A says to B, I will give you £25 and B replies, I will not accept it, but you may have the horse for £30. If you choose not to take it you can leave it in my barn. A declines to agree to this, but takes away the horse and appropriates it to himself. Is not this proof that he finally accepted B's offer? By his act of taking the horse away he indicated his acceptance. Kennedy leaves this child in Barlow's family, makes no complaint as to the treatment or instruction of the child, visits it and often speaks of its having a good home. Does he not shew that he acquiesced in Mrs. Barlow's conditions? I think his conduct is susceptible of no other interpretation. The evidence of witnesses, particularly of Delisle, Gosselin and Mrs. Maxwell, establishes that he made no stipulation, but placed the child back into Mrs. Barlow's arms after she had brought it back to him, and after he carried the child to see her friends, that he agreed to leave the child to be fed, clothed, educated and brought up with Barlow as he would bring up his own child, and promised to reduce this agreement to writing. Nothing whatever was said of the religious training of the child except that Barlow was to bring it up as he would a child of his own, and he was known by Kennedy to be a Protestant. It is said that this is an illegal contract. I see nothing illegal in it; care of one's offspring is committed to parents as a trust to see to their support and comfort and education. Is it illegal for a father to procure benefits for his child from another which he cannot provide himself? I think not, all things are legal which the laws do not prohibit, and which are not *contra bonos mores*. It is claimed that a question of religion is involved here: with this I have nothing whatever to do. There is no law which forbids a man to bring up his child in whatever religious faith he pleases. There is nothing in the law to prevent a Roman Catholic bringing up his children in the Protestant faith nor *vice versa*. It may be contrary to the precepts of their respective churches to do so, but with that, as a judge administering the laws of the land, I have nothing to do. This contract being proved, and being a legal contract, must be enforced. In coming

to this conclusion I am in this case consulting the interest of the child, of the father, and of society.

Kennedy and Barlow.

The family where the child is has been proved to be highly respectable, the child has become attached to Mr. and Mrs. Barlow as she would be to her parents who had nursed and cared for her. Her father has a second wife who has never known or cared for the child.

Barlow is in good circumstances and has brought up the child, and will still continue to do so in a manner far more advantageous for the child than Kennedy can do. To tear the child from this happy home and transfer it to one much less inviting, against the will of the child herself (who although young has shewn plainly her desires in this matter), would carry unhappiness into Kennedy's family, unhappiness for the parent, as well as the child. In a matter of this kind, I am sustained by precedents, as well as by my own judgment of the law, in consulting very much the welfare of the child. Considering the facts here proved, the former habits of Kennedy, his present domestic relations, his indigent circumstances, and on the other hand Barlow's ability to bring up and educate the child well, the length of time the child has remained in his family, the mutual affection that has been engendered between Barlow and his wife and the child, by dependence on the one hand, and kind care on the other, and the future prospects of the child; I have no hesitation in saying it is for the interest of the child to remain where she is, and that Kennedy should be held to the performance of his contract; and accordingly I dismiss the petition with costs.

AUTHORITIES CITED:—

2 Toullier, No. 1041-2.
Civil Code Ca. Arts. 242, 243, 245.
Ferrière's Justinian Lib. 1. Tit. IX.
Merlin's Répertoire, "Puissance Paternelle."
Dict. De Pratique, "Puissance Paternelle."
Civ. Code Louisiana, Art. 238.
1 Chitty's Practice, p. 64.
11 Law and Eq. Rep. 281.
Forsyth's Custody of Infants, p. 10, sec. 5; p. 12, sec. 8; p. 18, sec. 19; p. 22, sec. 23 p. 23, sec. 25; pp. 24 and 25, sec. 26; p. 26, sec. 29; p. 32, sec. 60; p. 34, sec. 40.

Petition dismissed.

Cabana & Belanger, attorneys for petitioner.
W. L. Felton, Q. C., Counsel.
Sanborn & Brooks, attorneys for respondent.
(J. L. S.)

MONTREAL, 27TH FEBRUARY, 1869.

Coram TORRANCE, J.

No. 651.

Booth vs. *Lawton*, and *Lawton*, Opposant.

HELD:—That when a defendant, after a Judgment by default has been entered against him, has been allowed to appear by opposition and plead to the action (484, 485 C. C. P.), he cannot afterwards make a motion for security for costs on the ground of the plaintiff being an absentee, unless in his opposition he has reserved his right to make such motion.

TORRANCE, J. This is a matter of procedure, and the rule is laid down for the first time. The defendant was served in this action, and allowed judg-

Booth vs. Lawton.

ment to go against him by default. The judgment was recorded on the 21st January, 1869. He subsequently fyled an opposition and plea under the provisions of the C. C. P. Art. 484, 485, on the 4th of February, instant: and on the same day gave notice of it to the plaintiff, and of his intention on the first day of term to move for security for costs as the plaintiff was resident without the Province. The demand of security for costs, C. C. 29, is favorable, but it should be made within the delays. By the C. C. P. Art. 120, such a demand is made the ground of a dilatory exception, to be fyled within the four days after return of the summons. By the rules of practice a motion for security may be made on the first day of the term following the return, provided notice has been given within four days after the return. In the present case the Art. 485 C. C. P. requires the defendant to fyle all his grounds of opposition at the same time, any subsequent demand should not be entertained. If his opposition had contained a reserve of his right to security for costs, and a notice of his intention to ask for it by motion, his present motion would not have been rejected as it is with costs. Motion rejected.

Perkins & Ramsay, for opposant.

John Popham, for plaintiff.

(J. K.)

MONTREAL, 30TH DECEMBER, 1868.

Coram TORRANCE, J.

No. 1609.

Gault et al. vs. *Wright et al.*

EXCEPTION DÉCLINATOIRE.

HELD:—1. That the evidence of the plaintiff is admissible to prove that a note dated at Montreal was made at Quebec.

2. That an action cannot be brought in a district in which the defendant has no domicile, and where he has not been served with process, unless the whole cause of action have arisen in that district.

This was an action on a bill of exchange and two promissory notes. The bill was drawn by plaintiffs at Montreal on defendants at Quebec, and was accepted at Quebec and payable there.

The 1st note was dated at Quebec, and was made payable there. The 2nd note was dated at Montreal, and was made payable at Quebec. The defendants were served with process at Quebec, where they had their domicile.

On the return of the action, the defendants pleaded an *exception déclinatoire*, on the ground that the bill of exchange had been accepted at Quebec and was payable there, and that the promissory notes, though one of them was dated at Montreal, were both made at Quebec and were also payable there, and that consequently all the several causes of action had arisen within the district of Quebec where the defendants had their domicile, and where they were served with process. At the *enquête*, Andrew F. Gault, one of the plaintiffs, who was examined on behalf of the defendants, admitted that, in regard to the note dated at Montreal, he had filled up the printed form and sent it to defendants at Quebec, who signed and returned it.

The plaintiffs' counsel entered an objection to this evidence as inadmissible.

At the hearing, *Perkins*, for plaintiff, moved to reject the evidence of A. F. Gault on the ground that oral testimony was inadmissible to contradict a writ-

ten document. He also argued that a plea, which denied the correctness or genuineness of one of the notes sued on or of any part of it, ought to be supported by affidavit.

Lunn, contra, argued that the date or place of making was not a material part of the note and did not form part of the contract, and might therefore be shewn to be erroneous by verbal testimony. (Halstead, Law of Evidence, p. 226, No. 13. Story on Notes, Nos. 45, 48, 49.) That moreover a party to a suit could always be examined, and that any admission made by him under oath was good evidence in favor of the adverse party, even in a matter not susceptible of proof by oral evidence.

That art. 145 of the *Code de Proc.* requiring denial of genuineness of a note to be supported by affidavit did not apply to *date or place* of making.

That as to the question of the *locus contractûs*, the rule was that it must be the place where the whole cause of action arose. See *Senecal and Chenevert, dictum* of Meredith, J., 12 L. C. Rep. p. 145, (reported also in 6 L. C. J. p. 46,) *Connor* vs. *Raphael*, 11 L. C. J. p. 126; *Warren* vs. *Kay*, 6 L. C. Rep. p. 492.

The case was taken *en délib.*, and judgment was afterwards rendered by Torrance, J., as follows:

The Court, having heard the parties as well on the merits of the *exception déclinatoire* fyled by defendants as on the motion of plaintiffs to reject the evidence of Andrew F. Gault, one of plaintiffs, for defendants;

Considering that said evidence is legal and admissible, doth reject the said motion with costs;

Considering also that the causes of action set forth in the declaration in this cause did not wholly arise in the district of Montreal, but did in part arise in the district of Quebec as regards each of the two notes and the one draft constituting said causes of action;

Considering that in order to give the Superior Court in this district jurisdiction in this action under the 34th art. of the Code of Civ. Proc., it was necessary that the whole cause of action, as regards any one of the said notes or bill should have arisen in this district, doth maintain the said *exception déclinatoire* with costs.

Perkins & Ramsay, for plaintiffs.
Cross & Lunn, for defendants.
(A. H. L.)

Exception maintained.

MONTREAL, 30th MAY, 1868.

Coram MONK, J.

No. 2686.

McShane vs. *Jordan*.

BETTING CONTRACTS.

HELD:—1. That the 1927th art. of the Civil Code, while refusing the right of action to recover money won on a bet or wager, does not declare such contracts illegal.

2. That the deposit of the money, before the event, in the hands of a stakeholder, is equivalent to a payment within the meaning of art. 1927, and that the losing party has no right of action to recover back the amount deposited by him, provided there be no fraud.

MONK, J.—This is an action to recover the sum of $400, deposited by plaintiff in the hands of defendant as stakeholder to cover a bet. The circumstances are as follows:

McShane vs. Jordan.

In the month of July last (1867) plaintiff met Mr. O. J. Devlin at an election meeting in Chaboillez Square and offered to bet him $200 that Mr. McGee would have a majority of votes over Mr. B. Devlin in the St. Ann's Ward at the approaching election of a member to represent the Western Division of the City of Montreal in the Parliament of Canada, and offered to bet another sum of $200, that Mr. McGee would have a majority of 1000 votes or more in the whole Western division. Mr. Devlin accepted the challenge; an agreement was thereupon written out and signed by both parties and deposited with their cheques for $400 each in the hands of the defendant, with the understanding that the latter was to get the cheques cashed the following day and hold the money until the election should be decided and then pay it over to the winner. Some 10 or 12 days afterwards, the plaintiff wrote a letter to the defendant notifying him that he wanted to have his money back. Defendant replied that he could not return the money to either party without the consent of both. Early in the month of September following the election took place and the result was that plaintiffs lost both bets. Defendant thereupon paid over $400 to Mr. Devlin but declined to pay over the balance, in consequence of the notification he had received from plaintiff. Shortly afterwards the present action was brought. The pretensions set up on the part of the plaintiff are that the bet was illegal and that the money having been paid to defendant without consideration it could be recovered back by the party who had so paid it. Special stress was laid on the argument that all betting on elections was illegal. On the part of the defendant it was argued that a bet was not an illegal contract either by the Lower Canada Code, or by the French Code, from which our own was borrowed, or in England by the law as it existed before 8th and 9th Victoria; that as to the argument founded on the subject matter of the present bet, the article of our Code made no distinction between one kind of bet and another; that according to the law in England before 8 and 9 Vict., a bet on an election was not illegal unless one or both of the parties were voters, and that this objection was not shewn to exist in the present case; that the deposit of the money in the hands of the stakeholder was a payment in advance within the meaning of art. 1927 of the Code, and that plaintiff had therefore no right of action to recover it back.

The 1st question for the Court to determine was whether the bet was illegal. On this point, we must look to our own law. It must be admitted that if the principles of the Roman Law or of the ordinances of the French Kings were applicable to this case, the plaintiff's pretensions would be well founded. But these principles have not been incorporated into our Code. Where the parties are in good faith and are able to dispose of their rights and the money has been paid, there is no action to recover. In the present case the bet was provoked by plaintiff himself, the parties appear to have acted in good faith, and if the deposit of the money was equivalent to a payment, then the bet must be held good, unless it is void on grounds of public policy.

The 2nd question is whether there has been a payment. On this point, there is some difference of opinion among the French authorities. *Troplong* inclines to think that deposit is not a payment, some of the English authors also say the same thing. There oth er authorities, such as *Duranton* and *Boileux*, who

express the contrary opinion. This Court, while feeling great respect for their opinions, does not consider itself absolutely bound by their decisions. The Court must use its own discretion in determining the question. What is the nature of the agreement between the parties, and what is the obligation of the stakeholder? He is bound to hold the money until the bet is determined and then to pay it over to the winner. He is authorized to do this by the terms of the agreement to which both parties have assented. The deposit of the money under this agreement therefore is a payment in advance, or upon a condition; and when this condition is accomplished it becomes an absolute payment. McShane vs. Jordan.

As to the question whether a bet on an election is void on grounds of public policy from its tendency to corruption and to disturbance of the peace, no such principle is laid down in our Code. It was almost admitted by the defendant's counsel that if it had been proved in this case that the parties were voters, the plaintiff's action might be well founded; but a distinction was drawn between bets made between voters and those made between non-voters. The Court, however, does not think it necessary to make this distinction. The Code does not make a distinction between one bet and another; and the Court cannot take upon itself to do what the law has abstained from doing. It is the province of the Legislature to make changes or amendments in the law; and until this is done, we must follow the law as we find it. The English authorities cited on behalf of the plaintiff do not apply, inasmuch as we are governed by the written enactments of our own Code and the interpretation which the Court is bound to give to that Code. Applying the law therefore as we find it, the Court has come to the conclusion that the action must be dismissed simply on the ground that betting is not declared illegal by the Code, and that the deposit in the hands of the defendant was equivalent to a payment.

Action dismissed.

Edw. Carter, Q.C., for plaintiff.
Cross & Lunn, for defendant.
(A. H. L.)

MONTREAL, 27TH FEBRUARY, 1869.

Coram MONK, J.

No. 1671.

The Bank of Toronto vs. *The European Assurance Society.*

HELD:—That the allowing by a Bank Manager of overdrafts without securing them (in the opinion of the Court) under a discretionary power possessed by him, and without fraudulent intent, is not an irregularity within the meaning of a policy guaranteeing the Bank against such loss as might be occasioned to the Bank by the want of integrity, honesty, fidelity, or by the negligence, defaults or irregularities of the manager.

The pleadings and facts are fully stated in the remarks of the Honorable Judge in rendering judgment.

MONK, J. This is an action brought by the Bank of Toronto against the defendants upon a guarantee policy issued to secure the Bank to the extent of $16,000, against "such loss as might be occasioned to the said Bank by the

The Bank of Toronto vs. The European Assurance Society.

[illegible] integrity, honesty, fidelity, or by the negligence, defaults, or irregularities" of Alexander Munro, the manager at Montreal.

The precise charge set forth in the declaration, and upon which the plaintiffs seek to recover the whole amount named in the policy, may be stated as follows:—That Munro, without any authority, in direct violation of his instructions, and contrary to every rule followed by banking institutions in this country, fraudulently allowed the firm of Nichols & Robinson, brokers of this City, to overdraw their current account in the Bank at Montreal from the 1st of March, 1865, to the 13th May of the same year, the balance of which overdrafts on the last mentioned day was $28,160.29 cy.; that these overdrafts were allowed without security, that various devices were made use of each month to conceal such overdrafts, and that they were contrived and carried out in collusion with Nichols & Robinson, who subsequently became insolvent; that a judgment had been obtained against the latter by the Bank for the amount, which could not be recovered, and that Munro had absconded and had left nothing wherewith to pay the debt.

The defendants met the action by the general issue, and by two special pleas which raised several distinct points—namely:—

1st. That the overdrafts were allowed by Munro in the exercise of the discretion appertaining to him as Manager at Montreal, and in the transaction of the ordinary business of the Bank. 2nd. That they were allowed openly and without fraud, and passed regularly through the books of the Bank at Montreal for months before the 1st March, 1865, as was well known to the plaintiffs, and 3rd, that although large overdrafts were constantly allowed by Munro, and regularly entered in the books of the Bank, which according to the proposals for the policy were under constant supervision by the head office, the plaintiffs had never notified the defendants of the fact; and that by withholding such notice, the policy had become void under the 4th condition therein stated, if, in point of fact, the allowing overdrafts, as in the present case, could give rise to a claim. The clause adverted to is as follows:—

"4th. That (subject to discretionary power exercisable in certain cases by the directors in Canada of remitting the forfeiture) a policy of guarantee becomes void as to future claims, upon its being made known to the directors of the said Society in Canada by the employers that the party whose honesty is guaranteed has committed or omitted any act which gives the right to make a claim under the policy; and that the employers are bound immediately upon discovering, or having notice of the commission or omission of any such act, to forward a written intimation of the same, and so far as circumstances will permit of all particulars attending the commission or omission thereof to the directors; and that by willfully and knowingly omitting or neglecting so to do for two months after such discovery or notice, the policy becomes absolutely void both as to existing and future claims thereunder."

The answers of the plaintiffs, though reiterating the charges of fraud and collusion, do not materially change the questions thus presented for the consideration of the Court. The questions appear to me susceptible of the following definite and condensed arrangement.

1st. Was the allowing of the overdrafts without security, a default or irregularity within the meaning of the policy, apart from any fraud or collusion?

2nd. If not, was there any fraud or collusion between Munro and the firm of Nichols & Robinson in respect of these advances?

3rd. If on either ground a claim arose, had the character of Munro's acts in regard to these overdrafts become known to the Bank more than two months previous to the notice by them given to the defendants?

An immense mass of documentary and other testimony has accumulated on these points, and has made the examination of this case unusually difficult and embarrassing, and the labour has been greatly enhanced by the incredible amount of vague and incoherent statements and loose assertions which characterize—in addition to their fatiguing prolixity and contradictions—the depositions of some of the witnesses which seem to have been written down and adduced to serve as the basis of other testimony and other statements equally inconsistent and intangible. It would be useless to analyze and discuss all the various questions of fact, in detail, to which the testimony refers, but a few of the leading points may be eliminated and adjudged without undue expenditure of time.

In proceeding to adjudicate upon the main—the decisive issues raised by the parties in this case, I must first advert to the rules of the Bank, and to its practices with respect to overdrafts. This is a point of essential—of paramount importance, and, as such, has received the careful consideration of the Court. Now, as a matter of fact, admitting of no doubt, there was no rule of the Bank, properly so called, prohibiting overdrafts previous to the occurrences under review, although such a rule is incidentally referred to by one of the witnesses as, having been since made; and there seems to be no doubt, from the evidence adduced, that overdrafts were frequently permitted. Mr. Worts, the Vice-President, does not deny that an agent may occasionally so accommodate a good customer, and the account of his firm in Toronto seems to have been frequently overdrawn. It was attempted to draw a distinction in this respect between the powers of the Cashier and the higher officers who managed the Bank at Toronto, and those of Munro who managed it in Montreal. But Mr. Worts himself says, that "the functions of the Cashier, Manager and Agent are similar as regards "the management of the local institution over which such officer is appointed;" and this statement appears to be justified by the character of the functions, and the plaintiffs' description of Munro's powers in their proposal for insurance. In Montreal overdrafts were permitted by Munro to other persons besides Nichols & Robinson; they were made evident in many of the reports furnished by him to the Board at Toronto. He appears also to have allowed them at Peterboro and although he was found fault with on that occasion, he was evidently very leniently censured; and, notwithstanding his having allowed them, the plaintiffs, in their guarantee proposal, declare that he had been in their employ for several years, and had given them satisfaction. Afterwards some overdrafts were found when his accounts were inspected in December, 1864. Mr. Dallas, the manager who succeeded him, seems to have allowed them, to a certain extent; and Mr. Arnold, the ledger-keeper, declares "that although it was not the general practice

The Bank of Toronto vs. The European Assurance Society.

"in the Bank to allow overdrafts, it was not unusual, and it was always admitted "that the agent or manager had the power to allow them or not, as he might "think proper;" and he says he was perfectly justified in acting under his orders in passing the cheques, and had done so for large and small amounts under Mr. Dallas' instructions since Munro's dismissal. And there is strong confirmation of this view to be found in the fact, that this Mr. Arnold, who passed all the overdrafts allowed to Nichols & Robinson, Sidey, Crawford and others, was not dismissed by the Bank, nor, so far as appears in evidence, was even censured for having done so, although he was perfectly cognizant of all the circumstances of the overdrafts, including the absence of security. It is remarkable, if not incredible, that the twelve folios of the deposit ledger which have been produced shewing the enormous transactions of Nichols & Robinson from 1st November, 1864, to the middle of May, would have exhibited column after column, composed chiefly of debit balances—many, if not most of which are overdrafts, if Munro was not recognized by every official in the Bank as having this species of discretionary power. But the attempt is made to distinguish between the overdrafts complained of and the numerous others exhibited in the record, on the ground of their amount, or, the security taken for them. But the fallacy of this pretension is plain. The principle is the same, so far as this case is concerned, whether the overdrafts be small or great. If overdrafts are permitted or tolerated at all, the amount of them is in the discretion of him who allows them. To permit too large an overdraft, then, becomes an imprudent or injudicious act, not an irregular one. The same argument applies to the distinction as to security. The taking of security seems to have been far from an invariable rule, apart from Nichols & Robinson's case, and this also is plainly referable to the discretion of the manager. If he could, without censure, advance fifty dollars without security, the advance of fifty thousand is within his functions, and it might easily be conceived that the loan of fifty dollars to one man without security might be more certain to be productive of loss to the Bank than the loan of fifty thousand to another, and, in this case, the immense transactions of Nichols & Robinson with the Bank reduce the amount of overdrafts to comparative insignificance. I am therefore of opinion that the allowance of overdrafts was not in itself an irregularity within the meaning of the policy.

But if the facilities given to Nichols & Robinson originated in any fraudulent or collusive design, the case would undoubtedly fall within the terms of the policy; and this point is of the gravest importance. It has been strongly urged by the plaintiffs, and as strongly contested by the defendants; and it requires the most careful consideration. Upon this point also, I must confine myself to the leading features of the case rather than seek to follow and analyze the smaller issues which present themselves.

The fraudulent collusion alleged materially rests upon the assertion that Munro and Nichols & Robinson carried on joint operations in stocks and gold, and that Munro afforded them facilities by way of overdrafts to assist in these joint speculations, to float over the margins which required to be put up for them, and for others of his own in New York; his object being to share the profits, and in

some transactions to receive commissions for the aid he was giving, and that he fraudulently contrived to conceal these overdrafts from his employers by conniving at fictitious balances being made up at the end of the month. These are serious charges, and, if substantiated, would, in the absence of every other obstacle, sustain the plaintiffs' action.

The principal witnesses in this branch of the case are Messrs. Nichols & Robinson. Robinson declares "that Munro was interested with them in joint specula-"tions in stocks and gold; that they could not have carried on their operations "without obtaining these overdrafts; that Munro seemed to be aware of their position; and that his losses were paid out of their overdrafts."

So also Nichols says: "He (Munro) had a joint interest in time contracts of "exchange in gold in New York and in American railway stocks." And he speaks of the amounts of gold and stocks in which Munro operated jointly with them. This appears sufficiently positive, though the absence of dates and amounts in a matter purely of figures appears to the Court in some degree remarkable. But the fact is, these witnesses, on cross-examination, give an account of their transactions the very opposite of that contained in their examination-in-chief.

Thus Nichols says: "The transactions in stocks were *not* joint transactions properly so called; but as Mr. Munro did not wish to purchase more than fifty shares at a time, and there was an advantage in buying a hundred, he proposed to us to purchase fifty *at the same time* that *he* did, thus making the purchase of a hundred shares at a time, fifty of which were placed to his account and fifty to ours, each of us holding our proportion afterwards at our own risk and disposing of it separately at our pleasure respectively."

He then proceeds to give precisely the same explanation of the so-called *joint* transactions in gold, and he declares that "Munro had no more interest in their business than any other customer," and that he never meant, by his examination-in-chief, to convey that he had. And again, he refers to these statments as explaining all he had said respecting joint accounts with Munro.

On being examined by the defendants, Robinson says: "The description of "these transactions, given by Mr. Nichols in his cross-examination, is as near "correct as I could make it. It was Mr. Nichols who arranged these transactions "with Mr. Munro."

So much for the alleged joint transactions in gold and stocks, which it is plain from this evidence have no existence whatever. Either these witnesses used the word joint in the incorrect sense in which they acknowledge they did at first, or their statements are directly contradictory of each other and destroy themselves. In either case there is no evidence against the defendants on this point. The assertion that the overdrafts were applied to the carrying the margins on Munro's stocks and gold also appears to be without foundation in the sense in which it was made. "The proceeds of the overdrafts," says Robinson, "went into "our ordinary business. We used them when we got them, as we used our own "funds. The whole of these funds were used in New York to keep up our mar-"gins till we stopped; and these margins comprised any gold or stocks we then "held for Munro as well as those held for ourselves and our other customers."

The Bank of Toronto vs. The European Assurance Society.

But subsequently it appears that these statements apply to the months of April and May, during which their estimated loss of their own capital amounted to $150,000, and during which they do not appear to have held either gold or stocks for Munro, all of [illegible] in March, if not in February. It is true that one lot of gold [illegible] been held till far into May: but the surrounding facts, the con[illegible] accounts, and the positive statement of Munro himself, concur in pointing to this as an error. They, therefore, had no margins to hold through April and May for Munro, and there is strong evidence, though I have not sufficiently scrutinized the accounts to pronounce it conclusive, to prove that they took all Munro's stocks to account on the 23rd February, in which case he would have been charged with no loss of any account. But it may be said that they carried Munro's losses through April, which they certainly did; but I find great difficulty in ascertaining what those losses amounted to. Neither Robinson nor Nichols give any intelligible or consistent account of them; and the copies of entries from their various books seem to disagree in most particulars. I refer the counsel to page 26 and the following pages to 31 inclusive, of defendants' printed evidence, the New York brokers' account, and Munro's deposition for numerous facts upon this point, and voluminous entries from the books of Nichols & Robinson concerning their transactions with Munro. These accounts and entries I have not thoroughly analysed, but I have sufficiently studied them to be able to convince myself that there is not satisfactory evidence of any large amount of indebtedness, though there was undoubtedly something due by Munro. I may be allowed to say I cannot determine how much, since no one of the three parties to these transactions can state it with any certainty, and the books of Nichols & Robinson, from which the various statements are taken, are not only evidently irregular and contradictory, both in themselves and as compared with other sources of information, but they are admitted by both Nichols & Robinson to be beyond their own comprehension. In many important particulars they seem to have been kept by one Hurley, without much appearance of system, and although consisting of a series intended to supplement each other, some of the entries respecting Munro are different in each book of the series, no one of them corresponding with another. With such books, and without personal knowledge of the witnesses examined, it is manifestly impossible for the Court to arrive, with any certainty, at the true position of Munro's accounts.

The interest in time contracts of exchange also appears to elude the grasp, when an attempt is made to seize upon it with certainty and precision. Robinson says: "My impression is that we were to have half the profits—but these arrangements were made entirely between Munro and my partner."

Nichols declares that there was no agreement or understanding whatever with Munro as to any share in the profits of [illegible] exchange bargains—that they never gave him anything or charged him with anything so far as he knew—but he thought Robinson could answer that better than he, and it must be observed that Munro himself swears most positively that he had no profit, or prospect of profit, from Nichols & Robinson, in respect of any of these transactions.

There are a number of small circumstances introduced into the record as tending to justify and confirm the plaintiffs' pretension, that the connection in

business, or certain transactions of business between Munro, Nichols & Robinson existed, but this fails to satisfy me, the more especially as the tenor sought to be attributed to them is directly controverted by the positive testimony of all the other principal parties. If Munro wrote two or three telegrams in Nichols & Robinson's office, it is declared that he did so because Nichols was an imperfect writer, and he was asked to do so for him. He said in Toronto that he was "completely demoralized," but the expression conveys rather the distress and bewilderment of a man ruined by the sudden crash in American securities, than a confession of crime, which is the construction Mr. Wort attempts to put upon this exclamation. Courts of Justice cannot be too cautious or too discriminating in ascribing a consciousness of criminality to the expressions of unfortunate and ruined men. In this I may remark that nothing very decisive can be deduced from the very peculiar testimony of Mr. McCulloch.

Upon this branch of the case I am disposed to accept the description of the situation which may be gathered from the evidence both of Nicols and of Robinson, taken as a whole, and which is positively sworn to by Munro himself. The firm was doing an enormous business with the Bank, whether very profitable or not seems doubtful, but that it far exceeded any other account they had in Montreal is certain. During the many months previous to the period charged in the declaration they had enjoyed the privilege of overdrawing their account at times, at first upon condition that they should make it good every day at three o'clock, afterwards being only required to do so at the end of each month. There seems to have been no concealment about the matter, as all the overdrafts were regularly passed through the Bank books by the proper officers, of whom there were several appointed by the Bank authorities. Much has been said of the artifices used to make up the account at the end of each month, and it is proper that I should notice that point here. As in regard to the other points, there is much vague assertion on this subject, but I can find no testimony of importance on this head. As to the balance at the end of April, Robinson says that Munro assisted in tiding over the settlement of their account at the end of April in the hope of their being enabled to get through by a stoppage in the fall of gold or by an improvement in the gold market. This assistance appears to have consisted in the holding over for two or three days of certain drafts on New York which, it is declared, would have been paid if presented, but the payment of which would have uncovered margins and forced sales. There is not sufficient evidence to satisfy me that anything more than this occurred at the end of April, or that it occurred more than once, and this does not in any way appear to me to constitute any evidence of fraud. The evil was then done; the loss had occurred, and the result was that after another week, finding gold still falling, Munro proceeded to Toronto, and laid the whole matter before his directors. If the overdrafts had not their origin in fraud (and I find no evidence of that), the "tiding them over" the monthly settlement to give Nichols & Robinson a few days' chance of retrieving themselves, would not give them a fraudulent character; and the delay resulted in no loss to the Bank, for it is not denied that Nicols & Robinson immediately placed all their assets in the hands of the Bank, and

The Bank of Toronto vs. The European Assurance Society.

one of them accompanied Munro to Toronto, and assisted him in giving the Directors all the information required.

I must also remark in connection with the question of fraud that the plaintiffs have never treated Nicols & Robinson as participators in any fraud; though, if Munro had been guilty of it, they would have been accomplices with him, though certainly with a less degree of guilt. They have obtained a judgment against them for the amount of overdrafts without making a charge of fraud against them, and they had large transactions with them in the summer of 1865, after, by their own showing, they were aware of all the facts as to their former account; and their intercourse with the Bank officers does not appear then to have entirely ceased; these circumstances do not favor the impression that the Bank authorities really attributed to them any fraudulent complicity with Munro. It is plain that if fraud existed at all they were sharers in it.

To return to the view I hold of this branch of the subject, I consider the ruin of Nicols & Robinson and their inability to meet their engagements at the Bank sufficiently accounted for by the terrible monetary crisis through which this and the neighbouring country was at that moment passing. A catastrophe which swept away from them $150,000 in one month might have well deranged the calculation of a Bank manager to a greater extent than that suffered by the plaintiffs, and the fact that the firm had such a capital to lose, and that any less misfortunes would have left them competent to fill all their engagements, may not be without significance in the consideration of the conduct of Munro.

I am unable, therefore, to find the evidence of fraudulent collusion involved in the second branch of enquiry: and as to the third very little remains to be said.

If the fact of allowing overdrafts in itself gave rise to the right to make a claim under the policy, then I would be of opinion that the policy was void by a breach of the fourth condition. But as I hold that allowing over-drafts *per se* without a positive, nay, a peremptory rule and practice of the Bank to the contrary, does not constitute a default or irregularity within the meaning of the policy, my decision in regard to the breach of the fourth clause becomes unnecessary; and also holding, as I do, that no fraud or collusion in respect to these overdrafts has been proved by legal and sufficient testimony to have been perpetrated by Munro, I am under the necessity of dismissing plaintiff's action.

Action dismissed.

R. & G. Laflamme, for plaintiffs.
J. J. C. Abbott, Q. C., for defendants.
(J.K.)

COURT OF REVIEW, 1868.

MONTREAL, 30TH NOVEMBER, 1868.

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

No. 2650.

Doolan vs. The Corporation of Montreal.

HELD:—That a City Corporation may be sued in damages for assaults committed by its servants such as policemen, when the assaults are approved and attempted to be justified by the Corporation.

This was an action by a carter for $1000 damages, against the Corporation of the City of Montreal.

The declaration set out that the plaintiff has always been an honest, sober and respectable citizen, and for several years past a duly licensed carter and cabman, and, as such, has always behaved himself as an honest and respectable carter, and by his exemplary conduct has acquired the good opinion of all who knew him; and was by his industry earning a good and respectable livelihood for himself and family. That the defendants, well knowing the premises, and contriving to ruin and injure the plaintiff in his good name, fame and reputation, and without any just cause or provocation, on or about the 28th of July, 1867, arrested and caused and authorised him to be arrested by two of their servants and policemen, then and there acting under and by the directions of the defendants, and in their employ as such policemen. That said two policemen then and there maliciously and illegally arrested and took the plaintiff into their custody as a prisoner on the public square called Victoria Square, at ten o'clock in the forenoon, and dragged him away from his horse and carriage. That said policemen refused to drive with him through the less public streets to the station, but drove through Notre Dame Street, the most public one, on a Sunday, when great numbers of persons were going to church. That said policeman delivered plaintiff over as a prisoner to the police officer in charge, and after holding him a long time in the station as a prisoner, there was no charge preferred against him, and he was finally permitted to go at large. That when plaintiff was so discharged he was unable to find his horse and carriage, from which he had been dragged as above mentioned, and when they were restored to him, ten hours afterwards, the carriage was broken, the cushions greatly damaged, and the plaintiff had been obliged to expend $50 in repairing said damage. Conclusion, for $1000 damages.

Pleas:—1. *Exception péremptoire perpetuelle:* That the defendants are not in any way responsible or liable for the misconduct imputed to the party or persons who may have arrested and imprisoned the said plaintiff, but that the only parties so liable are the policemen who committed the wrongful act complained of in the plaintiff's declaration.

Second Plea: That the plaintiff, on the occasion of his arrest by the policemen, as mentioned in his declaration, used abusive language to the Fire Police then in the discharge of their duty in and about extinguishing the fire in Zion church, and refused to perform his service as a licensed carter in the removal of a person injured at the said fire, and that the said policemen were justified in making the said arrest. That the plaintiff was discharged almost immediately after such arrest, and suffered no damage therefrom.

Doolan vs. The Corporation of Montreal.

3rd. *Défense au fond en fait.*

The plaintiff made proof of his arrest, and of damage to his carriage to the amount of $35. The defendants called no witnesses.

The action being dismissed by the Superior Court, Mondelet, J., on the 28th of March, 1868, the plaintiff inscribed in review.

Doherty, for the plaintiff: The facts and abuse of a grievous nature are fully proved and defendants make no proof, but rely wholly on the dictum of our Code that a corporation cannot sue nor be sued for assault or other violence on the person. Plaintiff submits that the defendants are liable for the acts of their servants and agents, the policemen, acting under the general authority of their employers, and within the scope of their ordinary duties, and that thus acting they tortiously took from plaintiff the possession of his horse and carriage, and broke and injured his carriage to the amount of $35. Plaintiff claims damages for two causes, firstly, putting him under arrest and exposing him to the gaze of his fellow-citizens, a *tort* and trespass against the person of the most grievous kind; and it is expressly laid down by Hilliard on Torts, Vol. 2, p. 344, "that a corporation may be sued for an assault and battery committed by their servant acting under their authority." 2nd. The breaking and damage done to the carriage is not a violence to the person, but a trespass and tort for which defendants are liable by the laws of every civilized country.

MONDELET, J.—I am happy to be able to come to a different conclusion in this case to what I arrived at when rendering judgment in the court below. Upon re-consideration, I think that by their second plea the defendants adopt the conduct of the policemen, and are responsible for it.

MACKAY, J.—The plaintiff sues for the recovery of $1000. Two kinds of damages are claimed, or rather damages for two things: arrest of person, and damage to carriage. The pleas are, 1st: That the defendants are not in any way responsible for the acts of the policemen; and, 2nd, that the policemen were justified in making the arrest. No witnesses, however, have been brought up by the corporation in support of the plea of justification. There is certainly a moral obligation on the corporation to make reparation to the plaintiff. Is there a legal one? At the argument it was contended that Art. 365 of our Civil Code prohibited such an action or suit as the present. It was said that a suit such this against a corporation was not known to have been maintained. It was further said that the consequences would be frightful if it were held that incorporated cities were liable for the acts of servants like policemen. The policemen referred to in the pleadings here were on their ordinary duty; they were acting under authority; the acts complained of were done by them while pursuing the authority the corporation gave them towards maintaining order in the city. For their acts, errors of judgment, or even excesses in the exercise of their employment, is the corporation liable? Is the corporation liable under the circumstances of the present case? "Trespass lies not against commonalties; the policemen alone are liable," say the defendants.

In a celebrated English case it is said that the whole doctrine that a corporation cannot be sued in trespass rests on one passage in Brooke's Abridgment, Vo. Corporations, where the reason given is that neither *capias* nor *exigent* can

go against a corporation. (See Maund v. Monmouthshire Canal Co., 4 Man. & G., 483).

If in Lower Canada a corporation never could be sued in trespass, this was never, and never could be, the reason, for actions here are usually commenced not by *capias*, but by simple summons without *capias*.

Notwithstanding the authority from Brooke and the *dictum* of Thorpe, it is now held in England that a corporation may be sued in trespass, and that it is liable in case of trespass for the tortious acts of its agents or persons in its employ. Any one conversant with corporation law must admit that modifications of the old law affecting corporations and their proceedings are being steadily made. That contracts should be under seal used to be the rule, but is now the exception in the United States; and we may live to see the American rule on this point adopted in England, perhaps not as regards all the old corporations, but as to new ones. Cases of great hardship continue, however, to occur there, through the enforcement of the old, common law, rule. Corporations have been allowed in some cases to enrich themselves in the most unjust manner, because of the want of a seal, at the expense of persons who have been led to deal with them. It has been held there that an attorney who has been appointed by the mayor and Town council to conduct and defend suits, but not under seal, cannot recover its costs from the corporation. Would it be held so in Lower Canada? It used to be said that a corporation could not be sued in *assumpsit*, the reason given being that a body corporate cannot assume or speak but by seal. Now, it is held that a corporation may sue and be sued in *assumpsit*. See 4 Man. & G. 878,895. It used to be said that libel could not be charged against a corporation, as malice could not be imputed to a body like it. Now, corporations may be sued for libels by their servants in their service. It is also held now that corporations may be indicted for neglect of duty, &c. [His Honour referred to an article in the English *Jurist*, 7th January, 1865, on the gradual development of the principles which regulate the liability of corporate bodies to actions for torts.]

"Many of the old technical rules affecting corporations are being condemned and [illegible]ded," said Kent, years before this article in the *Jurist*. He asked, why? and he answered, because inconvenient and impolitic, leading sometimes to mischief and injustice. Blackstone, and art. 365 of our Code merely give definitions. As in England, actions may be brought against corporations for assaults by their servants, notwithstanding Blackstone and the common law doctrine, so the same may be instituted here, notwithstanding the Code. Surely, under the generality of our Code corporations are not free to assault by deputation, and to trespass at pleasure! Talk of the absurdity of suing corporations for assaults, talk of the consequences that might result therefrom; the consequences would be ten times more frightful if corporations had carte blanche to procure assaults to be made, or to justify assaults by their servants, without incurring any responsibility whatever. Look at the great powers this Corporation of Montreal has. (For powers of Corporation here as to police, see p. 49 of the Acts and By-Laws; as to arrest by police, p. 69; see also for English cases analogous and what is said in them, 6 Engl. Railway and Canal cases, pp. 563, 564, 566, 605.)

In the present case, justification is pleaded by the second plea. The Corpo-

Doolan vs. The Corporation of Montreal.

ration thus admits and allows the arrest complained of. We hold the second plea to be a ratification of the acts of the policemen. Have not the policemen by this plea been exonerated by the corporation from the consequences toward the corporation of any supposed departure from the orders to them, before, or leading to, plaintiff's arrest? Certainly they have. The Corporation is to be held to have authorized that which they justify, when this is alleged to have been done by their servants in the course of their duty for defendants. The Corporation says it is not more liable than an ordinary Justice of the Peace addressing a warrant to any constable. But, in the first place, councillors are not Justices of the Peace. In the second place, would not even a Justice of the Peace be liable for his constable's misdoings, if approved by him and justified by plea, the plea itself wholly unproved?

Is the justification pleaded by the Corporation proved? No evidence has been adduced by the defendants; the policemen in question have not been brought up. So far from the policemen having been justified, we find them grossly to blame. The plaintiff was not liable to arrest, not being an offender against any law, or regulation of police. It was said during the argument that the policemen alone are liable. We do not think so. There is no hardship in holding the Corporation liable. They choose their own policemen. It is otherwise with many public officers; they have subordinates, but do not appoint them. It is most agreeable to the policy of the present day to attach to corporations the same liabilities to which natural persons are subject. Angell & Ames, ch 11. Without saying how far generally, or in other cases I would go, I say in the present one that the defendants are responsible to the plaintiff, notwithstanding anything in our Civil Code. We consider that we violate no article of the Code by holding what we do in this case. As said before, the plaintiff sues for arrest of his person, and for damages to his carriage. The Corporation is certainly responsible for the latter, and damages to the amount of $35 are proved in respect of this.

We say the Corporation is responsible for all, under the circumstances and under the pleadings in this cause. The Corporation is not sued for assault by it; it, an *être*, cannot commit an assault. The Code says so. The Corporation is sued for assault by its servants approved by it, attempted to be justified, but not justified by it, and we hold that it may be condemned.

BERTHELOT, J., concurred.

The judgment is as follows:

The Court now here, sitting as a Court of Review, having heard the parties by their respective counsel upon the judgment rendered in the Superior Court for the district of Montreal, on the 28th of March, 1868, having examined the record and proceedings had in this cause, and maturely deliberated:

Considering that plaintiff has proved the material allegations of his declaration; considering that his action and *demande* are well founded for recovery of damages for the causes alleged in his said declaration, to wit, of damages caused to him plaintiff, personally, and to his carriage, on the 28th of July, 1867, at Montreal by the acts and doings of the policemen on duty, servants of defendants, in their employ, acting under their authority.

Considering that defendant's policemen who arrested plaintiff were not justified in making said arrest of plaintiff, and that defendants have not proved the allegations of their plea justifying said arrest.

Considering that under the issues in this cause, and the proofs made, and by law, the defendants are liable in damages towards plaintiff, and that, therefore, in the judgment complained of, to wit, the said judgment of the 28th March, 1868, which declared defendants not liable, and dismissed plaintiff's action, there was and is error, this Court, revising said judgment, doth annul and reverse the same, and proceeding to render the judgment which said Superior Court ought to have rendered in the premises, this Court doth condemn defendants to pay plaintiff $100 damages for the causes set forth in said declaration; to wit, $35 for the damages caused to plaintiff's carriage, and $65 for damages to plaintiff, by the unwarranted arrest of him complained of, with costs against defendants.

Judgment reversed.

M. Doherty, for the plaintiff.

H. Stuart, *Q. C.*, and *R. Roy*, *Q. C.*, for the defendants.

(J. K.)

MONTREAL, 27TH FEBRUARY, 1869.

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

No. 1968.

The Quebec Bank vs. *Steers* et al., and *Seymour* et al., Tiers Saisis, and *Defendants*, Petitioners.

HELD:—(TORRANCE, J., dissenting). 1st. Where a trading partnership obtained advances from a bank under an agreement, that the moneys derived from the sale of hemlock bark extract, manufactured by them, should go in liquidation of the debt to the bank; and the said partnership while in a state of insolvency, and largely indebted to the bank, sold a quantity of bark extract, and applied the proceeds to the payment of other debts; that such act did not amount to secretion.

2. That there cannot be constructive secretion.

This was an action brought by the Quebec Bank against Thomas Steers, jun., and others, copartners, trading together under the name and firm of the Drummondville Bark Extract Manufacturing Company.

The circumstances out of which the action arose are in brief as follows: The defendants obtained discount from the bank to the extent of $10,000, which was to be paid in extract manufactured from hemlock bark. The defendants, in pursuance of this arrangement, delivered to the Bank upwards of 700 barrels of their manufacture towards the payment of their debt. On the 20th July, 1868, the defendants being in want of further advances, and apparently insolvent, stated to Mr. Rhind, cashier of the Bank, that they had then 174 barrels of extract ready for delivery, for which they would give him a bill of lading, upon the Bank making a further advance. Mr. Rhind declining to make such advance, Thomas Steers, jun., the manager of the company, sold the 174 barrels of extract to P. D. Brown, and applied the proceeds of the sale to the liquidation of other debts due by the company. Mr. Rhind thereupon made affidavit that the defendants were secreting their property with intent to defraud their credit-

The Quebec Bank vs. Steers.

ors, and obtained the issuing of a writ of attachment, by which the entire property of the defendants was put under seizure.

The defendants then presented a petition to the Superior Court, setting out that the allegations contained in the affidavit of Rhind were false and unfounded in fact, and praying that the seizure be quashed. Upon this issue the parties went to proof, and on the 20th of October, 1868, judgment was rendered by Mondelet, J., quashing the writ of attachment. The hon. Judge in pronouncing this judgment made the following remarks: "This is a case wherein an attachment of a certain quantity of goods has been issued, on the allegation that defendants are insolvent and secreting, etc. It is complained by defendants, in their petition, against the issuing of such writ of attachment, that there has been no secretion, and therefore the defendants pray that the attachment be quashed. It would be a waste of time to enter at length into the particulars of this case. It is evident that no actual secretion has taken place. If the acts of the defendants are to be qualified, they might, at the utmost, rank as acts of insolvency, with or without fraud, according as they are regarded in one or the other light; but there is nothing in the evidence amounting to secretion. The case, consequently, cannot hold for the plaintiffs, unless there be in our law such a thing as constructive secretion. But, in my opinion, there is no such constructive secretion recognized by the law of this country. The plaintiffs have in their affidavit used the present tense, "the defendants are secreting;" they have not proved it. It seems to me, that out of the three ideas, insolvency, fraud and secretion, much confusion has arisen. There may be insolvency without fraud, there may be fraud without insolvency; there may be insolvency with or without fraud, without secretion, but there cannot be secretion without fraud, though there may be secretion without insolvency. These words are not necessarily correlatives. In this view of the case, I am of opinion that the writ of attachment must be quashed."

The judgment was *motivé* as follows:

"Considering that there is no evidence in this case that at the time of the issuing of the writ of attachment against the goods and effects of defendants there was, or had been on the part of said defendants any act of secretion of the goods and effects such as required by law to justify the issuing and executing such writ of attachment, as has been done in this cause; this Court doth quash the said writ of attachment and all proceedings had thereupon, with costs against plaintiffs."

It was on the above judgment that the plaintiffs inscribed the case for review.

TORRANCE, J. I have the misfortune to dissent from the majority of the Court. This case is before the Court in review of a judgment rendered by his Honor Mr. Justice Mondelet on the 20th October, 1868. The plaintiffs instituted a suit on the 21st July last against the defendants jointly and severally as members of a trading partnership called "The Drummondville Bark Extract Manufacturing Company," for the recovery of the sum of $10,000, the amount of a note signed by the defendants. The action was accompanied by a writ of *saisie-arrêt* before judgment, based upon an affidavit made by William Rhind, the manager of the Montreal Agency of the Quebec Bank. The affidavit de-

posed "that the said firm or company is insolvent, and so are the partners thereof, and said defendants as the said firm, The Drummondville Bark Extract Manufacturing Company, are secreting the property of said company, with the intent to defraud its creditors and plaintiffs, &c." Under the writ obtained certain property has been seized, and attachments made in the hands of one or more garnishees.

On the 10th September last the defendants presented a petition under the provisions of the Code of C. P., articles 819, 854, praying that the attachments might be quashed, and the property seized, released, on the ground that the allegations of the affidavit were unfounded. As I read the law, the defendants were entitled to relief if they established or showed that the essential allegations of the affidavit were false or insufficient; in other words, the burden of proof is upon the petitioners to disprove what has been deposed to by the affidavit. An *enquête* was ordered and had in the cause on the petition, and finally the petition was heard on its merits, and a judgment rendered granting its conclusions. It is this judgment that is now under review.

The history of the indebtedness is as follows:

The defendants were seeking a charter of incorporation in December, 1867, and made the following representation to the plaintiffs: "This being the season for procuring bark, the company wishes to open an account with a Bank and to obtain a credit of $10,000 for that purpose.

They offer as security the company's note endorsed by the stockholders, whose names are Charles E. Seymour, No. 507 St. Paul Street, Montreal, Robert Mitchell, Brassfounder, Montreal, Valentine Cooke, mershant lumberman, Drummondville, Thomas Steers, jun., Drummondville, patentee, and Thomas Steers, Melbourne, thus proposing to give the personal liability of the stockholders, and the whole assets of the company as a guarantee.

The manufacture of the article from the raw material is completed every 24 hours, the capacity of the factory being 20 barrels of 40 gallons or 400 lbs each extract per day of 24 hours, and the value at the factory 3c. (three cents) per lb., or $12 per barrel, and that amount will be advanced by a shipper for England to the company, and as received paid into the said Bank to the credit of the company."

Upon these representations the plaintiffs advanced $1,000, for which the defendants gave the note sued upon in this cause. It was payable on the 6th May last, and protested for non-payment.

It appears in evidence that the plaintiffs make a number of complaints against the defendants. They charge them with having misrepresented the capacity of the works, and the value of the extract. William Rhind, the manager of the Bank, says he did not believe the capacity of the works was over 10 barrels a day in place of 20, and it was often stated that the extract would be sufficient in value to cover the amount of the note before its maturity. In July they were told specifically that the Bank would receive 300 barrels that month without further advance except freight, but the promise was not kept. I should add here that the Bank made another advance of $1000 on the 30th May, and a third advance of $1000 on the 6th June. Rhind also says that the extract instead of

The Quebec Bank vs. Steers.

being worth $12 per barrel was only worth about $5, or a little more than 1c. per lb in place of 3c., as represented when the first loan was made. The plaintiffs also complain that during the *enquête* the proof they desired to make was very much curtailed by the rulings of the learned judge. They were not allowed to prove insolvency, they were not allowed to prove facts subsequent to the attachment to shew the intent to defraud on the part of defendants when the attachment was made. They were not allowed to inquire into the application of the money they had advanced. They were not allowed to inquire of P. D. Browne what consideration he had given for $1000 of stock standing in his name in the new company.

As to the insolvency, there can be little doubt but that the defendants were insolvent, and their actions, if such was their condition, were much more open to the imputation of fraud than if their condition was that of solvent persons. They owed the plaintiffs $83,000; there was a claim against them of $20,000 and upwards in the name of Charles E. Seymour. There were besides at least four pending suits against the defendant Thomas Steers, jun., in whose name almost the whole of the stock in the chartered company stood. Rhind swore that none of the defendants were worth anything, that he believed the debts of the company on the 20th July were $35,000, corroborated by John Irvine and not contradicted; and that the factory did not cost over $20,000.

There is now the important question, "were the defendants secreting their property with intent to defraud?"

It was proved that one lot of 174 barrels of extract was sent to P. D. Browne, and money raised thereon by Thomas Steers, jun., in place of being sent to the bank to reduce their debt as agreed. There was also, what strikes me as a much more serious matter, the organization of the new company for which the charter was procured, entirely under the control of Thomas Steers, jun., without any provision being made to acknowledge the claim of the bank as a creditor, the effect of this organisation being, as I conceive, to withdraw from the pursuit of the bank, who had only a claim against the defendants personally and individually, at least $20,000 of property which the defendants were putting into the incorporated company. The land was held in trust by Hiram Seymour for the company, and on that land the only assets of the defendants, and company, the money of the plaintiffs had been placed. If that was not a withdrawal of the property of the defendants from the pursuit of their creditors, and an actual or constructive secretion of it, I do not know what secretion means. Rhind says there was an attempt to change the copartnery. "The company proceeded to organize without even having their accounts adjusted, and I notified the company at their first meeting, which was not according to law, that I would only wait until the first next meeting for an adjustment of our claim. Up to the day I fixed, this was not done, and I could not stand by, &c."

As to the intent to defraud, this may be proved by subsequent, as well as by antecedent, acts. 2 Russell, Crimes, 838.

1 Taylor, Evidence, 349—355 § 317.

A very similar case is that of *Langley* v. *Chamberlain*, reported 5 L. C. Jurist, p. 49, decided by Judge Badgley.

To resume, I am of opinion, 1. That there was insolvency. 2. There was secretion. 3. That the burden of disproving the allegations of the affidavit upon which the attachment issued, lay upon the defendants, and they did not disprove them.

BERTHELOT, J., was of opinion to confirm the judgment. Secretion had not, in his view of the evidence, been proved. The 174 barrels of extract were sold openly to Browne, and the proceeds applied to the payment of clerks, and in other legitimate ways. There was no doubt as to the insolvency of the petitioners, but the plaintiffs had failed to prove secretion. As to the complaint of the plaintiffs that they had been prevented from proving certain facts, there was no application to revise rulings at *enquête*, and the case came up as it stood. His Honor considered that the plaintiffs should have instituted proceedings in insolvency.

MONDELET, J. I see no reason or cause for deciding differently from the judgment appealed from. It has always appeared to me that the law admits of no constructive secretion, and there being in this cause no evidence of actual secretion, two consequences follow: 1st. It cannot be that constructive secretion, or what happens to be called such, can be substituted for actual secretion. 2nd. Insolvency in itself, not being an element of secretion, cannot be brought in to assist in raising a presumption of secretion, or to help in constituting constructive secretion.

Besides, the use of the present tense, "is secreting," cannot and ought not to open the door to evidence of acts long anterior to the date referred to by the words "is secreting." Rhind, the witness on whose evidence the plaintiffs' case turns, gives, to make out secretion, such reasons as are easily perceived to be perfectly valueless.

It has been said that the *onus probandi* was on the petitioners. I am of a different opinion. The article of the Code referred to applies only to cases of *capias*, and I think it was for the plaintiffs to make out their case.

Upon the whole, I am still of opinion that the writ of attachment issued in this cause against the goods and effects of the defendants was properly quashed by the judgment which is appealed from, and that the judgment should be confirmed.

Judgment confirmed.

Welch & Bullock, for the plaintiffs.
A. Robertson, Q. C., Counsel.
B. Devlin, for the defendants.
(J. K.)

COUR DE CIRCUIT, 1868.

MONTREAL, DECEMBER 10TH, 1868.

Coram TORRANCE, J.

No. 1885.

Allard vs. Legault et al., & E. Contra.

JUGE:—Que le fait du paiement peut se présumer par le laps de temps, ou par toute autre circonstance qui rend le fait probable.

Le demandeur poursuivait les représentants de feu Léon Hyacinthe Allard pour le paiement de deux années de rente viagère, savoir $16, laquelle rente ayant été créée par la vente d'un cheval, par acte du 19 juillet 1861.

Les défendeurs plaidaient compensation pour autant, et réclamaient une somme de 500 livres ancien cours, avec intérêt, depuis le 1er février 1854, que feu L. H. Allard avait payée, pour et à l'acquit du demandeur à Jérémie Groulx, le vendeur de ce dernier, en accompte de son prix de vente, avec subrogation.

La contestation s'engagea sur la demande incidente, et voici les points de droit soulevés de part et d'autre, et la conclusion à laquelle en est venue le tribunal:

G. Mirault, pour le demandeur, soutenait: 1o. que c'était avec les deniers du demandeur que feu L. H. Allard avait payé Groulx, et ce comme *negotiorum gestor;* 2o. que l'acte qui constituait la vente, était un commencement de preuve par écrit, autorisant le demandeur à prouver par témoins, le premier moyen, et que la preuve faite établissait que, de fait, c'était avec les deniers que le paiement avait été fait; 3o. que l'acte qui constituait la rente, et le fait d'avoir payé cette rente pendant cinq ans, sans protestation, étaient tous deux une présomption; que cette subrogation n'était d'aucune valeur et était éteinte; 4o. enfin, que le demandeur n'était pas présent à l'acte de subrogation, n'y avait pas consenti et que cet acte avait été passé sans considération et ne pouvait valoir contre lui.

G. Doutre,—Pour les défendeurs, répondait:

1o. Que la preuve par témoins n'était pas admissible pour prouver un mandat, dont l'objet dépassait une certaine somme. Elle ne l'est même pas pour un dépôt volontaire.

Pothier, Obligations No. 786. *Duranton*, Tome 13, No. 311.

Comme autorités sur l'inadmissibilité de la preuve dans le cas actuel:

Code Canadien, art. 1234. *Code Napoléon*, art. 1341. *Mercadé*, tome 5, pp. 100, 103 et 104. *Pothier*, Obligations, No. 785. *Prevost de la Jannès*, tome 2, p. 406, No. 672. *Duranton*, tome 13, No. 330, § 2.

2o. Que l'acte qui constitue la vente, ne pouvait servir de commencement de preuve par écrit, pour établir la prétention qu'un autre acte étranger à cette constitution de rente, est éteint, soit par paiement ou remise de la dette subrogée.

Merlin, Vo. commencement de preuve. *Duranton*, tome 3, No. 136, tome 13, Nos. 342, et suivants. *Code Napoléon*, art. 1347. *Toullier*, tome 9, No. 61, § 2, No. 74.

3o. Que les présomptions ne sont permises que lorsque ce sont des conséquences que l'on peut tirer des causes à leurs effets ou des effets à leurs causes, par la liaison qu'il peut y avoir entre les faits connus et les faits inconnus.

Duranton, tome 13, p. 404, cite en même temps *Domat*.

Or les deux fait connus, savoir la subrogation et la rente, n'ont aucune liaison, aucune connexité, ce sont deux contrats séparés, étrangers l'un à l'autre. Il n'y a aucune vraisemblance dans les faits inconnus dévoilés par la preuve. La présomption qui découle de la preuve orale, n'est pas suffisante pour détruire un acte authentique.

4o. Que l'acte de subrogation est légal, valable, malgré que le demandeur n'y fut pas partie, ou n'y aurait pas consenti.

Mourlon, Subrogation Personnelle, pp. 212, 440. *Dumoulin*, Traité des Contrats Usuaires, question 45, No. 331. *Renusson*, Subrogation, p. 269. *Pothier* Obligations, Nos. 499 et 789.

Pour explication de tous les faits d'où le demandeur prétendait tirer des présomptions, la défenderesse, veuve de feu L. H. Allard, alléguait que ce dernier, par commisération pour la pauvreté du demandeur, avait différé d'exiger le remboursement de ce qu'il avait payé pour lui, jusqu'au moment de son décès. Mais les déclarations par lui faites à son lit de mort établissaient qu'il n'avait jamais renoncé au droit de se faire rembourser, et sa veuve, contrainte à régler les affaires de la succession de son mari par cette poursuite, exerçait les droits dont son défunt mari avait fait preuve et elle insistait sur ses prétentions.

TORRANCE, J.—La seule question qui doive être l'objet de la décision de cette cause, est de savoir quelle force peut avoir la présomption qui découle des faits suivants: Le 23 Août 1844 le demandeur achète de Jérémie Groulx une propriété, payable par paiements des 500 livres ancien cours. En 1853, le demandeur s'étant grièvement blessé, a fait prendre sa récolte par feu L. H. Allard. En 1854, feu L. H. Allard fait un paiement de 500 livres à Jérémie Groulx pour le demandeur, et a pris de Groulx une subrogation. En 1861, feu L. H. Allard passe une obligation au demandeur, s'engageant à lui payer pendant la vie durant de ce dernier, $8 par année, En 1866, feu L. H. Allard décède, après avoir payé régulièrement les années de 1862 à 1866, inclusivement. Le demandeur réclame maintenant les deux années échues depuis le décès de feu L. H. Allard.

Des faits ci-dessus, il résulte clairement que feu L. H. Allard paie régulièrement cette rente, sans se réserver le droit de réclamer ces 500 livres, et sans même faire connaître au demandeur son intention de les réclamer. Or la présomption qui découle de l'ensemble des faits est puissante, pour démontrer que la subrogation avait cessé d'être, pour feu L. H. Allard, un titre sérieux lors de la passation de l'acte de 1861,

Menochius, II.—Tertia est præsumptio, quando creditor administrabat bona debitoris sui, affinitati conjuncti: sæpius cum eo calculabat, reddendo ei si rationem de administratis et tamen diù distulit petere hoc creditum. Hæc sanè conjecturam faciunt ipsi creditori fuisse solutum, et satisfactum.

Quarta est conjectura et præsumptio quando creditio administravit bona et reditus ispius debitoris, atque ite potuit sibi ipsi soluere. Est sane præsumendum quod sibi soluerit, nec suum jactare voluerit si administrator est creditor ejus cujus bona administrat, præsumitur suum [illegible] Et tanto magis conjec-

Allard vs. Legault.

tura hæc, locum habet quando administrator non confecit inventarium bonorum sui debitoris.

Quinta est conjectura et præsumptio quando creditor administrator bonorum debitoris, solet esse in rebus suis diligens. Nam tunc præsumitur quod fuerit etiam diligens in sibi ipsi solvendo, et quod fuerit id, quod solent facere alii administratores.

Sexta est conjectura, quando creditor egregiæ quantitatis, administravit bona debitoris, et eo tempore magnam pecuniarum summam ad aliquod negotium conficiendum contulit; nec constat, quod aliunde pecuniam habuerit, tunc præsumitur eam summam sumpsisse ex bonis debitoris.

Lib. 3, præs. 136.

Creditor solutum atque satisfactum quanto præsumitur.

Domat lib., 3, tit. 6, sect. 4.

Best, Law of Evidence, page 517. Independent of this statute, the fact of payment may be presumed by a jury from lapse of time, or other circumstances which render the fact probable, as for instance the settlements of accounts subsequent to the accruing of the debt, in which no mention is made of it.

3 *Starkie*, Evidence, 823, third Ed. 2 *idem*, p. 497.

1 Dickson, Evidence, § 614 and seq.

Le jugement fut motivé comme suit:

The Court, * * * Considering that it appears in evidence that the late Léon Hyacinthe Allard in the year 1853 was the administrator of the property of the plaintiff and received therefrom more than sufficient to pay the instalment of $ paid by him to the said Jérémie Groulx; considering that the said late Léon Hyacinthe Allard never in his lifetime demanded payment of the said [illegible]s from the plaintiff; considering on the contrary that the said Léon Hyacinthe Allard on the 19th July, 1861, made an obligation in favour of the plaintiff for the sum of $8 payable annually for the life time of the plaintiff, and paid said rent to plaintiff every year before 1867, doth reject the motion of the defendants and doth also dismiss the plea of defendants, and doth also maintain plaintiff's pleas to the incidental demand of defendants, and doth dismiss said incidental demand with costs, and it is considered and adjudged that plaintiff do recover from the defendants, &c., $16, being for two years' rent, &c.

Jugement pour le demandeur.

G. Mirault, pour le demandeur.

Doutre, Doutre & Doutre, pour les défendeurs.

(G. D.)

MONTREAL, 29TH APRIL, 1868.

Coram BERTHELOT, J.

No. 1029.

Rousson vs. *Gauvin et vir.*

HELD:—That a wife separated as to property from her husband is not liable for butcher's meat purchased by her and consumed by herself and family.

This was an action to recover the sum of £34 10s. claimed by the plaintiff for butcher's meat furnished by him to the female defendant, who was separated as to property from her husband.

The defendant, Dame Gauvin, pleaded, that she was separated as to property, *séparée quant aux biens*, from her husband, and that the latter alone was responsible for the debt. She alleged that the debt was one of those household expenses for which the husband as head of the family, *chef de la famille*, was alone liable. It had been proved that the meat had been purchased by Dame Gauvin and consumed by herself and her family, and [illegible] had even acknowledged the correctness of the account.

The Court maintained the plea of Dame G[illegible], and said that, because a woman was separated as to proper[illegible], it was not a reason why she should be held responsible for [illegible] of the family. Although there had been several decisions by [illegible] a contrary sense, the learned Judge could not agree with them. The [illegible]ld have an opportunity to bring the subject before a higher tribunal, w[illegible] it might be more fully sifted. The Honorable Judge added, that if the lady had kept a house separate and distinct from her husband he might have ruled otherwise, but, inasmuch as she lived with her husband, who by law was bound to pay all household expenses, he must dismiss the action.*

Magloire Desjardins, for plaintiff. Action dismissed.
Mackay & Austin, for defendants.
(S. B.)

SUPERIOR COURT.

MONTREAL, 30TH NOVEMBER, 1868.

Coram TORRANCE, J.

No. 2549.

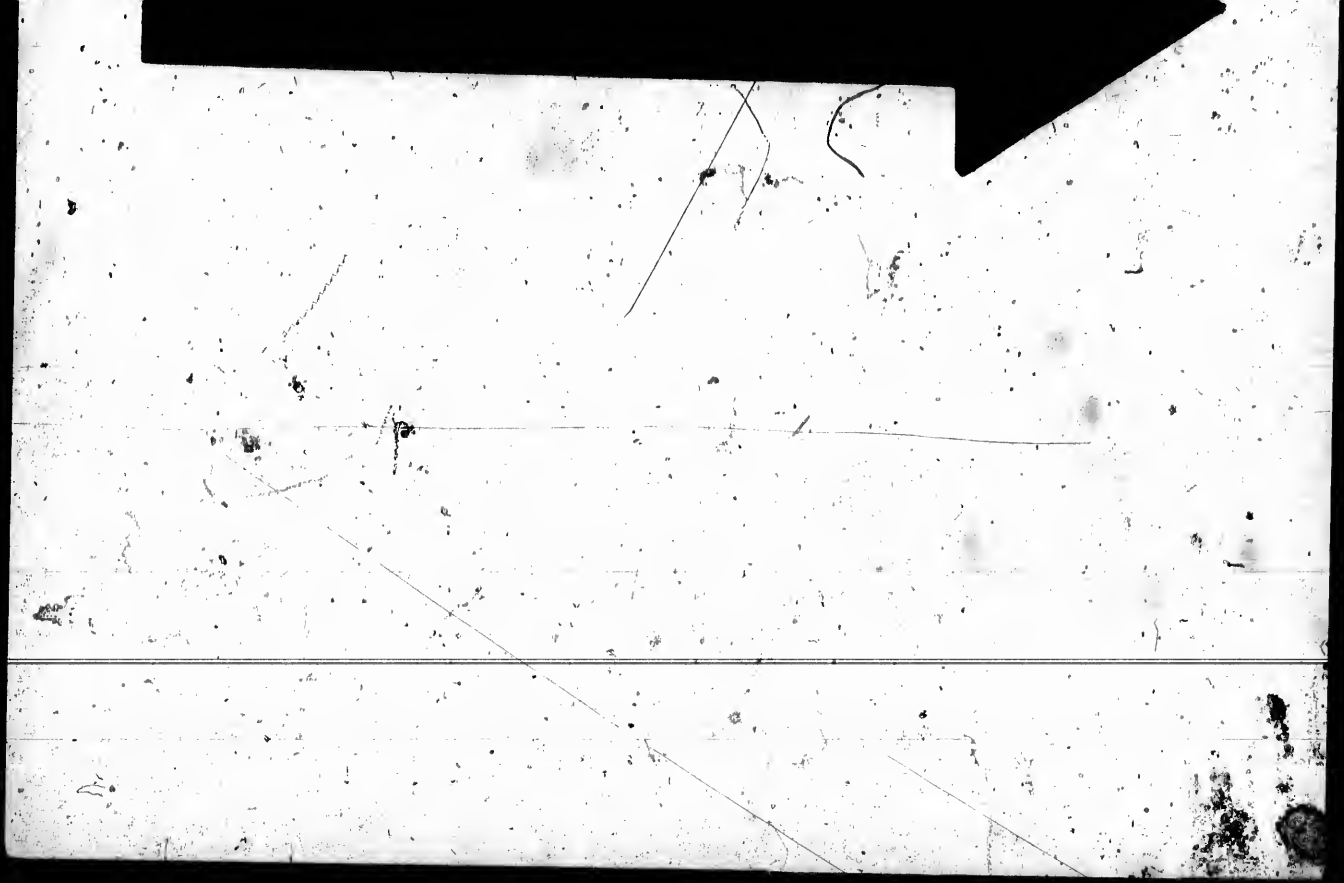
Hurtubise et al. vs. *Leriche.*

HELD.—1. That the 796th art. of the *Code de proc.* requires that an affidavit for *capias* should state directly that the defendant has secreted or made away with, or is immediately about to secrete or make away with his property and effects, with intent to defraud, &c.; and that the old formula that "deponent is credibly informed, hath every reason to believe, and doth verily and in his conscience believe," is insufficient.

2. That the secretion must be affirmed of the property and effects generally, and not merely of "the moveable property or effects."

TORRANCE, J.—A *capias* was issued in this case against the defendant on an affidavit made by Oscar Turgeon, one of the plaintiffs. The affidavit, after stating that the defendant was personally indebted to the plaintiffs in the sum of $100.95, amount in debt, interest and costs of a certain judgment rendered against the defendant in favor of the plaintiffs in the Circuit Court, at Montreal, on the 17th September, 1868, proceeded to state as follows, in the French language:—"That deponent is credibly informed, hath every reason to believe, "and doth verily and in his conscience believe that the said Eugène Leriche, "the defendant in this cause, has secreted, or made away with, and is immediately about to secrete, or make away with, his moveable property or effects "(*ses biens ou effets mobiliers*), with intent to defraud his creditors generally "and the plaintiffs in particular, and that deponent has been informed of these

Vide contra, pp. 30--32, Vol. 7, L. C. Jurist.—[Reporter's Note.]



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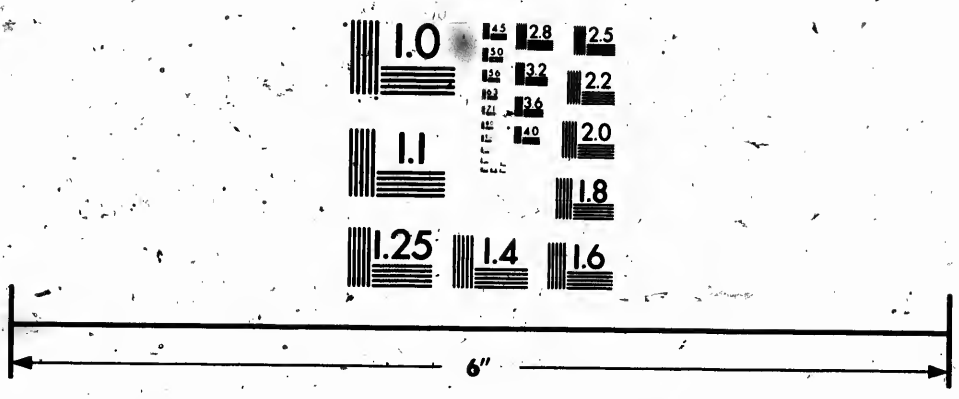

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Hurtubise vs. Leriche.

"facts, and of this conduct of the said defendant by Godfrey Cormier, the bailiff "charged with the execution in the cause above mentioned, by reason whereof "the said Benjamin Hurtubise and Oscar Turgeon, without the benefit of a writ "of *capias* against the body of said Eugène Leriche, may be deprived of their "remedy against the said Eugène Leriche, and deponent hath sighed."

The defendant's counsel has moved to quash the *capias*. Three objections are made to the sufficiency of the affidavit. 1. That the *jurat* does not mention the place where the affidavit was sworn, but as it is stated to be sworn before the Prothonotary, who is an officer of this Court, I hold this to be sufficient. 2. That in regard to the secretion of property, the affidavit only swears to the belief of the deponent, whereas this fact should be sworn to directly as a fact and not as a mere matter of belief. On this point I am with the defendant. An important change has been made in the law on this subject. The Consol. Stat. L. C. cap. 87, only requires a statement of deponent's belief, on grounds to be specially set forth in the affidavit, that defendant is about to abscond, or to secrete: whereas by the *Code de proc.* art. 798, though the fact of absconding may be stated as mere matter of belief, the secretion must be alleged positively as a matter of certainty. The Court pronounces this decision with much reluctance, but as the present is a *quasi*-penal proceeding, and in restraint of liberty, it must be construed strictly. The party using this process must bring himself strictly within the provisions of the Code. His affidavit is only hearsay, whereas the Code requires an affidavit establishing without qualification the fact of secretion.

There is another objection of a fatal nature which was not stated at the argument. The Code requires an affidavit of the secretion of property generally. The affidavit in the present case only deposes to the belief of secretion of the moveable property.

The following is the judgment of the Court:

The Court, &c., considering that by the affidavit of the plaintiff, Oscar Turgeon, it is sworn that deponent is informed in a credible manner, and has every reason to believe, and does verily and in his conscience believe that the defendant has secreted or made away with, and is about immediately to secrete or make away with his moveable property or effects, with intent to defraud his creditors generally, and the plaintiffs in particular;

Considering that the 789th art. of the C. of C. P. requires, in a case of secretion of property, an affidavit, establishing that the defendant has secreted or made away with, or is about immediately to secrete or make away with his property and effects with such intent;

Considering, therefore, that the said affidavit is defective, inasmuch as it only deposes to the belief of the deponent, whereas the Code requires certainty, and to the secretion of moveable property, whereas the Code requires secretion of property and effects generally, doth grant the said motion of the defendant with costs.

Capias quashed.

De Bellefeuille & Turgeon, for plaintiffs.
E. U. Piché, for defendant.
(A. H. L.)

COURT OF REVIEW, 1868.

MONTREAL, 30TH NOVEMBER, 1868.

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

No. 989.

Morley vs. *Massue.*

HELD:—1. That a general renunciation for consideration by a wife *séparée de biens*, in 1828, of all rights she might have in a property sold by her husband, and which at the time was hypothecated for the payment to her of a *douaire préfix*, did not operate as a bar to her children's claim to be paid such dower, when the same became open.

2.—That a sale of the property, under the Bankruptcy laws in force in 1845, did not purge the property from the dower, not then open.

This was a hearing in revision of a judgment rendered by the Superior Court, at Montreal, (MR. JUSTICE MONK presiding) on the 31st of December, 1867, maintaining the conclusions of the plaintiff's declaration.

The action was brought *en déclaration d'hypothèque*, to recover the sum of £200 cy., as the one half of a *douaire préfix* stipulated in favor of the plaintiff's mother, in her contract of marriage, executed in the year 1809.

The defendant pleaded, in effect, that the property had been sold by plaintiff's father on the 4th of September, 1815, and that, by an *acte* of ratification, executed by his mother (*séparée de biens*), on the 28th October, 1828, she, in consideration of the sum of 300 livres ancient currency, renounced purely and simply to all rights she might have in the property; also, that the property had been duly sold in 1845, under the Bankruptcy laws then in force, and that the legal effect of such sale was to purge the property from all liability for the dower, although the same was not then open.

Barnard, for defendant, submitted the following propositions and cited the following authorities:—

Le demandeur réclame, par action hypothécaire, une somme de £200, moitié d'un douaire préfix stipulé dans le contrat de mariage de ses père et mère en 1809, et hypothéqué sur un immeuble détenu par le défendeur.

Celui-ci allègue, pour défense, 1o. Que la mère du demandeur a ratifié une vente de cette propriété, faite par son père à l'auteur du défendeur; le demandeur a accepté la succession de sa mère, et par le principe de garantie ne peut troubler le défendeur.

2o La mère a renoncé à son douaire sur cet immeuble, en 1829, postérieurement à cette vente, et cette renonciation a eu l'effet d'anéantir le douaire des enfants.

3o La propriété en question a été vendue en 1845, par un commissaire en banqueroute; cette vente équivaut au décret, et a purgé le douaire préfix; de plus elle a été enrégistrée en 1863, et cet enrégistrement a fait disparaître complètement le douaire préfix.

I. Quant au premier point, le demandeur, il est vrai, a produit une renonciation notariée à la succession de sa mère, mais sa déposition et le compte de M. de Martigny, exécuteur testamentaire, constatent qu'il a gardé en mains et qu'il détient encore une somme de près de $80, appartenant à la succession de sa mère; de plus, quelque temps avant sa mort, celle-ci lui a cédé près de £300

Morley vs. Massue.

de rentes foncières, moyennant une faible pension viagère; cette transaction, suivant le défendeur, doit être considérée comme un arrangement de famille, et la somme cédée comme un avancement d'hoirie.

II. La renonciation faite par la mère à son douaire en 1829 *a eu l'effet de détruire le douaire des enfants.*

Cette proposition s'appuie sur la clause 37 de l'Ord. de 1841.

Il ressort de cette clause, qu'à partir du jour où l'Ord. est entrée en force, les enfants n'ont plus eu d'action pour leur douaire coutumier que sur les immeubles que la mère n'avait pas déchargés de son propre douaire *pendant la durée du mariage.*

Or, disons-nous, *pendant son mariage,* en 1829, Mad. Morley a renoncé à son douaire sur l'immeuble détenu par le défendeur; donc le demandeur, son enfant, n'aurait pas droit d'action, pour son douaire coutumier, sur cet immeuble.

Le douaire réclamé est préfix et non coutumier, mais le Statut 8 Vict. ch. 27, S. 3, 4, a étendu cette disposition au douaire préfix (voir également S. R. B. C. ch. 37, S. 52).

A cela le demandeur répond: 1o que la clause 37 de l'Ord. doit se lire avec la clause 35e, laquelle, suivant lui, ne donne cet effet qu'à la renonciation faite depuis l'Ord.; et 2o la 8e Vict. le déclare expressément quant au douaire préfix; 3o Il n'en peut être autrement sans effet rétroactif, quant aux renonciations antérieures à l'Ord. qui n'affectaient jamais le douaire des enfants, et sans détruire un droit acquis aux enfants.

Ces objections sont très spécieuses, et propres à séduire au premier abord; elles ont de plus l'avantage d'une apparence d'équité qui leur gagne la faveur, et elles rentrent, surtout celles qui soulèvent la question de rétroactivité et du droit acquis, dans les idées généralement reçues, à cause de certaines expressions impropres dont on se sert dans notre ancien droit coutumier sur le douaire. Mais le défendeur soumet humblement que ces objections ne sont fondées ni en droit, ni en équité, ni en raison, et il déclare de suite qu'en combattant l'opinion des droits acquis au douaire par les enfants, et en donnant à un acte de renonciation, touchant ce douaire, un effet qu'il n'avait pas lorsqu'il a été consenti, il est appuyé des plus hautes autorités légales du jour, et il ajoute que la thèse qu'il soutient aujourd'hui, quoique nouvelle peut-être en ce pays, ne l'est pas en France, où elle est maintenant réglée par tous les auteurs et les tribunaux dans le sens du défendeur.

Mais auparavant, montrons que les clauses 35e et 37e n'ont aucun rapport ensemble, et que rien dans ces deux clauses ne fait voir, même indirectement, que la loi, en parlant du douaire des enfants, le subordonnait à la seule renonciation de la mère faite depuis l'Ord.

Analysons la clause 35e et nous verrons qu'elle se réduit à dire que, si la femme, lors d'une vente faite par le mari, renonce à son douaire, ainsi qu'elle pouvait le faire auparavant, non-seulement elle le perdra sur l'immeuble qu'elle aura dégrevé, ce qui était l'ancien droit, *mais elle ne pourra le réclamer sur les autres immeubles de son mari; elle perdra son recours en garantie sur ces derniers biens;* voilà à quoi se réduit toute cette clause (voir S. R. B. C. ch. 37, sect. 52) *Elle ne concerne que le douaire de la femme, et ses droits de recours en in-*

demnité qu'elle perd, si elle renonce depuis l'Ord. et lors d'une vente faite par le mari, de même que ses *héritiers et autres représentants légaux*, ce qui, on le conçoit, ne comprend pas seulement les enfants, qui seuls cependant ont droit au douaire, mais tous ses héritiers en général, même les collatéraux. On voit donc que les mots "*Depuis et après le jour auquel cette Ord. aura force et effet*" ne s'appliquent en aucune manière à la renonciation qui affecte le douaire des enfants, mais seulement à celle qui fera perdre à la femme son recours en garantie sur les autres biens de son mari. Qu'on relise attentivement cette clause, et l'on verra que notre analyse est correcte (voir de plus les S. R. B. C. ch. 37, sect. 52). Le Demandeur ne peut donc invoquer cette clause en aucune manière comme affectant le douaire des enfants. [Morley vs. Masson.

La section 36 ne parle ni du douaire de la femme, ni de celui des enfants; mais il défend aux femmes de s'engager pour les dettes de leur mari autrement que comme commune en biens; cette clause qui paraît tout à fait étrangère au sujet, et placée là sans raison, sert cependant à nous faire connaître l'idée du législateur: après avoir parlé dans la 34e section de la vente des propres de la femme et dans la 35e du douaire *de la femme*, et de sa perte de recours, sur les biens de son mari, il continue à dire ce qui concerne la femme mariée, et lorsqu'il croit avoir dit tout ce qui la regarde, et l'avoir indemnisée de la perte qu'il lui a fait subir, il prend un autre sujet.

"A partir du jour où cette Ord. entrera en force, dit-il, j'abolis le douaire coutumier des enfants, sur tous les immeubles que leur mère aura dégrevés du sien propre, *pendant la durée de son mariage.*" Voilà qui est formel et distinct du droit de la femme. Nous admettons qu'il n'y aura que la renonciation de la femme, faite depuis l'Ord., qui la privera, *elle et ses représentants légaux*, du recours en indemnité sur les biens du mari. Mais quelque soit l'époque à laquelle la femme aura renoncé à son douaire, pourvu que ce soit *pendant son mariage*, celui des enfants cessera d'exister.

Pourquoi cette différence? En voici les raisons:

1o. Lorsque la femme renonçait à son douaire sur un immeuble, l'acquéreur était protégé contre elle, en ce sens qu'elle perdait sa jouissance sur cette propriété, mais souvent, lorsqu'il en avait joui paisiblement 30, 40, ou 80 ans, comme dans le cas actuel, il était troublé par un enfant, dont il avait confondu les droits avec ceux de la mère; c'est pour cela, sans doute, que l'Ord. a décrété que la renonciation de la mère, en quelque temps qu'elle eut été faite, éteindrait le douaire des enfants.

2o. La femme avait un droit acquis au douaire et à l'indemnité dès le mariage: ces droits formant partie du contrat formel ou tacite entre les futurs conjoints; au contraire les enfants n'ont pas de droit acquis au douaire, tant qu'il n'est pas ouvert par la mort de leur père, et c'est parceque la mort de leur père leur donne un droit définitif au douaire, que la loi exige que la renonciation de la mère soit faite *pendant le mariage*, pour pouvoir affecter *l'espérance ou l'expectative des enfants*—ainsi que nous le montrerons tout à l'heure; pour le moment il nous suffit d'avoir énoncé les raisons de la différence faite par la loi entre la renonciation requise pour faire perdre *à la femme* son recours en indemnité, et celle requise pour faire perdre *aux enfants* leur douaire. Nous allons maintenant répondre à l'objection tirée de la 8e Vict., ch. 27, sect. 3.

Morley vs. Masson.

L'effet de la première et de la dernière partie de cette clause est d'intercaler les mots *douaire préfix* dans l'Ord., comme s'ils y eussent été mis tout d'abord; sur ce point il n'y a point de discussion, et en lisant les clauses 35 et 37 de cette façon, on a déjà vu qu'il suffisait que la femme eut renoncé *pendant le mariage* à son douaire, pour que les enfants perdissent le leur; la différence d'opinion ne se rencontre que sur cette phrase: "*cette interprétation s'étendra à tous les actes passés depuis l'Ord.*" Or le défendeur soumet que cette phrase ne pouvait pas concerner l'action des enfants pour douaire, abolie par la clause 37e, chaque fois que la mère aura renoncé à son douaire *pendant la durée du mariage*, mais seulement la perte du recours en indemnité décrétée par la clause 35e contre la femme qui a renoncé depuis l'Ord.

1o. Cette interprétation paraît la seule d'accord avec l'intention de la loi, manifestée par ce qui précède et suit les mots en dernier lieu et par les mots: "de même que si *la dite section* eut compris" etc.; 2o. elle se trouve conforme à l'Ord., elle-même, et 3o enfin c'est ainsi que les auteurs des S. R. B. C., l'ont compris (ch. 37, section 52.)

Cela appert encore de la clause 4e de la 8e Vict.

35 de l'Ord. ne faisait perdre à la femme son recours en indemnité que dans le cas où elle renonçait à son douaire *dans* l'acte même de vente ou d'hypothèque que consentait son mari: il fallait *qu'elle se joignît* à lui, la sect. 4 de la 8e Vict. fit plus, elle permit de le faire *après* l'acte d'aliénation, soit qu'il ait été fait *avant ou après* l'Ord. D'où il appert 1o que la section 3e de la 8e Vict. ne se rapportait évidemment qu'à la 35e clause de l'Ord., laquelle, comme on l'a vu, n'a aucun rapport avec le douaire des enfants réglé par la 37e section, et 2o, que ni la 37e clause de l'Ord., ni la 3e de la 8e Vict. ne régissent la présente cause, puisque la renonciation a été faite *après* la vente, et qu'elle tomberait sous la 4e cl. de la 8e Vict.

Nous en venons maintenant à la question de savoir si les enfants ont un droit acquis au douaire, dès l'instant du mariage, et soumettons la proposition de droit suivante:

Le douaire des enfants, tant qu'il n'est pas ouvert, ne constitue pas pour eux un droit acquis, mais une simple espérance, une expectative, accordée par la loi, un droit successif de la nature des réserves coutumières, de la légitime ou du droit d'aînesse. Et la loi peut toujours changer cet ordre successif, et anéantir cette espérance sans effet rétroactif.

Les preuves à l'appui de cette proposition sont nombreuses. Disons d'abord que tous les auteurs modernes, en France, où cette question est débattue depuis 80 ans, se rangent de notre opinion; Merlin [1], Chabot [2], Mailher de Chassat [3], Grenier [4], Demolombe [5], etc.; nous avons aussi la jurisprudence de la Cour de Cassation, qui ne paraît pas avoir varié sur ce point; elle est constatée par tous ces auteurs. Nous avons encore l'ancien droit et les vieux

[1] Questions de droit, vo. Tiers Coutumier.
[2] Chabot, Questions, p. 38. 9, 83 et suivante, 88, 90.
[3] Mailher de Chassat, p. 173.
[4] Donations, p. 475.
[5] Demolombe, No. 47 et suivant.

auteurs, tel que Louet, Chopin, Lebrun [cités par Merlin] qui l'ont entendu ainsi à propos des questions soulevées lors de la réformation des coutumes au 16e siècle. Enfin, le droit et la raison nous montrent de toutes les manières que le douaire des enfants n'est rien de plus qu'une *espérance accordée par la loi, un droit successif, une espèce de légitime ou de réserve coutumière.*

En effet, 1o. La mort naturelle du père donnait seule ouverture au douaire. —C. C., B.-C., art. 1438.

2o. L'enfant était tenu de renoncer à la succession de son père, parce qu'il choisissait un autre mode de lui succéder, et il était tenu de rapporter tous les autres biens qu'il avait reçus de lui, comme dans toutes les successions.—C. C., B. C., art. 1468.

3o. Les enfants partageaient par parts égales, *comme dans les successions.*— C. C., B. C., art 1471.

4o. La part, dans le douaire, d'un enfant acceptant la succession, n'augmentait pas celle de ses frères. Il ne pouvait la transmettre à ses héritiers.— C. C., B. C., art. 1439, 1471; 2 Argou, p. 130, 141, 23, 5, 6; 2 Laurière, 272, 287; Pothier, Douaire, 393, 5; il fallait qu'il l'acceptât lui-même comme dans un cas de legs ou substitution qui ne constituent jamais un droit acquis, mais une espérance seulement, laquelle ne se réalise que si le testament n'est pas revoqué, ou si la loi des successions et substitutions n'est pas changée, et c'est pour cela que l'enfant ne pouvait pas plus vendre son douaire avant qu'il fût ouvert, que la succession de son père encore vivant.—Merlin, vo. Tiers Coutumier.

5o. L'exhérédation qui privait les enfants du droit de succéder à leur père, les privait aussi de leur douaire, même celle pour cause d'ingratitude.

Dumoulin sur l'art. 137 de l'ancienne coutume [cité par Merlin].

Lemaître, sur la coutume de Paris, p. 292.

Renusson, Traité de Douaire, ch. 6, No. 17.

L'art. 1466 du C. C. B.-C., et l'art. 1471.

D'où l'on doit conclure que le douaire des enfants n'est rien de plus qu'une espérance que la loi donne aux enfants sur les biens de leur père, de même qu'elle leur donne l'espérance de partager son hérédité, c'est pour cela qu'elle assimile ici le douaire à l'hérédité.

7o. Les enfants ne pouvaient pas faire opposition pour leur douaire non ouvert sur les biens de leur père vendus par décret. Ils n'avaient donc pas de droit acquis, "même conditionnellement," puisque la loi permettait, on l'admettra, de faire opposition pour conserver un droit conditionnel, et d'exiger un cautionnement des créanciers s'ils prenaient les deniers, ou de les prendre soi-même en fournissant caution de rapporter, au cas où la condition ne s'accomplirait pas. —Pothier, Procédure civile, 234-5, 263, 12; Guizot, 433; 2 Bourjon, 722; Héricourt, 157; Houvet, 351; Code de Procédure civil du B.-C., art. 730; C. C. B. C., art. 1086.

On ne considérait donc pas qu'il y eut de droit acquis, même conditionnellement. Bacquet, Droits de Justice, ch. 15, No. 17.

Répondons de suite à une objection qui paraît sérieuse, et à laquelle nous avons fait allusion en commençant. Si les enfants n'ont pas un droit acquis au douaire dès le mariage, que veulent donc dire les art. 248 et 249 de la coutume, reproduits dans les Art. 1433 et 1434 du C. C. ?

Morley vs. Masson.

Puisque la loi, nous dit-on, déclare le douaire *le propre héritage* des enfants, et qu'elle défend aux père et mère de l'aliéner au préjudice de leurs enfants, *dès l'instant du mariage*, elle a donc voulu les en faire *propriétaires dès l'instant du mariage* de leurs parents; ou au moins, elle leur a donc, dès ce moment, donné un droit à cette propriété, sous la condition de survie et de renonciation à sa succession; les enfants ont donc un *droit acquis* au douaire dès l'instant du mariage.

Voilà, croyons-nous, la manière la plus forte de présenter cette objection, mais est-elle fondée? Non, dit Merlin; "et sur quel fondement, se demande-t-il, le "jugeait-on ainsi [négativement] dans la Coutume de Paris et de Senlis? On le "jugeait ainsi d'après le principe que, dans les lois comme dans les contrats, ce "n'est point à l'écorce des mots, mais à la substance des dispositions qu'il faut "s'arrêter."

En effet, lorsqu'on s'est bien pénétré des principes sur la nature du douaire; lorsqu'on se rappelle que la loi l'assimile continuellement à un droit successif; lorsqu'on le compare aux *réserves coutumières*, à la *légitime*, à la *substitution*, on ne peut trouver, dans ces deux art. de la Coutume, rien de semblable à une déclaration de droit acquis dès l'instant du mariage.

Que disent-ils? 1o. Que le douaire consiste dans la moitié des immeubles que le mari détient au jour des épousailles, et de ceux qui lui échoïent *en ligne directe* pendant le mariage.

Observons de suite un fait qui frappe; c'est que le douaire n'atteint que les biens propres du mari, lors du mariage et ceux qu'il acquiert par *succession en ligne directe*: pourquoi cette restriction et pourquoi le douaire n'est-il établi qu'en faveur des enfants par l'art. suivant?

Il nous semble qu'il n'y a pas d'autre raison que le désir de conserver les biens dans la famille; c'est ce même désir qui avait établi le droit d'aînesse, la légitime, les réserves coutumières, et qui a donné tant de faveurs aux substitutions, toutes choses que nous avons complètement abolies, à l'exception des substitutions que nous venons de restreindre, et qui sont en voie de disparaître de nos lois. Qui cependant oserait soutenir que toutes ces faveurs donnaient aux enfants des droits qui devaient être régis d'après les lois en force lors de la naissance des enfants ou de la création de la substitution, et non d'après les lois en force lors de l'ouverture de la succession ou de la substitution? Quand la Coutume déclare que les immeubles frappés du douaire sont ceux possédés et détenus par le mari, *au jour des épousailles*, il est bien évident qu'elle ne parle ainsi que pour désigner les immeubles frappés du douaire, et non pas pour dire que les enfants ont un droit acquis sur ces immeubles, du jour des épousailles.

Que dit de plus l'art. 249? Que le douaire est le *propre héritage* des enfants, et que les père et mère ne peuvent, depuis le mariage, l'aliéner au préjudice des enfants.

Remarquons que l'art. ne dit pas que le douaire est le propre héritage des enfants dès l'instant du mariage, mais ces derniers mots ne se rapportent qu'à la défense d'aliéner, laquelle est la même que celle qui concerne la légitime et les réserves, et a quotité des biens disponibles. Mais supposons qu'on doive l'entendre ainsi, le législateur ne voulait que dire en quelle qualité les enfants pren-

draient le douaire, lorsqu'il s'ouvrirait; la femme n'aura que la jouissance, les enfants en auront la propriété; mais il y a loin de là à dire qu'ils en ont la propriété dès l'instant du mariage.

C'est ainsi que les codificateurs, reproduisant l'ancien droit, l'ont entendu, lorsqu'ils ont dit dans l'art. 1439, *que les enfants jouissent du douaire en propriété du jour de son ouverture.* La coutume ne voulait pas dire autre chose.

Pocquet, Douaire, règle 8, p. 219.—Loi, Douaire, règle 6, 2 Argou, 145, 68; Lam., Douaire, a, 32, 24; 12. Prat., fr. 174.

2 Argou, p. 135, 6.

C'est ainsi que Renusson et Ferrière expliquent aussi ces deux articles.

Renusson, Traité du Douaire, ch. 5, No. 3.

Ferrière sur l'art. 249 de la Coutume, glose 1re, No. 4.

Même art. glose 2, No. 19.

Pesnelle (cité par Merlin) sur la Coutume de Normandie, semblable sur ce point à la coutume de Paris, dit que les enfants ne peuvent aliéner leur douaire pendant que leur père vit, (est *in rerum naturâ*) *parce que pendant ce temps, ce n'est pas leur bien.*

8o. Ajoutons à toutes ces raisons et ces autorités, à celle des auteurs modernes que nous avons mentionnés en commençant, et à la jurisprudence de la Cour de Cassation, deux arrêts solennels du Parlement de Paris cités par Louet [Lettre C., § 6,] et rendus sur ses conclusions conformes.

Fortifions encore cette démonstration en citant notre Code lui-même, art. 1439-1441.

9o. Qu'entend-on par droit acquis? N'est-ce pas celui qui est tellement à nous, que nous ne pouvons en être dépouillés sans notre consentement, ou sans une déclaration expresse de la loi?

Chabot de Lallier, dans son 2e. vol. des Questions transitoires, p. 88, nous en donne l'explication.

Or, oublie-t-on que l'Ord. même permet à la mère d'anéantir pour toujours le droit des enfants au douaire. Singulier droit acquis que celui qui dépend de la volonté d'un tiers.

Répondons ici à une objection.

Toutes ces raisons, dit-on, sont bonnes à l'encontre du douaire coutumier, accordé par la loi seule; mais elles ne peuvent s'appliquer au douaire préfix qui résulte de la convention des parents, laquelle doit être respectée comme toute autre convention matrimoniale.

Nous répondons d'abord; Dans quelle loi trouve-t-on cette distinction entre le douaire coutumier et le douaire préfix? pourquoi l'un ne serait-il qu'une espérance, un droit successif, une réserve coutumière, et l'autre un droit acquis?

Mais nous admettrons qu'en France, la jurisprudence et les auteurs ont regardé avec une grande faveur cette stipulation expresse [par le contrat de mariage] ou tacite [par la coutume], et ils lui ont accordé autant qu'il était possible de le faire, c'est-à-dire, qu'ils l'ont maintenu *pour la femme, partie au contrat, soit que le douaire soit préfix ou coutumier*; car s'il est coutumier, la convention a été tacite, et les parties ont pris la loi pour contrat. On a donc déclaré que, *pour cette raison*, la femme avait un droit acquis. Mais en est-il de même des

Morley vs. Masson.

enfants? Toutes ces mêmes autorités ont répondu non. Car cette raison n'existe pas. Les enfants n'étaient pas partie à cette convention, puisqu'ils n'existaient pas, et c'est la loi seule qui a réglé leur douaire.

Voir Merlin, Questions de droit; vo. Tiers Coutumier.

2nd Chabot. Questions transitoires, p. 38 et 39.

MAILHER DE CHASSAT—*Rétroactivité des lois*, p. 173.

Questions transitoires, vo. *douaire coutumier*, p. 389.

CHABOT. Quest. trans. 2, p. 83.

De plus, la femme, en Bas-Canada, peut renoncer à son douaire, soit coutumier, soit préfix, et cette renonciation a l'effet de faire perdre l'un et l'autre douaire aux enfants de sorte que notre droit statuaire a formellement déclaré que l'un n'était pas plus acquis que l'autre.

On a aussi cité l'art. 1446 du C. C. pour montrer que le législateur entendait parler de la renonciation faite depuis l'Ord. Cet article ne dit rien de tel; il réfère à l'article 1444 qui ne fait que reproduire la sect. 35 de l'Ord., et tout ce qui pourrait résulter de cette référence serait que la femme renonçât en vue d'une aliénation, soit simultanée, soit antérieure du mari; or, nous nous trouvons dans ces conditions. Mais on remarquera combien cet art. 1446 a une rédaction vicieuse et contraire même à l'Ord.: en effet, il semblerait faire porter les mots: "*pendant la durée du mariage*," sur l'aliénation faite par le mari, tandis que l'Ord. les fait porter sur la renonciation.

Quoiqu'il en soit, ce n'est pas le Code qui régit cette cause, et s'il est en opposition avec l'Ord. sur ce point, la Cour ne doit point s'y arrêter. Mais le Défendeur n'y voit rien de tel.

Voir en outre ce que les codificateurs disent de l'effet de la renonciation antérieure à l'Ord. [2 vol., p. 240-22].

Concluons donc, en disant avec Merlin, que tout concourt à démontrer que le douaire n'était pas pour les enfants une propriété actuelle, tant que leur père vivait; qu'il n'était pour eux qu'une expectative, qu'une simple espérance, de la nature des réserves coutumières, et qu'un droit successif ressemblant au droit d'aînesse et à la légitime; que cette espérance, cette expectative, ce droit successif, ne formait pas pour eux un droit acquis, lorsqu'a paru l'Ord. de 1841; que conséquemment si cette loi l'eut aboli pour l'avenir complètement, comme en France, elle l'aurait aboli à l'égard des enfants déjà nés qui ne l'avaient encore ni atteint, ni exercé, comme à l'égard des enfants qui naîtraient à l'avenir; par conséquent, puisqu'elle l'a fait dépendre d'un événement, peu importe qu'il fut arrivé alors ou qu'il survint par la suite; la loi ne commettait pas plus d'injustice, et il n'y avait pas plus de rétroactivité dans un cas que dans l'autre.

Etrange contradiction! Nos adversaires admettent que la renonciation de la mère faite depuis l'Ord. anéantit pour toujours le douaire des enfants, même déjà nés, et ils ne veulent pas que la renonciation faite avant l'Ord. ait cet effet, *parce qu'elle détruirait un droit acquis, et aurait un effet rétroactif!* Ne voit-on pas qu'il est impossible d'admettre que la renonciation de la mère, postérieure à l'Ord., anéantit le douaire des *enfants déjà nés*, sans admettre en même temps qu'ils n'ont pas de *droit acquis* au douaire, avant qu'il soit ouvert par la mort du père. S'ils avaient un *droit acquis au douaire dès l'instant du mariage*, la

renonciation de la mère n'aurait pu affecter que le douaire des enfants nés de mariages postérieurs à l'Ord.; autrement, elle détruirait un droit acquis. Nos adversaires admettent donc que le demandeur n'avait pas de droit acquis en 1841.

Mais, ajoutent-ils, vous donnez à la renonciation faite en 1829 un effet qu'elle n'avait pas alors. Qu'importe, puisque la loi, en agissant ainsi, ne lèse le droit de personne, mais ne fait que retirer une espérance qu'elle avait donnée et qu'elle avait toujours le pouvoir d'ôter. Qu'importe que la mère eut voulu ou non affecter les droits d'un tiers; ce n'est pas sa volonté que la loi considère, *depuis comme avant l'ord.*, mais c'est le seul fait qu'elle a renoncé pour elle-même; si ce fait existe, et s'il a lieu *pendant la durée du mariage*, la loi, de sa pleine autorité, décrète alors que les enfants ne pourront plus réclamer de douaire; et nous en avons vu la raison plus haut; il s'agissait de protéger un acquéreur ou un prêteur qui, sur la foi de la renonciation de la femme à son propre douaire, se croyait complètement protégé, tandis qu'il ne l'était que contre le jouissance de la femme.

Le Défendeur se croit donc autorisé à conclure que la renonciation de Mme. Morley, en 1829, a éteint le douaire du Demandeur.

Avant de passer à la question de la purge par le décret, disons un mot de l'objection du Demandeur que la renonciation de Mme. Morley n'est pas suffisamment expresse.

On a cité l'analyse de Sir L. H. LaFontaine, p. 103.

Nous admettons que la seule présence de la femme à un acte de vente, *pour y consentir*, ne serait pas une renonciation suffisante de la femme; mais il y a plus ici. Mme. Morley *a renoncé* expressément *à tous les droits quelconques* qu'elle pouvait avoir ou prétendre sur la propriété vendue. L'Ord. n'exige rien de plus, ni la raison non plus.

Le demandeur a même admis à l'audience que cette renonciation était suffisante quant au douaire de la femme; la loi n'en demande pas davantage; si la femme a renoncé pour elle-même, l'Ord. déclare que cet acte a l'effet de faire disparaître le douaire des enfants, de sorte que la renonciation de Mme Morley est suffisamment expresse.

III. Le Défendeur soumet 1o. que le douaire préfix, ouvert ou non, est purgé par le décret depuis l'Ordonnance, d'où le douaire préfix du demandeur a été purgé par la vente en banqueroute en 18[illegible] laquelle équivaut au décret; 2o. que ne le fut-il pas par le décret, il l'a été par l'enrégistrement de cet acte, en 1863, en vertu de la 25 Vict., ch. 11, sect. 3.

1o. Le douaire préfix n'a toujours été qu'une simple hypothèque dont tous les biens présents ou futurs du mari étaient chargés, à moins qu'il ne consistât dans la propriété d'un immeuble, ce qui n'est pas le cas qui nous occupe. Or, l'Ord. a exigé que toutes les hypothèques fussent enrégistrées, même celles antérieures à cette loi, sous peine de déchéance à l'égard des tiers acquéreurs; le douaire préfix fut donc soumis à cette nécessité, même à l'égard de la femme, et nous pouvons ajouter "sans injustice, ni rétroactivité." Car le législateur ne faisait qu'exiger une simple formalité, de la part du propriétaire du droit acquis, pour le conserver, et les auteurs admettent que cette formalité, dépendant de la volonté de la personne dont le droit peut se trouver atteint, est requise sans injustice, rétroactivité.

Morley vs. Massue.

Duvergier, de l'effet rétroactif des lois, édition de 1845, p. 40.

Quoiqu'il en soit, l'Ord. ordonne l'enrégistrement de toutes les hypothèques, sous peine de déchéance. Or, quelle raison y a-t-il d'exempter de la purge par décret une hypothèque pour douaire préfix, soumis à la nécessité de l'enrégistrement; comme toutes les hypothèques, il faut qu'elle devienne publique; elle constitue *pour la femme* un droit acquis conditionnellement; pourquoi serait-elle exempte de l'opposition, aux mêmes conditions que les autres créanciers conditionnels? Et puisque la femme avait droit d'être colloquée ou d'exiger une garantie qu'elle aurait la somme d'argent promise et assurée sur la propriété vendue, les enfants se trouvaient par là même protégés, quoiqu'ils n'eussent pas de droit acquis. De fait, les enfants pouvaient également faire opposition pour s'assurer leur droit éventuel, leur espérance, puisque la propriété vendue se trouvait dégrevée de la garantie en leur faveur; ils tombaient sous la règle générale des créanciers conditionnels; et ils ne subissaient aucune injustice. Nous n'émettons là d'ailleurs aucune proposition nouvelle, puisque, dans l'ancien droit, lorsque le douaire, *même coutumier et non ouvert*, apparaissait lors de la distribution des deniers, les créanciers postérieurs ne pouvaient toucher leurs deniers, sans fournir cautionnement de rapporter, au cas de l'ouverture future du douaire. C'est ce qui apparait à l'art. 1443 du C. C. B.-C.

Cette purge rentrait d'ailleurs dans l'intention de l'Ord. dont le but était non-seulement la publicité des hypothèques, mais encore le dégrèvement de la propriété.

A ce raisonnement, nous ajouterons l'autorité d'une loi postérieure, que l'on peut considérer comme déclarative sur ce point; c'est la 25 Vict. ch. 11. sect. 3 [citée au long plus bas], et qui prend pour accordé que *tout enrégistrement* pour douaire préfix est *rayé* par l'enrégistrement d'un décret ou d'une vente en banqueroute antérieurs, lequel enrégistrement équivaut à un *enrégistrement d'une décharge* du même droit.

Aussi les codificateurs [2 vol., 2e édit., p. 456], ont-ils donné, comme loi en force, l'article suivant: 188ter Code, art. 1448. Et ils l'expliquent dans leur rapport, V. p. 242, 4.

Le demandeur se prévalant de ces paroles, a voulu trouver dans le statut de 1860, qui ordonne la production d'un certificat des hypothèques, l'origine de la purge du douaire préfix non ouvert. En vérité, l'on ne s'attendait guère à trouver la purge dans le certificat du régistrateur. Serait-ce le fait que le régistrateur portera à son certificat telle hypothèque qui en purgera l'immeuble vendu? Mais il ne doit pas remonter au-delà d'un titre du shérif ou autre vente équivalente, *excepté quant aux hypothèques qui ne sont pas par là purgées ou éteintes.* (Art 700, C. de P. C.) Nous en revenons donc à la question de savoir si l'hypothèque était *purgée ou éteinte par le décret.* Puisque le demandeur admet que le régistrateur doit inclure dans le certificat les hypothèques pour douaire préfix non ouvert, il admet donc qu'elle est purgée ou éteinte par le décret. A quelle époque remonte donc la purge de ce douaire par le décret? Le demandeur n'a pu en découvrir d'autre, postérieure à la vente en banqueroute de la propriété du defendeur, que celle de 1860, et l'on voit que cette découverte n'en est pas une; il faut donc remonter à l'établissement des bureaux d'enrégistrement.

Mais, dit le demandeur, la clause 17 du ch. 36 des S. R. B.-C. dit expressément que le décret ne purge pas le douaire non ouvert; et il ne distingue pas entre le douaire coutumier et le douaire préfix.

Malgré la généralité des termes, nous maintenons que cette clause ne regarde que le douaire coutumier.

En effet, 1o. On trouve, dans le même chapitre, le statut de 1860 qui ordonne la production du certificat du régistrateur, que le demandeur admet comme preuve de la purge du douaire préfix non ouvert.

2o. Cette section est tirée de la 9 George IV, qui a été modifiée quant au douaire préfix comme on l'a vu, par l'Ord. de 1841. Les auteurs de la refonte de nos statuts auraient donc dû, en 1860, faire cette distinction, que les codificateurs ont faite plus tard, entre le douaire coutumier et le douaire préfix. Mais cette abrogation de la 9 George IV n'existant que par implication, et les auteurs de la refonte n'étant pas chargés d'approfondir, comme les codificateurs, tous les effets de notre système hypothécaire, ils ont reproduit le vieux statut pour valoir ce qu'il pourrait. Dans tous les cas, l'autorité des codificateurs et la 25 Vict. démontrent que la 9 Geo. IV ne s'appliquait plus, en 1860 comme en 1841, qu'au douaire coutumier.

3o. Le demandeur a admis, du reste, et avec raison, que cette 17e clause doit être restreinte et limitée. En effet, il admet que, de tout temps, le douaire *coutumier ou préfix non ouvert a été purgé* dans bien des cas. 1o. Lorsque l'immeuble était vendu à la poursuite d'un créancier antérieur au douaire; 2o. Lorsque tel créancier était colloqué. Malgré les termes généraux de la sect. 17, il faut donc distinguer; or, puisqu'on admet des exceptions, on ne peut refuser la purge du douaire préfix non ouvert, décrétée d'ailleurs par une loi postérieure, à cause de la généralité des termes de la 9 Geo. IV.

3o. Enfin, si tous ces raisonnements portent à faux, il en reste encore un tiré de l'effet de l'enrégistrement, en 1863, de la vente en banqueroute en 1845. Cet effet est emprunté de la 25 Vict. ch. 11, sect. 3.

Il faut se rappeler, en lisant ce statut, ce que nous avons dit de la nature du douaire des enfants, à savoir, qu'il ne constitue pas pour eux un droit acquis tant qu'il n'est pas ouvert; que la loi, en l'abolissant pour l'avenir, comme elle l'a fait en France en 1790, frappe tous les douaires non encore ouverts, qui seront régis par la loi en force lors de leur ouverture.

Or, M Morley, père, n'est mort qu'en 1866; par conséquence le douaire du demandeur n'était pas ouvert lorsque cette dernière loi a été passée, et lorsque la vente en banqueroute de 1845 a été enrégistrée (en 1863). Cette loi décrète que l'enrégistrement d'un tel acte équivaut à l'*enregistrement d'une décharge de toute hypothèque pour assurer le douaire préfix* (*any registration for securing douaire préfix*). Par conséquent, l'hypothèque pour douaire préfix qui frappait l'immeuble du défendeur en faveur du demandeur, a *été déchargée et éteinte en* 1863, et celui-ci ne pouvait plus, après cette date, porter d'action sur cette hypothèque. Lors de la mort de M. Morley, père, en 1866, la loi avait alors déchargé de tout douaire préfix la terre du défendeur.

La seule réponse que le demandeur apporte contre ce raisonnement, consiste à dire que le statut de 1862 ne parlait que des douaires préfixs qui étaient alors

Morley vs. Masson.

purgés par le décret, tels que les douaires ouverts et ceux non ouverts par la mort du père, mais qui disparaissaient de la propriété par la collocation d'un créancier antérieur.

Nous répondons à cela 1o. que le texte du statut de 1862 ne comporte pas cette restriction, mais il atteint *toute hypothèque pour assurer le douaire préfix (any registration for securing douaire préfix)*; les mots *qui sont purgés par telle vente*, etc., ne s'appliquent qu'aux autres hypothèques; cela ressort d'abord des mots: "*y compris* toute hypothèque, etc" lesquels étaient inutiles, si le législateur n'eut voulu inclure que les hypothèques pour douaire ouvert; car de tout temps le décret a purgé le douaire ouvert, et celui-ci était suffisamment compris dans *toutes les hypothèques qui sont purgées*, etc.; cela ressort de plus de la généralité des termes à l'égard du douaire préfix, sur lequel la loi a attiré l'attention spécialement: *y compris toute hypotheque, ou any registration, etc.* Enfin, cela ressort surtout de la version anglaise dans laquelle la mention du douaire préfix vient à un espace de cinq lignes après les mots *qui sont purgees*. Le défendeur soumet que le texte anglais ne semble pas souffrir de difficulté.

2o. C'est ainsi du reste que les codificateurs l'ont interprété dans leur rapport (cité ci-dessus), et dans l'art. 188 ter du projet de Code, titre douaire (C. C., art. 1448, aussi cité ci-dessus.)

3o. Enfin, le demandeur l'a pareillement interprété de la même manière, lorsqu'il a prétendu que le douaire préfix non ouvert était alors purgé depuis 1860. Il reconnaissait donc que le statut de 1862 entendait faire radier, par cet enrégistrement, l'hypothèque pour douaire préfix non ouvert. C'est aussi notre prétention, mais avec cette différence 1e. qu'il était purgé par la renonciation de 1829 en vertu de l'Ord.; 2o. qu'il était purgé par le décret de 1845, aussi en vertu de l'Ord.; et 3o. qu'il a été purgé pour toujours par l'enrégistrement en 1863 en vertu du statut de 1862.

Dorion, for Ptlff.—Le demandeur réclame par cette action une somme de £200 pour sa part ou moitié du douaire stipulé dans le contrat de mariage entre John Morley et Marie Appoline Des Rivières père et mère décédés, passé le 9 juillet 1809.

Le défendeur, tiers détenteur et poursuivi hypothécairement, oppose à cette demande:

1° Que Mme. Morley a renoncé à son douaire le 2 octobre 1828, ce qui a eu l'effet de détruire le douaire de ses enfants.

2° Que Mme. Morley a ratifié la vente faite par son mari de l'immeuble que le défendeur possède et que le demandeur a accepté la succession de sa mère et ne peut troubler le défendeur.

3° Que l'auteur du défendeur a acheté la propriété sur laquelle l'on réclame le douaire à une vente faite en 1845 par un commissaire en Banqueroute; que cette vente enrégistrée le 9 déc. 1863 a purgé le douaire.—

4° *Défense en fait.*

1° Sur la 1e exception.

Le demandeur soumet qu'avant l'ord: d'enrégistrement, 4 Vict., c. 30 (1841), la renonciation de la femme à son douaire n'affectait pas le douaire des enfants. 3 Ferrière Com. sur. l'art. 249 de la Coutume, p. 763, N°. 1, 2, 3, 4, et 5.

Pothier, du douaire, No. 85, 4o. al.....le consentement de la femme ne décharge pas l'héritage du douaire des enfants.

Rapport 5e des codificateurs p. 240, obs. sur les articles 184, 185, 186 et 187.

2o. L'ordonnance n'a autorisé que les renonciations au douaire coutumier qui seraient faites après sa mise en force (31 déc. 1841). Elle ne s'applique pas aux renonciations antérieures.

4 Victoria, ch. 30, sect. 35.

"Et qu'il soit de plus statué que depuis et après le jour auquel cette ord: aura force et effet, il sera loisible, etc."

Par l'acte 8 Vict., ch. 27, sect 3 (1845), l'on a étendu cette disposition de l'ord: au douaire préfix quant aux *renonciations faites depuis* l'ordonnance (1841). Cela exclut formellement toutes les renonciations faites antérieurement à l'ordonnance.

La sect. 37 de l'ord. dit bien que les enfants ne pourront réclamer le douaire que sur les biens qui seront en la possession de leur père à son décès et sur ceux qui n'en auront pas été déchargés par leur mère pendant son mariage, mais cela ne doit s'entendre que de la décharge autorisée par la sect. 35 de l'ord. c'est-à-dire celle faite postérieurement à l'ordonnance.

Voir les clauses citées 35 et 37,—Statuts Ref. B. C., ch. 37., sect. 53, 54; art. 1446 du Code Civil du B. C.

3° Pour priver les enfants de leur douaire, la renonciation de la femme doit être expresse et conforme à la 35e clause de l'ord: c'est-à-dire qu'elle doit renoncer spécialement au douaire. Or, la renonciation de Mme. Morley est une renonciation générale qui n'affecte que ses droits et non ceux de ses enfants. Lors même qu'elle aurait été faite depuis l'ord: elle n'aurait pas éteint le douaire des enfants parce qu'elle n'est pas dans les termes voulus.*

Pour priver le demandeur de son douaire à raison de cette renonciation, il faudrait non seulement donner à l'ord: un effet rétroactif, mais encore faire produire à cette renonciation faite avant l'ord. un effet qu'elle n'aurait pas si elle eut été faite depuis.†

Analyse de l'ord. d'enrégistrement par M. Lafontaine, pp. 101, 102 et 103. Nos. 193 à 201.

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* 4 Vict., ch. 30, sect. 30.

† Proudhon de l'usufruit T. 5, No. 2613, p. 51 et 52. "La question étant ainsi,..... ....."Où en serions-nous, si les effets de nos négociations pouvaient dépendre des dispositions futures et incertaines d'une législation imprévue.

"Et quelle absurdité n'y aurait-il pas de prétendre que la loi nouvelle eut réglé les conditions d'une convention qui l'a précédée comme si un effet pouvait être antérieur à sa cause.

Chabot. Questions transitoires T. 2, p. 89. Vo. Droits acquis.

"*Quant aux droits réels s'ils résultant de conventions expresses et s'ils ont été stipulés irrévocables ou déclarés tels par la loi existante, ce sont des droits acquis qu'une* nouvelle loi ne peut abolir, altérer, modifier, changer ni régir en aucune manière, pas même pour les effets postérieurs à sa publication.

Elle ne peut les régir en aucune manière, lors mêmes *qu'ils ne s'ouvrent, ne se réalisent et ne produisent leurs effets que postérieurement à sa publication; lors même qu'ils étaient soumis à des conditions qui ne s'accomplissent, ou à des événements incertains qui n'arrivent que sous l'empire de la loi nouvelle.*"

Morley vs. Massue.

Statuts Ref. du B. C., ch. 37, S. 52.

Art. 1443, 1444, et surtout 1446 du C. B. C.

L'on a prétendu que le douaire n'était pas un droit acquis parce qu'il était soumis à la condition de survie. Les auteurs modernes qui ont soutenu cette doctrine n'ont fait l'application de leurs raisonnements qu'au douaire coutumier et non pas au douaire préfix, qui résulte toujours d'une convention expresse et non de la loi seule. Tous les auteurs anciens s'accordent à dire que le droit au douaire est acquis aux enfants dès l'instant du mariage.

L'article 249 de la Coutume le dit expressément: "*dès l'instant de leur mariage;*" Voir aussi Ferrière sur cet art., p. 755.

"No. 3.....mais ces conditions étant arrivées, il est vrai que la propriété du douaire leur appartient (aux enfants) *non pas du jour du décès de leur père et de l'acceptation du douaire, mais du jour de la célébration du mariage ou du contrat de mariage suivant la distinction ci-dessus.*"

Renusson du douaire, p. 50, No. 2.

"A l'égard de la Coutume de Paris,.....le douaire coutumier ou préfix *est acquis aux enfants dès l'instant du mariage;* mais néanmoins le droit des enfants est toujours en suspens du vivant du père et *ne leur est acquis que sous condition*, au cas qu'ils survivent leur père."

Le même, p. 122, No. 9, in fine No. 10.

Pothier, du douaire, No. 147.

Code civil B. C., art. 1433.

Le douaire étant acquis dès l'instant du mariage, la renonciation de la femme doit être apprécié d'après les lois existantes, lorsqu'elle a été faite, et non d'après les dispositions de l'ord. d'enrégistrement et des actes subséquents qui d'après leurs termes mêmes n'y sont pas applicables.

Sur la 2e Exception.

Le demandeur se borne à dire qu'il n'y a aucune preuve qui ait fait acte d'héritier soit avant soit après sa renonciation à la succession de sa mère. S'il a reçu quelque chose ce n'est qu'en sa qualité de curateur à la succession vacante et il est prêt à rendre compte aux créanciers de l'emploi qu'il a fait des sommes ainsi reçues.

Sur la 3e exception.

Le demandeur soumet que le douaire qu'il réclame n'est devenu exigible (ouvert) qu'au décès de son père en 1866 et qu'il n'a pu être purgé par un décrêt fait en 1845 puisqu'alors il n'était pas encore ouvert.

Renusson, du douaire, p. 90, No. 9.

Le douaire préfix n'est pas ouvert du vivant du père, de même que le douaire coutumier; il ne peut se prescrire, ni être purgé par décrêt du vivant du père, mais seulement depuis qu'il est ouvert par le décès du père, *quando jus est quæsitum.* Le même, p. 88, No. 1.

Pothier, du douaire, No. 91, No. 86.

9 Geo. 4, Ch. 20, Sect. 8.

"Provided always that nothing hereinbefore contained shall extend to take "away, alter, or in any way affect the rights or hypotheca of women during "marriage upon the immoveables of their husbands, or of children upon the

"immoveables of their fathers in relation to *dower not yet open*, nor in any "manner or way to affect substitutions."

Statuts Refond. du B. C., Ch. 36, Sect. 17.

L'acte 25 Vict. Ch. 11 (1862) pourvoit à la manière de faire radier les hypothèques éteintes en fesant enrégistrer les ventes par le shérif, etc. Et la clause 3 déclare que tel enrégistrement sera réputé un enrégistrement de la décharge ou extinction de toutes les hypothèques y compris toute hypothèque enrégistrée pour assurer le douaire préfix, qui sont purgées par telle vente, etc.

Cette clause n'avait pas pour but d'éteindre les hypothèques existantes, mais seulement de faire radier celles qui étaient éteintes, les mots "qui sont purgées par de telle vente" l'indiquent clairement, il n'y a que les hypothèques qui étaient purgées qui devaient être radiées, et comme le douaire du demandeur n'était pas éteint, ni purgé par la vente faite en 1845, il s'en suit que l'enrégistrement de cette vente ne pouvait l'affecter.

Mais, dira-t-on, pourquoi a-t-on mentionné le douaire préfix dans cette clause. C'est que dans beaucoup de cas les douaires étaient purgés par le décrêt et que l'on ne voulait laisser aucun doute que l'hypothèque pour douaire comme toutes les autres hypothèques devaient être radiées lorsqu'elles étaient éteintes par le décrêt. Ainsi étaient purgés par le décrêt :

1o. Tous les douaires ouverts.

2o. Ceux affectés sur propriétés décrétées à la poursuite de créanciers antérieurs au douaire.

3o. Ceux rachetés ou éteints au moyen des collocations faites en vertu de l'acte 23 Vict. Ch. 59, Sect. 2 et 12.

4o. Ceux mentionnés par Pothier en son traité du douaire aux numéros 91, 93, 94, 95 et 96.

C'est pour ces différents cas dans lesquels le douaire était purgé par le décrêt, que l'acte 25 Vict. Ch. 11 a autorisé le régistrateur d'en faire la radiation.

Les codificateurs dans leur 5me. rapport p. 244, semblent dire que depuis l'ord. d'enrégistrement le décrêt a eu l'effet de purger le douaire préfix non ouvert. Cependant ils admettent que les lois d'enrégistrement ne contiennent aucune disposition formelle à cet égard, et ils ajoutent qu'il n'y a pas de doute que depuis la 25 Vict. ch. 27, le décrêt ne purge le douaire préfix et que cela suffit pour leur faire adopter la règle établie par l'art. 1448 du code, et que quant aux questions transitoires, c'est-à-dire, les questions que feraient naitre les décrêts antérieurs, ils laissaient aux tribunaux à les décider.

Les codificateurs ont bien fait de ne pas trancher la question. Ils n'avaient sans doute pas vu la clause 17 du Ch. 36 des Statuts Refondus, qui déclare en termes formels que le décrêt ne purge pas le douaire, autrement ils n'auraient pas pu exprimer de doute sur cette question puisque cet acte a été passé vingt ans après l'ordonnance. Il est bien vrai que depuis l'acte 23 Victoria ch. 59 et non pas seulement depuis l'acte 25 Vict. ch. 11, comme le disent les codificateurs, le douaire préfix est purgé par le décrêt, mais pourquoi cela ? c'est parceque cette loi, la 23e Vict. ch. 59, a pourvu à ce que les douaires préfixs même non ouverts, seraient colloqués sur le prix de la vente et que les douairiers ne pourraient pas retenir leur hypothèque et obtenir leur douaire ou un cautionnement

Morley vs. Masson.

de la part des créanciers qui en toucheraient le montant. De fait cette loi a déchargé la propriété décrétée de l'hypothèque du douaire préfix pour la transférer sur le prix. Mais cela n'a lieu que depuis la 22e Vict; avant cela le douairier ne pouvait pas faire d'opposition pour le douaire non ouvert. Ses droits étaient préservés sans cela.

Le douaire du demandeur n'était pas purgé avant l'acte 25 Vict. ch. 11 (1862) et le simple enrégistrement d'un décrêt antérieur à cet acte n'a pas pu le purger, à moins que cet acte ne le dise expressément et qu'il ne soit pas susceptible d'une autre interprétation, ce qui n'est pas le cas.

Il est bon d'observer que le défendeur ou son auteur ont acheté la terre en question, connaissant l'existence du douaire qu'ils ont pris à leurs risques et que pour cette raison ils n'ont payé la terre que la moitié de sa valeur en sorte qu'il ne perd rien même en payant le douaire.

MONDELET, J. Le défendeur, condamné par le jugement de la Cour Supérieure du district de Montréal (Monk, J.,) rendu le 31 décembre 1867, soumet ce jugement à la revision de cette cour. Voici en peu de mots ce dont il s'agit:

Le demandeur réclame, par action hypothécaire, une somme de £200, moitié d'un douaire préfix stipulé dans le contrat de mariage de ses père et mère, en 1809, et hypothéqué sur un immeuble détenu par le défendeur.

Cette action est rencontrée par le défendeur en la manière suivante:

1o. La mère du demandeur a ratifié une vente de cette propriété que le père du demandeur a faite au défendeur; le demandeur a accepté la succession de sa mère, et, par le principe de garantie, ne peut troubler le défendeur.

2o. La mère a renoncé à son douaire sur cet immeuble en 1829, postérieurement à cette vente, et cette renonciation a eu l'effet d'anéantir le douaire des enfants.

3o. La propriété en question a été vendue en 1845, par un commissaire en banqueroute; cette vente équivaut au décrêt, et a purgé le douaire préfix; de plus, elle a été enregistrée en 1863, et cet enregistrement a fait disparaître complètement le douaire préfix.

Il a été cité un grand nombre d'autorités par les savans avocats du défendeur, et de son côté le savant avocat du demandeur n'a pas, assurément, traité crument les questions: chez lui, comme chez ses confrères, le droit et l'argumentation n'ont pas fait défaut. Il me semble que toutes les raisons qu'on a données de part et d'autre, peuvent être réduites à peu de propositions, dont il me parait facile de saisir la portée.

Et d'abord: Il s'agit ici d'un douaire préfix et non d'un douaire coutumier, en sorte que les autorités que l'on a citées, et qui pouvaient, disons, avoir quelque rapport au premier, n'en ont aucun quant à l'autre. Partant de cette considération, nous trouvons de suite, et par là-même, la matière considérablement simplifiée.

Le défendeur a prétendu que la mère du demandeur a ratifié la vente faite de l'immeuble en question par le père du demandeur, son époux, que le demandeur a accepté la succession de sa mère, et que devenant par là même garant, il ne peut troubler le défendeur.

Il n'y a rien de concluant dans cette prétention. D'abord, la mère n'a fait

rien autre chose que ratifier l'acte de vente, dans lequel il n'y a pas un mot de renonciation, en sorte que les enfans ne peuvent par cela, aucunement, être privés du douaire, s'ils y avaient droit. Le défendeur, lorsqu'il a acheté, a dû s'informer s'il y avait un douaire sur l'immeuble; s'il ne l'a pas fait, à lui la faute.

Maintenant, en principe de droit, quelque renonciation même qu'aurait faite la mère, en 1829, ou à aucune époque subséquente à la vente par le père du demandeur, elle n'aurait jamais eu l'effet d'anéantir le douaire qui est *le propre héritage des enfans*. Ni l'Ordonnance des Enrégistrements, ni aucune loi, à moins que par une déclaration *expresse* de rétroactivité monstrueuse, n'auraient pu produire un effet que tout principe et sentiment de justice répronveraient.

Quelque spécieuses que puissent paraître les observations que l'on a faites à l'occasion du droit des enfans au douaire en expectative, l'on en peut facilement faire justice. C'est un brillant sophisme de la part du défendeur, mais il disparait en présence de la raison et de la loi. Cette expectative ne l'est que jusqu'à la mort du père, époque à laquelle le douaire dont l'existence remonte au contrat de mariage, est et devient capable d'appréhension. Les enfans prennent alors ce qui est devenu leur propriété, leur héritage propre par le contrat de mariage, qui a donné l'existence à ce douaire, et que la mère ne peut, n'a pu, par son fait, détruire. Avant l'ordonnance, rien ne pouvait priver les enfans de leur douaire, et on prétend que cette ordonnance a eu l'effet, dix-huit ans après l'acquisition, de faire rentrer dans le néant, le douaire des enfans! Impossible, insoutenable, par conséquent.

Les savans avocats ont, avec persistence, soutenu que les clauses 35 et 37 de de l'ordonnance doivent être lues, interprétées et appliquées séparément! Mais cela est contraire à tout principe. N'enterprête-t-on pas une loi d'après son ensemble? La doit-on scinder, afin d'en tirer des conséquences que ne justifient ni la lettre ni l'esprit de cette loi, lue, comprise et appliquée dans son ensemble? D'ailleurs, un moment d'attention et de réflexion, nous la fait envisager cette loi, comme elle est, en effet, une loi prospective, et par conséquent, et nécessairement, toute renonciation imaginable, antérieure à la promulgation de l'ordonnance, ne peut jamais affecter le douaire des enfans, leur propre héritage. Et encore bien moins une renonciation de la mère "à tous les droits quelconques qu'*elle* pouvait avoir ou prétendre sur la propriété vendue," laquelle n'a aucun rapport aux droits de douaire des enfans, qu'elle n'eût pu affecter, eût-elle même fait ou prétendu, *expressis verbis*, renoncer au douaire de ses enfans.

Inutile d'ajouter à ce qui précède, aucune observation relativement à la dissertation de l'un des savans avocats du défendeur, sur la théorie des droits acquis. Son syatème repose sur ce que l'on ne peut appeler droit acquis, ce qui peut être révoqué par celui qui a constitué, conféré, ce droit acquis. Soit, mais comme la constitution, la création du douaire, dans l'espèce, est irrévocable, le système de la défense, à cet égard, croule de lui-même.

Le douaire a été purgé par la vente en banqueroute. Mais c'est une autre erreur: la vente a eu lieu en 1845, et le douaire n'a été ouvert qu'en 1866, par la mort du père du demandeur.

Morley vs. Massue.

Quant à l'enrégistrement, il n'a eu aucun effet à l'encontre du douaire que l'on a, à tort, voulu assimiler à une hypothèque. Cet enrégistrement de l'acte de vente n'était que pour constater une quittance à l'égard d'hypothèques, mais nullement pour purger le douaire.

D'après ce qui précède, j'arrive à la conclusion que le douaire dont il est question, n'a pas été purgé, ni éteint, que le demandeur est bien fondé en son action, et que le jugement dont est appel doit être confirmé.

MACKAY, J., said, that at the argument it was contended that the woman from whom the plaintiff derived her title had barred her dower; but nothing of that sort appeared in the deed by which she was said to have done so.

The judgment of the Superior Court was, therefore, declared to be confirmed purely and simply.*

Judgment of S. C. confirmed.

Dorion, Dorion & Geoffrion, for plaintiffs.
Barnard & Pagnuelo, for defendants.
(S. B.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 9 DECEMBRE 1868.

Présents:—DUVAL, Juge en chef, CARON, J., DRUMMOND, J., BADGLEY, J., ET LORANGER, J. A.

RODERICK McLENNAN,
(*Défendeur principal et Demandeur en faux en Cour Inférieure,*)
APPELANT;

ET

KENNETH DEWAR,
(*Demandeur principal et Défendeur en faux en Cour Inférieure,*)
INTIMÉ.

JUGE:—1o. Que dans un testament solennel il faut que le notaire et les témoins instrumentaires entendent la langue du testateur et celle dans laquelle le testament est rédigé.

2o. Qu'en conséquence, un testament rédigé en français par un notaire qui n'entendait pas le testateur qui ne parlait et n'entendait que le Gaelic, en présence de deux témoins dont l'un entendait le Gaelic, mais n'entendait pas le français et l'autre servait d'interprête, doit être déclaré faux et nul.

†L'intimé cessionnaire de Finlay McLennan, qui était le légataire universel de Kenneth McLennan et de Catherine McLeod, ses père et mère, poursuivait l'appelant pour recouvrer un immeuble qui avait appartenu aux testateurs.

Avant de répondre à cette demande l'appelant s'est porté demandeur en faux tant contre les minutes que contre les expéditions des testaments de Kenneth McLennan et de Catherine McLeod, que l'intimé, demandeur en Cour inférieure, avait invoqués dans sa déclaration, comme ayant été passés devant Mtre Meilleur, le 3 septembre 1847.

Entr'autres moyens de faux, l'appelant articulait les suivants: 1o que la minute du testament du dit Kenneth McLennan était datée du 3 septembre

*The case is now in appeal.—[Reporter's note.]

† This is the case reported at page 196 of 11th vol. of L. C. Jurist.—(*Reporter's note.*)

1840, tandis qu'il n'avait jamais fait de testament le dit jour trois septembre 1840, et que l'expédition produite par l'intimé était datée du 3 septembre 1847 ; 2o que les dits Kenneth McLennan et Catherine McLeod étaient tous deux nés en Ecosse, et qu'ils ne parlaient ni la langue anglaise, ni la langue française, mais seulement le Gaelic, que ne comprenaient ni ne parlaient le notaire et les témoins ; —que ces testaments n'avaient pas été dictés par les dits Kenneth McLennan et Catherine McLeod et qu'ils ne leur avaient pas été lus.

Il était admis que les testateurs, Kenneth McLennan et Catherine McLeod, qui n'ont pas signé les testaments dont il est question, ne parlaient et n'entendaient que le *Gaelic ;* que le notaire qui a rédigé les testaments en français ne parlait et ne comprenait que la langue française ; que l'un des témoins ne parlait et ne comprenait que l'anglais et le Gaelic et que l'autre témoin parlait et comprenait l'anglais, le français et le Gaelic, en sorte qu'il n'y avait qu'un seul témoin qui pouvait comprendre le notaire et les testateurs. Il était de plus prouvé que le testament de Kenneth McLennan, quoique daté du 3 septembre 1840, n'avait été fait qu'en 1847 ; que l'expédition portait une date et la minute une autre.

La Cour Supérieure avait renvoyé l'inscription de faux de l'appelant et ce jugement avait été confirmé par la Cour de Révision.

L'extrait suivant du factum de l'appelant contient le résumé des moyens de droit et de fait sur lesquels il fondait son appel :—" Ces deux cours, la Cour " Supérieure et la Cour de Révision, ont, par là, décidé qu'un notaire pouvait faire " un testament sans comprendre le testateur et sans que le testateur le comprit, " que le notaire pouvait remplir le but de la loi en faisant au testateur la lecture " d'un testament dans une langue qu'il ne comprenait pas et que l'un des témoins " ne comprenait pas non plus ; enfin, qu'un testament fait en 1847 pouvait valoir " lors même qu'il n'était daté que de 1840, et que la copie pouvait porter une " date différente de la minute sans que ni l'une ni l'autre ne fut fausse. Les " minutes de ces deux testaments sont signées par H. F. Charlebois, N. P., qui " n'était pas présent lorsqu'elles ont été faites et dont la signature n'est pas " reportée sur les copies.

" L'appelant croit que la première condition requise pour la validité d'un " testament authentique, c'est que le testateur qui le dicte, le notaire qui le " rédige et les témoins qui y assistent puissent se comprendre [1] ; et qu'il est " également essentiel que tout acte authentique et surtout un testament ait une " date certaine [2], et que la minute et la copie portent la même date, sans quoi " l'une ou l'autre devra nécessairement être déclarée fausse [3], c'est pourquoi il " n'hésite pas à demander que le jugement de la Cour Inférieure soit infirmé."

(1) Code Civil B. C., Art. 847.

Demolombe, T. 21, p. 264.

No. 251. Voici un testateur qui veut faire son testament dans un idiôme étranger ; c'est un Anglais par exemple, ou un Allemand qui ne parle que sa langue nationale ; ou bien un Alsacien, un Breton, un Provençal, qui ne peut s'exprimer que dans le *patois* de sa province.

Il est évident d'abord, qu'il faut que la langue, l'idiôme ou le patois dont il va se servir soit compris par le Notaire et les témoins.

Aucun truchement ou interprête ne pourrait se placer entre le testateur et le notaire et les témoins.

McLennan et Dewar.

Le même, T. 21, p. 210-1, No. 197.
Ricard, *des Donations*, No. 1568, No. 1606.
Troplong, *des Donations et Testaments*, No. 1525.
Merlin, Quest. de droit, vo. *Testament*, § 17, art. 4.
" " vo. *Témoins instrumentaires*, § 18.
Toullier, T. 5, p. 365, 6, 7, 8, 9 et 443.
Marcadé, T. 4, p. 307.
Duranton, T. 9, Nos. 79 et 80.
Coin Delisle. *Don. et Test.* Art. 972, No. 7.
Zachariae, T. 5, p. 100.
Rousseau de Lacombe, vo. *Témoins*, Sect. 4, No. 15.
Bourjon, T. 2, p. 309. Nos. 37 et 40.
Grenier, T. 2, No. 255.
(2) Merlin, Répertoire, vo. *Testament*, p. 137.
Guyot, Répertoire, vo. *Acte*, p. 138, 2e col.
Duranton, T. 9. No. 53.
Code Civil du B. C., art. 844 et 854-5.
(3) Code Civil du B. C., art. 856, 1215.

M. LE JUGE LORANGER, rappelant les termes de l'art. 289 de la Coutume de Paris, qui exige que, pour qu'un testament soit réputé solennel, il faut qu'il ait été dicté et nommé par le testateur aux notaires, curé, ou vicaire général et lui lu et relu en présence des dits notaires, curé ou vicaire général et témoins, dit qu'il ne pouvait y avoir de doute que pour remplir le but de la loi, il fallait que le notaire et les témoins fussent en état de comprendre ce que le testateur dictait au notaire, et ce que le notaire écrivait sous cette dictée. Un notaire qui n'entendait pas la langue du testateur ne pouvait écrire sous sa dictée, de même un témoin qui n'entendait pas la langue dans laquelle le testament était écrit et dicté devait être considéré comme un témoin qui n'était pas présent à la lecture du testament puisqu'il n'y comprenait rien. De fait il n'y avait que le témoin Grinsell qui fut idoine puisque lui seul entendait et le langage du testateur et celui du notaire. Il pouvait à son gré changer les dispositions du testament, puisque c'est lui qui transmettait au notaire les volontés du testateur et qui ensuite traduisait au testateur ce que le notaire avait écrit; ni le notaire, ni Morison, l'autre témoin, ne pouvaient le contrôler, parceque le premier ne comprenait pas le langage du testateur et que le second ne comprenait pas celui du testament. En France, où la loi exige que tous les actes soient rédigés en langue française, la question s'est souvent présentée, si un étranger qui n'entendait pas la langue française pouvait y faire un testament. Les tribunaux ont décidé qu'il le pouvait, mais à la condition que le notaire et les témoins entendissent la langue du testateur et celle dans laquelle le testament était rédigé, et les auteurs recommandent que dans ce cas le notaire rédige le testament en français et mette en regard une traduction dans la langue du testateur. Il est évident qu'ici le notaire ne pouvait faire cette traduction puisqu'il n'entendait pas un mot de Gaëlic, qui était le seul idiome dont les testateurs se servaient. Pour ces raisons, le jugement doit être infirmé et les testaments déclarés faux.

M. LE JUGE BADGLEY concourait dans les motifs exprimés par le savant juge qui l'avait précédé. Les testaments argués de faux n'étaient pas l'œuvre des tes-

tateurs, mais bien du témoin Grinsell qui seul avait compris les testateurs et le notaire. L'on ne pouvait donc pas dire que ces testaments fussent l'expression des volontés des testateurs. Sous un autre rapport le testament de Kenneth McLennan devait encore être annulé. La minute portait la date du 3 Septembre 1840, tandis que l'expédition produite par l'intimé était du 3 Septembre 1847. Or la minute et la copie ne pouvaient pas être toutes deux authentiques, et cependant porter une date différente, l'une ou l'autre devait être fausse. Il était d'ailleurs prouvé que ce testament avait été fait longtemps après 1840, et comme tout acte authentique, et surtout lorsque cet acte est un testament, doit avoir un date certaine, ainsi que l'ordonnance de Blois l'exige, il est évident que le testament de Kenneth McLennan n'a pas de date certaine et que pour cette raison il devrait être déclaré faux.

DUVAL, JUGE EN CHEF. Il n'est pas nécessaire de citer beaucoup d'autorités pour faire voir que ces testaments sont radicalement nuls et faux. Si le notaire et le témoin Morison étaient appelés en témoignage et que l'on demanderait au notaire ce que les testateurs lui ont dicté, il serait obligé d'avouer qu'il n'en sait rien. De même si Morrison était interrogé sur ce que le notaire a lu aux testateurs, il admettrait qu'il n'y a rien compris. Cela suffit pour démontrer que ces testaments ne peuvent être maintenus, et la Cour est unanime à infirmer le jugement de la Cour Supérieure.

Le jugement a été motivé comme suit:

La Cour, * * * Considérant que d'après l'article 289 de la coutume de Paris, qui est la loi qui régit cette cause, pour réputer un testament solennel passé par un notaire et deux témoins, il faut qu'il soit dicté et nommé au notaire par le testateur, et que ce testament lui soit lu et relu en présence du notaire et des témoins; que cette dictée ne peut avoir lieu dans le cas où le notaire, qui prétend recevoir un testament, ne comprend pas le langage du testateur, et également que la lecture ordonnée par la coutume ne peut se faire valablement que quand le testateur comprend la langue dans laquelle le testament a été écrit et lui est lu; qu'interpréter autrement cette disposition ne ferait que prescrire, pour cette dictée, et cette lecture, l'accomplissement de formes vaines, n'ayant aucun objet utile et dont l'omission ne pourrait affecter la validité du testament, et que cette interprétation non seulement pervertirait le but de la loi, mais serait en contradiction directe de la jurisprudence constante et établie en France et dans ce pays, sous cet article de la coutume :

Considérant que les témoins appelés au testament pour remplir le but de cette vocation, qui est de contrôler, la rédaction de l'acte, doivent comprendre la langue dans laquelle le testament a été dicté par le testateur au notaire et écrit par ce dernier, afin de s'assurer si le testament a été écrit tel qu'il a été dicté, et lu tel qu'il a été écrit, et que la présence de deux témoins qui n'auraient pas cette connaissance ne remplirait pas le but de la loi :

Considérant que les testaments argués de faux de Kenneth McLennan et de Catherine McLeod ont été reçus par un notaire qui n'entendait pas la langue Gallique, le seul idiome connu des testateurs, et ont été écrits en français, langue ignorée d'eux; que les dits testaments n'ont pas par conséquent été dictés directement par le testateur dans la langue dans laquelle ils ont été écrits, mais

McLennan et Dewar.

qu'ils ont été dictés par les testateurs en Gallique et traduits au notaire en français par John Grinsell, un des témoins appelés aux testaments, et qu'ils ont été par le notaire lus en français et traduits en Gallique par le dit John Grinsell, ce qui n'a pas constitué la dictée et la lecture voulues par la coutume, et qu'au contraire cette dictée et cette lecture ont été des actes auxquels la loi ne peut reconnaître aucun effet légal et qu'elle ne peut traiter que comme entachés de nullité :

Considérant qu'à part cette imperfection résultant de l'ignorance réciproque des langues des testateurs et du notaire, et du vice de la dictée par interprète, il appert que les testaments en question sont encore entachés de nullité par le fait que l'un des témoins appelés aux dits testaments, savoir, Norman Morrison, ne comprenait pas la langue française dans laquelle ils ont été rédigés, ignorance qui a fait défaillir le but de la vocation de ce témoin, qui a été de contrôler la dictée et la lecture de ces testaments comme susdit, et que ce témoin ne peut être considéré comme ayant été présent aux testaments qui ne peuvent pas être traités comme ayant été reçus devant un notaire et deux témoins :

Considérant que les testaments en question n'ont pas été, suivant le vœu de la loi, dictés et nommés par les testateurs au notaire et par lui à eux lus et relus en présence des témoins et ne sont pas partant des testaments solennels, qu'ils ne peuvent être convertis en aucune autre forme valable n'étant ni mystiques ni olographes et n'ayant pas les conditions voulues par les lois anglaises pour constituer des testaments valables dans la forme anglaise, qu'ils doivent être considérés comme des nullités complètes pour les raisons susdites ; et qu'il n'y a pas lieu de prononcer sur les autres moyens de faux de l'appelant, tirés de la fausseté de leurs dates, ni du défaut de conformité des dates entre les minutes et les copies pour déclarer faux les dits testaments, que le notaire affirme avoir été dictés par les testateurs et à eux lus et relus, et qu'il y a mal jugé dans les jugements qui en ont maintenu la validité et rejeté l'inscription de faux de l'appelant, a cassé et casse, &c., &c."

Le jugement de la Cour Inférieure infirmé.

Dorion, Dorion & Geoffrion, pour l'appelant.

Doutre & Doutre, pour l'intimé.

(V. P. W. D.)

MONTREAL, 9 DECEMBRE, 1868.

Coram DUVAL, JUGE EN CHEF, CARON, J., DRUMMOND, J., BADGLEY, J., LORANGER, J. A.

No. 54.

AMABLE PREVOST,
(*Défendeur en Cour Inférieure,*)
APPELANT ;

ET

AUGUSTIN PERRAULT, *et al.*,
(*Demandeurs en Cour Supérieure,*)
INTIMÉS.

JUGE :—Qu'avant le code, le propriétaire qui voulait bâtir dans la ligne séparant son héritage de celui du voisin avait le droit de prendre la moitié de l'épaisseur de son mur sur le terrain voisin, pourvu que l'épaisseur totale du mur n'excédât pas dix huit pouces, et cela lors même qu'il existait déjà une clôture en bois séparant les deux héritages.

L'appelant et les intimés sont propriétaires de terrains contigus situés sur la

Prévost et Perrault.

Place Jacques-Cartier, dans la cité de Montréal. En bâtissant, l'appelant a placé sa maison dans la ligne qui sépare les deux héritages, appuyant le pignon sud-est partie sur son propre terrain et partie sur celui des intimés. Cette maison est à quatre étages et le mur du pignon a seize pouces d'épaisseur. L'appelant a pris sept pouces de terrain chez les intimés, fournissant lui-même ce qu'il lui fallait pour compléter l'épaisseur de son mur.

Les intimés ont vu dans cet acte une empiétation de la part de l'appelant et ils ont porté, contre lui, une action *en dénonciation de nouvel œuvre*, par laquelle ils ont conclu à ce que l'appelant fut condamné à démolir son mur et à leur payer £500 de dommages.

Ils alléguaient spécialement, qu'ils avaient un passage le long du terrain de l'appelant pour communiquer de la rue à la cour de leur maison, qui était louée comme hotellerie; que ce passage avait existé de temps immémorial, et qu'il n'avait que la largeur rigoureusement nécessaire pour permettre aux voitures d'y passer; que l'appelant, en prenant sept pouces de terrain sur la largeur de ce passage pour y asseoir son mur, l'avait rendu si étroit que les intimés ne pouvaient plus y poser une porte de cour et s'en servir; que ce passage, devenant inutile, dépréciait notablement la valeur de leur propriété, tandisque ces sept pouces de terrain n'ajoutaient rien à la valeur de celle de l'appelant.

A cette action, l'appelant a répondu, que par la loi, il avait le droit de placer la moitié de l'épaisseur de son mur sur le terrain de l'intimé; que quoique son mur eut seize pouces d'épaisseur, il n'en avait pris que sept chez les intimés, et qu'en le faisant, il avait exercé un droit que la loi lui accordait; que d'ailleurs le passage de la propriété des intimés était encore assez large pour permettre aux plus grandes voitures d'y passer et qu'il ne leur avait causé aucun dommage.

Les intimés, se fondant sur la position relative des deux héritages, prétendaient que le droit de mitoyenneté était une servitude que l'appelant ne pouvait exercer qu'en autant qu'il lui en résultait un avantage réel et qu'il ne leur causait aucun dommage; que dans le cas actuel, l'appelant n'avait aucun intérêt à exercer cette servitude et les intimés un très grand à l'en empêcher.

L'appelant invoquait l'article 209 de la coutume qui oblige les propriétaires dans la ville et faubourgs de Paris, à séparer leurs héritages et à contribuer à la confection des murs de séparation jusqu'à la hauteur de dix pieds; les articles 196 et 198, qui permettent à un voisin de bâtir sur un mur de clôture et sur un mur mitoyen, et l'article 194, qui autorise un voisin à bâtir contre un mur non mitoyen en payant la moitié de ce mur.

Il invoquait en outre l'opinion unanime des auteurs et la jurisprudence des tribunaux, tant en France que ceux du pays, qui ont de tout temps jugé qu'un propriétaire avait le droit de contraindre son voisin à fournir jusqu'à neuf pouces de terrain pour y asseoir la moitié du mur de séparation entre leurs héritages, jurisprudence reconnue par les codificateurs et adoptée dans l'article 520 du Code Civil du Bas-Canada, qui précise la règle que l'on suivait autrefois à Paris, en fixant à neuf pouces la largeur du terrain que les voisins peuvent exiger pour y asseoir les murs séparant leurs héritages. (1)

(1) Desgodets sur l'Art. 194, C. de Paris, p. 123.—Note A. Obs. de Goupy: "..... "il est permis à celui qui bâtit le premier d'asseoir le mur qui sépare son héritage d'avec "celui de son voisin moitié sur son terrain et moitié sur son voisin."

Desgodets, p. 140, No. 32.—" Si celui qui a fait bâtir le premier, avait fait une cloison " ou pan de bois de charpente, au lieu d'un mur joignant sans moyen à l'héritage de son " voisin, si le voisin voulait bâtir contre, il pourrait obliger le premier à démolir son pan " de bois et à contribuer pour la part dont il serait tenu, à reconstruire un mur mitoyen " à frais commun...."

Ferrière sur l'art. 187 de la Coutume de Paris, t. 2, p. 1573.

No. 7. " Celui qui bâtit le premier en place non close de mur peut prendre la moitié " de l'épaisseur de son voisin pour porter son mur, pourvu que l'épaisseur entière du mur " n'excède pas dix-huit pouces."

Desgodets, p. 147.

No. 6. " Les architectes expérimentés conviennent que les murs mitoyens qui servent " à porter des édifices devraient être de dix-huit pouces, ou au moins de quinze pouces " d'épaisseur, et que ceux qui auraient moins de quinze pouces d'épaisseur ne peuvent " pas être mitoyens: ainsi, aux murs mitoyens qui auraient moins d'épaisseur l'on doit " prendre du terrain également des deux côtés pour les fortifier à l'épaisseur de quinze " pouces."

Idem No. 7 et No. 6.

Do p. 278, No. 12; p. 279, No. 13; p. 281, No. 14; p. 282, No. 15.

Coutume d'Orléans, art. 236.

Perrault, Décisions du Conseil Supérieur, p. 33, No. 89.

Cette action était portée contre un tuteur pour l'obliger à construire un mur de clôture et à fournir neuf pouces de terrain. Ce tuteur répondait qu'il avait une bonne clôture en pieux debout et qu'il serait très-onéreux à son pupille qui était pauvre de construire un mur en pierres. L'action fut déboutée, mais sur appel au conseil supérieur le jugement fut renversé et le tuteur fut condamné à contribuer à la confection du mur et à fournir neuf pouces de terrain.

Code Civil du B. C., art. 520.

Les Codificateurs sur l'art. 22 du projet de code (art. 520 du code) disent: " Ces " dispositions prises de la Coutume de Paris (art. 209) sont conformes à notre jurisprudence actuelle "

Demolombe, des Servitudes, t. 1, p. 454, No. 385; p. 455 et suivante, No. 386.

Pandectes Françaises, t. 11, p. 432 et 433.

Et il ajoutait qu'en supposant que la construction de son mur eut causé quelques dommages aux intimés, ces dommages n'étaient que la conséquence de l'exercice d'un droit légitime, et qu'il n'en était pas responsable.*

La Cour Inférieure, M. LE JUGE MONK siégeant, avait adoptée les vues des intimés, et condamné l'appelant à démolir son mur et à payer les frais.

Ce jugement a été infirmé.

M. LE JUGE BADGLEY, en prononçant le jugement, a fait remarquer que le droit du propriétaire de construire un mur mitoyen entre son héritage et celui de son voisin était fondé sur l'intérêt public et non sur le plus ou moins d'intérêt que chaque voisin en particulier pouvait avoir à faire ou empêcher cette construction; que le droit d'asseoir le mur par moitié sur chaque héritage, lorsque c'était un mur de dimensions ordinaires et n'excédant pas dix-huit pouces, était indubitable, tant avant que sous le code, et que l'appelant au lieu de prendre neuf pouces sur le terrain des intimés, comme il aurait eu le droit de le faire s'il avait construit [illegible] dix-huit pouces, n'avait réellement pris que sept pouces, ce qui n'était [illegible] la moitié de l'épaisseur de son mur; que quant aux dom-

*Demolombe, des servitudes, T. 1, No. 406.

Prévost et Ferrault

mages que les intimés prétendaient avoir souffert, cela ne pouvait avoir aucune influence sur la cause, mais qu'en fait ils n'en avaient pas prouvé; que quoique le passage eut été retréci de sept pouces par la construction du mur, il était encore suffisant pour tous les besoins ordinaires, puisque l'on y fesait passer facilement les plus gros voyages de foin et les plus grandes voitures des charretiers du Grand Trone; qu'il y avait un fait qui avait été prouvé et qui fesait voir que les intimés n'ont pas toujours considéré le droit des propriétaires relativement à la construction des murs mitoyens, comme ils le fesaient maintenant, c'est qu'il y a quelques années, ils avaient fait construire un batiment, dans la profondeur de leur terrain, en arrière de celui de l'appelant, et qu'ils ont forcé celui-ci à leur fournir neuf pouces de terrain pour appuyer leur mur, et cela nonobstant l'opposition de l'appelant qui alléguât alors que ce mur lui serait nuisible en diminuant la grandeur de sa cour qui était déjà trop petite. Ainsi soit au point de vue des faits ou du droit, les intimés n'avaient aucune raison de se plaindre, et le jugement de la Cour Inférieure devait être infirmé, et l'action des intimés déboutée avec dépens.

CARON, J.—Les parties sont propriétaires de terrains contigus, situés en la cité de Montreal, séparés jusqu'en 1865 par une clôture de planches leur servant de ligne limitative.

Entre cette clôture et la maison des intimés, existait depuis plus de 30 ans, un passage (sujet du présent litige) de 7 pieds 5 pouces de large, appartenant exclusivement à l'emplacement des intimés, et étant le seul moyen d'y communiquer en profondeur.

De son côté entre la clôture et la maison de l'appelant était aussi un passage plus étroit lui appartenant, et dont il est inutile de parler d'avantage.

En 1865, l'appelant fit abattre la vieille maison qui existait sur son emplacement pour la remplacer par une construction considérable qu'il voulut ériger sur tout le front de son terrain. A cette fin, il crut que non-seulement il aurait droit de placer son mur, avoisinant les intimés, à la place de la clôture de planches, mais qu'il lui était loisible de placer le mur qui devait à l'avenir séparer leurs héritages respectifs, pour moitié de son épaisseur, sur le terrain des intimés.

Sous cette impression, après avoir notifié ces derniers de son intention, il a assis ce mur, qui a 16 pouces anglais d'épaisseur, sur le terrain des intimés pour une épaisseur de sept pouces français, en prenant sur son propre terrain le reste de l'épaisseur du dit mur. Par suite de cette opération le passage des intimés se trouve réduit d'autant.

C'est de cette réduction que se plaignent les intimés, qui, après avoir notifié le défendeur de leur objection à aucun changement des lieux, et protesté contre ce qu'ils appellent une empiétation illégale sur leur terrain, ont porté la présente action par laquelle ils demandent la démolition du mur, et aussi des dommages intérêts pour son exécution.

La Cour de première instance (la Cour Supérieure, siégeant à Montréal) leur a accordé l'une et l'autre demande par son jugement du 31 décembre 1866, duquel est interjeté le présent appel.

Les motifs de ce jugement peuvent se résumer comme suit:

Prévost et Perrault.

Le défendeur, en plaçant son mur, contre le gré des intimés, pour partie sur leur terrain, a commis une impiétation, dont ils ont droit de se plaindre, parcequo par là leur passage est diminué de largeur à leur grand préjudice, sans nécessité et sans aucun avantage pour le défendeur. Que pour justifier cette impiétation, il faudrait montrer une loi expresse, une convention entre les parties ou une nécessité manifeste. Qu'en loi, une clôture mitoyenne ne peut être convertie en *mur mitoyen* sans nécessité, contre le gré du voisin, et sans que le changement soit pour le bénéfice commun et mutuel des propriétaires. Que dans l'espèce rien de tout cela n'existe; et que partant c'est injustement et illégalement que le défendeur a bâti sur le terrain des demandeurs.

L'appelant conteste ces diverses propositions et prétend qu'elles ne sont fondées ni en fait ni en droit.

Il soutient que, d'après la loi en force en ce pays, tout propriétaire a droit de contraindre son voisin à fournir la moitié du terrain sur lequel doit être érigé un mur mitoyen, pourvu qu'il n'excède pas l'épaisseur de 18 pouces; que l'excédant doit être fourni par celui des deux voisins pour qui cette épaisseur ne suffit pas; que ce droit peut être exercé indépendamment du consentement du voisin, même dans le cas où ce dernier en souffrirait du préjudice, et sans être obligé d'établir que celui qui l'exerce en retirera de l'avantage et que la chose lui est nécessaire.

Pour soutenir ces prétentions l'appelant cite un nombre d'autorités que l'on trouvera au bas de la page 3 de son Factum. A ces citations l'on peut ajouter les suivantes:

Pothier—Société, N° 202 et 212.

II, Marcadé, N° 602.—II, Demolombe, N° 623.

Les extraits des régistres de la prévoté de Québec, par Perrault, page 73.

Berthelot et Sabourin, et aussi:

The Canadian Extracts, page 49, pour établir que les articles de la coutume de Paris 96 et 98, étaient alors (en 1772) en force dans le pays; II Ligneville N° 500, p. 11.

Par toutes ces autorités il est clairement établi: qu'en France, comme dans ce pays, d'après la loi ancienne comme d'après la moderne, le droit reclamé et exercé par l'appelant a toujours été reconnu par les tribunaux, et fait jurisprudence parmi nous.

Les codificateurs ont été d'avis que ce droit était la loi du pays; ils l'ont soumis comme tel à la législature qui leur a donné raison en sanctionnant l'article 520 de notre Code Canadien, qui le reconnait comme étant la loi existante lors de sa promulgation.

De leur côté les intimés ont cité plusieurs autorités: (Demolombe, Demante, Fremy-Ligneville, Solon,) dans la vue d'établir que la faculté de forcer son voisin à porter sur son terrain une partie du mur mitoyen, n'était pas un droit général, universel, exigible dans tous les cas, mais seulement accidentel, dépendant des circonstances et exigibles à la discrétion des tribunaux, suivant que l'exercice en est plus ou moins avantageux, profitable ou nuisible à l'un ou à l'autre des propriétaires.

Dans cet effort les intimés ont entièrement failli; leurs autorités établissent le principe tel que nous l'avons posé; seulement elles vont à dire que vu que l'exercice du droit en question est dans certains cas restrictif du droit de propriété,

L'prévost et l'errault.

il doit, comme tous les droits de ce genre, être restreint dans ses justes limites, et ne doit jamais être étendu au delà.

L'existence du droit une fois établie, l'on ne doit payer aucune attention aux considérations d'équité et de convenance invoqués par les intimés, lorsqu'ils disent que l'appelant en prenant partie de leur terrain, détruit leur passage, leur fait un grand dommage, et cela sans avantage pour lui-même.

D'abord il n'est pas vrai, d'après la preuve, que le passage, dans l'état où il est depuis la construction du mur dont se plaignent les intimés, leur soit devenu impraticable et inutile.

Le témoignage constate que, quoique plus étroit ou moins commode qu'auparavant, ce passage est encore très-praticable et suffisant pour les usages ordinaires; mais en supposant qu'il en fut autrement, ne peut-on pas leur dire (aux intimés) à qui la faute? (page 3 de leur Factum)—N'est-ce pas à vous, qui, devant connaître la loi, deviez prévoir qu'un jour on pourrait vous faire la demande qui vous a été faite par l'appelant, alors pourquoi, vous, ou votre auteur n'a-t-il pas laissé entre la maison qu'il a bâtie et la ligne de division un espace suffisant pour rencontrer l'éventualité qui se présente aujourd'hui. Il a voulu faire sa maison quelques pouces plus longue, l'appelant veut en faire autant pour la sienne; pourquoi refuser à l'un d'eux ce que l'autre s'est arrogé de lui-même. Mais pour faire ressortir d'avantage l'injustice des prétentions des intimés, supposons que le jugement dont est appel, soit mis à exécution, et que le mur de l'appelant soit démoli, il faudra, comme de raison, le rebâtir en entier sur son propre terrain: aussitôt que la chose sera faite, les intimés pourront forcer l'appelant à leur céder la mitoyenneté dans ce nouveau mur et dans le terrain sur lequel il sera édifié; par suite de quoi ils se trouveront avoir forcément obtenu de l'appelant une partie de son terrain justement pour épargner le leur. N'aurait-il pas été plus juste et surtout plus légal, lorsqu'ils ont vu l'appelant en frais de construire le mur, de faire avec lui quelqu'arrangement qui les aurait mis à l'abri de l'embarras dans lequel ils prétendent se trouver maintenant.

Quant à la question de savoir si les quelques pouces de terrain sur lesquels est assi le mur est ou non de quelque valeur pour l'appelant, ce n'est certainement pas aux intimés à la décider; l'appelant est et doit être le meilleur juge de ses propres intérêts; si son droit existe, il peut l'exercer, sans être tenu de rendre aux intimés aucun compte de ses motifs.

Pour toutes ces raisons je suis d'avis que le jugement est erroné, et doit être infirmé, et l'action des intimés renvoyée avec dépens.

Le jugement a été motivé comme suit:—La cour * * * considérant que par la loi qui régit les servitudes réelles, établies sans convention mais par la seule opération du droit et les usages suivis en ce pays, le propriétaire d'un immeuble situé dans une cité ou ville et sur lequel il érige un mur de séparation de son héritage d'avec celui de son voisin, a droit de l'asseoir de neuf pouces sur le terrain de son voisin et que ce droit s'exerce sans indemnité, mais seulement aux charges ordinaires de la mitoyenneté; que cette disposition prise de la coutume de Paris est conforme à la jurisprudence de ce pays, et que l'article cinq cent vingt du code civil qui porte que "chacun peut contraindre son voisin dans les cités et villes à contribuer à la construction du mur de clôture faisant séparation

Prévost et Perrault.

de leurs maisons, cours et jardins jusqu'à la hauteur de dix pieds sur une épaisseur de dix-huit pouces, chacun des voisins devant fournir neuf pouces de terrain," n'a fait que confirmer la loi telle qu'elle existait lors de sa promulgation

Qu'en prenant sept pouces, mesure française, du terrain des intimés pour bâtir sur le sien le pignon de la maison qu'il a érigée en la cité de Montréal, lequel pignon est devenu par le fait même un mur de séparation entre les terrains respectifs des parties et mitoyens entre elles (la mitoyenneté se présumant s'il n'existe de titre contraire, lequel titre n'existe pas dans la présente espèce) l'appelant n'a fait qu'user d'un droit que la loi lui reconnaissait, et qu'en exerçant ce droit il ne peut être taxé de l'intention de nuire aux intimés, les motifs de celui qui exerce un droit légitime, ne pouvant être mis en question par la partie qui est tenue d'en supporter l'exercice: Considérant de plus que ce tribunal reconnaissant à l'appelant le droit de construire le pignon de sa maison pour partie sur le terrain des intimés et de l'y asseoir de sept pouces mesure française ainsi qu'il l'a fait, devient inutile d'apprécier les conséquences de cet acte et d'examiner les questions soulevées entre les parties sur la suffisance ou l'insuffisance du passage des intimés, retréci par l'érection de ce pignon, la raison générale de la loi faisant taire ici, les réclamations particulières élevées contre l'exercice d'un droit par elle reconnu: Considérant enfin que la cour de première instance a mal à propos denié à l'appelant l'exercice de son droit en le condamnant à démolir le pignon en question et à payer des dommages, et qu'il y a erreur et mal jugé dans le jugement portant ces condamnations, savoir le jugement rendu le trente-unième jour de décembre mil huit cent soixante-six, par la Cour Supérieure, siégeant à Montréal, a infirmé et infirme, cassé et casse le dit jugement, et faisant ce que le premier juge aurait dû faire, a débouté et déboute les intimés de leur action avec dépens faits devant les deux cours.

Le jugement de la Cour inférieure infirmé.

Dorion, Dorion & Geoffrion, pour l'appelant.

Jetté et Archambault, pour les intimés.

(V. P. W. D. & S. B.)

SUPERIOR COURT, 1869.

MONTREAL, 20TH APRIL, 1869.

No. 612.

Fulton vs. *Stevenson et al.*

Coram BEAUDRY, J.

HELD:—That a suit wherein the plaintiff avers in action for illegal and malicious attachment "injury to credit, name and reputation and brought into disgrace," is triable by jury under art. 348, Code de Procédure.

The action was brought to recover damages for illegal and malicious attachment, "injury to credit, name and reputation, etc."

A motion was made by plaintiff to reject the declaration of option for trial by jury made by the defendants in their first and second pleas.

The motion was rejected with costs.

Motion rejected.

Carter & Hatton for plaintiff.

Perkins & Ramsay for defendants.

(J. A. P. jr.)

COMMON PLEAS—ONTARIO, 1868.

Coram WILSON, J.

In re *Moore* vs. *Luce*.

INSOLVENCY—DEBT NOT MATURED—RIGHT OF CREDITOR TO COMMENCE PROCEEDINGS.

HELD:—Under the Insolvent Acts a creditor, whose debt is immatured, may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time. But in this case, it appearing that the debtor did not owe more than $100 beyond the creditor's debt, none of which was at the time due, and a portion not payable for several years to come, the Court directed that he should be allowed further time to shew, if he could, that he was not, in fact, insolvent, and so not liable to have his estate placed in compulsory liquidation.

A writ of attachment in insolvency was issued on the 25th of March, 1868, on the usual affidavits. The principal affidavit was made by R. P. Luce, the agent of the creditor, who stated, among other facts, that John R. Moore "is indebted to the plaintiff in the sum of $866.65 currency, for principal money accruing due upon eight promissory notes, hereunto annexed, made by said defendant: to the best of my belief and knowledge, the defendant is insolvent."

This affidavit was made on the 9th of March, 1868.

The first note was payable at two years, and each of the other notes was payable respectively, at three, four, five, six, seven, eight, and nine years.

The debtor petitioned the Judge of the County Court of the County of Elgin on the 28th of March, 1865, to set aside the attachment, because his estate had not become subject to compulsory liquidation, as he was quite solvent, and the notes mentioned were not due.

The petition was argued before the learned Judge in the Court below, and the following judgment rendered:

D. J. HUGHES, J.—I have carefully considered all the reasons urged in favor of the petition, as well as those against it, and the affidavit on which the fiat was made which formed the groundwork of those proceedings; but I have had no evidence furnished me as the 12th subsection of sec. 3 of the Insolvent Act requires.

The 7th subsection of the Insolvent Act of 1864, s. 3, enacts that in U. Canada in case any creditor by affidavit of himself or any other individual (which, as suggested by form "F," may be an individual who will swear that he is the Clerk or Agent of the plaintiff duly authorised for the purpose of procuring the proceedings) shews to the satisfaction of the judge *that he is a creditor of the insolvent for a sum not less than* $200, and also shews by the affidavits of two credible persons such facts and circumstances as satisfy such judge that the debtor is insolvent within the meaning of the Act, and that his estate has become subject to compulsory liquidation, such judge may order the issue of a writ of attachment, &c.

The 3rd Section (subsections, "a" to "i" inclusive) shews the various grounds upon which or for the doing whereof a debtor shall be deemed insolvent, and which shall subject his estate to compulsory liquidation;—the 1st (a) is if he absconds or is immediately about to abscond from the Province of Canada as it was formerly constituted (that is from Ontario and Quebec), with intent to defraud any creditor, or to defeat or delay the remedy of any creditor, or to avoid being arrested or served with legal process, &c. The 2nd (b) refers to the secret-

Moore vs. Lusc.

ing of his estate—and the 3rd (c) provides that if he assigns, removes or disposes of, or is about or attempts to assign, remove or dispose of any of his property with intent to defraud, defeat or delay *his creditors* or any of them."

The defendant's counsel urged as in the petition set forth—1st, that because the promissory notes constituting the debt referred to in the affidavits filed, upon which the fiat issued—are *solvendum in futuro* and not yet due, the plaintiff cannot be regarded as a creditor of the defendant within the meaning of the 7th subsection of the 3rd section.

2nd—That it is not a good attaching creditor's debt under the Insolvent Act or one for which an action at law can now be maintained.

4th—That the defendant's estate is not liable to compulsory liquidation, and that he is not insolvent within the meaning of the statute for the reasons given by him, and urging that the affidavits of the plaintiff's agent and others do not disclose sufficient reasons.

I shall dispose of the legal questions first, and then give the reasons for not setting aside the attachment upon the other grounds, that is, upon the allegation of facts set forth in the defendant's petition :—1st. I think the plaintiff in the first instance made out all that was required of him with regard to his being a creditor of the defendant, for the following reasons. The 5th subsection of the 12th section gives an interpretation of certain words, amongst others the word "*creditor* is to be held to mean every person to whom the defendant (the insolvent) is liable, whether primarily or secondarily and whether as principal or surety; but no debt is to be doubly represented, or ranked for, &c.; so that as I understand the 7th subsection of the 3rd section, all that the plaintiff had to do under this head was to make out that he was a creditor of the defendant for a sum not less than $200, and it was not necessary for him to prove what the nature of his debt was, beyond substantiating that the plaintiff and defendant respectively bore the relation towards each other of creditor and debtor, and that the defendant was liable to the plaintiff for a debt of at least the given sum ($200) and to shew an act of insolvency. A liability is all that is necessary to subsist in order to constitute the man who owes it a debtor, and the man to whom it is owed a creditor. A debt under the garnishee clauses of the Common Law Procedure Act is no less attachable because it is not due; and there must be a debt although it may not be due in point of payment (vide Jones vs Thomson, 31 L. T. Reports, 80 E. B. & E. 62. S. C.)

I do not find that it was requisite for the debt to be due; the 6th subsection applies exclusively to Lower Canada, and although that requires that the *particulars of the debt* should be set forth it does not require that a debt overdue should be shewn. The 7th subsection applies to Upper Canada exclusively and *that* does not even require that the particulars of the debt should be set forth either overdue or not overdue as the 6th subsection does. The form "F" in the schedule is referred to in both subsections (I apprehend the form could not be read as either enlarging or qualifying the provisions of 7th subsection but as suggestive merely of a matter of form : Boyle vs Ward, 11 U. C. Reports 416.) I do not find anything whatever either in the body of the enacting clause or in the form which requires the affidavit of the plaintiff to set forth that he is a

creditor for any particular kind of debt or for an overdue debt as would undoubtedly be required of him supposing he were applying for a writ of Capias, or an attachment under the Absconding Debtors Act. Under the old Statute of U. C., 2 Geo. 4, Cap. 1, Sec. 8:—5 Wm. 4, Cap. 3, the creditor was obliged to shew a cause of action consummate and not inchoate before a bailable writ of *Ca. re.* could issue to hold defendant to bail. The same was required under 8 Vic. Cap. 48, Sec. 44. The same is required under C. S. of U. C., Cap. 24, Sec. 1, and in order to hold a defendant to bail now, under 5th Section of Con. Stat. of U. C., Cap. 24, a "*cause of action*" must be sworn to exist. In the 1st section of the Absconding Debtors Act of U. C., 2nd Wm. 4, Cap. 5, the wording was peculiar, but shewed a necessity for alleging in the affidavit of the creditor an existing *cause of action*. The expressions were: "*If any person or persons*" "*being indebted, &c., shall secretly depart, &c., it shall be lawful for any person*" "*or persons, &c., to whom such absconding person, &c., is indebted, &c., to make application, &c., and then make affidavit that the absconding person, &c., is indebted to him, &c., in the sum of £5, expressing the cause of action.*" A similar provision is contained in the second section of the Con. Stat. of U. C., 25th Cap.

Under the Insolvent Act of 1864, I find nothing to confine the operation of the 7th subsection to an existing "*cause of action*", or requiring the expression of a cause of action in the affidavit. I make no doubt whatever that the Act has been mainly founded upon the Imperial Bankrupt Acts, and intended, as its preamble sets forth, to make provision for the estates of insolvent debtors, for giving effect to arrangements between them and their creditors, and for the punishment of fraud. I regard the intention to have been to afford means for putting a debtor's estate in compulsory liquidation:

1st. Where he has absconded, or 2nd. Where he is about to abscond from the Province with intent to defraud any creditor, or to defeat or delay the remedy of a creditor, or to avoid being arrested or served with legal process; or if being out of the Province (that is as I understand it, where he has not actually absconded) he remains out with a like intent, or if he conceals himself within the Province with a like intent. All this I take to refer to the fact of a cause of action subsisting and consummate, and that in order to make out an act of insolvency under the subsection "A" of section 3 it would be necessary to shew a cause of action to have matured; because in order to defeat or delay *the remedy* of a creditor, or to avoid being arrested or served with process, there must, I should imagine, be shown not only a subsisting and consummated cause of action, upon which the creditor, by the ordinary proceedings of a Court of Law, might have his remedy, or arrest the person of his debtor or serve him with process; but he must have absconded or be immediately about to abscond with intent to defraud his creditors, or defeat or delay his remedy, to constitute the act of insolvency. Under subsections "B" and "C" although the words "*defeat*" and "*delay*" are made use of—the words "*the remedy of his creditors*" are not made use of; but in subsection "B" the words "*with intent to defraud his creditors or to defeat or delay their demands, or any of them,*" are employed, whilst in subsection "C" the words "*with intent to defraud, defeat or delay his creditors, or any of them,*" are employed, without the use of the words "*or to defeat or delay their demands.*"

Moore vs. Luce.

The word "creditor" in the English Bankruptcy Act of 1849, sec. 112, has lately undergone construction in the Court of C. P. in England in the case of Phillips vs. Poland, H. T. 1865, 1 L. R. 206 (C. P.), and Woods against De Mattos, 1 L. R. Ex. 91, M. Term 1865. Willes, J., in his judgment says: "Does it mean any "creditor for any debt? Or does it mean a creditor who can come in under the "Bankruptcy and have the benefit of it? I apprehend that the latter is the true "construction. The rule is clear that general words are to be construed gener- "ally unless there is something in the Act which shows that such was not the in- "tention of the Legislature. But it is clear, also, that general words are to be re- "strained to the matter with which the Act is dealing; and if it be dealing with some particular species only, the general words must be limited to that species "except when it can be shown to be dealing with something larger." Now if the word "*creditor*" in this Act is to be held to mean "every person to whom the de- "fendant is liable whether primarily or secondarily, and whether as principal or "surety," I can see no reason for restricting the meaning, but rather for making application of it in its most extensive sense, so that any creditor can come within its terms and make use of its provisions, and that it means "*any creditor for any debt*;" and proceedings in insolvency under our statute of 1864 are not adopted like an ordinary suit, commenced by proceedings under the Absconding Debtors Act, or by bailable process, for the sole benefit of a plaintiff prosecuting in his own behalf and upon his own claim; but as proceedings under the winding-up Acts and Bankruptcy proceedings in England may be prosecuted, as well for the petitioning creditor as for the benefit of the body of creditors at large. Were it not for the peculiar construction to be placed upon the word "*creditor*," and the peculiar provisions and wording of the 7th subsection of the 3rd section, there is abundance of authority for the defendant's contention here, that the debt must be due before the creditor can make any application to place the estate of a debtor in compulsory liquidation; amongst others are the cases of Richmond vs. Heapy et al, 1 Stark. 203; Price vs. Noxon, 5 Taunt. 338, under the old Bankrupt Act in England; but the cases of Simpson vs. Sykes, C. M. & S. 295; Starly vs. Barns, 7 East 435; and exparte Donthat, 4 Barn. & Al. 67; and in re John Charles, a Bankrupt, 14 East 197; Exparte Hawthorn, Mont. 132; Buckland vs. Newsome, 1 Taunt. 477, 1 *Camp.* 474, are authorities the other way, see also Archbold's Bankruptcy Law, 10 Ed. 89.

I am therefore disposed to think that this Insolvent Act was intended more fully to prevent frauds by debtors upon creditors, and to make it more difficult for them so to dispose of their property, as that it should be placed beyond the reach of their creditors, when the time might come for it to be sought after by a Sheriff's Officer. If the 7th subsection bears any other construction than the one I have given it, all that a fraudulently disposed debtor would have to do, would be to get his creditors to accept promissory notes for short periods for all the debts he owes, then sell all his property, put the money in his pocket and set his creditors at defiance, and go where he liked, as many a man has done heretofore. Under the 7th subsection in Upper Canada I think all the creditor has to do is by affidavit to show to the satisfaction of the judge, that he is a creditor of

the insolvent for a sum of not less than $200 and that the debtor is insolvent—without anything whatever being required, setting forth the particulars of his debt or that it is due.

There is no doubt whatever that the plaintiff, under the 2nd subsection of the 5th section, might have proved his claim before the assignee and shared in a dividend, subject to a rebate of interest, and to have ranked upon the estate of the defendant supposing he had become insolvent and his estate had been placed in liquidation by other means than the plaintiff's own, so that in that case the word creditor as in the interpretation clause would undoubtedly apply.

Under the Imperial Bankruptcy Act of 1861 (24 and 25 Vict., c. 134), it has been held that the word "*creditor*" means any person who could have proved against the debtor's estate—see Wood vs. De Mattos, 1 L. R. (Ex.) 91, (M.T. 1865). Blackburn, J., in delivering judgment says: "Throughout the Bankrupt Acts the word '*creditor*' is used in the sense of a person having a claim which can be proved under the bankruptcy whether it is strictly a debt or not."

I do not know that I can add anything further upon this ground; and I consider that the attachment should not be set aside for the first and second reasons stated in defendant's petition.

As to the 4th reason, I am confined entirely to the affidavits upon which the attachment issued on the one hand and to the allegations contained in the defendant's petition, supported as it is merely by his own affidavit attached to it, on the other hand.

The 12th subsection of the 3rd section is the authority for my acting in a summary way by hearing the parties upon this application, and it seems to me, from the analogy which exists betwixt this and proceedings of a like nature for annulling a fiat under the Bankruptcy Acts in England, that I should have had some other evidence furnished than that which the mere affidavits and petition afford. The concluding words of the 12th subsection require that I should hear and determine the petition in a summary manner, and conformably to the evidence adduced before me thereon.

Evidence *dehors* the affidavits and the petition, either *viva voce* or by deposition, should have been adduced on both sides; the one to the alleged act of insolvency and the other to answer it; in the absence of such, I am not in a position to review the grounds set forth in the affidavits filed at the institution of these proceedings, so that the defendant's petition and application upon the facts must fall to the ground.

Rufus Peters Lace, the plaintiff's agent, swore 1st, that the defendant had disposed of the greater part of his chattel property, and had attempted, and was attempting to dispose of his farm and the residue of his chattel property, with intent to defraud the plaintiff of the monies in the said notes specified.—2nd. That he called upon the defendant on the 7th March and proposed to give the defendant the price he asked for his farm, namely $4500, provided the defendant would allow the plaintiff the amount of the promissory notes, and that to this proposal the defendant answered, "I will sell my farm to *you*," putting great emphasis on the *you*, for $5000.

Then 2nd, Hiram Burley Smith swore, 1st, that the defendant had been for

Moore vs. Luce.

some time endeavouring secretly to dispose of his farm and personal property with intent to defraud his creditors, and the plaintiff in particular, of his just dues, and believed further, that he was about to abscond to the United States with the like intent (I observe, however, he gave no reason for his belief); and 2nd, that the defendant had offered to sell his farm to Leslie Pearce, James Pound, and other persons, and had *requested them to keep it secret* and say nothing about his offering the same for sale.

The affidavits of Mr. Horton I do not regard as anything but hearsay and belief, which are inadmissible as evidence to support the attachment, so that it really rests upon those of Rufus Peters Luce and Hiram Burley Smith. These affidavits are not altogether contradicted in the defendant's petition, for he admits he has sold or disposed of *some* of his personal property, but that he still owns a good deal of it (to the value of $400), and his farm, which he says he still owns, but denies the motives of selling it to be for the purpose of defeating or defrauding the plaintiff, or to abscond to the United States, or to defraud or defeat his creditors. He admits also, that he offered to sell his farm to Leslie Pearce, and other persons, and insists that he had a perfect right to do so, and to ask them, as he says *he did ask them, to keep his offer secret*, but he does not explain why he did so.

I must say, that I am not at all satisfied with the way in which the facts of the case are left in my hands for decision under this petition,—because, as I have already said, I should have been furnished with evidence in support of the plaintiff's allegation, and of those in the defendant's petition, whereby I might be enabled satisfactorily to decide in point of fact as well as of law, whether or not the defendant's estate has become subject to compulsory liquidation; as it is, there is the evidence furnished by the affidavit of a person, apparently unconnected by interest with the plaintiff's claim, whereby it was shewn to my satisfaction, that the plaintiff is a creditor of the defendant in upwards of $200, and by the affidavits of two credible persons, also unconnected by interest, who showed such facts and circumstances as satisfied me at the time that the defendant was insolvent within the meaning of the Act on the one hand, and the unsupported affidavit of the defendant on the other.

I am not, therefore, in a position to determine the petition, upon the facts, favourably to the defendant, because I have heard no evidence of a competent witness upon the matter, other than the affidavits upon which the fiat for the attachment was granted.

The petition was thereupon dismissed without costs.

The defendant appealed to revise the decision of the judge, and that it might be declared his estate was not, under the circumstances set forth in the affidavits on which the attachment was granted, subject to compulsory liquidation; and that all proceedings therein might be set aside, with costs to be paid by the plaintiff, and that all the defendant's property and rights might be re-invested in him, in same manner as if the attachment had not been issued.

A. Wilson, J.—The question is one of novelty with us, and it is of great consequence it should be settled, both as respects debtors and creditors.

If our Insolvent Act is expressed, and is to be construed in the same way

as the English Bankruptcy Acts, the policy of both being alike, the decision appealed from must stand.

Before the passing of the English Statute 7 Geo. 1, ch. 31, none but creditors whose debts were due at the time of the act of bankruptcy committed were entitled to prove for their debts, or to be petitioning creditors for the commission: *Tully* v. *Sparkes* (2 Ld. Ray. 1549.)

The 7 Geo. 1., ch. 31, enabled creditors who had security in writing to prove for their debts, though not due when the bankruptcy was committed, but it precluded such creditors from being petitioning creditors.

By the 5 Geo. II., ch. 30, sec. 22, this disability was removed, and under it the case *Ex parte Douthat* (4 B. & A. 67) was decided.

The statute of Geo. II. was confined to creditors who had security in writing for their debts. If the creditor, therefore, had a debt for goods sold and delivered, which was not due, but no agreement or note in writing for the amount payable at a certain time, he could not prove in respect of such debt: *Hoskins* v. *Duperoy* (9 East. 498); *Price* v *Nixon* (5 Taunt. 338.)

The 6 Geo. IV., ch. 16, sec. 15, enabled every creditor whose debt was not due at the time of the bankruptcy committed, to prove his debt, or petition for a commission, whether he had a security in writing or not for his debt, and the 12 & 13 Vic., ch. 106, sec. 91, is to the same effect.

The question then, is, does our Insolvency Act permit a person, whose debt is not yet due, to make his debtor an insolvent in respect of that debt?

This power can only be exercised, if expressly or by plain implication it has been conferred on the creditor, for without it he can have no such power.

It is quite clear that debts not due may be proved against the estate by the direct language of the statute, and this goes far to establish the right to commence proceedings for them; for, as said by Abbott, C. J., in 4 B. & C. 71, in relation to the 7 Geo. I., ch. 31, and the 5 Geo. II., ch. 30, and some years before the 6 Geo. IV. was passed, "No distinction can now be taken between a provable debt and that of the petitioning creditor."

The different parts of the Act of 1864, which apply to the question, are the following: Sec. 2 requires the person making a voluntary assignment to exhibit a statement to the creditors shewing, among other things, the amount due to each "distinguishing between those amounts which are actually overdue and those which have not become due at the date of such meeting."

The form B in the schedule shews the distinction made, not as to direct liabilities, which is strange, but as to *indirect* liabilities, maturing *before* and *after* the day fixed for the first meeting of creditors.

The form of oath of the insolvent immediately following this schedule states, "That all the above-mentioned liabilities are honestly *due* by me, and that none of them were created or have been increased with the intention of giving to the creditor thereof any advantage *either in voting at meetings of creditors or in ranking on my estate.*

Sec. 2, sub-sec. 3, also refers to direct liabilities *then actually over due:* on such latter securities the creditor may vote, but not on indirect liabilities which are not due.

Moore
[vs.
Lace.

By sec. 3, sub-secs. *b*, *c*, *i*, a creditor whose debt is not due may be injured, and under them he may state, in respect of his immatured debt, a cause of insolvency which affects him equally with a creditor having a claim which is past due.

The affidavit the creditor has to make, by the form given under sub-sec. 7, when he applies for a warrant against his debtor, is that "the defendant is indebted to the plaintiff" in a particular sum, stating the value of the debt, and, to the best of the creditor's belief, that the defendant is insolvent within the meaning of the Act, and has rendered himself liable to have his estate placed in compulsory liquidation. The 7th sub-sec. does not use the phraseology that the defendant *is indebted* to the plaintiff, which the form does, but that the plaintiff *is a creditor* of the insolvent; no doubt very different language; but the statement that the insolvent *is indebted* may be read by the light of the statute, which in effect makes an undue debt to be due, and so the party *indebted* for the purpose of the Act.

By sec. 5, sub-sec. 2, "all debts *due and payable* by the insolvent at the time of the execution of a deed of assignment, or at the time of the issue of a writ of attachment under this act, and all debts *due, but not then actually payable*, subject to such rebate of interest as may be reasonable, shall have the right to rank upon the estate of the insolvent."

By sec. 9, sub-sec. 3, the consent in writing of the proportion of creditors specified to the discharge of a debtor "absolutely frees and discharges him from all liabilities whatsoever [except those hereinafter excepted] *existing against him and proveable against his estate, whether such debts be exigible or not* at the time of his insolvency, and whether direct or indirect;" and, lastly, the word *creditor* by sec. 12, sub-sec. 5, shall be held to mean "every person to whom the insolvent is liable," whether primarily or secondarily, and whether as principal or surety.

The respondent was certainly a *creditor* of the appellant at the time when these proceedings were taken: he had a direct and primary liability against him: his claim was *due* under sec. 2 and the oath to Form B, and under sec. 5, sub-sec. 2; although according to sec. 2, *not actually overdue*, or according to sec. 5, sub-sec. 2, *not then actually payable*, or according to sec. 9, sub-sec. 3, *whether exigible or not*: and such a debt he would be barred by the discharge under the last mentioned section from ever enforcing against the appellant, because by that section, and also by sec. 5, sub-sec. 2, it was proveable against and entitled to rank upon the estate of the insolvent.

The consideration of these enactments of these statute leads us to the conclusion that our Insolvent Act must in this respect be construed as the Bankrupt Acts are in England, and that a creditor having an immatured debt may commence proceedings against his debtor, who is insolvent, in like manner as he might have done if his debt had been overdue at the time, although there is no direct enabling clause to this effect in the statute, as there is in the English Acts.

The right exists, by virtue of his position as a creditor, and to prevent the exercise of this right would require a disqualifying clause such as was originally contained in the Act of 7 Geo. I, ch. 31.

The averment in the affidavit of the creditor before alluded to, that the insolvent *is indebted* to him, must be construed according to the general tenor, effect and purpose of the statute; and by the Act the insolvent *is* indebted to him. The expression cannot, then, be said to be inconsistent with the purview and intent of the Act.

Under the words "all debts owing or accruing," that which is *debitum in præsenti*, though *solvendum in futuro*, is attachable: *Jones* v. *Thompson* (E. B. & E. 63); *Dresser* v. *Johns* (6 C. B. N. S. 429.)

The cases referred to by the learned judge in the Court below, of L. R. 1. C. P. 204, and L. R. 1 Exch. 200, show that the word *creditor* as used in the Bankrupt Acts is not applied to all persons who are creditors; that it does not apply to a person who recovered judgment for a debt contracted after the debtor became a bankrupt, but to a creditor "who can come in under the bankruptcy and have the benefit of it, whether his claim be strictly a debt or not."

The judgment of the learned Judge of the County Court has been very carefully prepared, and is fully and satisfactorily sustained by his reasoning.

As to the merits,—the application to have the proceedings set aside, because the respondent was not in fact insolvent, or amenable to the Act; we think that evidence of the facts contained in the petition might have been and may still be admitted; and, no doubt, where the effect of such proceedings is to accelerate the payment of a debt but lately contracted, by several years, they should be looked upon with that natural degree of suspicion which so great an advantage to the creditor unavoidably creates. We are of opinion the appeal must be disallowed, excepting that the debtor should be allowed a further time to sustain the allegations of his petition, if he can; upon which the learned Judge, after hearing the testimony on both sides, legally advanced and admissible, will of course pronounce his own opinion. We should not probably require this to be done in an ordinary case; but in so unusual and peculiar a one as this is, and the debtor not owing more than about $100 beyond this creditor's debt, and having apparently quite a large property in possession, the very fullest opportunity should be offered to the debtor to scrutinize the proceedings of a creditor, whose interest is so obviously opposed to the delay of waiting for his debt until it is due, and is so plainly benefited by anticipating, if he can, the long day of payment he agreed to give.

Rule disallowing the appeal, excepting that the debtor be allowed a further day, to be named by the Judge of the County Court, to support his petition by evidence, if he can, and that the parties be then reheard therein on the merits; and on the whole, without costs, if the residuary proceedings be finally set aside by the learned Judge below; but if they are directed to stand on such rehearing, the whole costs should be costs against the estate.

Street, for the appellant.

Harrison, Q.C., for the respondent.

(J. K.)

IN REVIEW.

MONTREAL, 29TH JANUARY, 1869.

Coram MONDELET, J., BERTHELOT, J., BEAUDRY, A.J.

No. 157.

The Quebec Bank vs. *Louis Paquet.*

HELD:—1st. A party in a cause has the right at any time prior to the rendering of a final judgment to settle, compromise or transact with respect to all matters in dispute in the cause, including the costs.

2nd.—That if a case has been settled by the parties prior to a final judgment awarding distraction *de frais*, the attorney of either of the parties cannot continue the suit in the name of his client for the purpose of obtaining his costs from the opposite party.

The points of the case are sufficiently stated in the factum submitted by plaintiffs.

Morris, J. L., of counsel for the plaintiffs:—

This is a petitory action, brought in 1859, by the plaintiffs to recover from the defendant the East half of the lot number eleven in the third range of the township of Wolfestown, of which the plaintiffs alleged themselves to be the proprietors in virtue of a sheriff's title of date the 24th May, 1830.

The defendant appeared by his Attorney, G. S. Carter, Esquire, and pleaded only a *défense au fond en fait.*

The case was inscribed on the role des enquêtes, but before any witnesses were examined it was discovered that through some error in the instructions which had been furnished to the Attorney who instituted the action, the possession of the wrong lot had been demanded from the defendant, who held the East half of number *thirteen*, (not *eleven*) in the third range of Wolfestown. It therefore became necessary for the plaintiffs to amend their declaration, but before it was possible to make an application to the court for that purpose, the defendant's Attorney, although notified of the plaintiffs' intention, insisted on their enquête being closed, and also inscribed the cause for hearing upon the merits.

On the sixteenth day of March, 1861, the plaintiffs applied for leave to amend their declaration by inserting the word *thirteen* in the place of "eleven," wherever the description of the property claimed occurred, which application was granted on payment of costs. Nothing further was done until the 12th of September, 1862, when the defendant's costs, payable in case the amendment was made, was taxed at $40.24.

On the 28th November, 1862, before any amendment was made, the plaintiffs and defendant settled the case, and the defendant, by deed executed before Johnson, N.P., purchased from the plaintiffs the East half of lot number thirteen in the third range of Wolfestown, for the very moderate price of $250, payable in instalments, and agreed thereby to pay all costs incurred on both sides. The clause relating to the payment of costs is as follows: "S'oblige de plus le dit acquéreur de payer à demande tous les frais tant de la demande que de la défense encourues en une certaine action à lui intentée par la dite Banque en déguerpissement ou autrement il y a deux à trois ans devant la Cour Supérieure du District de Saint François, le dit acquéreur s'obligeant de payer les dits frais

de défense à son avocat ou à qui de droit sans délai, ou de prendre avec son dit avocat tel arrangement qu'il sera nécessaire, le tout à la décharge de la Banque et les dits frais de la demande à la dite Banque elle-même."

Notwithstanding that the suit was thus settled, the defendant's Attorney, on the 23rd January, 1863, again inscribed the cause for hearing upon the merits. The plaintiffs moved to reject this inscription on the ground, firstly, that the inscription was irregular, the plaintiffs having obtained leave to amend, and the amendment not having been disposed of in any way, the plaintiffs having neither amended nor been declared foreclosed from the right of doing so; and, secondly, that the parties, plaintiffs and defendant, had transacted and settled the suit as above mentioned, and produced the deed of sale passed before Johnson, N.P., in support of their motion. The motion was then taken *en délibéré*, and on the 26th May, 1863, was dismissed. The plaintiffs fyled an exception to this judgment.

Nothing further was done in the cause until the 22nd October, 1867, when the defendant's Attorney, having apparently no confidence in the judgment of the 26th May, 1863, renounced that judgment and withdrew his inscription for hearing upon the merits, and on the same day moved that a day be fixed within which the plaintiffs should be held to amend their declaration and pay the taxed costs, and in default of so doing that their right to amend should be declared forfeited. On the 23rd October, 1867, the plaintiffs were ordered to amend within fifteen days. The plaintiffs fyled an exception to this judgment, and a protest against further proceedings being taken in the cause for the reasons already stated, declaring the case to be settled, and have taken no further part in the proceedings in the cause.

On the 20th December, 1867, the defendant's Attorney moved that the plaintiffs' right to amend be declared forfeited, which was granted. The case was inscribed for final hearing in May, 1868, and having been heard in the absence of the plaintiffs and their counsel, on the 26th May, 1868, the Court (Short, J.) pronounced the following judgment:

"The Court, &c., considering that by reason of certain errors in the plaintiff's declaration the said defendant was entitled to have the action of the plaintiffs in this behalf dismissed with costs as claimed by him in his pleas, and his attorney, George S. Carter, Esquire, was entitled to have distraction of said costs awarded to him, and considering that said plaintiffs having failed to amend the said errors in their declaration as they were permitted to do, the said George S. Carter, the defendant's attorney, had a just right to proceed in the said action on his own behalf and prosecute the same to judgment for the recovery of his fees and disbursements therein, notwithstanding the pretended arrangement and compromise between the said plaintiffs and defendant with respect to the said fees and disbursements, and has now the right to demand the dismissal of the plaintiffs' action, and to recover from them his costs therein, doth in consequence dismiss the action of the plaintiffs in this behalf, with costs, and doth condemn the said plaintiffs to pay the said costs to the said George S. Carter, the defendant's attorney."

The plaintiffs have inscribed this cause for review of the above judgment, which in effect declares that a party engaged in litigation cannot transact or

The Quebec Bank vs. Paquet.

settle a suit without the consent of his attorney *ad litem*, in so far as respects the costs of action, and that the attorney, notwithstanding such settlement, and the consequent revocation of his mandate, may continue the suit in the name of his client for the purpose of obtaining his costs from the opposite party.

The plaintiffs respectfully submit that this is unsustainable as a legal proposition, and that on the contrary the party in the cause has an undoubted right at any time prior to the rendering of a final judgment by which distraction *de frais* is awarded to the attorney, to settle, compromise or transact with respect to all matters in dispute in the cause, including the costs.

The client has at all times a right to revoke the power which he has entrusted to his attorney, either directly by a formal revocation, or indirectly by a settlement of the suit. "Le mandat peut être revoqué en tout état de cause. Le mandant ne doit au mandataire aucune explication, et ce dernier ne saurait élever de controverse pour prouver que la révocation est intempestive, injuste, capricieuse ou dictée par l'erreur et la colère. La volonté du mandant est souveraine." Troplong, Mandant, No. 765. "Le mandat *ad litem* finit *finita lite* soit par un jugement définitif, soit par une transaction, soit par un désistement pur et simple de la demande que la partie a donnée, ou par un acquiescement à celle qu'on a donnée contre elle." Pothier, mandat, No. 143.

All contracts having a tendency to put an end to litigation have always been looked upon with favor. "La transaction a toujours été vue avec faveur; tellement que les lois reconnaissent en elle une autorité qui doit être respectée à l'égal des jugements. La prohibition de transiger est odieuse." Troplong, Transactions No. 2. "Tout acte qui tend à la terminaison d'un procès, a toujours été, et doit toujours être regardé d'un œil favorable par les cours de justice. C'est pour cela que dans tous les temps, l'on a facilité les transactions sur procès. Ces transactions se font le plus souvent par acte extra judiciaire. Les parties n'ont pas besoin, pour adopter cette voie, de l'assistance ou du consentement de leurs procureurs *ad litem*. Par la transaction le mandat du procureur prend fin, de même que par une révocation formelle; mais pour que la transaction, comme la révocation, produise cet effet, il ne faut pas que le procureur soit laissé dans l'ignorance de l'acte de son client, autrement toute procédure qu'il aurait pu faire dans cette ignorance serait à l'abri de la critique. La transaction extra judiciaire entraine nécessairement un désistement du litige." Lafontaine, C.J., in Ryan vs. Ward, 6 L. C. Reports, p. 212, to which case the plaintiffs particularly refer, as containing a full discussion of the subject. "L'avocat et procureur a des fonctions ministérielles à remplir, tant qu'il se tient dans les limites de ces fonctions, il doit être soutenu, mais non quand il les franchit. Le mandat est un contrat fait uniquement dans l'intérêt du mandant, et quand ce mandant fait connaître sa volonté de se désister d'une demande judiciaire, soit par l'organe de son mandataire ou procureur, ou de toute autre manière, la Cour est tenue d'accueillir ce désistement. La question de dépens entre lui et son procureur ne peut avoir aucun poids en cette circonstance, quant à la partie adverse." Badgley, J., in same case.

So long as no final judgment has been rendered by which *distraction de frais* has been awarded to the attorney he cannot oppose any settlement which his

client thinks proper to make, and this seems necessarily to result from the definitions of *distraction* given by the best authors. "La distraction est un transport que le client au profit de qui *le jugement est rendu*, est censé faire à son procureur de la créance qu'il acquiert contre la partie condamnée aux depens." Pothier, Mandat, No. 135. "C'est une demande formée par un procureur aux fins de toucher ses frais et salaires sur les dépens *adjugés à sa partie*, comme les ayant avancés pour elle." Guyot, Répertoire Vo. Distraction, p. 730. "On appelle distraction de dépens, l'attribution ou application spéciale faite par justice, au profit d'un procureur, des dépens auxquels une partie *a été condamnée* envers le client de ce procureur." Nouveau Denisart, Vo. Distraction, p. 542. Even a judgment awarding distraction to the attorney does not prevent the client from transacting as to the costs, if the judgment has been appealed from and the appeal is still pending. "Il paraît que la distraction même obtenue n'a cet effet que dans le cas où la condamnation de dépens a été prononcée par un jugement en dernier ressort. Si elle l'a été par un premier jugement, dont la partie condamnée a appelé, l'effet de la condamnation se trouvant alors suspendue par l'appel, on tient que les parties peuvent transiger, sans que le procureur au profit duquel la distraction a été prononcée puisse s'y opposer. Un procureur qui a obtenu a son profit une distraction de dépens ne devient pas pour cela partie dans la cause. Son action est suspendue par l'appel de la sentence qui a prononcé la distraction, sentence qui est subordonnée au sort de cet appel: et de même qu'elle est tous les jours anéantie par l'infirmation de la sentence, elle peu l'être aussi par une transaction sur l'appel. Il serait bien malheureux que les parties ne pussent transiger sur leur différends, parce qu'il plairait au procureur qui aurait obtenu la distraction de ses frais, de s'y opposer et de faire revivre l'appel." Nouveau Denisart, Vo. Distraction p. 544–5.

In this case no award of distraction was made in favor of Mr. Carter up to the time of the final judgment. The amendment never was made, and no costs therefore ever became payable upon it. The plaintiffs are at a loss to understand why the defendant's attorney should have taken the proceedings in this cause which he has done, inasmuch as the defendant was at the time he settled with the plaintiffs, and still is, perfectly solvent and abundantly able to pay his attorney the amount due him for costs in the cause, and would no doubt have done so long since, had the proper means been adopted to obtain that end.

The plaintiffs respectfully submit that the judgment of the Superior Court at Sherbrooke is erroneous, and must be reversed with costs.

MONDELET, J.—This is an appeal from a judgment rendered by the Superior Court, District of St. Francis (Short, J.), on the 26th May, 1868, dismissing plaintiffs' action and condemning plaintiffs to pay the costs to C. S. Carter, the defendant's attorney. It would appear that by reason of certain errors in the plaintiffs' declaration, the defendant was entitled to have the action dismissed with costs, as prayed for in his pleas. A motion was made on behalf of the plaintiffs, to be permitted to amend their declaration, but no amendment was made. The parties having come to an arrangement, and the defendant having obliged himself therein and thereby to pay all the costs, there was, of course, an end to the *procès*. That was a matter between the parties, which could not

The Quebec Bank vs. Paquet.

be controlled by the attorneys of either of them. It is a necessary sequence, that the attorney for the defendant who had and could have no *distraction de frais* at that stage of the proceedings, had no right to go on with the case and obtain the dismissal of the action. He was *functus officio;* his mandate was at an end. Mr. Carter inscribed the case, and got the action dismissed. The Court assigned as a *considérant*, that Mr. Carter was entitled to have distraction of costs, and a just right to proceed in the said action on his own behalf, and prosecute the same to judgment for the recovery of his fees and disbursements therein, notwithstanding the pretended agreement and compromise between the plaintiffs and the defendant, and had the right to demand the dismissal of the action. It is certain in law that the attorney here had no right whatever to those costs, with respect to which he had obtained no *distraction de frais*. The most remarkable and most objectionable part of the judgment so dismissing plaintiffs' action is that the plaintiffs are condemned to pay these costs to the said G. S. Carter, the defendant's attorney, who had obtained no distraction. That judgment must, of course, be reversed.

BERTHELOT, J., and BEAUDRY, A. J., concurred.

Judgment reversed.

Ritchie & Borlase, for plaintiffs.
J. L. Morris, Counsel.
Edward Carter, Q.C., for defendant.
(J. L. M.)

COURT OF REVIEW.

MONTREAL, 25TH NOVEMBER, 1868.

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

No. 2239.

Grange vs. Benning.

HELD:—That an action lies to recover damages for breach of promise of marriage.

This was an action for $40,000 damages for breach of promise of marriage. The plaintiff, Mary Sophia Grange, alleged an engagement on the part of the defendant to marry her, her offer to fulfil the engagement and the refusal of the defendant to keep his promise. The plaintiff further alleged: "That the fact that a marriage had been agreed upon to take place between the defendant and her, and the fact that it was appointed by the said defendant, with the consent of the plaintiff, to take place and be solemnized on or about the said 3rd day of June last, was publicly known, as well as the fact that it was to take place on or about the said 3rd day of June; and that she, the plaintiff, had made all necessary arrangements and preparations on her part therefor, and that by reason of the refusal of the said defendant to marry her, the plaintiff, as he had promised and undertaken, she, the plaintiff, hath been grievously wounded in her feelings, and hath moreover been greatly injured in her good name and reputation, and hath, by reason of the premises, sustained damage to the amount of $40,000."

The defendant demurred to the action, maintaining, among other things, that

under the Code there is no right of action for breach of promise of marriage; that such action is contrary to law and morality, as tending to restrict freedom of marriage; that the only action to which breach of promise could give rise was the action in *assumpsit*, for pecuniary loss occasioned thereby. That the plaintiff did not specify any actual loss, but relied only on the promise of marriage.

The demurrer was dismissed by the Superior Court (TORRANCE, J.,) on the 30th October, 1868, and the defendant thereupon inscribed in review.

D. Girouard, pour l'appellant :—Cette cause ne doit pas être décidée d'après les principes qui règlent les cas de séduction ou de la diffamation de caractère. Il n'y a rien de cela dans l'espèce actuelle. On invoque une obligation : on se plaint de sa violation ; on réclame des dommages-intérêts en résultant immédiatement et directement. On donne donc à cette obligation une valeur légale ; car il n'y a que les obligations de droit qui puissent se résoudre en une condamnation de dommages-intérêts. Les promesses de mariage sont-elles valables ? Voilà toute la question.

Le défendeur prétend que sous le Code, sous l'empire duquel la présente demande a originé, quelqu'ait été l'ancien droit, quelque soit aussi le droit commun anglais ou américain, les promesses de mariage sont absolument nulles, et qu'étant ainsi nulles, elles ne peuvent résulter en des dommages-intérêts, suivant la maxime : *Quod nullum est, nullum producit effectum.* On ne saurait soutenir que les promesses de mariage participent de la nature des obligations en général. Notre Code, Art. 1062, déclare : l'objet d'une obligation doit être une chose possible, qui ne soit ni prohibée par la loi, ni contraire aux bonnes mœurs." Puis l'Art. 1059 dit : "Il n'y a que les choses qui sont dans le commerce qui puissent être l'objet d'une obligation." Assurément que nos adversaires ne soutiendront pas que l'objet des promesses de mariage soit une chose dans le commerce. On ne saurait soutenir que la jurisprudence qui a prévalu sous l'ancien droit, soit en France, soit au Canada, peut suppléer au silence du Code. L'Art. 3613, déclare en effet que "les lois en force lors de la mise en force de ce Code, sont abrogées dans les cas où elles sont contraires ou incompatibles avec quelques disposition qu'il contient." Or nous l'avons vu, les promesses de mariage sont incompatibles avec les dispositions du Code sur le mariage et les obligations en général. Disons encore que, dans le droit primitif, les promesses de mariage n'étaient aucunement reconnues dans le for extérieur. La jurisprudence romaine fut unanime sur ce point. Toute convention de se marier était absolument nulle et ne produisait aucun effet. Ce ne fut que par une loi spéciale proclamée par l'empereur Léon que les promesses de mariage furent déclarées valables, et que les dommages, résultant de leur inexécution ou de la clause pénale en cas de dédit furent recouvrables en justice.

Le Code Napoléon ne parle pas des promesses de mariage, et comme celui du Bas Canada, il laisse donc à la doctrine le soin d'examiner si elles sont valables dans les principes généraux qu'il établit. Aussi, comme il arrive assez souvent lorsqu'il n'y a de texte formel en une matière, les opinions des jurisconsultes ont d'abord singulièrement varié sur cette question. Plusieurs auteurs recommandables, tels que Merlin, Rolland de Villargues, et Toullier, ont pensé que

Grange vs. Benning.

les promesses de mariage étaient valables. Suivant ce dernier commentateur, il n'y a de contraire aux bonnes mœurs que les promesses dont l'objet blesse la morale. Il n'y a pourtant pas de doute que la majorité des commentateurs et des arrêts sont en faveur du défendeur.

Autorités additionnelles citées par le défendeur:

Pezzane, Empêchements du Mariage, No. 79, 80, 81, 86, 87. Duranton, Code Civil, vol. 10, p. 320. Cour de Cassation, arrêt, 11 juin, 1838, 30 mai, 1838. Kay v. Bradshaw, 2 Vernon 202 (1689). Woodhouse v. Shepley, 2 Atk. 535 (1742). Marcadé, Revue Critique de Législation, 1853, 1ère partie, p. 197.

Abbot, Q. C., and *Devlin*, contra.

MONDELET, J., in rendering judgment, observed that the pretension of the defendant that promises of marriage were not valid in our law carried absurdity on the face of it. It was the first attempt in this country to lay down such a doctrine. Promises of marriage were legal by the French law introduced into this country, and were so still. It was not necessary that the Code should lay down that promises of marriage are binding: the principles of eternal justice teach us that they are binding. It is a well-known principle that every wrong must be redressed; that every engagement which is not declared by law to be null is binding, and the violation of such engagement must be redressed. In short, although the Code does not speak of promises of marriage, still such engagements do exist in our law, and they are founded upon two principles: 1st. That every engagement is binding in law, unless proscribed by law, or contrary to good morals. 2nd. That every injury done to one's neighbour must be redressed. As to the pretension that promises of marriage are contrary to good morals, such doctrine is preposterous, nay immoral in the highest degree, and would sap the very foundations of the social edifice.

BERTHELOT, and TORRANCE, JJ., concurred.

Judgment confirmed.

B. Devlin, for plaintiff.
D. Girouard, for defendant.
(J. K.)

SUPERIOR COURT.

MONTREAL, 31ST DECEMBER, 1868.

Coram MACKAY, J.

No. 2138.

Munro es qual. vs. *Lalonde.*

A lot of land was sold under a deed as containing 40 arpents in superficies more or less without guarantee of precise measurement, but giving the different boundaries of the lot. The purchaser found on measuring the lot that it only contained 30 arpents in superficies.

HELD:—Such sale was of a block of land within defined limits and not a sale *ad mensuram*.

The declaration set out a sale under a deed of date 17th April, 1858, of a lot of land described as follows:

"Un lopin de terrain situé en la dite paroisse de Ste. Anne du bout de l'Isle, de la contenance de quarante arpents en superficie plus ou moins, sans garantie de mesure précise et tel que contenu dans les limites suivantes, savoir, born

par un bout au sud par la terre de Joseph Crevier, et partie par le terrain vendu à Basile Legault, ou ses représentants, d'un côté au nord-est, par les représentants de Dame Simon Fraser, et de l'autre côté par les dits représentants de cette dernière, sans batiments dessus construits, à la réserve par le vendeur en faveur de Basile Legault, ses successeurs et ayant cause sur le terrain susvendu du droit de passer à pied et en voiture en toute saison à perpétuité pour communiquer du terrain du dit Basile Legault à la terre du dit Joseph Petit," and demanded payment of the balance due under said deed.

The defendant pleaded amongst other things that although he had bought under said deed of sale a lot of land 40 arpents in superficies, the land delivered to defendant, and which he has possessed ever since, contains in reality only 30 arpents in superficies, being 10 arpents in superficies less than that bought by him, or a quarter of the whole extent according to the deed of sale. The defendant concluded this part of his plea by asking that the price *of sale be reduced by* $166.00 *and interest*, the value of the ten acres not delivered to him.

MACKAY, J., said the sale in this case was *en bloc* and not *ad mensuram*. The boundaries of the lot being defined the purchaser knew what land he was buying, and the vendor therefore was not bound to suffer diminution of price as for less land being delivered than what was sold. Considering the expressions in the deed of sale in the light of the opinion laid down by Marcadé vol. 6., p. 232, it was quite clear that this was a sale *en bloc*.

The judgment was *motivé* as follows:—The Court, &c., &c.

Considering that the sale to Joseph Lalonde of the 17th April, 1858, declared upon by plaintiffs, was a sale of block of land within defined limits and was not a sale *ad mensuram*;

Considering defendant's pretensions to the contrary in his *défenses* unfounded; Considering that plaintiffs have proved the material allegations of their declaration, and that defendant is indebted to them as alleged, save only in so far as the amount of said debt alleged is to be modified by said admissions fyled; doth condemn the said defendant to pay and satisfy to the plaintiffs *ès noms et qualités*, the sum of $898.34, current money of Canada, due as follows, to wit, $666.67, said current money, equal to four thousand livres ancient currency, being the purchase price stipulated in the deed of sale of the said 17th April, 1858, made and consented by F. A. Pillette to said defendant, passed before Filiatreault and colleague notaries, and $231.67, balance of nine years interest upon said capital sum accrued on the 17th April, 1867, with interest on $666.67 from the said 17th April, 1867, and on $231.67 from the 30th of said month of April, 1867, date of the service of process in this cause until paid, and costs of suit, distraction whereof is granted to Messrs. R. & G. Laflamme, attorneys for plaintiffs.

Judgment for plaintiff.

R. & G. Laflamme, for plaintiffs.
Bélanger & Desnoyers, for defendant.
(J. L. M.)

MONTREAL, 30th OCTOBER, 1868.

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

No. 127.

Bailie vs. *Whyte*, es qual.

Held:—That A, the holder of a receipt by which B declared he held in trust for A two hundred tons of coal and would sell the same, accounting for the proceeds and acknowledging himself to be bailee of said coal for A, cannot transfer the said receipt without endorsement.

On the 4th of October, 1867, the plaintiff by process of attachment *saisie revendication*, seized 60 tons of nut coal, balance of a larger quantity as belonging to him in the possession of the defendant as assignee of the insolvent estate of William Middleton.

The defendant pleaded that the said coal was purchased by the said Middleton from the plaintiff on the 19th April, 1867, was duly delivered, and had ever since remained in his possession and formed part of his estate.

Defendant also denied all of plaintiff's allegations. Plaintiff by his answers alleged that it was true that the said coal had, by virtue of a written agreement of 19th April, 1867, recited in defendants' pleas, passed into possession of said William Middleton.

That in order to carry out said agreement and get paid for said coal the plaintiff, on 28th of May, 1867, made his bill of exchange on said Middleton for $1068.37, which was duly accepted.

That on 3rd June, 1867, the Quebec Bank discounted said bill of exchange for the plaintiff, and delivered the proceeds to him on receiving from said Middleton a warehouse receipt for said coal in the following terms:

"Received in trust
"from the 'Quebec Bank' two hundred tons nut coal, and we hereby undertake
"to sell the property specified for account of said Bank, and collect the pro-
"ceeds of sale or sales thereof, and deposit the same with the said Bank in
"Montreal to the credit of our acceptance due 31st August for $1068.37, hereby
"acknowledging ourselves to be bailees of the said property for the said Bank,
"Montreal, June 3rd, 1867."

Signed, Wm. Middleton & Co.

That said coal thereupon and then became the property of the Quebec Bank. That when said bill of exchange became due and payable it was protested for non-payment, and said Wm. Middleton refused to pay the same, but it was afterwards, long before the institution of this action, paid by said plaintiff, whereupon the said Quebec Bank duly handed and transferred to plaintiff said warehouse receipt and the coal therein mentioned, of which said Middleton had due notice, and plaintiff then became proprietor of said coal and entitled to control the same, and in fact was in possession of said coal, which said Middleton kept warehoused for him as his agent.

The receipt in question, although duly delivered to the plaintiff by the Quebec Bank, was not endorsed by them.

All the other allegations of plaintiff's declaration and answers were proved. On the 5th March, 1868, his honor Mr. Justice Monk rendered judgment in favor of plaintiff, declaring the *saisie revendication* good and valid.

The defendant inscribed the cause for review.

Carter, Q.C., for defendant, contended that the receipt in question not having been endorsed by the Quebec Bank could give no title to the plaintiff, and cited Con. Stat. of Canada, cap. 54, p. 645.

Morris, for plaintiff, cited Molsons Bank *vs.* Janes et al., 9 L. C. J., p. 81, decided by the Court of Review, *Coram* Smith, J., Berthelot, J., Monk, J., where it was held that a transfer of goods may be validly made to a banking institution by the delivery of a warehouse receipt without endorsement.

The plaintiff's counsel stated that in the case cited he took the same view as the counsel for defendant in the present case, and relied upon the same act but was unfortunate enough to have the Court against him.

He now took the law from the Court and expected it to abide by its former ruling.

The judgment was *motivé* as follows:

The Court considering, etc, etc., that the plaintiff is not, nor was at the time of the issuing of the *saisie de revendication* in this cause, proprietor of the coals seized, nor of any part or portion thereof;

Considering, that there not having been any transfer legally made to him by the Bank of Quebec, of the alleged warehouse receipt given to said Bank of Quebec, as collateral security for the payment of a certain indebtedness by William Middleton, the insolvent, to said Bank of Quebec, said warehouse receipt could not in law vest or confer any right to plaintiff to said coals, by mere delibery without being duly endorsed, which said coals are vested in the defendant *es qualité*; Considering, that the *saisie revendication* issued in this cause, was unduly and without any right issued, and should have been dismissed;

Considering, therefore, that in the judgment appealed from, to wit, the said judgment of the 5th of March, 1868, there is error, 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 action of plaintiff and the *saisie revendication* therein issued, be and the same are hereby dismissed with costs, distraits to Edward Carter, Esquire, attorney for defendant.

Judgment reversed.

Torrance & Morris, for plaintiff.
Edward Carter, Q.C., for defendant.
(J.L.M.)

IN REVIEW FROM THE SUPERIOR COURT.

MONTREAL, 31ST MARCH, 1869.

Coram MONDELET, J., TORRANCE, J., and BEAUDRY, A. J.

No. 2172.

Johnson vs. *Rimmer, and Lockwood et al.*, intervening.

HELD:—That a motion for a rule *nisi* for *peremption* made by a defendant in person, who has ceased to be represented by his attorney *ad litem*, and who has not subsequently appeared by a new attorney or in person, is irregular, null and void.

The defendant in this cause had been represented by F. G. Johnson, Esq., Q. C., as his attorney *ad litem*. During the progress of the suit, however, that

Johnson vs. Rimmer.

gentleman having been appointed a judge of this court, his functions as such attorney ceased, and the defendant had not subsequently taken any steps to name a new attorney, or to appear in person.

No proceeding had been taken in the cause for a period of three years from the 20th April, 1865, on which day the *délibéré* on plaintiff's motion to fix a day for a new trial by jury was discharged.

On the 18th May, 1868, a motion for a rule *nisi* for *péremption* was made by the defendant in person "present in court," this motion was signed by the defendant in presence of the prothonotary and was served, according to the bailiff's certificate, on "A. Cross, Esq., advocate;" it is not stated in the certificate that this gentleman was the attorney of the plaintiff. On the 19th May, the plaintiff, by his attorney, obtained a rule *nisi* against the defendant ordering him to appear in person, or to name a new attorney. The two rules were argued at the same time before Mr. Justice Berthelot, and after the case had been taken *en délibéré*, judgment was rendered dismissing the plaintiff's action.

The case was thereupon inscribed by the plaintiff for hearing in review.

Cross, Q. C., for plaintiff, said that by art. 455 of the *Code de Proc*, it is declared that *péremption* does not take place "when the party has ceased to be "represented by his attorney in the cases mentioned in articles 201 and 202."

Art. 202 declares that if the attorney of one of the parties ceases to act, "either in consequence of being appointed to a public office incompatible with "his profession, or of suspension or death, the opposite party, when represented "by an attorney at law, is sufficiently informed without further notice." Arts. 203 and 204 go on to provide a mode of compelling the party in default to name a new attorney, or to appear in person.

From the articles just cited it results that, when a party in a cause has been represented by an attorney *ad litem* and has ceased to be so represented, whether by the voluntary withdrawal of the attorney after notice given, as provided in art. 201, or by his appointment to a public office, or by his suspension or death, in such case *péremption* does not take place.

This was exactly the case in the present instance; the defendant was represented by an attorney *ad litem*: the functions of that attorney ceased on his appointment to a judicial office; since that time the defendant had taken no steps either to appear personally, or to name a new attorney. He had been himself in default, and he had no right to avail himself of that default for the purpose of getting plaintiff's action dismissed.

It had been said that "the party who has ceased to be represented by his "attorney" referred to in art. 455, means the plaintiff, not the defendant. But this would be to give the plaintiff protection against *péremption* when he is himself in default, and to give none when it is the defendant who is in default. The contrary rule, moreover, has been laid down in the New City Gas Company *vs.* Macdonnell, 3 L. C. J., p. 283, where it was held that the fact of the plaintiff having ceased to be represented by attorney did not interrupt *péremption*. The case of *Day* vs. *Decousse* referred to at the argument was not in point. In that case the defendant had not appeared at all, and he was never therefore in default to name a new attorney. The rule laid down allowing him personally to apply

for *péremption d'instance* is not applicable to the present case inasmuch as the defendant Rimmer having appeared by attorney and that attorney having ceased to act, he was bound to name another, or to appear in person, and until he did so, he was in default and no *péremption* could run in his favor.

Art. 200 moreover declares all proceedings null after the attorney of one of the parties has died, or ceased to act, or has withdrawn.

Bethune, Q.C., showing cause, contended that the article 435 of the Code of Civil Procedure clearly referred only to the party against whom the *péremption* was claimed. The article, in defining when peremption does not take place, does not declare that when the *opposite party* has ceased to be represented by attorney the *péremption* shall not accrue, but simply "when *the party*," namely, the only party who can possibly suffer by the invoked *péremption*, has so ceased to be represented. He further argued, that the case of the *New City Gas. Co. vs. Macdonnell* had no application to the present one, as it was there held (contrary to terms of the article of the code) that the fact of the plaintiff's attorney having ceased to act did *not* prevent the *péremption* from accruing. And he relied on the ruling in Day *vs.* Décousse as strictly applicable to the present case.

MONDELET, J., in rendering the judgment of the Court, said:

The plaintiff submits for revision a judgment rendered by the Superior Court (Berthelot, J.), on the 30th Sept, 1868, declaring plaintiff's action to be *périmée* from the lapse of three years with no proceedings. On the 20th April, 1865, the proceeding certified by the prothonotary to have been had was "*délibéré* discharged."

The proceeding now in question is a motion by defendant in person and signed by him, present in court, for *péremption d'instance* "unless cause to the contrary be shewn on the 27th inst., sitting the Court." This motion bears date and was made on the 18th May, 1868. The service of the rule was made upon "A. Cross, Esq., advocate," by leaving a true and certified copy with himself in person at the city of Montreal.

Such a service is evidently insufficient. There may be several persons, advocates, of the name of A. Cross, living in different parts of the country, and how do we know that the "A. Cross" on whom the bailiff certifies having served a copy of the rule is the "A. Cross" who is attorney of record for the plaintiff in this cause.

This settles the case, were there no other reasons against the decision rendered by the Superior Court.

It is hardly necessary to observe that in such a proceeding as the present, which is a rigorous one, he who complains of the *laches* or negligence of his adversary should be all right himself *en règle*. In what position does the defendant stand? He has had no attorney in the case since the appointment to the judicial office of Mr. Johnson, who was previously his attorney. The plaintiff acting under the prescription of the Code made a motion on the 19th May, 1868, "that defendant be ordered to appear in person or to name another attorney *ad* "*litem* in the said cause, within such delay as shall be fixed by this Honorable "Court, and that in default of his appearing in person, or naming another "attorney, the plaintiff be allowed to proceed with the said suit *ex parte*, unless "cause to the contrary be shewn on the 26th May inst."

Johnson vs. Rimmer.

The rule obtained on this motion was regularly served on the defendant in person on the 22nd May.

On the 18th, most irregularly and most unaccountably, the defendant, not subsequently to, but before being called upon to name an attorney or to appear in person, made a motion for *péremption*, where and before whom no one knows, in his own name, he being then without a new attorney, and never having obtained leave from the Court to appear in person.

This proceeding must have been taken out of the view of the Court, probably, in the office of the prothonotary; an inference which is justified by the absence of an authenticated certificate by the signature of a judge, or otherwise that the defendant's motion for a rule *nisi* was ever granted by the Court.

On the 30th Sept. the Court granted the motion of defendant and decreed *péremption*.

I consider the whole of this procedure as not only irregular, but null and void, and am of opinion that all the proceedings from and including the motion made by defendant in person on the 18th May, 1868, should, by the judgment of this Court, reversing the judgment appealed from, be set aside and the parties ordered to proceed, as to law and justice may appertain, upon the rule obtained by plaintiff on the 19th May, 1868, ordering defendant to appear in person, or to name a new attorney:

The following is the judgment:

The Court, considering that the defendant having, by the appointment to the judicial office of Mr. Johnson, his attorney *ad litem* in this cause, ceased to be therein represented:—Considering that the said defendant had no right to make a motion in this cause, without leave from the Court to appear in person:—Considering that not having obtained such leave from the Court, he should have, when called upon to do so, appointed an attorney to represent him in this cause:—Considering therefore that all the proceedings had in this cause from and including those of the 18th May, 1868, on which day said defendant made his motion for *péremption d'instance*, are null and void:—Considering further that in the judgment rendered by the Superior Court for the district of Montreal on the said 30th Sept., 1868, declaring plaintiff's action to be *périmée*, there is error, this Court doth reverse, annul and set aside the said judgment, and rendering the judgment which should have been rendered by the Superior Court, it is adjudged and ordered that all the proceedings from and including the motion made by defendant on the 18th May, 1868, be and the same are set aside and annulled, and that the parties do proceed in the said Superior Court upon the rule obtained by the plaintiff against the defendant on the 19th May, 1868, to appear in person, or name another attorney, as to law and justice may appertain.

Costs in review and on defendant's motion of 18th May awarded to plaintiff.

Judgment reversed.

A. Cross, Q.C., for plaintiff.
S. Bethune, Q.C., for defendant.
(A.H.L.)

COUR DE CIRCUIT, 1869.

ARTHABASKAVILLE, 21 AVRIL, 1869.

Coram A. POLETTE, J.

No. 4272.

Maise Beauchêne vs. Louis Edouard Pacaud.

JUGE :—1o. L'oubli dans un bref de contrainte par corps de certains frais, ne délie pas le débiteur de l'obligation de les payer plus tard;

2o. Les frais d'enregistrement d'un jugement sont toujours à la charge du débiteur.

En rendant son jugement la Cour s'exprime ainsi :

Le 27 Juin 1868, le défendeur M. Pacaud obtient jugement contre le demandeur Beauchêne, à la Cour de Circuit, pour $50.00, intérêt et dépens, et le 11 Août suivant il le fait enrégistrer, avec un avis contenant la désignation d'un immeuble de Beauchêne, au bureau d'enrégistrement du comté de Mégantic. Un bref de *fieri facias de bonis* émane contre Beauchêne et celui-ci en empêche l'exécution, en usant de force et de violence, et donne lieu par là, à l'octroi d'un bref *de contrainte par corps* contre lui ; mais en préparant ce bref, on omet de comprendre dans les frais une somme de $3 dues à un huissier sur le bref *fieri facias de bonis*. Beauchêne, est emprisonné, paye au shérif les sommes portées au bref de contrainte et est remis en liberté. Beauchêne, désirant faire-radier l'hypothèque dont enregistrement du jugement grévait son immeuble, s'addresse à M. Pacaud pour en obtenir une quittance, mais celui-ci ne la lui accorde qu'en recevant au préalable une somme de $5.25. dont $3 pour frais d'huissier omis dans le bref de contrainte par corps, et $2.25 pour le coût d'enrégistrement du jugement et de l'avis. Beauchêne paye ces deux dernières sommes sous protêt, et poursuit M. Pacaud pour en être remboursé. M. Pacaud résiste à cette demande prétendant qu'il n'a reçu que ce qui lui était légitimement dû. Il ne peut pas y avoir de questions par rapport aux $3 qui étaient dues. Dire que M. Pacaud a omis de les faire inclure dans le bref *de contrainte*, il ne s'en suit pas qu'il doive les perdre. Il avait droit de les exiger de Beauchêne, et en les payant, celui-ci ne faisait que s'acquitter de ce qu'il devait légitimement, et il ne peut pas en demander le remboursement.

Une question s'élève au sujet de l'autre somme ; celle de $2.25. Qui du créancier ou du débiteur doit supporter les frais d'enregistrement d'un jugement, afin d'acquérir hypothèque ?

Notre Code garde le silence sur cette question, et force est à la cour de recourir aux principes généraux du droit pour la résoudre.

Peut-on assimilier ces frais à ceux d'actes passés pardevant Notaires ? Par qui sont payés ceux-ci ? Y a-t-il analogie entre les uns et les autres ?

L'acquéreur d'un immeuble, le preneur à bail, celui qui consent une obligation, est débiteur du prix de vente, de loyer, ou fermage, de l'obligation. L'acquéreur a besoin d'un acte pour assurer la propriété qu'il acquiert, le preneur n'obtiendrait pas l'objet loué sans un bail, le débiteur ne trouverait pas emprunter, à acheter des effets s'il ne consentait une obligation au préteur, à celui qui lui rend, ni d'extension de délai s'il donnait un tel acte pour ce qu'il a déjà emprunté, acheté. C'est donc à l'acquéreur que l'acte est le plus utile, au débiteur, que l'acte profite le plus, puisque sans cet acte, il n'aurait pas eu d'emprunt, d'effets,

Beauchêne vs. Pacaud.

d'extension de délai. Aussi, les frais d'actes doivent-ils être à sa charge, non seulement de ceux qui contiennent les conventions, mais encore les frais de payement et des actes de libération. Il y a même raison de décider à l'égard de ceux d'enregistrement. L'acquéreur a intérêt que son acte d'acquisition soit enregistré ; le débiteur sait que son obligation le sera aussi, et il s'y soumet. L'enregistrement est la suite de l'acte, il en est comme le complément : c'est donc celui qui paye les frais de l'acte à acquitter ceux de son enregistrement.

" En général, les frais occasionnés par les actes sont à la charge de celle des " parties à qui la convention doit profiter, ou dans les mains de qui elle doit for- " mer un titre utile ; ainsi, d'après le Code Civil, les frais de quittance sont à la " charge de la partie que se libère ; les frais de vente sont à la charge de l'ache- " teur ; ceux d'un bail, à charge du preneur, etc., etc., c'est en suivant le même " principe que la loi du 22 Frimaire, an. 7, article 31, dispose que les droits des " actes emportant, *obligation, libération* ou translation de propriété ou d'usufruit " du meubles d'immeubles seront supportés par les débiteurs ou nouveaux " posseseurs."

5. Rolland de Villargues, Dictionaires du Droit Civil, Vo. Honoraires, sectl 5, p. 83, No. 208.

Pothier, Obligations, 550.

2. Poujol, Obligations, ch. 5, no. 13, pp. 85.

Teulet, D'Auvilliers et Sulpicy, Codes annotés, pp. 408, 409, art. 1248 du Code Napoléon, et No. 18.

3, Larombière, Obligations, pp. 172, 173, sur l'art. 1248 du Code Napoléon, No. 1, Malcville, vol. 3, p. 308, rapporte l'article 1593 du Code Napoléon; lequel est en ces termes : " Les frais d'actes et autres accessoires à la vente sont à la " charges de l'acquéreur," & il ajoute : conforme à l'usage : c'est donc de droit ancien.

C'est en suivant le même principe, que la Coutume de Paris obligeait l'acquéreur de fief, de payer le quint du prix (article 23) et l'acquéreur d'héritage en censive, de payer les lots et ventes au seigneur (articles 78.)

Notre Code Civil contient aussi quelques dispositions relatives aux frais d'actes, article 1479. " Les frais d'actes et autres accessoires à la vente sont à la charge " de l'acheteur, à moins d'une stipulation contraire." C'est l'article 1593 du Code Napoléon, avec la dernière partie de plus.

Article 1153. " Les frais de payement sont à la charge du débiteur."

L'article 2149, dernier alinéa, est en ces termes: " Le créancier est tenu de " voir à ce que la quittance soit enregistrée et est responsable de tous frais qui " peuvent résulter du défaut d'enrégistrement, et il ne peut être tenu donner " quittance; s'il ne lui est mis en main une somme suffisante pour acquitter les " frais d'enregistrement et de transmission."

Cet article qui ne parle que des frais d'enrégistrement de la quittance ne peut pas être considéré comme exemptant, même indirectement, le débiteur de payer ceux d'enrégistrement de l'acte qui crée l'hpothèque. Il n'est là que pour protéger les autres créanciers du débiteur commun, en leur donnant droit de se faire payer des frais qu'ils seraient obligés de faire pour contester la collocation du créancier payé qui aurait négligé de faire enrégistrer la quittance. C'est la reproduction d'une des dispositions de l'acte 27, 28 Vic. Cap. 40, Sec. 4, § 4.

Beauchêne vs. Pacaud.

La question doit être aussi examinée à un autre point de vue.

Tout créancier a droit de poursuivre son débiteur négligent pour s'en faire payer, et de recouvrer ses frais d'action. Le jugement qu'il obtient lui serait souvent inutile, si la loi ne lui donnait pas hypothèque sur les biens de son débiteur, en le faisant enrégistrer: Mais qui payera les frais d'enrégistrement? Ces frais ne sont-ils pas une suite de ceux d'action et aussi nécessaires la plupart du temps? C'est bien le débiteur qui les a occasionnés en négligeant de s'acquitter; pourquoi serait-il responsable des uns, et exempt des autres? Est-ce que la loi ne donne pas au créancier tous les moyens légitimer de se faire payer, non seulement de sa créance, mais encore de tous les frais qu'il est obligé de faire pour y parvenir? et si l'enrégistrement est un de ces moyens, quelle raison y a-t-il de lui en refuser les frais? Il ne fait pas d'injustice à son débiteur: il ne porte pas préjudice aux autres créanciers qui peuvent légalement employer les mêmes moyens: il ne fait qu'exercer un droit bien légitime, forcé qu'il y est par le mauvais vouloir, quelquefois même, par le malhonnêteté de son débiteur; il est donc juste que celui-ci en paye les frais, puisque c'est lui qui les occasionne.

Si notre Code Civil ne contient pas de disposition spéciale qui accorde les frais d'enregistrement au créancier, il ne lui denie pas non plus le droit de s'en faire payer par son débiteur. L'on peut donc invoquer en faveur de la prétention de M. Pacaud ce principe de justice et d'équiter qui ne pouvait pas manquer dêtre reconnu par nos lois; que celui qui occasionne des frais doit les payer. Le Code Napoléon applique ce principe au cas de l'enrégistrement, par son article 2155 qui est en ces termes: "Les frais des inscriptions sont à la charge du débiteur, s'il "n'y a stipulation contraire; l'avance en est faite par l'inscrivant, si ce n'est "quant aux hypothèques légales, pour l'inscription desquelles le conservateur a "son recours contre le débiteur. Les frais de transcription, qui peut être "requise par le vendeur, sont à la charge de l'acquéreur."

Cette dispositfon parut si juste, si équitable aux codificateurs français, qu'elle ne souleva pas de discussion, comme nous l'apend Locré, Législation Civile, etc., Vol. 15, p. 79, en disant: "cet article (1553) n'a donné lieu à aucune observation."

Aussi les auteurs qui ont écrit sur cet article sont-ils d'accord à dire qu'ils est fondé sur ce principle de justice que celui qui occasionne des frais doit les payer. S'il y a différence d'opinion entre eux, ce n'est que sur la question, si le créancier a, pour ces frais le même privilège, la même hypothèque que pour le capital. Les uns disent, que pour assurer cet avantage leur montant doit figurer dans l'inscription, sans quoi ils entrent dans la classe des créances chirographaires, tandis que les autres soutiennent que le privilège, l'hypothèque, est conservé par l'inscription même pour le capital de la créance, mais cette question est sans intérêt dans la cause.

"Notre article (2155) décide qu'elle est celui du débiteur ou des créanciers qui "doit les frais d'inscription. "*La justice veut que ce soit sur le débiteur qu'ils "retombent,*" à moins de stipulation contraires. *C'est toujours lui qui est la cause que le créancier se trouve dans la nécessité de prendre inscription en droit, il est de principe que les frais sont à la charge deceux qui les occasionnent.*

3, Troplong, Privilèges et Hypothèques, pp. 262, 268, No. 729.

Beauchêne vs. Pacaud.

" La loi met ici à la charge de celui qui les occasionne les frais de l'inscription " *En définitive c'est le débiteur qui a donné lieu à ces frais*, par la nécessité où " il a été de fortifier sa solvabilité personnelle par une sûreté réelle sans laquelle " le créancier n'aurait pas consenti à traiter. Le débiteur supportera donc les " frais."

2, Paul Pont, Hypothèques, p, 985, No. 1065. " *Comme c'est le débiteur* " *qui occasionne les frais d'inscription ces frais sont à sa charge* à moins " de stipulation contraire; l'avance en est faite par l'inscrivant."

" Il en est de ces frais (ceux d'inscription) comme de ceux fait pour obtenir- " jugement. Quoique la loi ne leur accorde nommément aucune hypothèque, per- " sonne n'a jamais douté qu'ils ne fussent mis au même rang que la créance pour " laquelle ils avaient été faits.

2, Persil, Régime Hypothécaire, p. 114.

Il répète la même chose, dans ses *question sur les privilèges et hypothèques*, Vol. 1, pp. 363, 364, voir encore Despréaux Dictionnaire général des hypothèques, Inscription, p. 422, No. 12.

1, Sirey, Codes Annotés, p. 996, sur l'article 2155 du Code Napoléon.

3, Battur, Privilèges et hypothèques, No. 453, pp. 449, 450.

1, Flandin, Transcription, pp. 582, 583, No. 806.

1, Mourlon, Transcription, p. 604, No. 361.

Pour tous ces motifs, Beauchêne doit être débouté de son action. Il n'a payé que ce qu'il devait.

Action déboutée avec dépens.

Felton & Honan, pour le demandeur.
E. L. Pacaud, pour le défendeur.
(E. L. P.)

SUPERIOR COURT, 1869.

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

No. 1109.

Rousseau v. *Trudeau* et al.

HELD :—That notice of demand for security for costs by motion must be served within four days after return.

The action was returned on the 7th April. By the writ it appeared that the plaintiff lived without the province. On the 21st April the defendants made a motion for security for costs, of which they gave notice only on the 17th.

TORRANCE, J.—If this demand had been made by *exception dilatoire*, the Code required it to be fyled within four days after the return (art. 120), and a demand by motion should not be entertained unless notice of it be given within four days after return.

Motion rejected.

J. J. J. Abbott, Q.C., for plaintiff.
Rouer Roy, Q.C., for defendants.
(J. K.)

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

No. 922.

Aimbault & vir vs. *Bates et al.*

HELD :—Where the attorney of record has duly elected a domicile, service must be made upon him at such domicile, but he is bound to have some one to represent him at his domicile.

D. Browne, for the defendants, moved (April 23) to reject the *réponse* filed by the plaintiffs, on the ground that it had been irregularly filed without notice to the defendants as required by C. C. P. art. 462. The copy had been served at the prothonotary's office, the bailiff stating in his return that the office of D. Browne, the attorney of record, was open, but no one was in attendance there. This, it was contended, was no service at all, as Mr. Browne had a duly elected domicile, at which only could service be made.

Pagnuelo, for the plaintiffs :—In the first place, this motion comes too late, because issue has been joined. Articulations have been filed on both sides. Further, the service must be made within certain hours, and the bailiff went to Mr. Browne's office repeatedly, and found no one there. The election of domicile, if made, was not effective in the present instance, because the office was not occupied by any one when the bailiff went to make the service. Art. 85 C. C. P., Kingsley vs. Dunlop et al.

Browne, in reply :—In Kingsley vs. Dunlop, the bailiff made his return that the office was shut, and that the attorney had made no election of domicile, and the paper was served at the prothonotary's office. That case has, therefore, no bearing upon the present, as the attorney in this instance has a domicile duly elected. As to issue having been joined before the present application was made, I was not aware that this paper had been filed till I had occasion to refer to the record some time after, and then I immediately gave notice of this motion. Art. 85 C. C. P. applies only where no election of domicile has been made.

TORRANCE, J.—The defendants made a motion to reject from the record the answers fyled by plaintiff to defendants' pleas, on the ground that no copy had been served upon the defendants. It appears from the record that a copy of the answers was served at the prothonotary's office for the defendants, and the bailiff serving returns that he went to the office of defendants' attorney to make the service there, and found the office open but no one in charge upon whom he could make a service. This was the reason why service was made at the prothonotary's. The Court thinks that neither party is free from blame. The service should have been made at the office where defendants had elected their domicile, and not at the prothonotary's, but the defendants' attorney should have had some one in charge at his office to receive service. Under the circumstances, the motion is dismissed with costs, plaintiff to serve another copy upon defendants.

Motion dismissed.

Barnard & Pagnuelo, for plaintiffs.
Dunbar Browne, for defendants.
(J.K.)

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

Nos. 1116 & 1141.

Aimbault et vir vs. *Dunlop.*

HELD :—That papers filed as exhibits in one cause cannot be transferred to another pending cause without special permission from the Court.

Browne, for defendant, moved (April 23) that certain exhibits filed by the plaintiffs be rejected, inasmuch as they had already been filed in another cause.

Pagnuelo, for the plaintiff: The exhibits in question are exhibits belonging to the plaintiffs; there can be no objection to my filing them in this case. It is for my opponent in the other suit to complain that they are wanting in that case.

TORRANCE, J.—The defendant makes a motion to reject deeds fyled as exhibits in these causes which had already been fyled and were being used in other pending causes. The Court has been against this practice and the motions are granted.

Motions granted.

Barnard & Pagnuelo, for plaintiffs.
Dunbar Browne, for defendant.
(J. K.)

MONTREAL, 31ST MARCH, 1869.

Coram BEAUDRY, J.

No. 247.

Exparte John Stephen, PETITIONER;

AND

Francis Stephen, DEFENDANT.

HELD :—That a surety or bailsman cannot withdraw from liability under a bail bond even upon giving notice to the parties.

Petitioner was held to give and did in fact enter security for costs on the 25th September, 1865. One of the sureties, Thomas Simpson, on the 18th March, 1869, notified the parties as follows: "Take notice that I am unwilling to "remain any longer security for the petitioner to pay the defendant's costs in case "the petition in this cause be dismissed, and I forbid any further costs being "made for which I may be looked to as security."

Petitioner moved to reject the document from the record as illegal and irregularly fyled, and cited No. 27, Meunier & Morin, decided in appeal, 5th December, 1868.

Motion granted.

Perkins & Ramsay, for petitioner.
Cross & Lunn, for defendant.
(J.A.P., JR.)

COURT OF QUEEN'S BENCH.

IN APPEAL FROM THE SUPERIOR COURT, MONTREAL.

MONTREAL, 9TH JUNE, 1868.

No. 31.

Coram DUVAL, C. J., CARON, DRUMMOND AND BADGLEY, JJ.

ROBERT WIGGINS,

(*Plaintiff in the Court below,*)

APPELLANT:

AND

THE QUEEN INSURANCE COMPANY OF LIVERPOOL AND LONDON,

(*Defendants in the Court below,*)

RESPONDENTS.

In an action on a policy of fire insurance for $1000, defendants pleaded fraud and false statement which, under a condition of the policy would avoid plaintiff's claim, and also that plaintiff did not forthwith give notice of his loss, and deliver in as particular an account of such loss as the nature of the case would admit of, and make proof of the same by declaration or affirmation, and by his books of account or such other reasonable evidence as the defendants or their agent required. On the case being submitted to a jury, they found that there was no fraud or false statement, and fixed plaintiff's loss at $990, but in answer to the following question: Did plaintiff forthwith and within the delay required by the said policy, to wit: the 12th day of December, 1866, at Montreal, give notice to defendants, and deliver in an account giving particulars of his loss, under oath, and offer all information to defendants, and make claim to the payment of the sum of $1,000 currency of and from the defendants?

They answered, "We consider the claim made *but not in due form.*"

Plaintiff in term moved

1st.—That the words "but not in due form," be struck out as surplusage.

2nd.—For judgment on the verdict for $990 and costs.

Defendants moved—1st, for a new trial, 2nd, for arrest of judgment, and 3rd, for judgment on the verdict dismissing action because the answers of the jury negatived the allegations of plaintiff's declaration.

In the S. C. all these motions were rejected except the last, which was granted. In appeal by plaintiff reversing judgment of Superior Court,

HELD:—That in adding the words "*but not in due form,*" to their answer to 8th question, the jury answered beyond the matters enquired of; the words were therefore surplusage and of no legal effect.

This was an action upon a policy of insurance against loss by fire, instituted in the Superior Court, on the 13th Feby. 1867.

The declaration sets up the policy dated 21st June, 1866, whereby for moneys then paid, the Queen Insurance Company insured the plaintiff in the sum of $1000 from 30th May, 1866 to 30th May, 1867, against loss or damage by fire to household furniture, wearing apparel, &c., &c.

The destruction of said premises by accidental fire is then alleged, whereby plaintiff sustained loss to the extent of $1272.23 upon the effects so named.

The plaintiff then alleges "that he did forthwith after the damage and loss,

Wiggins, and The Queen Insurance Co. of Liverpool and London.

"give notice to defendants, and, also, as soon after as possible, to wit, at Mon-"treal aforesaid, did deliver in an account, stating the particulars of such loss "under oath, and was ready and willing to prove the same by the production of "the bills of sale and such other documents and vouchers as the said Board of "Directors should reasonably require, and did afterwards within three months "next after such loss and damage at Montreal aforesaid, claim of and from "said defendants the sum of one thousand dollars, the amount of insurance "effected," which was refused.

He also alleges that he had "in all things conformed himself to and observed all and singular the said articles, stipulations, conditions, matters and things which on his part were to be observed and performed according to the form and effect of the said deed or policy." Conclusions for $1000, amount of the policy. And plaintiff put himself upon the country.

The defendants fyled five pleas to the action, denying all plaintiff's allegations. The 1st recited the 12th condition endorsed on the policy, to wit:

"Persons insured, sustaining any loss or damage by fire, are forthwith "to give notice thereof to the Company, or to the agent through whom the "insurance was effected, and within fourteen days thereafter deliver in as par-"ticular an account of their loss or damage, and of the value of the property "destroyed or damaged immediately before the happening of the fire, as the "nature and circumstances of the case will admit of, and make proof of the same "by declaration or affirmation, and by their books of accounts or such other "reasonable evidence as the Company or its agent may require, and until such "evidence is produced, the amount of such loss, or any part thereof shall not be "payable or recoverable; and if there appears any fraud or false statement, or "that the fire shall have happened by the procurement and wilful act, or means or "connivance of the insured or claimant, he, she, or they, shall be excluded from "all benefit under this Policy. No profit of any kind is to be included in such "claim; and in the event of no claim being made within three calender months, "after the occurrence of the fire, the insured shall forfeit and be barred of any "right to restitution or payment by virtue of this policy, and time shall be "of the essence of the contract."

That plaintiff did not "as soon as possible after the loss or damage arising from the fire mentioned in plaintiff's declaration in this cause, deliver in as particular an account of such loss or damage as the nature of the case would admit of, or as alleged by plaintiff in his said declaration."

And that in the claim made by plaintiff there appeared to be and there was fraud, within the true intent and meaning of the said twelfth condition; that is to say *fraud* in giving the quantity, nature and value of articles and effects claimed to be totally destroyed, and of which there were no remains, and fraud in claiming and affirming that plaintiff had suffered loss or damage by fire to the amount of $1272,80-100, contrary to said condition, and was, therefore excluded from all benefit.

2nd.—That under said twelfth condition *there was a false statement by plaintiff* in his claim fyled in their office and produced with pleas.

3rd.—That there was fraud and false statement in the claim.

4th.—That the plaintiff did not suffer loss or damage beyond $500 currency.

5th.—*Défense au fonds en fait.*

And by each praying the dismissal of the action.

The answers were general.

When the period arrived for defining the issues to be enquired of by the jury, plaintiff suggested the articles Nos. 1 to 8 inclusive, hereafter recited, while the defendants suggested those numbered 9 and 10, and the issues were so fixed.

On the 12th and 13th day of September 1867, the cause was tried before the Hon. Mr. Justice Monk, and a special jury. After evidence and hearing the parties the presiding Judge charged the jury in effect, that if they thought plaintiff had sustained the loss claimed, they should find for plaintiff for full amount. If they were of opinion that there was any fraud or wilful false statement in his claim, they must reject it and find for defendants; but that if they came to the conclusion that the amount claimed was greater than the loss actually sustained, and thought the claim was not wilfully exaggerated, then they should give a verdict for plaintiff for the amount at which they fixed his actual loss.

The Jury thereupon after deliberation returned answers to the interrogatories as follows:—

First.—Did the defendants execute in favor of plaintiff the Policy of Insurance described in the plaintiff's declaration at the date and for the amount recited by said declaration?

Answer.—Yes.

Second.—Did plaintiff, from the time of making said Policy, until the date of the fire, hereafter mentioned, fully pay the defendants the premiums and sums of money due thereon, and were the same accepted by defendants?

Answer.—Yes.

Third.—Was the plaintiff interested in the subjects insured at the date of said Policy and up to the time of the fire in the sum of $1,000 currency, and was plaintiff the owner of the subjects insured at said date and up to the time of the said fire?

Answer.—Yes.

Fourth.—Were the premises of said plaintiff at Montreal on the 29th day of November, 1866, partially destroyed by fire and his goods and property consumed by said fire?

Answer.—Yes.

Fifth.—What was the cause of said fire?

Answer.—Unknown to us.

Sixth.—Was the Policy before mentioned, at the time of said fire, in full force and existing?

Answer.—Yes.

Seventh.—To what amount did said plaintiff sustain loss and damage by fire, to wit: at the date mentioned in plaintiff's declaration in respect of the property referred to in the Policy issued by defendants to plaintiff?

Wiggins, and The Queen Insurance Co. of Liverpool and London.

Answer.—One juror for $1,000; nine for $900; two for $800.

Eighth.—Did plaintiff forthwith and within the delay required by said Policy, to wit: the 12th day of December, 1866, at Montreal, give notice to defendants and deliver in an account giving particulars of his loss, under oath, and *offer all information to defendants* and make claim to the payment of the sum of $1,000 currency of and from the defendants?

Answer.—We consider the claim made *but not in due form.*

Ninth.—Did the plaintiff, by his claim in writing, claim from the defendants the sum of $1,000 currency, and was and is there fraud in said claim?

Answer.—He did make his claim and we consider *there was no fraud.*

Tenth.—Was there a false statement in said claim?

Answer.—*We think not.*

On the 20th September following, plaintiff moved the Court that the words "But not in due form" should be struck out from the answer of the jury to the eighth question, as surplusage, and not referring to matters in issue, and contrary to the evidence.

The same day respondents moved 1st in arrest of judgment, and 2nd for a new trial upon many grounds set forth in the motions.

These motions were continued to 26th September on which day plaintiff moved for judgment on the verdict for $900 with interest and costs, and the defendants, also, the same day presented the following motion:

"Motion on the part of the defendants that judgment be entered up for them "on the verdict of the Jury rendered in this cause, and that the plaintiff's action "may be dismissed with costs.

"Because the findings of the jury shew that the plaintiff did not prove the "allegations of his declaration.

"Because they also shew that the defendants proved the allegations of their "pleas."

These five motions were all heard before Mr. Justice Berthelot 26th September, and on the 28th November 1867, Mr. Justice Berthelot rendered judgment, rejecting plaintiff's motions as well as those of respondents, in arrest of judgment and for new trial, and granting their other motion above cited, dismissed plaintiff's action with costs as follows:—

"La Cour, après avoir entendu le demandeur et la défenderesse par leurs "avocats, tant au mérite que sur le verdict du jury, et sur les deux motions du "demandeur, produites le vingt et le vingt-six septembre dernier, et sur les trois "motions de la défenderesse, aussi faites et produites les dits vingt et vingt-six "septembre dernier, examiné la procédure et la preuve, et sur le tout avoir déli- "béré, a rejeté les dites motions tant du demandeur que de la défenderesse, pré- "sentées le dit vingt septembre dernier;

"Et procédant à adjuger au mérite de l'action, contestation du verdict du jury "et des dites motions présentées de part et d'autre le dit vingt-six de septembre "dernier, vu les réponses du jury aux différents faits qui lui ont été soumis par "jugement de cette Cour du vingt-six juin mil huit cent soixante et sept, et "particulièrement sa réponse à la huitième question, par laquelle il affirme que "le demandeur n'a pas présenté sa réclamation à la défenderesse en bonne et

" due forme, conformément à sa police d'assurance, sur laquelle il réclame, et que " sans cette preuve, le demandeur ne peut être reçu à poursuivre la défenderesse " conformément à la condition douzième au dos de la police d'assurance récitée " en la déclaration du demandeur.

" La Cour a, en conséquence, renvoyé la motion du demandeur et accordé la " motion de la défenderesse du dit vingt-six septembre dernier, et a débouté et " déboute l'action du dit demandeur, avec dépens, distraits en faveur de Messrs. " Torrance et Morris, avocats de la défenderesse."

The hon. judge after summing up the pleadings, and stating that the principal question now before him arose from the 8th, 9th and 10th articles above recited, and the answers returned thereto by the jury, remarked that: " Ces trois réponses peuvent se résumer comme suit: Le demandeur n'a pas commis de fraude, ou produit d'état faux, mais il n'a pas fait sa réclamation conformément à l'exigence de la condition de sa police d'assurance. Par une autre réponse à la 7me. question, le jury ou plutôt neuf d'entre eux ont répondu que la perte soufferte par le demandeur avait été de $900. La difficulté qu'il y a de concilier toutes ces réponses résulte de ce que le verdict n'était pas général. Il n'a pas été soumis au jury, une question qui est ordinairement la dernière et par laquelle on demande s'il rapporte pour le demandeur ou pour le défendeur.

De la part du demandeur, deux motions ont été soumises à la cour; l'une pour faire retrancher de la réponse à la 8me. question les mots suivants: " *but not in due form* " comme inutiles et ne se rapportant pas à la contestation et étant contraires à la preuve et illégales. Puis une autre motion pour jugement sur le verdict pour $900.

De la part de la défenderesse, trois motions ont été faites. 1. Pour nouveau procès.

2. En arrêt de jugement.

Et 3. Pour jugement en sa faveur, parce que les réponses du jury n'ont pas soutenu les allégués de la déclaration et qu'elles ont soutenu les plaidoyers de la défenderesse.

Il est certain que la première motion du demandeur ne peut être accordée. Le jury était parfaitement dans son droit en limitant, par la dernière partie de sa réponse au 8me. fait, le sens qu'il voulait lui donner. Une motion au même effet a été rejetée dans une cause de Davis vs. Fitts.

Une fois la suggestion de fait réglée et soumise au jury, elle doit entraîner toutes ses conséquences. Si le jugement du 26 juin 1867, qui a réglé la suggestion de faits, a été erroné en laissant au jury par la huitième question de déterminer si la réclamation avait été bien et duement présentée, le demandeur aurait du se plaindre de ce jugement.

C'était peut-être une question mixte de fait et de droit qui aurait pu être réservée par la Cour, mais elle ne l'a pas été et les parties ne s'en sont pas plaints.

Comme je le disais dans la cause de Racine vs. The Equitable Assurance Company, à quoi bon soumettre cette question au jury si sa réponse une fois faite ne devait pas être adoptée par la Cour. C'est peut-être une inconvénient du système des suggestions de fait, à moins que dans tous les cas comme je l'ai dit plus haut on fasse une dernière question pour demander en faveur de qui il entend rapporter.

Wiggins, and The Queen Insurance Co. of Liverpool and London.

Cette première motion du demandeur doit donc être rejetée.

Pour les mêmes raisons, ou à peu près les mêmes, les deux premières motions de la défenderesse pour nouveau procès et en arrêt de jugement ne peuvent pas être accordées.

Il n'est pas possible de prétendre que la preuve était insuffisante ou illégale ou contraire de part à d'autre. Elle a été assez étendue et contradictoire pour permettre aux jurés d'apprécier dans un sens ou un autre les prétentions des parties—aussi l'on voit qu'un d'eux voulait accorder $1000, deux $800, tandis que neuf d'entre eux ont fixé la perte à $900. Ce n'est pas un cas dans lequel on peut accorder un nouveau procès, car indépendamment de la preuve testimoniale, il y avait dans la cause le rapport fait par les deux experts, Armstrong et Carlisle nommés par les parties le lendemain ou surlendemain du feu—pour établir le montant de la perte en sorte que le jury comme la Cour pouvait par la preuve faite, arriver assez aisément quant au jugement qui pouvait avoir été rendu et pour quel montant. D'ailleurs le jury a trouvé qu'il n'y avait ni fraude, ni faux dans les états soumis et présentés par le demandeur.

Ces deux motions étant aussi rejetées, la seconde motion du demandeur et la 3ème. motion de la défenderesse sont en présence l'une de l'autre.

Il faut en revenir à examiner quel est l'effet de la réponse du jury au 8ème. fait sur la contestation telle qu'elle se présente, et si la condition de la clause 12me. doit avoir tout son effet n'ayant pas été suivie par le demandeur en autant que sa réclamation (bien qu'étant ni fausse, ni frauduleuse suivant le jury) n'avait pas néanmoins été produite et filée "*in due form*" avant le 14ème jour après l'accident ou même en aucun temps depuis.

La présentation de la réclamation dans le délai fixé et dans les formes voulues par les conditions de la police est une chose de rigueur tant en droit anglais qu'en droit français, et si ces formes et ces conditions ne sont pas strictement observées et accomplies dans le délai fixé et tel que prescrit par icelles, il s'en suit un ordre de échéance et une prescription qui profite à l'assurance et empêche l'assuré de pouvoir exercer son action.

Je vais répéter ici ce que j'ai dit et j'ai cité de *Quenault* lorsque j'ai rendu le jugement dans la cause de Racine vs. The Equitable Insurance Co., rapportée à la page 89 du 6ème. Vol. du jurist.

En France les conditions de police d'assurance de même caractère que celle qui fait l'objet de la présente difficulté sont regardées comme strictement obligatoires pour l'assuré.

Quénault—Assurance terrestre, No. 252. Si les assurances ne satisfont point à la demande que l'assuré leur fait à l'amiable, il doit intenter contre eux l'action en paiement de l'assurance avant l'expiration du délai fixé pour la prescription de cette action.

Plus loin dans sa traduction de l'ouvrage de Marshall, Ch. 5 P. 377 à 384, il rapporte plusieurs jugements des cours anglaises qui ne laissent aucun doute sur la nécessité pour l'assuré de faire cette preuve de la production de sa réclamation *en bonne forme* avant de pouvoir recouvrer, même dans le cas d'un *verdict* en sa faveur.

Il doit en être de même et avec beaucoup plus de raison dans un cas comme

celui-ci ou le verdict n'est que spécial et qualifié; il reconnait la réclamation et fixe le montant, mais il a expressement rapporté le fait que l'assuré n'a pas réclamé en bonne forme. En d'autres termes "selon les conditions de la police," à moins que l'on ne doit attacher aucun sens à la réponse au 8ème. fait, ce qui n'est ni raisonnable ni possible.

La Cour ne peut faire autrement que de donner suite à ce verdict qui bien qu'en fait et jusqu'à un certain point est en faveur du demandeur, est en droit et en fait en faveur de la défenderesse.

La seconde motion du demandeur est également rejetée et la troisième motion de la défenderesse adoptée et accordée.

Je regrette qu'il en soit ainsi et que le demandeur succombe sur un point qui peut paraître faible, ayant obtenu du jury des réponses favorables au vrai mérite dans sa cause, puisque le jury l'a absous des reproches de fraude et de fausse représentation. Mais cette manière de voir et de prononcer mon jugement aura cet avantage qu'en réduisant la question à un point de droit, il aura facilement et à peu de frais son recours en révision ou en appel sans avoir recours à un nouveau procès.

The plaintiff appealed from this judgment and the case was heard before the Queen's Bench in March term 1868.

John A. Perkins, for appellant, argued, that by the judgment below great injustice had been done appellant and that upon the facts and upon the law of the case he was entitled to reversal. That the motions of respondents for a new trial and in arrest of judgment having been rejected, under the present appeal this Court had to adjudicate alone upon the two motions of appellant and that of respondents praying the dismissal of the action.

The plaintiff's motion to strike from the answer of the jury to the 8th question, should have been granted. By the question the jury were not asked anything as to the form of the claim. They were required to answer,

"Did plaintiff forthwith and within the delay required by said policy, to wit, the 12th December, 1866, at Montreal, give notice to defendants and deliver an account of particulars of his loss, under oath, and *offer all information to defendants*, and make claim to the payment of a sum $1000, of and from defendants?"

By the last words of their answer, "We consider the claim made *but not in due form*" they have given an answer beyond the question. There was no issue raised as to the *form* of *appellant's* claim. The words are mere surplusage and by the practice of the Court in such cases, should be struck out. Respondents contended in the Court below that these words were in answer to that part of the question which asks "did plaintiff offer all information to defendants." The words "not in due form" cannot be construed into the words "he did not offer information." The form is in writing and can be judged of on simple examination. If the jury did not answer the question in its entirety it may be a ground for a new trial, but not for totally depriving plaintiff of an action.

As matter of fact, the form of the claim is correct. The plaintiff had been insured by the defendants for several years under divers policies on various houses occupied by him successively. No questions were ever asked, or examin-

Wiggins, and The Queen Insurance Co. of Liverpool and London.

ation of his property ever made, to ascertain whether he actually had property to the value insured, although some time previous to the loss in question, the defendants were obliged to pay a small loss under one of these policies. The fire took place on 29th Nov., 1866. On the following day plaintiff notified defendants, agent at their office, verbally, of the fire and of his loss being beyond the amount of the policy. Mr. A. M. Forbes asked for a valuation of the articles of which remains were found, which was made by two appraisers appointed, one by each party, and their report fyled with the company. On the 12th December, within the fourteen days, appellant, *upon a printed form furnished by defendants*, gave in under oath his statement of loss in detail, under the following divisions:—

1st.—Amount allowed by valuators for loss of goods and effects of which they could identify remains.....	$355 45
2nd.—Articles of furniture and usual household effects totally destroyed.....	326 30
3rd.—Wearing apparel of all kinds, of self, wife and four children.	590 63
Total.....	$1,272 38

(And claimed from the respondents the sum of $1000 currency, "amount of the said Policy.")

After several visits to respondents to obtain settlement, and believing from the numerous delays that they did not intend to satisfy his claim, he placed it in the hands of his Attorney, who, by letter of 30th January, 1868, informed Mr. Forbes thereof, and stated that if he desired any further information or papers, upon request they would if possible be supplied, but that if no settlement were made before 10th February, an action would be instituted for the amount of the Policy.

This letter was written in a friendly spirit with the view of avoiding litigation; but though received by defendants' agent, no notice was taken of it, and this action was instituted 13th February, 1867. Defendants plead fraud and false statement, not informal claim.

Good faith and fair dealing are of the very essence of the contract of insurance and hence an answer that they would not settle is a waiver of any pretended imperfection in the preliminary proofs. It is settled in fire, as well as in marine insurance, that when underwriters make no objection to a deficiency in the preliminary proofs, or to the notice given, but rest their denial of liability upon other grounds, then there is a waiver of the objection of a defective notice; any formal defect in preliminary proof may be supplied whenever objection to pay a loss is put upon that ground. Phillips on Insurance, Vol. 2 No. 1812 &c: where many cases are cited. All the authorities upon this subject, agree with the principle laid down by an eminent judge, that, "Good faith on the part of the underwriters, "requires that, if they mean to insist upon a mere formal defect in preliminary "proofs they should apprize the assured that they consider the same defective in "that particular, or put their refusal to pay upon that ground, as well as others, so "as to give him an opportunity to supply the defect before it could be too late; "and if they *neglect* to do so, their *silence* should be held a *waiver* of such defect "in preliminary proofs, so that the same shall be considered as having been duly made

"according to the conditions of the Policy." If the Respondents had contemplated the objection, it would have been but ordinary fair dealing to have apprised the Appellant of it—for it is obvious, that if any defect existed it could have been immediately supplied.

The form of claims in insurance matters is a question of law for the Court, not one for the Jury. The Court below should have itself decided as to sufficiency of form, and not have taken the opinion of the jury thereon. In this case the Hon. judge held that the jury having said the claim was informal he could not go behind the answer and examine the claim itself or the evidence thereon. But it was his duty to do so as it is a question of law, and if he found its form correct to give effect thereto. In fine, 1st the form was never impeached, 2nd. The jury had no right to decide the matter. 3rd. They answered beyond the inquiries in the question. 4th. The claim is in perfect form. 5th. The valuation following the verbal notice of fire and loss, and made by both parties, completely covers any defects.

The appellant urges that he is consequently entitled to have the words "but *not in due form*," struck out as surplusage and irrelevant, and that then the answers of the jury being on all points in his favor, he is entitled to judgment on the verdict for $900 and costs, and therefore prays the reversal of the judgment.

J. L. Morris, for respondents, argued that the words *not in due form*, were not irregular or surplusage. The question was three fold. It asks: Did Plaintiff forthwith and within the delay required by said policy, to wit; the 12th December, 1866, at Montreal, give notice to Defendants, and deliver an account of particulars of his loss under oath?

2. Did he offer all information to Defendants?

3. Did he make claim to the payment of a sum of $1,000, of and from Defendants?

The last part of the question is answered in the affirmative by, "we consider that the claim was made," the former two parts, in the negative, by the words, "but not in due form."

The matters inquired into by the question were more than mere matters of form, although necessarily clothed in formality to a certain extent; and the Jury finding by the evidence that the conditions of the policy had not been complied with, properly answered that the claim was not made in due form; and this they say without pretending to judge as to the effect of such non-compliance.

In answer to the pretention of appellant in his reasons of appeal that the claim was a matter upon which the Court had to adjudge as to form and sufficiency, and not a matter within the province of the Jury, respondents say, that the Jury did not attempt to adjudge as to the sufficiency of the manner of making the claim, but certain questions, especially agreed upon by both parties to the cause and sanctioned by the Judge, having been put to them, they simply answered them.

To the eighth question they answer, "the claim was not made in due form." That is a matter of fact founded upon the evidence which the Jury had a right to determine, and it is for the Court to say whether in the light of the conditions of the policy, that answer is not fatal to the Plaintiff's demand.

Wiggins, and The Queen Insurance Co of Liverpool and London.

The present appeal comes up upon a point of law, whether, the Jury having found in answer to the eighth question, that the plaintiff did not make his claim in due form, as required by the policy, he was entitled to an action against the defendants.

The respondents contending that he was not, made their motion that judgment be entered up in their favour on the verdict.

The appellant made a motion that judgment be entered up in his favour *on the verdict*.

Both motions are based upon the verdict, and it would be useless trouble for the Court, besides being beyond the issue, were it to attempt to adjudge the case upon the evidence as the appellant expects. The Jury were the judges of the facts submitted to them, and having determined these facts it is now for the Court simply to declare the result in law, which the respondents believe is favourable to them. At the same time the respondents declare that by the evidence it is proven that the appellant was guilty of most flagrant fraud in making his claim.

The Court cannot in view of that answer of the Jury do otherwise than declare that plaintiff has no right of action.

Clauses in policies, requiring the insured to adduce certain evidence of a preliminary character in support of their claims, are not inserted as meaningless forms, but by agreement of both the insurer and the insured, as equitable and just, the object being to satisfy the insurer and avoid litigation.

The respondents refer to the case of Cinq Mars *vs.* the Equitable Fire Insurance Company of London, decided in the Court of Queen's Bench, Upper Canada, and reported in 15 U. C. Q. Bench Reports, p. 143. The point raised there was that plaintiff had not made preliminary proof of his loss by books, vouchers, &c., as required by the 10th condition of the policy, and a new trial was ordered, the Court holding that the defendants ought to have succeeded. At the second trial the verdict was given in favour of defendants. The verdict in that case being general, and in favour of the plaintiff, the only course open for defendants was the motion for a new trial; but in this case the verdict is special and it is for the Court to determine in law, whether it is in plaintiff's or defendants' favour.

The following were among the remarks made by the late Chief Justice Robinson in rendering judgment:

"It is right to remember, in such cases, that the reasonable intention of this "condition in the policy, is to give insurers the means of satisfying themselves as "fully as they can whether the claim for loss is just as to amount, without the "expense and trouble of litigation, and that it is not enough to say to them at the "trial: 'you must be satisfied with what you see and hear now, that our loss "was as great as we have stated.' It is damaging to the reputation of an In"surance Company to throw impediments unnecessarily in the way of a settle"ment of any loss for which they are liable, and it is right, therefore, that they "should have all the information that they can reasonably require, to enable "them to judge whether the claim is a just one, or one that they would be justi"fied in opposing."

Scott et al, appellants, and the Phœnix Insurance Company; Stuart's

Wiggins, and The Queen Insurance Co. of Liverpool and London.

Reports, 354. Held by the Privy Council affirming a judgment of the Court of Appeals at Montreal, that if a condition in the policy require, in the event of loss and before payment, a certificate of a magistrate, such certificate is a condition precedent. The action was dismissed with costs on this ground.

See also as to Preliminary Proof, 2 Phillip's Ev. Nos. 1805, 6, 10, and 11. Ellis, Insurance, p. 132. Racine vs. The Equitable. 6 L. C. Jurist p. 89, Arnold, Marine I. 1, 543, 2, 1314. Id. 1314, Construction of Policy.

As to notice of loss and proving material averments in declaration, see Ellis, Insurance, p. 131, note 1, "Every material averment in the declaration must be "proved; one of the most material of which is that of the truth of such war- "ranties as constitute conditions precedent, as the delivering in an account of "the loss and damage to the office, with evidence in support of its accuracy, "according to the rules laid down by the respective offices."

The respondents submit, in conclusion, that the Court cannot go behind or beyond the verdict of the Jury [illegible] therefore pray that the appeal be dismissed with costs.

On the 9th of June 1868, BADGLEY, J., [illegible]dering the judgment of the Court said:

The only difficulty in this case is the alleged non compliance with the 12th condition of the policy. The verdict of the jury estimating the loss at $900 altogether puts aside the objection of fraud and fraudulent estimation, which is so clearly within the province of the jury, that the appellant is entitled unhesitatingly to all its advantage. The verdict therefore controls this part of the case and the only difficulty is as to the 12th condition referred to. Now the jury in answer to the 8th question say: "We consider the claim made *but not in due form.*" This answer is a general answer affirming the articulation and cannot be affected by the addition "but not in due form," because the form of the claim was not objected to or inquired of, nor any particular form required or set out in the condition, but simply "an account of the loss, or damage, and of the value of the property destroyed or demanded." Now this *was* done and was supported by the affirmation of the appellant.

The addition in the answer respecting the form of the de[illegible] or its informality, is unimportant, and is not essential to the claim as [illegible] loss, which the jury declare to have been made in time, with particulars, and of course could not apply to the subsequent part of the condition which referred to the proof of the claim, otherwise they would doubtless have taken upon themselves to declare, that the appellant "did not make proof &c., &c." What gave rise to the objection to a settlement by the Company, was 1st the agent's suspicion that the appellant had assisted or contributed to set fire to his premises, and 2nd that his effects had been overvalued by him for insurance. Both these suspicions so strongly impressed themselves on the mind of the agent that he would not yield to any persuasion, nor direct the appellant how to give details. This plea sets out both objections. As to the first, the jury distinctly negatived it, and as to the second as already stated, the same result is established by the 3rd and 7th articulations, and their respective answers. The appellant's interest for insurance at the date of the policy, and at the time of the fire was $1000 and his loss was $900.

Wiggins, and The Queen Insurance Co. of Liverpool and London.

It is only necessary to glance at the testimony of the agent given for the benefi of his office and to the evidence upon this point, to be satisfied that his suspicions all along stood in the way of a settlement. The company made their own inquiries They received from the appellant his account or statement of his loss supported by his affidavit. Not satisfied, they cause an investigation to be made. "Defendants made usual inquiry into plaintiff's circumstances to know if he was justified in having such a stock, what his occupation and means were, and whether he was in such a position to have such value as he made a claim for;" and they went beyond this and got an appraisement made by their own appraiser in addition to that furnished to the company by the appellant's appraisers; the difference between the two being that the defendants' appraisement only valued the remaining damaged effects, whilst that of the appellant valued the loss as well as the damage. After all this had been done and the agent still continued his objection, he was again applied to by the plaintiff's counsel by letter, admitted by agent to have been received by him, in which the appellant requested him to state if he required any further evidence or information; but no notice was taken of this reasonable request and the suit followed. Now it will scarcely be possible to gainsay the appellant's opinion that the company's investigation and their appraisement by their own appraiser, their subsequent joining with the appellant in another appraisement by his appraiser and one appointed by themselves, was a substantial compliance adopted by themselves of the terms of the contract, and necessarily compelled the appellant to come to the court for the enforcement of his claim. It is quite true that the probable object of the condition in question was to have adjustments made without the expense and trouble of litigation, and it could never have been contemplated by any possible reasoning that the insured was to be at the mercy of the unfounded suspicions of the insurer or of his agent and precluded for such reasons from recovering his loss.

Whether there should be a suit or not in the first instance, rests upon the insured, but having made the joint appraisement and persisting in their refusal after such compliance by appellant, if the insured is compelled to sue by reason of their refusal, it is then quite enough for him to say to them at the trial, "the verdict proves that you were wrong and that the loss was properly and "honestly claimed." The only possible ground that could be safely pleaded by the company was this, not that there is no action for the recovery of the loss, but that it was so doubtful as to have justified the refusal of settlement, and that if established by a verdict, the cost and expense of litigation should not be cast upon the insurer. The company does not assume such compromise but has pleaded absolute fraud and criminality against the appellant, and having put their case upon that issue they cannot expect to be relieved from the costs incurred by the appellant who was forced by them in the first instance to sue, and who was afterwards forced by them to sue to judgment.

We think that the judgment of the Superior Court is wrong and should be reversed. The following is the judgment of the Court:

"The Court considering that the words "but not in due form," contained in the answer given by the jurors who tried the issues in this cause before the Court of original jurisdiction to the eighth question submitted to them, were and are

Wiggins, and The Queen Insurance Co. of Liverpool and London.

in no wise pertinent to the issues they had to try, and should therefore be considered as mere surplusage, and of no legal force or effect whatever:

Considering that the motion made by the appellant on the twenty-sixth September last, for judgment upon the verdict for nine hundred dollars, with interest and costs, should have been granted:

Considering therefore that in the judgment rendered by the said Court of original jurisdiction, there is error:

This Court doth reverse, set aside and annul the said judgment, and proceeding to pronounce the judgment which the said Court should have rendered, doth adjudge and condemn the respondents to pay and satisfy to the appellant the sum of nine hundred dollars, with interest, and costs in both Courts, &c., &c.

Judgment reversed.

Perkins & Ramsay, for appellant.
Torrance & Morris, for respondents.
(R. A. R.)

IN APPEAL.

MONTREAL, 5TH DECEMBER, 1868.

Coram DUVAL, C. J., CARON, BADGLEY, MONK, and MACKAY, JJ.

JAMES BENNING,
Defendant in the Court below,
APPELLANT.

AND

MARIA SOPHIA GRANGE,
Plaintiff in the Court below,
RESPONDENT.

HELD:—That an appeal will not be allowed from an interlocutory judgment of the Superior Court, dismissing a demurrer to a declaration.

Girouard, for the defendant, petitioner, moved (Dec. 1) to be permitted to appeal from the judgment of the Superior Court (Torrance, J.), rendered on the 31st of October, 1868, confirmed in review (Mondelet, Berthelot, and Torrance, JJ.), on the 25th of November, 1868, dismissing the demurrer to the declaration filed by the defendant, (*ante*, page 126). The demurrer denied the plaintiff's right of action, and if there was no right of action, it would be a hardship that the parties should be put to the trouble and expense of an enquête or jury trial.

DUVAL, C. J. Every demurrer to the declaration denies the right of action. We have already refused leave to appeal from judgments of this class. The Court has a discretion to exercise; but we do not think we should depart from the rule in the present case.

Motion rejected.

B. Devlin, for the Plaintiff.
J. J. C. Abbott, Q. C., Counsel.
D. Girouard, for the Defendant.
A. A. Dorion, Q. C., Counsel.
(J. K.)

IN ERROR.

MONTREAL, 9TH SEPTEMBER, 1868.

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

No. 55.

EDWARD SPELMAN,

(*Plaintiff in error.*)

AND

THE QUEEN,

(*Defendant in error.*)

HELD:—In an indictment for obstructing an officer of Excise under 27 and 28 Vict., cap. 3, that the omission in the indictment of the averment, that at the time of the obstruction the officer was acting in the discharge of his duty "*under the authority of 27 and 28 Vic. c. 3,*" is not a defect of substance but a formal error which is cured by the verdict.

DRUMMOND, J.—(dissenting).—Before the Court of Queen's Bench, Crown side, sitting at Montreal, the plaintiff in error, Edward Spelman, was on the 3rd October last, tried, and convicted of felony, upon an indictment charging him with having on the 9th of the preceding month of April, at the Parish of Laprairie de la Magdeleine, feloniously, by threat of force and violence, obstructed *one Thomas C. J. Ricey, then being an officer of Excise, and then being in the due exercise of his office and duty, as such officer, against the form of the Statute,* &c.

On the 7th of the same month of October, Spelman moved in arrest of judgment for reasons which may be succinctly stated as follows:

1st. Because no felony is charged in the indictment.

2d. Because the charge is neither a felony nor a misdemeanour.

3d. Because it is not alleged that the said Racey was, at the time of the alleged obstruction by threat of force and violence, in the discharge of his duty as an officer of Excise under the authority of the 27 and 28 Vic., c. 3.

4th. Because it is not alleged that the said Racey was at the time of the said obstruction in the discharge of his duty as an officer of Excise.

5th. Because the threats made use of to obstruct the said Racey are not set out in the indictment.

On the following day (10th Oct.) the presiding Judge (Badgley, J.) ordered that Spelman should take nothing by his motion, and sentenced him to be imprisoned in the common gaol for two calendar months. A writ of Error having been returned into this Court, at the suit of the said Spelman, on the 30th of October last, an assignment of Error was filed on the 27th November, the substance of which is as follows:

1st. The indictment is not sufficient in law to warrant the judgment.

2d. The threats of violence alleged to have been made use of by the said Edward Spelman, in obstructing Racey, are not specified and set out in the indictment.

3d. The particular acts which Racey was then performing, or about to perform, in the exercise of his duty, as such officer of Excise, are not specified.

The second objection is unfounded. For the gist of the offence is not the meaning of the words, but the effect produced by them, viz: the obstruction.

The first objection is, however, of a different character. It alleges that the indictment is not sufficient in law to warrant the judgment, a proposition sufficiently comprehensive to authorize and require this Court to determine whether there is or not any substantial error in the indictment.

The principal reason alleged in argument in support of this proposition, was substantially as follows:

Because it is not alleged that the said Racey was at the time of the alleged obstruction by threats of force and violence, in the discharge of his duty as an officer of Excise, under the authority of the 27th and 28th Vict., c. 3.

Now I do not hesitate to say that the omission in the indictment of the averment, that *at the time of the obstruction the officer was acting under the Excise Act, completely vitiated it*, and fully justifies the allegation contained in the first assignment of error, viz., "That the indictment is not sufficient in law to warrant the judgment." In fact it charges no crime known to the law, as I think should appear clearly upon a careful perusal of the 111th and 112th sections of the Excise Act above cited. They run as follows,—111th. "Every person who "shall obstruct, impede, or interfere with any officer of Excise, &c., in the dis- "charge of his duty shall be guilty of a misdemeanour."

112. "If any person, under any pretence, either by actual assault, force, or "violence, or by threats of such assault, force, or violence, in any way resists, "molests, or obstructs any officer of Excise, or any person acting in his aid or "assistance, in the discharge of his or their duty, under the authority of this "Act * * * * such person, being convicted thereof, shall be adjudged "guilty of felony, and shall be punished accordingly."

Thus any obstruction, impediment or interference with any officer of Excise in the discharge of his duty *generally*, was made merely a *misdemeanour* by the 111th Section; while the 112th constituted a *felony* the act of obstructing any such officer in the discharge of his duty *under the authority of that Act, and of that Act alone.* I therefore consider that the fact of the officer being in the discharge of his duty under the authority of that Act, viz., in the performance, or on the eve of the performance, of some duty required of him by some one or more of its enactments, is a necessary ingredient of the offence, and should have been both alleged and proved.

But it was argued that under Lord Campbell's Act, now forming part of our Criminal Code, this error was cured by the verdict, and cannot form the basis of a writ of error. The enactment on this subject applies to *formal errors*, not to *errors of substance*, such as the omission of a statement, which constitutes an essential of the crime, as in this case. Such is the interpretation given to this law in England, and invariably acted upon by this Court since the judgment pronounced in the case of the Queen vs. McCorkill, several years ago. Archbold (English edition of 1856. p. 53,) says:—"If any fact or circumstance "which is a necessary ingredient of the offence, be omitted in the indictment, "such omission vitiates the indictment, and the defendant may avail himself of "it—by demurrer, motion in arrest of judgment, or writ of error." And he gives as an instance, a case nearly analogous to this, namely, an indictment for *assaulting an officer in the execution of process, without showing that he was an officer of the Court out of which the process issued.*

Spelman and The Queen.

And *infra* he says (p. 161): "Now by 14 & 15 Vic., ch. 400, s. 25, every objection for any formal defect apparent on the face of an indictment shall be taken before the jury are sworn, &c. But for every defect in substance in an indictment, where a question of law has not been reserved for the Judges of the Court for Crown cases reserved, for irregularity in the verdict or judgment, or any manifest error on the face of the record, a writ of error is the proper remedy."

For these reasons I am of opinion that the indictment should be quashed, that the verdict and judgment should be declared null and void as well as the proceedings taken in the case.

DUVAL, C. J., delivering the judgment of the Court, said that he concurred with Mr. Justice Drummond, that if there were a defect in substance in the indictment, Lord Campbell's act would not apply, and the defect could not be cured. But he was unable to find any such defect in the indictment under consideration. His Honour then compared the indictment with the 112th section of the 27 & 28 Vic., c. 3, and pointed out the similarity between the phraseology of the indictment and that section.

E. Carter, Q.C., for the Crown. Conviction affirmed.

W. H. Kerr, for the plaintiff in error.

(J. K.)

MONTREAL, 9TH SEPTEMBER, 1868.

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

No. 36.

THE EASTERN TOWNSHIPS BANK,
(Plaintiffs in Court below,)
APPELLANTS.

AND

HUMPHREY, et al,
(Defendants in Court below,)
RESPONDENTS.

HELD:—That the discounting of a promissory note by a Bank, in the year 1862, by paying the face of the note (less the discount) in American greenbacks, taken at par, and deducting, in addition, a commission of $10 to cover alleged trouble connected with previous renewals, was not usurious.

This was an appeal, from the judgment rendered in the Court of Review, at Montreal, on the 29th of October, 1867, and reported at pp. 137 *et seq.* of the 12th L. C. Jurist.

The majority of the Court of Appeal (MR. JUSTICE CARON, *dissenting*) reversed the judgment of the Court of Review, which had confirmed the judgment of the Court of original jurisdiction dismissing the appellants' action, and condemned the respondents to pay the amount demanded by the appellants' declaration.

The following were the *motifs* of the judgment in appeal:—"The Court * * * considering that the usury complained of by the said respondents,

defendants, by their pleadings in the Court below, hath not been established, and that in the judgment of the said Superior Court appealed from there is error, doth reverse &c."

The Eastern Townships Bank and Humphrey.

Judgment of Court below reversed.

Sanborn & Brooks, for appellants.
Felton & Felton, for respondents.
(S. B.)

CIRCUIT COURT, 1869.

MONTREAL, 30TH APRIL, 1869.

Coram BEAUDRY, A. J.

Nos. 7948 and 519 to 527.

Austin, et al. vs. *Bertram*.

HELD:—1st. That the Chief Engineer of the Fire Department, Montreal, was not legally put *in mora*, to grant to the Fire Marshal the certificate required by the Quebec Act, 31st Vic., ch. 32, by making a simple demand therefor, without making due proof to the Engineer that the fire had occurred and that the Fire Marshal had made investigation into its cause, within the period prescribed by the Act.

2nd:—That the Chief Engineer was not liable to be sued personally for the recovery (by way of damages) of the fees intended to be covered by the certificate demanded of and withheld by the Engineer, and that the only legal remedy in the premises was the writ of *Mandamus*.

These were actions instituted by the Joint Fire Marshal, of Montreal, against the Chief Engineer of the city, for unduly withholding the certificate required to be signed by him under the Statute of the Province of Quebec, 31st Vic., ch. 32.

The facts of the case and the special points raised by the defence appear in the observations of the Honorable Judge.

Per Curiam:—Under the Quebec Act, 31st Vict., chap. 32, the Fire Marshal is directed to institute an investigation whenever a fire takes place, and a house or building or any other property whatever shall have been or shall be exposed to be wholly or partially destroyed or injured by such fire.

Sec. 13 enacts that the Fire Marshal shall remit all the depositions and proceedings to the Clerk of the Peace within eight days after the closing of the investigation.

Sec. 14 enacts that the Fire Marshal shall be entitled to receive for his services during such investigation, ten dollars for the first day, and five dollars each subsequent day, but not more than forty dollars.

Sec. 15 provides that the costs of each investigation shall be paid by the Company or Companies of insurance where the property is insured, and when no insurance shall have been effected on said property, then the City Treasurer shall pay to the Fire Marshal the sum of ten dollars, and no more, for the investigation, over and above the cost of warrants, &c., and the City Treasurer shall pay such sum on presentation of a certificate of the Chief Engineer of the fire department, showing that an investigation has been held within five days after the fire; and the Company or Companies of Insurance shall be held to pay according to the amount of policy, *pro rata*, the expenses of said inves-

Austin, vs. Bertram.

tigation on presentation of a like certificate; and in case of refusal of payment within three days after the presentation of said certificate, the amount may be recovered before the Judge of Sessions, the Recorder or a Justice of the Peace.

Such are the legal provisions of which the plaintiffs avail themselves to sue the defendant who, as they allege, has refused in his quality of Chief Engineer of the Fire Department to sign a certificate to enable them to receive ten dollars from the Liverpool, London and Globe Insurance Co., as and for their fees in an investigation concerning a fire or the burning of a fire at the Seminary of Montreal on or about the 8th of November inst.

The plaintiffs allege that the defendant has refused, without good reason, to sign a certificate as required, and pray that he may be condemned to pay them the said sum of $10, with $4 as and for costs of protest, unless he produce the said certificate.

The defendant pleaded 1st that no *vinculum juris* existed between plaintiffs and defendant, and that the conclusions taken by plaintiffs to be paid their salary in the above manner was unfounded; 2nd, that the defendant was under no obligation to sign said certificate—that it was left to his discretion; 3rd, that an action could be brought against him only before the Judge of Sessions, the Recorder, or a Justice of the Peace, according to the terms of the Statute; 4th, that he never knew of the pretended fire at the Seminary, nor of the investigation of such fire; therefore that he could not be held to give a certificate.

It is necessary, in order to decide upon this contestation, to interpret the meaning of the law and the intention of the legislature.

An obligation was imposed upon the Fire Marshal, and, as it was equitable that he should be paid for his services, the law contains a provision therefor, but requires at the same time, in the interest of those who would be called upon to pay the fees, that a certificate shall be obtained from the Chief Engineer of the Fire Department to the effect that an investigation has taken place within five days after the fire; without such certificate the Fire Marshal could not get paid. That legislative enactment is not founded on the public interest, but solely in the interest of the Fire Marshal, or of the Insurance Companies or of the Corporation, and imposes upon the Chief Engineer the duty to deliver to the Fire Marshal a certificate; from his refusal to deliver such certificate he became answerable to the Fire Marshal for the consequence *i. e.* damages (Civ. Code of L. C. Art 1057-1065); however, such responsibility exists on condition that the Chief Engineer do receive notice, and be summoned to fulfil his obligations.

Has he been duly notified? The plaintiffs maintain he was sufficiently notified by the Statute, that he was bound to know their proceedings, to repair to the office of the Clerk of the Peace to ascertain whether an investigation had been held, and they even pretend that he ought to have been satisfied with their simple declaration that the investigation had taken place, and signed in the blank certificate presented to him for his signature.

The court cannot confirm such a pretension.

The Fire Marshal was the only party interested to obtain the certificate, and

was bound to take every step to procure it; it was incumbent upon him to give to the Engineer every information, to exhibit to him the necessary documents in order to enable him to sign a certificate, and then it would have become the bounden duty of the Engineer to certify to the investigation; the Engineer had no discretion to exercise, as to the necessity or regularity of the investigation; he had only to certify two facts, viz: the holding of the investigation, and the time at which it had been held.

All that could appear by the *Enquête*, even in case the Engineer would have had no personal knowledge of the facts. In this case the Engineer has had no knowledge of the fire, the alarm bell not having rung; the plaintiffs did not communicate to him the investigation, they did not notify him legally, therefore their action is unfounded and premature.

Another question raised by the defendant is whether the plaintiffs could institute an action of this nature.

Under article 1065, Code Civ., the breach of an obligation to do a certain thing resolves itself in damages. Such is not properly speaking, the action of the plaintiffs; they claim from the defendant, in his capacity of Chief Engineer of the Fire Department the payment of their fees, unless he prefers signing a certificate. Although the term damages is not made use of, the action bears that character, and option is given the defendant as if damages were claimed.

Indeed the damages have been reduced to the amount which the plaintiffs cannot recover without a certificate and to the costs of protest; and the objection is dismissed.

An important question has been raised by the plea in the following terms: "the plaintiffs have no right in law to claim damages without adopting the legal "means prescribed by law to oblige public officers to fulfil the duties imposed upon them."

At the argument, this objection was explained, and it was urged that the only legal means to force the defendant to sign a certificate was the *Writ of Mandamus*.

The plaintiffs answered that such a form of procedure did not exclude their recourse by simple action at common law.

The common law can only be invoked by individuals personally, whilst here the plaintiffs have sued the defendant as a public officer, who holds no moneys, and is called upon to perform a certain act in his official capacity. He could not, even according to the tenor of the action, be condemned personally, and, in his official capacity, he has a right to ask that no proceedings be instituted against him except in the form required by Art. 1022, Sec. 2, Cod. Proc. Civ. —concerning public functionaries.

For all these reasons the action is dismissed, *sauf recours*.

Action dismissed.

Belanger & Desnoyers, for plaintiffs.
Rouer Roy, Q.C., for defendant.

(S.B.)

SUPERIOR COURT, 1868.

MONTREAL, 31st DECEMBER, 1868.

Coram MACKAY, J.

No. 1440.

Lyman et al. vs. *Dyon et al.*

HELD:—1st. That parties holders of accommodation paper, even with knowledge of the fact, can recover thereon.

2nd:—That the holders of such paper duly endorsed to them may rank upon the estate of and discharge the endorsers and even knowing the same to be still accommodation paper, thereafter recover thereon from the maker thereof.

3rd.—That the imputation of payment made by the creditors of monies paid by the endorser and not declared to be incorrect upon an account furnished, will operate as a valid imputation even against the accommodation maker.

Suit issued the 23rd April, 1868, against Dyon, as maker, and Rivard & Co., endorsers of a promissory note for $4000 cy. made 15th October, 1867, due the 18th November, 1867, and duly protested. Defendant Dyon, pleaded that he had signed the note in favor of Rivard & Co., as an accommodation note, without consideration and as a loan, to plaintiffs' knowledge, who thereby tacitly renounced any recourse thereon against him, and yet plaintiffs, the 9th April, 1868, after maturity of note, compounded with Rivard & Co., by deed before Geoffrion, N. P., and accepted, with other creditors of Rivard & Co., $20,000 in full payment of all debts of Rivard & Co., and discharged Rivard & Co., in full; that he, Dyon, was not party thereto or authorized such acceptance by plaintiffs, and therefore he, Dyon, was discharged, as he had lost his recourse against Rivard & Co., who were really his debtors upon the accommodation note given them. By his second plea, Dyon urged payment expressly by Rivard & Co., to plaintiffs, on account of the note sued on of $2525 cy. the 19th November, 1867, and claimed that in any event judgment should only pass for the balance $1475 cy.

J. A. Perkins, jr., for plaintiffs.—The composition and atermoiement of the plaintiffs and other creditors of Rivard & Co.. with Rivard & Co., was in effect proved as alleged—Dyon was not a party thereto. The note is certainly proved to have been an accommodation note; Mr. Clare (one of the plaintiffs) admits ranking upon the estate of Rivard & Co., for their whole claim including the Dyon note. He knew in January, 1868, that the note was an accommodation note, yet plaintiffs ranked and compounded thereafter. Rivard declares he informed Mr. Clare, when handing him the note on general account that the note was accommodation paper, and again so told him a few days before the passing of the deed of composition. There is therefore under the pleadings and evidence to be decided:

1st. Whether a holder of accommodation paper knowing it to be such has any recourse thereon against the party lending as it were his name. Vide Ross, on Bills of Exchange and Promissory Notes, page 104-5 [140] and cases cited in note.

1 Parsons on Notes and Bills, 183-4 and Notes.
Smith vs. Knox, 3 Esp. p. 46.
Brown & Motf, 7 Johnson, p. 361.
Grant & Ellicott, 7 Wendell, p. 227.

2nd. As to whether plaintiffs could compound with Rivard & Co., and still hold Dyon, it was equally certain they could validly do so. The parties were jointly and severally bound to them; Rivard & Co., were the indorsers; there would not be double ranking; an endorser might be discharged and the privilege as against maker still remain. If *less* or damnified, Dyon still had his recourse against Rivard & Co., who in nowise in schedule of creditors placed him, Dyon, as a creditor. Plaintiffs by law had a right to rank upon the estates of each individual separately till full payment of debt.

3rd. The plea of payment has next to be dealt with. Rivard certainly swears that when paying, he did impute the monies to the note in question. Mr. Clare emphatically denies this. It is to be remembered that Rivard is much interested, and his cross examination, to say the least, somewhat shakes his testimony on this point: Mr. Boyd, plaintiffs' bookkeeper, present when payment was made, states that Rivard staid but a moment in the store, paid and said nothing, and that the payment was forthwith imputed upon the large amount of the account of Rivard & Co., to plaintiffs, which appears to have been altogether unsecured, and which large indebtedness has been proved without doubt. Verbal testimony of such matters is always more or less doubtful; the balance of evidence is strongly with plaintiffs. But the Court was saved much embarassment because plaintiffs have upon his cross examination extracted from Rivard their account dated April 17th the entries whereof are as follows:

1867.	Dr.	
Dec. 16th—To retired protested Note $5000 and costs		$5042.33
1868.		
Jan. 18th—Amount of account rendered for goods		31.05
Jan. 28th—Paid freight seed		26.00
Feb. 3rd—Balance on Flaxseed account		2274.91
		$7376.29

1867.	Cr.	
Aug. 27th—By Goods	45.00	
Nov. 19th—By Cash	2525.00	
Dec. 31st—By Clover seed	813.92	3383.92
		$3992.37
Indirect Liability.		
To amount, Dyon Note due Nov. 18th endorsed		4003.00
		$7995.37

Rivard says that the words erased and the addition at the end were made in his presence by Mr. Clare, whilst they together examined the account and that he then remarked that the last line should be erased as it was incorrect. He does not recollect saying anything more. It will be at once remarked the imputation made by plaintiffs, of the monies received. Rivard (the party paying) never objected, but tacitly consented. The Court should be guided in its decision by the important proceeding touching the payment more than by any verbal testimony.

Lyman, vs. Dyon.

Now this exhibit is fatal to defendant's pretensions. The last line is struck out as incorrect, but the imputation of $2525 in it was not said to be incorrect. The article 1160 of our Code [illegible] against defendant, for a writing by which the creditor made the imputation [illegible] by the debtor.

F. X. Archambault, for defendeur Dyon, soutenait:

Qu'en acceptant ce billet de Rivard & Cie., les demandeurs savaient que Dyon n'avait eu aucune valeur ni considération pour ce billet qui était prêté.

Que sachant cela, ils devaient savoir également que strictement parlant Dyon n'était pas le principal obligé sur le dit billet, mais que c'était au contraire, "Rivard & Cie."

Qu'ayant fait avec ces derniers une composition et décharge et les ayant déchargés, les demandeurs se trouvaient à n'avoir plus de recours contre le dit Dyon, qui devait lui-même être déchargé, son principal l'étant de fait, en vertu du dit acte de composition et décharge. En sus de cela, le nommé Dyon prétendit avoir prouvé tous ces faits là, de même que ceux qu'il avait affirmés dans une autre exception péremptoire, à savoir:

Que dès avant l'institution de l'action des demandeurs ils avaient reçu en accompte du billet en question de Rivard & Cie., une somme de $2525.21 laquelle avoit été imputée et devait en droit l'être sur le montant du dit billet, comme étant alors la dette la plus onéreuse des nommés "Rivard & Cie." envers les demandeurs.

Le nommé Dyon s'appuyait pour cela sur la déposition de M. Clar[illegible] un des demandeurs et sur le témoignage de Pierre Rivard qui furent entendus comme témoins de la part du nommé Dyon.

His Honor, in giving judgment for the plaintiffs upon all points raised, referred to the following authorities.

Byles on Bills Am. Ed. [180] also Note (i) to 181.
Smith's Mer. Law. Am. Ed. (22[illegible]).
Bank of U. S. vs. Dunn, Holcomb's Leading cases.
Code Civil, Art. 1160.

Judgment.—Considering the defendant Dyon has "failed to prove and establish the material allegations of his pleas, considering the imputation by him claimed as of $2525 cy. in reduction of the note sued on, to be one that cannot be allowed, and ought not to be under the evidence, particularly exhibit A, fyled by witness Rivard on his cross-examination and the evidence bearing upon it; considering his exceptions unfounded and not supported by the law and the facts; doth condemn defendant Dyon to pay $4[illegible], &c., with costs," &c.

Perkins & Ramsay, for plaintiffs.
Jetté & Archambault, for defendants.

(J. A. P. Jr.)

Judgment for Plaintiffs.

MONTREAL, 27TH MAY, 1869.

Coram BEAUDRY, A. J.

No. 1261.

Johnson vs. *Gauthier.*

HELD:—That each distinct pleading must be followed by a conclusion.

A. H. Lunn, for the plaintiff, moved to reject the paper writing filed by the defendant, entitled *exception péremptoire perpétuelle*, the said plea not having any conclusion.

H. Stuart, Q.C., for the defendant, said that by a clerical error the conclusion had been omitted, though the signature of the attorney was affixed. But the omission was cured by the subsequent *défense en fait* to which there was a conclusion in due form, which might be taken to apply to all that preceded.

BEAUDRY, A. J., sustained the plaintiff's pretension, but permitted the defendant to amend on payment of fifteen shillings costs.

Cross & Lunn, for the plaintiff.

H. Stuart, Q. C., for the defendant.

(J. K.)

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

No. 112.

Clement vs. *Moore.*

HELD:—1st. That an affidavit affirming, after setting out the indebtedness of defendant, "that the deponent is credibly informed and hath every reason to believe, and doth verily and in his conscience believe" that defendant is secreting, etc., with the grounds of belief, is sufficient to obtain a warrant of attachment, *saisie-arrêt* before judgment.

2. That the omission of the word "verily" in the conclusion of the affidavit "doth verily believe" that without a warrant of attachment" etc., is not fatal.

Lunn, for the defendant, moved to set aside the attachment *saisie-arrêt* before judgment issued in the cause. The principal objection to the affidavit was that it did not establish positively and as a matter of certainty that the defendant was secreting, or immediately about to secrete. It had been held in Hurtubise vs. Leriche (ante, p. 83) that it is not sufficient for an affidavit for *capias* to depose merely to the belief of the deponent; and the language of Art. 834 C. C. P., respecting attachments, was similar to that of Art. 798 respecting *capias*. There was another defect in the affidavit. The word "verily" in the conclusion of the affidavit had been omitted.

Perkins, for the plaintiff, contended that the affidavit was as positive as could be made. The deponent, after setting out an indebtedness under a contract, proceeded to affirm that he "hath been credibly informed, hath every reason to believe, and doth verily and in his conscience believe that the defendant is now secreting his estate, debts, chattels and effects and now immediately about to secrete the same with intent to defraud his creditors generally and plaintiff in particular," etc. The reasons for the belief were fully set out. The omission of the word "verily" in the concluding clause was immaterial, as it was inserted in two allegations in the body of the affidavit. In Miller v. Dutton, it had been held by Smith, J., that the omission of the words "and in his conscience" was not material.

Clement vs. Moore.

TORRANCE, J.—The Court is of opinion that the allegations of the affidavit, if true, do establish secretion. A form of affidavit to obtain attachment is given in the Appendix to the Code of Civil Procedure (No. 45) and the affidavit in this case appears to be drawn in accordance with the form there given. The motion is therefore rejected with costs.

Motion rejected.

Perkins & Ramsay for the Plaintiff.
Cross & Lunn for the Defendant.
(J. K.)

MONTREAL, 31st MARCH, 1869.

Coram BERTHELOT, J.

No. 757.

Ellice vs. *Renaud*.

SEIGNIORIAL CADASTRE—RIGHT OF DEFENDANT TO PLEAD ERROR.

HELD:—That a *Cadastre*, duly deposited and closed, and as to which no appeal was taken before the Seigniorial Court of Revision, is final, and that a defendant cannot ask its reformation upon the alleged ground that the commissioner was led into error owing to the non production of deeds.

The action of the plaintiff was brought for the recovery from the defendant, as proprietor of a portion of the *Arrière Fief Primeau*, of $400, for 4 years arrears of the rent or indemnity due by that *Arrière Fief* to the Seignior of the Seigniory of Beauharnois, as the Seignior *dominant*, as established by the Cadastre of the Fief Primeau.

The defendant pleaded, in substance, that by certain deeds, passed between the former Seignior of Beauharnois and Mr. Primeau, then proprietor of the *Arrière Fief*, the *quint* had been reduced to one twelfth of £2,500, equal to $833.33. That when the *Cadastre* of the Fief was made, these deeds were designedly withheld from the commissioner, who, in ignorance of their existence, fixed the annual rent or indemnity due to the Seignior of Beauharnois at $100, calculated upon a capital of $1,666.66, instead of taking the one twelfth of £2,500, as the capital which, it is assumed, he would have done had the deeds referred to been produced. The defendant tendered $200, for four years' arrears of rent, at the reduced amount claimed by him.

The plaintiff put in an answer in law stating in effect that the defendant's plea could not be maintained.

Firstly, because the *Cadastre* containing the commissioner's award was final, and could not be impeached.

And secondly, because the defendant acquired the property in question after the completion and deposit of the Cadastre, and had therefore no legal interest or right to plead or set up any of the errors alleged by him.

It was urged by the counsel for the defense,

Firstly, that section 29 of the Seigniorial act being the one relied on by the plaintiff in support of his demand, was only intended to refer to the matters of form and procedure adopted by the commissioner, and had only the effect of pre-

venting any technical objections being raised or any exception taken to the manner in which the commissioner conducted the proceedings, and although it was admitted that the section in question was conclusive as to the *regularity* of the proceedings, it was contended that where there was connivance and where important deeds which might and would have influenced the decision of the commissioner were withheld or suppressed, the Court could set aside his award in favor of a previous stipulation.

And secondly, that the defendant having made search in the Registry Office and being aware of the existence of these deeds, and supposing consequently when he purchased the property that these deeds correctly represented the amount of Seigniorial dues payable by him as purchaser, had therefore an evident interest in setting up these errors on the part of the commissioner.

It was contended on the other hand by the plaintiff that the award of the commissioner was clearly intended to be final by the section 29 of the act. That the parties in possession at the time the award was being made had every opportunity of producing evidence in support of their views respecting their rights, and if there were any grievances the Seigniorial Court of Revision was the proper place to urge their claims, that court having been specially constituted for hearing such objections, and once the *Cadastre* was deposited it became final.

That Mr. Renaud ought to have looked for his own satisfaction not merely to the Registry Office, but to the *Cadastre* which was then deposited and was open for his inspection, and if through negligence he omitted to do so he cannot now claim an interest in pleading what, had he used proper precaution he would have had no legal interest in pleading.

The Court in rendering judgment accepted the views of the plaintiff's counsel in almost every respect, and dismissed the defendant's plea.

Answer in law maintained.

Ritchie, Morris & Rose, for plaintiff.

F. X. A. Trudel, for defendant.

(W. R.)

MONTREAL, 22ND MAY, 1869.

Coram BEAUDRY, A. J.

No. 966.

Fitts vs. *Piton, et al., and Her Majesty's Principal Secretary of State for the War Department, et al., T. S.*

HELD:—That moneys payable on account of a peculiar contract with the War Department, for the erection of fortifications in this Province, are not liable to attachment.

Semble.—That no attachment in the hands of the Secretary at War will lie under any circumstances.

This was a final hearing on the merits of the attachment, which had been quashed, on motion, as reported at pp. 289, 290 of the 12th vol. of the L. C. Jurist.

The judgment last referred to had been reversed by the Court of Review, on the ground that the attachment could not be set aside by a mere motion, and the case sent down to be heard on the merits.

Fills, vs. Piton.

Per Curiam.—The opinion of the court is fully expressed in the *motifs* of the judgment which are as follows:—"The Court * * *, considering that the said J. F. Rogers has declared, that there is now retained in the hands of the Commissariat Department, a sum of $1138.92, payable to defendant on account of a contract pending between the War Department and the said defendant, for the furnishing of materials for the construction of the fortifications at Levis, but that such declaration was made, without admitting the right of the plaintiff to attach the said moneys, and considering that no judgment can be rendered on such declaration against the said Garnishee, and considering that there is nothing in said declaration to show that the said Garnishee has any power or control on the amount by him declared to be payable by the War Department to the said defendant: and considering moreover that no attachment can be made of the moneys payable by the War Department, and no compulsory order be given against the said War Department, doth dismiss the attachment in this cause in the hands of the said Garnishees."*

Attachment dismissed.

Perkins & Ramsay, for plaintiff.
Strachan Bethune, Q.C., for defendant.
(S. B.)

MONTREAL, 20TH APRIL, 1869.

Coram BEAUDRY, A. J.

No. 698.

Mills vs. *The Granby Red Slate Company.*

HELD:—1. That a party to a cause (plaintiff) may at any time produce and fyle at enquête without notice to the defendant, papers and documents not proven, provided they appear to bear upon the case, though less as to his own evidence than against the defendant's plea.

2. That such documents will not be rejected upon motion, but their materiality will be adjudicated upon the final hearing of the cause.

Defendants' counsel moved to reject papers produced as above stated, and relied upon articles of Code de Procedure Nos. 99 to 106, and upon the inadmissibility of the documents themselves as evidence.

PER CURIAM.—The documents mentioned in defendants' motion are not those on which the action is based, and therefore do not come under the provisions of articles 99 and 106, and notwithstanding art. 210, a party may fyle at *enquête* any document under art. 213 subject to the costs of proving the same. As to the merits or value of the documents, the court can take cognizance thereof only when the cause comes on for hearing on the merits.

Motion rejected with costs.

Perkins & Ramsay, for plaintiff.
Cushing & Trenholme, for defendants.
(J. A. P., jr.)

[Reporter's Note.—A similar judgment was rendered on the same day, by the same Judge, in 1152 Joseph vs. Anderson and the Senior officer of the Commissariat Department of Montreal, T. S., connected with a contract to supply coal to the Royal Navy.]

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

No. 1722.

Winning et al vs. *Fraser*.

HELD:—1o. That the plaintiffs under evidence showing that two notes, constituting the greater portion of their claim, had been transferred to them merely to enable them to adopt any course they might think proper against the defendant, and without their becoming the owners of the notes, had a right to arrest defendant by capias ad respondendum as their *personal debtor* for the whole sum by them demanded.

2o. That bail entered by defendant should not be reduced.

Plaintiffs arrested by capias ad respondendum as *their personal debtor* the defendant, and held him to bail as such for

1o. Amount of notes given them.....	$327 25
2o. Amount of note transferred them by David Roberison.....	475 72
3o. Amount of note transferred by Messrs. Moore, Semple & Hatchette.....	515 23
	$1318 20

The following evidence was adduced by defendant:

David Robertson. "The said note was endorsed by me in favor of plaintiffs "to enable them to adopt upon it any course they might think proper against "the defendant. I am interested in the note and will get whatever is recovered "on account of it. In the meantime plaintiffs are the holders of the note, it "having been endorsed to them by me. The note was given by defendant for "the only purchase he made from me."

John H. Semple. "Our note was given us by defendant for goods sold him. "It is the only debt he owed us. The note was handed over by us to plaintiffs "about third June last to enable them to adopt upon it any recourse they might "think proper against defendant; Moore, Semple & Hatchette are proprietors of "the note. They merely gave it for legal purposes. We will recover from plain-"tiffs any amount they obtain by virtue of said note." Defendant thereupon petitioned to reduce bail to $827.25 amount of indebtedness to Winning, Hill & Co. alleged that the evidence disclosed no personal indebtedness as to other sums, and that no party had a right to amass claims to harass his debtor and cause heavy bail to be entered.

PER CURIAM.—Having considered this case I am of opinion that defendant's petition cannot be granted. The personal indebtedness required by art. 798 of Code de Procédure is made out. It is true, that the plaintiffs may be held to account to others for a portion of their claim if recovered from the debtor, but the defendant is to all intents and purposes, the personal debtor of the plaintiffs whose capias should therefore be maintained in its entirety. The case of *Quinn vs. Atcheson*, 4 L. C. Rep. 378, is in point.

Petition rejected with costs and capias maintained for full amount.

Petition rejected.

Perkins & Ramsay, for plaintiffs.
Leblanc & Cassidy for defendant.
(J. A. P., Jr.)

MONTREAL, 27TH APRIL, 1869.

Coram TORRANCE, J.

No. 909.

Cochrane et al. vs. Bourne et al.

HELD:—That the issue is completed by declaration, exception and answer to exception, if the answer to exception be general (C.C. P. 148.)

W. W. Robertson, for the defendants, moved (April 22,) that the inscription by the plaintiffs for hearing on law, be rejected as prematurely filed before issue joined. The action was brought on a promissory note. The defendants pleaded an exception, to which the plaintiffs answered generally. The same day that the plaintiffs filed their general answer, they also filed their articulation of facts and inscribed the case for hearing on law. The defendants contended that issue had not been joined, as it was necessary for them to file a replication to the plaintiffs' general answer, to complete the issue. Art. 148. C. C. P. "The issues are completed: 1. By declaration, pleas and replications, if there are no perpetual exceptions; 2. By declaration, exceptions, answers to exceptions and replications to answers, if the answers contain facts that are not alleged in the declaration." The plaintiffs should have waited till the defendants had filed their replication.

Trenholme, for the plaintiffs, submitted that by the Article of the Code cited, a replication was necessary only when the answer *contained facts not alleged in the declaration.* In the present case, the plaintiffs' answer was general. Stuart's L. C. Reports, p. 115, Sewell, C. J., observes: "A general answer takes issue upon the matter of the exception, by a general denegation; and such general answer *completes the issue*, and consequently concludes the pleadings."

TORRANCE, J.—The defendants make a motion to reject an inscription for hearing on law as made before issue joined. The defendants pleaded specially to the action, and the plaintiffs fyled a general answer. The defendants contend that they had eight days to fyle a replication to the general answer. The Court is against the defendants. The authorities (C. C. P. art. 148, S. S. 2, and Stuart's Reports, p. 115;) are against them.

Motion dismissed.

Cushing & Trenholme for plaintiffs.
A. & W. Robertson for defendants.
(J. K.)

COURT OF QUEEN'S BENCH, 1868.

MONTREAL, 9TH DECEMBER, 1868.

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

No. 23.

PINSONNEAULT,

(*Plaintiff in Court below*),

APPELLANT;

AND

VALADE et al.,

(*Defendants in Court below*);

RESPONDENTS.

HELD:—That a deposition sworn to, *by consent*, before a Commissioner of the S. C., is *null and void*.

This was an appeal from a judgment rendered by the Superior Court at Montreal (the HON. MR. JUSTICE MONDELET presiding) rejecting from the record, as null and void, the deposition of one Charles L'Ecuyer, which had been sworn to, *by consent*, before a Commissioner of the S. C.

The following was the judgment of the S. C. which was rendered on the 28th day of December, 1867:—

"La Cour, parties ouïes par leurs avocats au mérite de cette cause et avoir "examiné la procédure, pièces produites et le témoignage et sur le tout mûre- "ment délibéré; considérant que la déposition de Charles l'Ecuyer, ingénieur, "examiné par et de la part du Demandeur, laquelle paraît avoir été assermentée, "prise et reconnue, à Montréal, de consentement devant J. A. Labadie, C. C. "S., c'est-à-dire, commissaire de la Cour Supérieure, est nulle de plein droit, at- "tendu l'absence de juridiction pour ce, dans la personne du dit J. A. Labadie;

"Considérant que le consentement produit en cette cause et signé par l'avocat "du Demandeur et par l'avocat des Défendeurs, en date du neuf novembre, "mil huit cent soixante et sept, que toutes les dépositions prises jusqu'alors par "le Demandeur, fussent considérées comme prises à l'enquête, cour tenante, et "suivant la pratique ordinaire, n'a pu avoir l'effet de légaliser la déposition "sus-mentionnée du dit Charles l'Ecuyer, lequel consentement a été donné sans "pouvoir et sans droit;

"La Cour déclare nulle, et met de côté la déposition du dit Charles l'Ecuyer, "laquelle doit être regardée comme non avenue.

"Et considérant que le Demandeur n'a pas prouvé les allégués essentiels de "sa déclaration, savoir; quant à l'accident arrivé à sa barge, ainsi qu'à l'égard "de la faute alléguée des Défendeurs et des dommages réclamés, la Cour dé- "bouto l'action du Demandeur avec dépens distraits en faveur de M. Ludger "Labelle, avocat des dits Défendeurs."

This judgment dismissed the action for want of proof, but the Court of appeal held that it went too far, and, as the error was a common one to both parties, the court of appeal reversed the judgment in that respect and sent the case back to *enquête*, ordering each party in appeal to pay their own costs.

The following were the *motifs* of the judgment in appeal:

"La Cour * * * considérant que dans le jugement dont est appel *

Pinsonneault and Valade.

* * * il a été correctement jugé en déclarant nulle et mettant de côté la déposition du nommé Charles l'Ecuyer * * pour la dite déposition avoir été assermentée devant le nommé Labadie, Commissaire de la dite Cour Supérieure, nullité que n'a pu couvrir le consentement donné à cet effet par les procureurs respectifs des parties, lequel consentement ne pouvait conférer au dit Commissaire une jurisdiction qu'il n'avait pas, ni être considéré comme une admission des faits contenus en la dite déposition; Considérant que cette déposition est indispensable au Demandeur, et que sans elle la partie la plus importante de sa demande se trouve sans preuve, mais considérant que le dit consentement a été donné sous l'impression où étaient les parties qu'il était légal et suffisant et qu'en cela elles étaient également en erreur, et que partant il serait injuste de faire supporter à l'une d'elles seulement les conséquences d'une erreur commune aux deux, et qu'au lieu de renvoyer l'action le jugement aurait dû fournir au demandeur l'occasion de réparer les suites de cette erreur commune, et que partant sous ce rapport il y a mal jugé dans le dit jugement, le casse et annule, &c."

Judgment of S. C. reversed in part.

Girouard & Robidoux, for appellant.

Bélanger & Desnoyers, for respondents.

(S. B.)

MONTREAL, 2ND JUNE, 1869.

Coram DUVAL, C. J., CARON, J., MACKAY, A. J., JOHNSON and TORRANCE, JJ., *ad hoc*.

No. 46.

FRANCOIS PROVOST et ux.

(Plaintiffs in the court below.)

APPELLANTS,

AND

WILLIAM JACKSON, et al.,

(Defendants in the court below.)

RESPONDENTS.

HELD:—That in an action for damages (under C. S. C. Cap. 78) for the death of a relative killed by accident, the relationship must be established by legal proof, and special damages must be alleged.

This was an appeal from a judgment of the Superior Court, Montreal, rendered 26th March, 1860.

The action was brought to recover damages resulting from the death of Joseph Provost, child of the appellants, who was drowned on the 4th June, 1859, in consequence of the canoe in which he was being upset by the steamer *Beaver*, belonging to the respondents, while the Victoria Bridge was being constructed.

The declaration was as follows:

"Que du légitime mariage des demandeurs est né Joseph Provost qui est mort intestat le ou vers le quatre juin dernier, vis-à-vis la cité de Montréal, sur le fleuve St. Laurent, ainsi qu'il sera après dit, laissant pour ses héritiers naturels

et légitimes et ses plus proches parents, ses pères et mère, le dit Joseph Provost étant mort sans enfans ou hoirs de son corps.

"Qu'à l'époque susdite, savoir le ou vers le quatre juin dernier, les défendeurs étaient entrepreneurs et associés et propriétaires en possession entre autres d'un bateau à vapeur appelé le "Beaver."

"Que le dit jour, le ou vers le quatre juin dernier, le dit bateau à vapeur était conduit par les employés des défendeurs, agissant les dits employés sous les ordres, contrôle et responsabilité des défendeurs, descendait la rivière vis-à-vis Montréal, étant mu par la vapeur, et que le dit Joseph Provost remontait cette rivière en canot.

"Que par la faute lourde, négligence, impéritie des dits employés des défendeurs, et notamment du capitaine et du pilot à bord du dit bateau à vapeur, qui voyaient ou devaient voir le canot dans lequel se trouvait le dit Joseph Provost, le dit bateau à vapeur déviant même de sa course naturelle et accoutumée, au lieu d'éviter le canot du dit Joseph Provost, le submergea en le frappant, le dit Joseph Provost, qui avait tout fait en son pouvoir pour échapper à la rencontre du dit bateau à vapeur, fut jeté à l'eau et fut tué par les roues du bateau à vapeur, ou se noya, ce que ne peuvent préciser les demandeurs, toujours fut-il que le dit Joseph Provost perdit la vie par la faute lourde et négligence des dits employés des défendeurs, et son cadavre fut retrouvé quelque temps après.

"Que les défendeurs sont responsables envers les demandeurs des dommages à eux causés par la mort du dit Joseph Provost, arrivée comme susdit par la faute lourde, négligence ou imprévoyance des défendeurs conduisant le dit bateau à vapeur par leurs employés comme susdit, lesquels dommages ils évaluent à la somme de £2,000, laquelle les défendeurs refusent de payer quoique de ce faire requis."

No documents were fyled in support of the action.

The defendants pleaded to the action, denying the facts alleged, and their responsibility for the death of Joseph Provost. The case was tried before a special jury. At the trial the defendants objected to evidence of special damage, there being no allegation of special damage in the declaration, and the objection was maintained by the presiding judge. The plaintiffs' case being closed, the defendants, without entering on their case, applied for a non suit, and the judge directed the jury to find accordingly, informing them, moreover, that the plaintiffs should have proved their marriage, and produced the *extrait de baptême* of Joseph Provost. Notwithstanding the charge of the judge, the jury found for the plaintiffs for $1000 damages. The verdict was entered with permission to defendants to move to have it rejected, and to have a non suit entered.

The defendants in pursuance of leave granted moved for a non suit, and for the dismissal of the plaintiffs' action. The principal grounds were: 1st. Because the plaintiffs entirely failed to prove upon the trial their quality and right to bring the action, firstly, inasmuch as no *extrait de mariage* of the plaintiffs, and no *extrait baptistaire* of the deceased Joseph Provost was ever fyled of record, and secondly, because no such documentary evidence to establish plaintiffs' right of action was ever legally produced and read to the jury.

2nd. Because the plaintiffs entirely failed to prove any damages whatever as having been sustained by them.

Provost and Jackson.

This motion was granted by the court. The *motifs* of the judgment were:

1o. Qu'en droit commun les parents ou héritiers d'un défunt n'ont pas d'action contre les auteurs de sa mort causée par leur faute ou négligence.

2o. Que l'action, n'ayant d'existence que par le statut qui l'a créée, n'a lieu que pour dommages spéciaux, et que dans l'espèce ils n'étaient pas allégués.

3o. Que nulle preuve de dommages n'avait été faite par les demandeurs.

4o. Que les défendeurs n'avaient pas procédé à leur preuve, et avaient été condamnés sans qu'ils eussent fait entendre de témoins sur leur défense.

The plaintiffs appealed from this judgment.

CARON, J. (dissenting.)—L'action est par l'rovost et sa femme, en dommage (£2,000) pour les employés des défendeurs avoir fait noyer le nommé Joseph Provost, leur fils, ce qui leur avait causé (aux demandeurs appelants) un dommage au montant de la dite somme.

Les défendeurs ont nié les allégations de la demande et ont par exception repoussé la responsabilité de la mort du fils des demandeurs et des dommages qui leur en résultent; alléguant au contraire que c'est par la faute et l'imprudence du défunt que la chose est arrivée; qu'il s'était lui-même jeté sur le bateau des défendeurs dont les employés avaient fait tout en leur pouvoir pour éviter l'accident, lequel n'était nullement de leur faute.

Consentement d'omettre les suggestions de faits devant le jury auquel la cause a été référée.

Plusieurs témoins ont été entendus de la part des demandeurs seulement, au moyen desquels ils se sont efforcés de prouver les dommages qui leur étaient résultés de la mort de leur fils, mais cette preuve a été empêchée par le juge président, sous le prétexte que l'on n'avait pas allégué dans la déclaration de dommages spéciaux, et que partant tels dommages ne pouvaient être prouvés. Le refus de cette preuve est constatée par le dossier.

La preuve des demandeurs terminée, les défendeurs ont fait motion que vû l'insuffisance de la preuve, un *non suit* fut entré. Le juge a été d'avis que de fait la preuve était insuffisante et a adressé le jury dans ce sens et les a avisés qu'ils devaient trouver en faveur des défendeurs. Cependant, après délibération, dix des jurés ont rapporté un verdict en faveur des demandeurs pour £250, malgré la charge du juge qui, lui, était d'avis que les demandeurs n'avaient fait aucune preuve de leurs qualités à porter l'action, et qu'en outre il n'y avait aucune preuve de dommages spéciaux.

Ce verdict fut enrégistré avec réserve aux défendeurs de faire en cour motion pour *non suit*. Cette motion a été faite *in banco* et a été accordée par jugement du 26 mars 1860, dont est appel.

Les motifs de ce jugement, qui se trouvent à la page 2 du Factum des Appelants, sont: 1o. Que les demandeurs n'ont pas produit la meilleure preuve de leurs qualités prises en l'action, savoir qu'ils étaient le père et la mère du défunt; 2o. Que l'action était fondée sur un statut particulier, (S. R. C. ch. 78, s. 1 et 2) qui ne s'appliquait qu'au cas de dommages spéciaux allégués et prouvés; que dans l'espèce, de tels dommages n'avaient été ni allégués ni prouvés; 3o. Que les défendeurs avaient été condamnés sans avoir eu l'occasion de faire preuve de leurs prétentions.

Prevost and Jackson.

Quant à la première prétention (que les qualités des demandeurs n'ont pas été prouvées), on y répond en disant : 1o. Que n'ayant pas été niées spécialement par les défendeurs, elles doivent être regardées comme admises : 2o. Que les parties n'ayant pas produit d'articulations de faits, et les défendeurs, n'ayant pas expressément nié les qualités prises par les demandeurs, sont, d'après l'art. 217 du Code de Procédure Civile (qui au reste n'est que l'expression du droit antérieur (S. R. B. C. ch. 83, s. 93, p. 746) censés avoir admis les dites qualités, lesquelles me paraissent suffisamment établies dans la cause.

Quant au second motif du jugement : Que l'action est nécessairement portée sur le statut (S. R. C. ch. 78), et que ce statut ne s'étend qu'au cas de dommages spéciaux, dont aucuns ne sont prouvés dans l'espèce ; l'on répond en disant que dans la cause de Ravary et le Grand Trone (6 L. C. Jurist, p. 49), il a été décidé, par la majorité des juges de la Cour d'Appel, savoir : pour, Lafontaine, Aylwin et Bruneau, contre : Badgley et Duval ; que le statut n'avait nullement aboli le droit commun sur le sujet ; que d'après le droit commun le remède réclamé par les demandeurs existait et que des dommages pouvaient être accordés, sans allégations et sans prouver de dommages spéciaux. Les raisons données par le juge Aylwin en rendant ce jugement de la majorité de la cour, me paraissent satisfaisantes et je suis disposé à les accepter. Aux autorités qu'il cite, j'ajouterai : II Dareau (Injures) p. 425, II Shelford, Law of Railways, p. 750, I Sourdat, No. 33, p. 22.

Le Statut Anglais qui est le même que le nôtre, (9 et 10 Vic. c. 93) ne s'étend pas à l'Ecosse, parceque, là, on a le remède du droit commun, ce qui rendrait l'autre inutile. L'on aurait pu en dire autant ici ; l'on aurait pu se contenter de l'appliquer au Haut-Canada, où, comme en Angleterre, le remède du droit commun n'existait pas ; il était inutile pour le Bas-Canada, mais on l'y a appliqué par erreur ; mais ce droit commun reste comme auparavant. Au reste quand même il serait vrai que l'action présente est fondée uniquement sur le statut ; que l'on serait d'avis que la clause 5 est applicable au cas et exige l'allégation de dommages spéciaux, il me paraît que c'était aux défendeurs à se plaindre de cette omission, que ne l'ayant pas fait, il ne peut s'en plaindre à présent, ni s'opposer à ce que preuve soit faite des dommages que les demandeurs ont effectivement soufferts. Mais il me semble que dans la supposition que l'action est tout à fait fondée sur le statut, les dommages me paraissent suffisamment allégués, et le juge présidant au procès aurait dû en permettre la preuve. Je n'hésite pas à dire que pour une raison ou l'autre, soit que l'action soit fondée sur le statut ou sur le droit commun, le juge aurait dû permettre de soumettre aux témoins les questions qu'il a rejetées. Par suite de cette décision, il est tombé dans une autre erreur, celle d'accorder la motion des défendeurs pour un *non suit* ; il aurait dû permettre aux demandeurs de faire preuve de leurs dommages et obliger les défendeurs à procéder à leur défense. D'après sa décision et la charge qu'il a faite au jury, les défendeurs ont été privés de cet avantage, et se trouvent avoir été condamnés sans avoir eu l'occasion de se défendre.

La question est de savoir s'ils ont droit de s'en plaindre vû qu'ils l'ont demandé eux-mêmes, et que le juge n'a fait qu'acquiescer à leur réquisition.

Provost and Jackson.

D'un autre côté, l'on demande si les jurés avaient légalement le droit de rapporter un verdict en faveur des demandeurs sans preuve aucune, ou du moins sur une preuve incomplète et déclarée illégale et non recevable par le juge, auquel appartenait la décision de ces questions de preuve. Autre point de droit: pouvaient-ils d'eux mêmes apprécier ces dommages sans autre preuve que celle rejetée par la cour ou d'après leur propre appréciation? S'ils avaient ce droit, je renverserais le jugement qui accorde un *non suit* et renvoie l'action des demandeurs, et j'accorderais aux demandeurs la motion qu'ils ont faite pour jugement suivant le verdict.

Si au contraire les jurés n'avaient pas de droit d'estimer d'eux-mêmes, ces dommages, ni de se guider sur la preuve rejetée par la cour comme illégale, alors il me semble que le moyen de rendre justice aux parties, serait de permettre un nouveau procès; et comme c'est bien les demandeurs qui réussissent, je leur donnerais les frais d'appel, sauf à statuer sur les autres au jugement final.

Quant à la prétention émise de la part des défendeurs que les jurés auraient dû déclarer par leur verdict de quelle manière devait être distribué entre les demandeurs le montant accordé, c'est élever une difficulté, de la part des défendeurs, qui ne les regarde pas. Pour eux cette distribution est tout à fait indifférente; c'est exciper du droit d'autrui; pour eux le seul intérêt qu'ils ont c'est de ne payer que ce qu'ils doivent légitimement.

MACKAY, A. J.—In this case it was absolutely necessary on the part of Provost and his wife to prove their marriage, and establish that the boy killed was their son. Suppose the plaintiffs were alleging the death of their son, and claiming $50 belonging to him from a Savings Bank, it would be necessary for them to prove the marriage. The judge who tried the case was therefore right in saying that the defendants need not enter on their case, as the marriage of the parents and birth of the son had not been proved.

JOHNSON, J. *ad hoc*.—The ground on which the court goes is this: The statute gives a right of action to surviving parents in certain cases. Now, in the present case, the parents have not proved their relationship; therefore there is no right of action.

DUVAL, C. J., and TORRANCE, J., *ad hoc*, concurred.

Judgment confirmed.

Loranger & Frères, for the appellants.
Cartier & Pominville, for the respondents.

(J. K.)

MONTREAL, 12th NOVEMBER, 1863.

Rodgers and Laurin.

Coram SIR L. H. LAFONTAINE, C. J., DUVAL, MEREDITH, J. J., AND MONDELET, A. J.

No. 40.

WILLIAM H. RODGERS, *et al.*,
(Plaintiffs in the Court below,)
Appellants;

AND

FRANCOIS LAURIN,
(Defendant in Court below,)
Respondent.

HELD:—1st.—That subscription for stock in a Railway Company may be conditional.
2nd.—That until the fulfillment of the condition imposed no action at law would lie in favor of the Railway Company as against the subscriber.
3rd.—That under the circumstances a judgment creditor of the M. & B. R. Company had no action against Respondent under and by reason of his conditional subscription.

This Appeal arose from a final Judgment of the Circuit Court, sitting at Papineauville, in the District of Ottawa, on the 10th day of May, 1862, dismissing the action of Appellants.

The Declaration of Appellants alleges :—

That Appellants had obtained a Judgment against the "Montreal & Bytown Railway Company," already corporate under the 16 Vic., ch. 103, amounting to the sum of £26,272 14s. 0d. currency; that the said Railway Company was insolvent; that a Writ of Execution had issued against the goods and lands of the said Company to satisfy said Judgment and had been returned unsatisfied by the Sheriff of the District of Montreal; that on or about the 31st of January, 1854, Defendant (Respondent) subscribed for and became Shareholder in the capital stock of said Railway for one share of £25 cy., was so still, and had paid nothing thereupon, and was liable by law (14 and 15 Vict., 51, S. 19.) to Appellants for such sum, and Appellants concluded for a Judgment against Respondent for £25 cy., interest and costs.

The Respondent pleaded to this action besides a *Défense au fond en fait*, specially to the following effect :—

That he did not subscribe unconditionally for stock or ever become liable to Appellants or to the Railway Company; that he became a Stockholder only on the conditions expressed in writing over his signature in the document bearing his name, that the Railway contemplated should pass through the County of Ottawa; and that his subscription was only payable when such passing occurred, and not before; and that the said Railroad Company never fulfilled such condition in whole or in part, and said Railway never passed through said County; that said condition was never fulfilled; that no call had ever been made by the said Company or the Directors thereof on Respondent as a Stockholder, and that he was not indebted, bound or liable to Appellants.

The issues being completed, parties proceeded to evidence.

That of Appellants consisted of an authentic copy of Judgment, Rodgers & al. vs. The Montreal & Bytown Railway Company, and an Execution Writ, the return of the Sheriff of the District of Montreal thereto of Nulla Bona and

Rodgers and Laurin.

Nullæ Terræ within the said District of Montreal, also the testimony of Respondent and of James Hagan, and the production of a pretended Stockbook.

Respondent adduced no evidence except Appellants' admission that the Railway had never yet been constructed in the County of Ottawa, and after final hearing the action was dismissed by the Court below.

Dorion, Dorion & Senécal, for appellants :—

D'abord il est difficile d'admettre que la souscription faite par l'Intimé soit conditionnelle. Les termes qu'il invoque comme exprimant la condition sont écrits en tête d'une page laissée en blanc dans le livre des parts ou actions, et la signature de l'Intimé se trouve sur une page subséquente et entièrement distincte où il n'est nullement question de condition.

Mais en admettant même que l'intimé n'eut souscrit que sous la condition que le chemin de fer passerait dans le comté d'Ottawa, cela n'invaliderait pas sa souscription.

Le principe de droit est que l'apposition d'une condition à la souscription de parts ou actions dans des compagnies de ce genre, ne rend pas la souscription nulle, si la condition en est une que la compagnie avait le pouvoir de remplir lorsqu'elle a été apposée.

Or si la souscription est bonne, l'actionnaire ne peut se refuser au paiement de ses parts sous prétexte que la condition n'est pas accomplie. C'est précisément pour l'accomplir que la compagnie a besoin d'être payée des actionnaires. Ceux-ci pourront ensuite exercer leurs droits contre la compagnie si elle ne remplit pas ses conditions.

En devenant actionnaire, l'Intimé a contracté une obligation envers les créanciers de la [illegible]. Cette obligation est précise et impérative. L'intimé ne peut s'y soustraire en prétendant qu'il avait stipulé certaines conditions avec la compagnie, conditions particulières entr'eux et auxquelles les appelants n'étaient pas partie.

P. Ayleu and John A. Perkins Jr., for Respondent :

The insolvency of the Company is an essential allegation of Appellants' declaration, which, Respondent respectfully submits, Appellants have not sustained in evidence. True, the Judgment of Appellants against the Company states, "Considering that Plaintiffs have established in evidence that the said Defen- "dants are now insolvent, *en état de déconfiture*." This is no proof in an action against Respondent. What was the evidence against the Company of insolvency? Certainly there is no evidence on that point. As to the return to the execution, it applies to and is only made concerning any property of the Railway in the District of Montreal, wherein a rail was never laid and no property ever existed, though the Company outside the District had a Railway, works, materials and *property*.

The pretended Stockbook is not proved to be real or legal or authentic, and certainly (if good) is headed "Stock subscriptions conditional upon the "Railway passing through the County of Ottawa."

The evidence of Hagan is to the effect that he (Hagan) signed Respondent's name in the pretended Stockbook. That Respondent was present and consented to such entry by Hagan, and so authorized him to write his name "under con-

dition that the Railway should pass through the County of Ottawa," and when at Templeton (where Respondent lives) he, Respondent, should work out his share. That was a condition to his authority to sign for him. No part of the condition was ever fulfilled. Respondent objected to such proof.

Therefore, Respondent respectfully pretends, that it is not proved that he ever subscribed for Stock as alleged. The St[illegible] evidently produced by Appellants at Enquête as appears by [illegible] Record. It is not mentioned in Appellants' list of [illegible] filed therewith. Hagan evidently exceeded his authority, and [illegible] Respondent in this cause.

Respondent further pretends that the Appel[illegible] proved that he ever took stock at all; in fact Respondent's subscr[illegible]ly amounted to a promise to take stock after a certain event which never happened. Upon such promise the Company could not legally issue any Bonds, and Appellants could not, and certainly never did, advance their money upon the security of such subscription, or rather promise to subscribe.

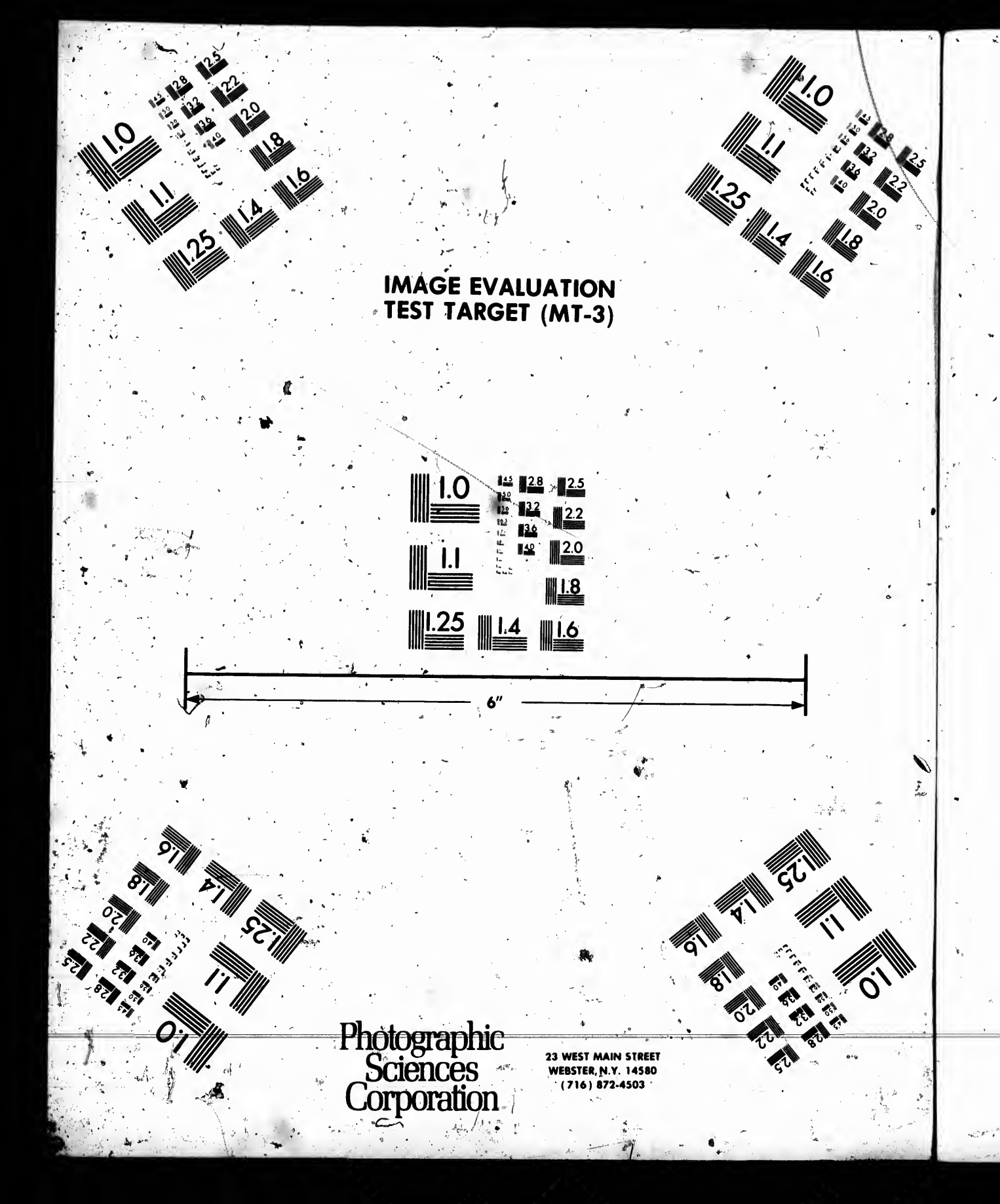
But admitting for the moment that the allegations of the *demande* are established on the merits, the judgment of the Court below is correct. The Appellants cannot go further and have, or pretend to have any rights that the Railway Company could not urge against the Respondent in an action by the Company for payment of subscription to stock. Respondent's defence of conditional subscription would be a valid defence to any such action. The appellants would in this action only stand in the position of the Railway Company. The contract between the Company and the Respondent is only complete, and the subscription exigible, when the Company fulfils the conditions of the contract. The Respondent writes: "I subscribe conditionally upon the Railway passing through the county in which I reside." Till such takes place, there is no liability on the part of the Respondent. There are numerous instances of such conditional subscriptions, and, to condemn Respondent on such incomplete and unfulfilled contract, would only be to subvert all principles of equity; and the effect thereof be forever to forbid parties to assist in the advancement of Railways in any country.

MEREDITH, J., said, that the condition not having been accomplished in any respect, the Appellants could not recover.

The judgment of the Court below was confirmed with costs.

Judgment confirmed.

Dorion, Dorion & Senécal, for Appellants.
P. Aylen, J. A. Perkins Jr., for Respondent.
(J. A. P., JR.)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WEBSTER, N.Y. 14580
(716) 872-4503

COURT OF REVIEW, 1869.

MONTREAL, 30TH APRIL, 1869.

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

No. 35.

Graves vs. *Dennison, et al.*

HELD;—That it is not necessary for the Plaintiff to notify the Defendant that he has put in security for costs; notice that security will be put in on a day specified is sufficient, and the delays run from the date of putting in security.

This was an appeal by the Plaintiff from a judgment rendered at Sherbrooke.

MONDELET, J. A very small point indeed, is to be decided in this case, but as the Plaintiff considers himself in the right, no blame can be attached to him for seeking to obtain the reversal of the judgment of the Superior Court of the District of St. Francis, of the 21st December 1868, rejecting and setting aside a demand of plea, and all the proceedings had on and since the said demand of plea; with costs distraction of which was awarded to Defendant's attorney. A few facts are decisive in the case. Plaintiff was called upon to give security for costs, *judicatum solvi*. He gave notice to Defendant's attorney, with the names of the intended sureties, that on a given day he would give the required security, which o the very day mentioned he did. This being done he demanded a plea to the action. The Defendant having fyled no plea, Plaintiff foreclosed him. The Defendant on 21st December 1868, made a motion to obtain the rejection of the demand of plea and of the foreclosure, and he grounded his motion on the fact that the Plaintiff had not given him notice of his having put in security. On the 21st December (same day) the Court "considering that the demand of plea fyled by the Plaintiff and all his proceedings had on and since the said demand of plea and the foreclosure, have been irregular," rejected and set aside the same with costs. Now we are of opinion that the Plaintiff having regularly given notice that on a given day security as required would be put in, and having done so, it was for Defendant to ascertain whether such security had so been given, or rather he should have attended on the day indicated, to either consent to the sureties being accepted, or object. If he had gone as notified, he would have ascertained that the security had been given. The Plaintiff must not suffer from the negligence of Defendant. The judgment cannot be sustained. The Defendant was properly foreclosed and the judgment setting aside the demand of plea and foreclosure, must be reversed, and the demand of plea and the foreclosure be declared to have been regularly made.

TORRANCE, J. I always understood the practice here to be, that the Plaintiff, when he did give security, should notify the Defendant that he had done so, and that from that time the delays would run. The judgment of Mr. Justice Short would seem to show that the same practice has existed at Sherbrooke, and I regret to see his judgment disturbed. There is a reasonableness, too, in requiring such notice to be given; for in this case the Defendant's counsel travelled to Sherbrooke several times for nothing, the Plaintiff failing each time to put in security. The fourth time the Defendant's attorney thought he would

not go, and on that occasion security was put in, and then the Plaintiff surprised him by foreclosing him.

BERTHELOT, J., expressed his opinion that there was nothing in our rules of practice or procedure that obliged the Plaintiff to give notice of security having been put in. The Court could not take into consideration the inconvenience arising from the fact of an attorney not residing at the place where the suit was proceeding. The judgment was as follows:

"Considering that the Defendants had no right to obtain their motion of the 21st December 1868, the rejection of the demand of plea and of the foreclosure effected by the said Plaintiff, inasmuch as said Plaintiff, after he had given security for costs in pursuance of notice duly thereof by him given to Defendant, was not bound to give said Defendant notice of such security having been put in:

Considering, therefore, that there is error in the judgment appealed from, to wit, the judgment of the 21st December, 1868, granting the said motion of the same day made by Defendant, 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 all the proceedings had since the demand of plea and foreclosure by the Plaintiff be and the same are set aside, and that on this record being remitted to the Court below, such proceedings be had as to law and justice may appertain; the Hon. Mr. Justice TORRANCE dissenting."

Judgment reversed.

Sanborn & Brooks, for the Appellant.
Geo. S. Carter, for the Respondent.
(J. K.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH APRIL, 1869.

Coram TORRANCE, J.

No. 765.

Tuckett et al. vs. *Forester et al.*

HELD:—That it is not necessary for the Plaintiff to notify the Defendant that he has put in security for costs; notice that security will be put in on a day specified is sufficient, and the delays run from the date of putting in security.

The action was returned 9th September, 1868. The Defendants appeared by attorney 11th February, and on the same day gave notice for the 17th, of motion for security for costs, (the Plaintiffs residing at Hamilton, O.) On the 7th April, the Plaintiffs notified the Defendants that security would be put in on the 13th April. On the 17th April, the Plaintiffs demanded a plea, and also on the same day gave notice that security had been put in. On the 27th, the Defendants moved to reject the demand of plea as prematurely fyled, because the Defendants were entitled to eight days' delay from the date that notice was given them that security for costs had been put in. (See preceding case.)

TORRANCE, J. This is a motion by the Defendant to reject from the record a demand of plea on the ground that the Plaintiff had not given notice that he

Tuckett vs. Forester.

had put in security for costs. The point raised is similar to that which came up in the case of Graves vs. Dennison, decided by the Court of Review to-day. In that case the Court at Sherbrooke decided that the Plaintiff, being a non-resident could not proceed in the case, not only till he had put in security, but also had given notice to the Defendant that he had done so. The Court here, reversing the judgment of Mr. Justice Short at Sherbrooke, decided that it was not necessary for the Plaintiff to give notice that he had put in security, and that the delays would run from the date of putting in security. It is my duty to conform o that judgment, and I therefore dismiss the motion, but without costs.

Motion rejected.

Curran & Grenier, for the Plaintiffs.
J. J. C. Abbott, Q. C., for the Defendants.
(J. K.)

MONTREAL, 30 SEPTEMBRE, 1868.

Coram MACKAY, J.

No. 1589.

Renaud vs. *Walker & E. Contra.*

JUGE:—1o. Qu'une partie ne peut réclamer d'une autre des dommages pour négligence de remplir certaines conventions, lorsque la partie obligée ne pouvait raisonnablement prévoir que sa négligence causerait de tels dommages, et que pour acquérir un droit d'action, il lui aurait fallu mettre le Défendeur en demeure de remplir cette partie du contrat, et l'avertir du dommage qui allait résulter de son inexécution.

2o. Que bien que le mandat en matière commerciale soit de sa nature onéreux, une partie ne sera point reçue à réclamer une commission, si elle s'est engagée à exécuter le mandat par un contrat synallagmatique, quand il est présumable que cette commission a été considérée comme partie de la considération de ce contrat.

L'action était intentée pour $232.00, balance sur le prix d'une quantité vendu et livré.

Le défendeur plaida: qu'il s'était engagé comme propriétaire de moulin, à moudre pour le demandeur 13500 minots de blé moyennant que le demandeur lui fournit les poches pour mettre la farine en provenant; que le demandeur avait en outre chargé le défendeur de vendre cette farine et de lui rendre compte du produit de la vente; que le demandeur ayant négligé de lui fournir des poches malgré ses demandes réitérées, le moulin du défendeur s'était trouvé arrêté pendant 6 jours, causant au défendeur $20.00 par jour de dommages, formant $120,00; qu'il aurait aussi vendu la plus grande partie de cette farine pour le demandeur et aurait rendu compte du prix à ce dernier; que pour cette vente, la collection du prix, l'emmagazinage de la farine et l'usage de poches pour la mettre, il avait droit à 5 centins de commission par quintal, formant sur la quantité vendue $230.00, lesquelles sommes unies à $22.00 d'emmagazinage pour du blé d'inde, formaient $372.00 qu'il offrait en compensation à l'action, réclamant le payement de la balance par demande incidente.

Le demandeur nia que le moulin eut été arrêté par défaut de poches; que l'eut-il été, le défendeur n'en aurait souffert aucun dommage, ce dernier n'ayant pas alors d'autre grain à moudre; qu'il ne s'était pas obligé à fournir de poches,

et que, dans tous les cas, il n'avait jamais été mis en demeure d'en fournir; que le défendeur n'avait droit à aucune commission. Que la convention entre lui et le défendeur avait été qu'il lui vendait son blé à 90 centins le minot, et acceptait en payement de la farine à $2.20 par 100 livres, et que le défendeur s'était engagé à lui vendre la plus grande quantité possible de cette farine, cette condition faisant partie d'un contrat parfaitement synallagmatique dont le demandeur avait fait faire une entrée dans ses livres, sous les yeux du défendeur qui en avait entendu la lecture. Cette entrée, que les parties n'avaient pas jugé à propos de signer, se lit comme suit:

" Agreement made this day with William Walker of St. Gabriel Lock. I will " furnish him with fourteen thousand five hundred and four bushels Spring " wheat at ninety cents per bushel, and he will furnish me good bag flour at $2.20 " per hundred and twelve pounds, and said William Walker binds himself to sell " for me all the flour he can, and to remit me the money as fast as collected."

Dated at Montreal, 4th May 1864.

Le défendeur prétendit que cet entrée ne contenait que partie de la transaction et avait été laissée inachevée, l'entrée étant terminée par une virgule.

Le demandeur prouva que ce document avait été écrit en présence du défendeur qui en avait entendu la lecture et y avait donné son assentiment, et que l'écrit contenait toute la convention. Le défendeur prouva que son moulin avait été arrêté pendant 6 jours par manque de poches, mais il fut reconnu qu'il n'avait pas alors d'autre grain de rendu prêt à moudre. La preuve démontra aussi que bien que le défendeur eut envoyé chez le demandeur demander des poches, cependant le demandeur lui-même n'avait jamais été régulièrement mis en demeure d'en fournir sous peine de dommages:

PER CURIAM:—La contestation en cette cause se réduit à deux questions:

1o. Le défendeur a-t-il droit à des dommages pour le retard causé à son moulin par le défaut de la part du demandeur de fournir des poches?

2o. L'entrée dans les livres du demandeur tel qu'elle se lit ci-dessus et qui a été prouvée renfermer la convention des parties, obligeait-elle le défendeur à vendre la fleur en question sans charger de commission?

Quant à la 1ère question, le défendeur ne pourrait réclamer des dommages que s'il eut régulièrement mis le demandeur en demeure de livrer ces poches, lui faisant connaître en même temps quels dommages résulteraient de sa négligence, ce que le défendeur n'a point fait.

Pothier, Obligations, No. 164. Vente, No. 132. 6 Toullier, No. 284. Troplong, Vente.

Pour ce qui est de la 2e. question, il est reconnu qu'en matière commerciale le mandataire a droit à une commission malgré qu'elle n'ait pas été stipulée. C'est tout le contraire de ce qui a lieu en matières civiles, où le mandat est toujours censé gratuit s'il n'y a convention au contraire, tandis qu'en matière commerciale, il est lucratif, s'il n'y a pas convention qu'il sera gratuit. Mais dans le cas actuel, il est évident que l'entrée au livre du demandeur constitue une convention parfaite, un contrat synallagmatique où est entrée la commission du défendeur en considération de la vente que lui faisait le demandeur. D'un côté

Renaud vs. Walker.

le demandeur s'engageait à vendre une certaine quantité de blé pour un certain prix et à recevoir de la fleur en payement: D'un autre côté, le défendeur s'engageait à donner en payant cette fleur à $2.20 le quintal et à vendre autant de cette fleur qu'il pourrait et à rendre compte du prix en résultant. Il n'y avait donc pas lieu à réclamer une commission, le défendeur s'en trouvant payé par la livraison du blé à 90c. le minot.

L'action du demandeur doit donc être maintenue et la demande incidente déboutée avec dépens. Jugement pour le Demandeur.

F. X. A. Trudel pour le demandeur principal et le défendeur incident.

J. J. C. Abbott, Q.C., pour le Défendeur principal et le demandeur incident.

(F. X. A. T.)

MONTREAL, 31st MAY, 1869.

Coram TORRANCE, J.

No. 1993.

The Chaudière Gold Mining Company of Boston vs. Desbarats, et al.

HELD:—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, and therefore a foreign corporation has no right to hold lands in the Province, without such permission or authority.

This case came up on demurrer to the declaration. The plaintiffs sued as "the Chaudière Gold Mining Company of Boston, in the State of Massachusetts, "a body politic and corporate, duly incorporated under the laws of the said "State of Massachusetts for the purpose of and now actually carrying on the "business of a Mining Company there and at the Township of Watford in the "county of Dorchester, and elsewhere in the Province of Quebec;" and claimed from the defendants as *arrière-garants* $250,000 damages suffered by the plaintiffs in consequence of their eviction from certain lands purchased by them. The defendants demurred, setting up among other grounds the following:—

2nd. That the plaintiffs suing as a body corporate and politic have not alleged that they had been duly incorporated by any competent authority recognized by the laws in force in the Province of Quebec.

3rd. That the said plaintiffs have instituted their action as being a body corporate and politic incorporated under the laws of the State of Massachusetts, a foreign State, and therefore a foreign Corporation, having no recognized existence or status in this Province of Quebec.

6th. That it does not appear by the allegations of the plaintiffs' declaration, that they had any right to acquire lands or real estate in the Province of Quebec, but on the contrary at all and every the periods mentioned in the plaintiffs' declaration, the said plaintiffs as a body corporate and politic (*main morte*) had no right to acquire any real estate within the said portion of the late Province of Canada now constituting the Province of Quebec, and cannot therefore claim any damages by reason of the pretended sale from James Foley to them, which sale by the allegations of their declaration is shown to be absolutely null and void, and could not convey to the plaintiffs any right or title to the lands therein mentioned.

The Chaudière Gold Mining Company of Boston vs. Desbarats.

TORRANCE, J.—The declaration sets out the purchase of certain lands by the plaintiffs, and the registration of the deed, and concludes in damages to the amount of $250,000, for the eviction of the plaintiffs from these lands. The defendants have fyled a demurrer to the action, and the court calls attention to the sixth reason of demurrer: that the plaintiffs, as a foreign corporation, had no right to acquire any real estate within the Province of Quebec, and could not claim damages by reason of such purchase. On this question of the right of corporations to hold lands in mortmain in Lower Canada, the court refers to vol. 1, last edition of edits et ordonnances of Quebec, pp. 576–581. It is called "Déclaration du Roi concernant les ordres religieux et gens de main morte établi aux colonies françaises. The 10th clause is in these words: "Faisons défenses à toutes les communautés religieuses et autres gens de main morte, établis dans nos dites colonies, d'acquérir ni posséder aucun bien immeuble, maisons, habitations ou héritages situés aux dites colonies ou dans notre royaume, si ce n'est en vertu de notre permission expresse, portée par nos lettres patentes, &c."

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

This edict is regarded as law in a case reported in Stuart's reports, *Desrivières* vs. *Richardson*, p. 224. See also Freligh and Seymour, 5 L. C. R. 492.

The court would also refer to the 366th Art. of the Civil Code, which declares that corporations are under certain disabilities with regard to holding land in Lower Canada. The judgment of the court therefore is that the demurrer of the defendants to the plaintiffs' action must be maintained.

The judgment is as follows:

The Court having heard, etc., considering that it appears by the declaration in this cause that the plaintiffs are a foreign corporation and body politic and corporate incorporated by the laws of the State of Massachusetts, one of the United States of America:

Considering 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:

Considering that the plaintiffs do not show by their declaration any right or title to hold the lands described in the said declaration:

Considering, therefore, that the plaintiffs are not well founded in the bringing an action of damages against the defendants as representing their alleged *arrière-garant*, the late George Desbarats, for having been dispossessed of the said lands purchased as set forth in the said declaration; doth maintain the *défense au fond en droit* of the defendants, and declare valid the sixth reason of said *défense*, and doth dismiss plaintiffs' action with costs. Action dismissed.

Cross & Lunn, for the plaintiffs.

Dorion, Dorion & Geoffrion, for the defendants.

(J. K.)

MONTREAL, 30TH APRIL, 1869.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 215.

In re *Henry Davis et al.* Insolvents, *E. Muir*, claimant, and *Carlos Chamberlin et al.*, creditors contesting.

HELD:—That the nullity declared by paragraph 3 of section 8 of the insolvent Act of 1864 is an absolute nullity, and a promissory note given in violation of the provisions of said paragraph is absolutely null and void *ab initio* even in the hands of a third party innocent holder before maturity.

This with two other similar cases A. Milloy and M. Campbell claimants, came before the court in appeal from the award of the Assignee of the insolvent estate, James Court, rejecting the demand of the claimant, and denying his right to rank on the estate for the promissory note claimed on.

The facts of the case are as follows: About the month of June, 1867, the insolvents obtained from James Muir of Montreal, his accommodation notes in their favor for about $12,000, he taking from them at the time the ordinary receipts showing that they were accommodation notes.

About the 10th of January, 1868, seven days before the assignment by Davis, Welsh & Co., James Muir learning that they had suspended payment, with a view to protect himself from loss, as far as possible, on the above notes which were still outstanding, obtained from them in exchange for the receipts their notes made and antedated to correspond exactly both in amounts and dates with the accommodation notes for which the receipts were given and which had been got by them from Muir in June previous.

Three of the notes thus obtained by Muir, of about $2000 each, were transferred by him *sans recours* to the three claimants in question, viz., E. Muir, A. Milloy, and M. Campbell, who were at the time of the transfer his creditors, and as such took the notes by way of security for antecedent debts but before their apparent maturity and without any (positive) knowledge of their origin.

Shortly after the transfer of the notes by James Muir, as above, he himself became insolvent. Under these circumstances the holders of the accommodation notes got from him in June, and which were still outstanding, came in and ranked on Muir's estate as maker of the notes and on the estate of Davis, Welsh & Co., as the indorsers: and the holders of the notes got by James Muir from the insolvents in January, 1868, holding them as collateral security *sans recours* did not rank on James Muir's estate but filed their claims against the estate of the insolvents as the makers of these notes. Their right thus to rank is what was contested by the contestants in this case.

The grounds taken by the contestants were:

1. That the notes, being clearly given in violation of paragraph 3 of section 8 of the insolvent Act of 1864, were absolutely null and void *ab initio*.

2nd. That in any event the claimants could not be allowed to rank as they had parted with no new consideration and incurred no new obligation on the strength of the notes, but had simply taken them as security for an antecedent

debt, *causa lucrandi*, which did not constitute them holders for value as against the creditors of the estate. Davis and Muir.

he contestants cited Chitty, Bills 82, 88, 91, 94, Dorion & Macrae, 742. James' Insolvency Act of the United States, p. 153, 183.

The assignee held on both grounds that the claimants could not rank, and rejected their claims.

TORRANCE, J., without entering upon the second of these grounds, confirmed the judgment of the assignee in the three cases upon the first alone. After reading subsection 3 of section 8, of the insolvent Act, his Honour said that as to the transaction between James Muir and Davis, Welsh & Co., there was no doubt that it was an illegal attempt to create a security upon the estate of persons then insolvent. The judgment would therefore be confirmed with costs in all three cases.

Judgment of the assignee confirmed.

Perkins & Ramsay, for the claimants.

Cushing & Trenholme, for the contestants.

(J. K.)

CIRCUIT COURT, 1869.

MONTREAL, 30TH JUNE, 1869.

Coram MACKAY, J.

No. 1573.

Les Syndics de la paroisse des Saints Anges de Lachine, vs. *Gabriel Lefebvre.*

HELD:—That la Côte de Notre Dame de Liesse forms part of the parish of St. Laurent. Edits & Ordonnances, Vol. 1, p. 443, (ed. of 1854.)

This was an action to recover from the defendant the sum of $16.72, being an instalment of the amount for which the defendant was assessed by the Parish Church at Lachine for the construction of a Church. The plaintiffs prayed that the defendant's land be charged with this and the remaining instalments.

The defendant pleaded an *exception péremptoire*, that the land possessed by him is situated in la Côte de Notre Dame de Liesse, which forms part of the Parish of St. Laurent, and not of the Parish of Lachine.

MACKAY, J.—The defendant was taxed $200.68 in favour of the Parish Church at Lachine, payable in annual instalments of $16.72. He has paid seven annual instalments. The present action prays for the instalment for 1867, and that the defendant's land be declared charged with it, and also with the remaining instalments, with costs.

Defendant pleads that the land taxed does not belong to Lachine parish, but to St. Laurent, and that his former payments were made in error. Many facts were adduced by both parties tending to prove on the one side that the land charged was in Lachine parish, and on the other that it was in that of St. Laurent. The plaintiffs proved that defendant had had a pew in Lachine church till 1866; that defendant in his marriage contract styles himself of Cote de Liesse, Parish of Lachine; that defendant had already paid seven of these instalments. The defendant proved that for several years he has had a pew in St.

Les Syndics de la paroisse des Saints Anges de Lachine vs. Lefebvre.

Laurent Church; that he has paid his *dixmes* for the last two years to the Curé of St. Laurent; that Defendant's mother not long dead was buried at St. Laurent; that Defendant makes his *communions paschales* at St. Laurent; that in the commutation deed for this land the Seminary styles it of St. Laurent Parish. The evidence of the two curés is relied on.* The evidence of the Roman Catholic Bishop is in favour of defendant. The defendant can only have one *propre curé*. On the evidence the defendant has made the best proof, especially seeing that the plaintiffs admit that there are other properties in Côte de Liesse where the defendant's property is situated, and that too, nearer to Lachine than defendant's land, which nevertheless belong to St. Laurent Parish. The judgment is mainly based upon a piece of public law, Edits et Ordonnances, Edition of 1854, p. 443, which expressly declares that Côte de Liesse is in the Parish of St. Laurent. No part of it is put into Lachine. The *propre curé* of defendant is the Curé of St. Laurent. Plaintiffs have shown no *démembrement* of the Parish of St. Laurent from the time of that Edit, which expressly forbade any court or judge from interfering with its provisions. There can be no doubt that the defendant's land is in the Parish of St. Laurent, and the plaintiffs' action must be dismissed with costs.*

Action dismissed.

Gironard & Robidoux, for the plaintiffs.

Bondy & Fauteux, for the defendant.

(J. K.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH JUNE, 1869.

Coram TORRANCE, J.

No. 1208.

Wilson vs. *Ibbotson*.

HELD:—That service of a writ upon the clerk of the Recorder's Court at his office attached to the Court, during office hours, and whilst he is engaged in his official duties, but not *à l'audience*, is a valid service.

The plaintiff sued the defendant for £500 damages, for malicious prosecution. The defendant had caused him to be arrested on a charge of obtaining money under false pretences, by selling him (defendant) a barrel of apples which were found on examination to be mostly of a different description and of inferior quality. The Grand Jury returned no bill to the indictment; and the plaintiff now instituted proceedings to recover damages.

The defendant, who is clerk of the Recorder's Court, pleaded an *exception à la forme*, on the ground that the writ and declaration had been served upon him "during office hours at the office of the clerk of the Recorder's Court, attached to and forming part of said Court, and a necessary adjunct thereto and component thereof, and whilst he, the defendant, was then and there acting and engaged in his official duties as such clerk; that by reason of his so acting and being so engaged in his said official duties, he, the defendant, was then and

* The same judgment was also rendered in an action by the same plaintiffs against Antoine Lefebvre in which the facts were the same.—*Reporter's note.*

there unable to take any cognizance of the said service, and be called upon so to take and accept service as aforesaid, without dereliction of duty as such clerk to the public, and more particularly to and towards the Mayor, Aldermen and citizens of the city of Montreal, whose public servant, he, the defendant, was then and there," &c.

The plaintiff answered that the exception was unfounded, because the service had not been made in Court, à *l'audience*, but in the office adjoining.

The plaintiff's counsel cited the following authorities:—

Rodier, sur l'article 3 du titre 2, Ord. de 1667.
Papon, tit. 5, No. 27.
Pigeau, Vol. 1, p. 136, Notes.
Carré & Chauveau, p. 395.
Code de Procédure civile, Art. 71.

TORRANCE, J.—I am of opinion that the service is good. It was not a service à *l'audience*.

Judgment: Considering that service of the writ and declaration in this cause upon the defendant, being then and there clerk of the Recorder's Court of the city of Montreal, during office hours at the office of the clerk of the said Recorder's Court, attached to and forming part of the said Court, and a necessary adjunct thereto and component thereof, and whilst the defendant was then and there engaged in his official duties as such clerk, was not a service à *l'audience*, in Court, and is therefore a valid service, doth dismiss, &c.

Exception à la forme dismissed.

McCoy & Lefebvre, for the plaintiff.
D. Girouard, for the defendant.
(J. K.)

MONTREAL, 30TH JUNE, 1869.

Coram TORRANCE, J.

IN INSOLVENCY.

No. 743.

In re Catherine Morgan, Insolvent, *John Whyte*, Assignee, and *Samuel Biron*, Contesting Dividend Sheet.

HELD:—That the privilege of the landlord on the proceeds of the effects found on the premises leased, is not affected by the Insolvent Act of 1864, and has precedence over the privilege of the assignee and the insolvent for the costs of their respective discharges under the Act.

In the case of Catherine Morgan, an insolvent, John Whyte, official assignee, prepared a first and final dividend sheet, in which he collocated himself for the sum of $45, for the costs of procuring his discharge as assignee, and also collocated the insolvent for a like sum of $45 for the costs of her discharge. The entire proceeds of the estate, with the exception of a balance of $31.61, were absorbed by these and other expenses of winding up.

The claimant, Biron, contested this collocation, claiming that the sum of $80, due him by the insolvent for rent, should have been collocated to him by privilege before the above mentioned two sums of $45, and praying that the dividend sheet be set aside, and a new sheet prepared, collocating him for $80, by privilege.

Morgan and Biron.

Both the assignee and the insolvent appeared by counsel and filed answers to the contestation, alleging, first, that it was not made within the six days allowed by law, and came too late; and, secondly, that the collocation of the two sums of $45 each as a first privilege had been made in accordance with law.

The parties went to proof before the assignee. The assignee filed an admission that the proceeds of the estate were the proceeds of goods and furniture found in the premises leased by Biron to the insolvent. The clerk of the assignee was examined to prove that the charge of $45 was the usual charge.

On the 2nd April, 1869, the assignee gave judgment both on his own claim for $45, and on the insolvent's claim for the same sum, holding 1st, that the contestation being fyled after the expiration of the six days allowed by law, was null; 2nd, that the assignee and the insolvent were respectively entitled by law to be collocated for the sum of $45, by privilege.

The contestant appealed from this decision.

TORRANCE, J.—The contesting creditor is the proprietor of the premises occupied by the insolvent. He has a claim for rent due, and objects to two items in the dividend sheet; 1st, the sum of $45 for the assignee's discharge; and, 2nd, a like sum of $45 for the insolvent's discharge. Sec. 5, of the Insolvent Act, subsection 4, says, "in the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this Act." As to the costs of the insolvent's discharge, and the costs of winding up the estate, the Act simply says, that they shall be paid out of the assets. With respect to the time of fyling the contestation, it was not fyled too late. The Court is therefore of opinion to reverse the judgment of the assignee, and to maintain the contestation.

The judgment is as follows:

"I the undersigned Judge, etc., having heard, etc., considering that the Insolvent Act, S. 5, S. S. 4, has declared that the rank and privilege of creditors shall not be disturbed by the provisions of said Act: considering that there is error in the dividend sheet prepared by the assignee John Whyte, of date 3rd March, 1869, inasmuch as the sum of $45 for assignee's discharge, and the sum of $45 for insolvent's discharge are made a first charge upon the assets of the insolvent, and before the privilege of the lessor, which privilege should have precedence, do annul and set aside said dividend sheet so far as concerns the said items, and do order that the said contestant be collocated by privilege and preference before the allowance and collocation of the said two items, with costs to the said contesting party, as well of his contestation before the said assignee as of the present appeal."

Judgment reversed.

R. Laflamme, Q.C., for the contestant, appellant.
C. P. Davidson, for the assignee.
F. E. Gilman, for the insolvent.

(J.K.)

COURT OF REVIEW, 1869.

MONTREAL, 29th JANUARY, 1869.

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

No. 310.

Lynch vs. *Bertrand.*

HELD:—That a defendant, who succeeds in review in obtaining a reversal, in considerable part, of the judgment complained of, may, nevertheless, be condemned to pay the costs in Review.

This was a hearing in review of a judgment rendered by the Superior Court for the district of Beauharnois, condemning the defendant to pay to the plaintiff £36.5.5cy. and interest and costs, for the causes stated in the plaintiff's declaration.

The defendant contended in review, that, according to the evidence, the action of the plaintiff ought to have been dismissed with costs.

The Court of Review was of opinion (Mr. JUSTICE TORRANCE *dissenting*, only as regarded costs in review) that the judgment complained of was wrong, and they, therefore, reversed it, and condemned the defendant to pay the sum of £19.10 only and interest, and costs as in an action of that class, but they also condemned the defendant to pay all the costs in review.

The following were the *motifs* of the judgment:—"The Court, considering "that there was due by the defendant to the plaintiff * * * a balance of £19.10 "doth reverse the said judgment, and doth adjudge and condemn the defen- "dant to pay and satisfy to plaintiff the said sum * * with interest * * and "costs as in an action for that amount against defendant, and doth condemn "the said defendant to pay the costs in this Court of Review. Mr. Justice Tor- "rance dissenting as to costs of review which he is of opinion should be divided."

Judgment of S. C. reversed.

M. Branchaud, for Plaintiff.

Dorion, Dorion and Geoffrion, for Defendant.

(S. B.)

MONTREAL, 30th DECEMBER, 1868.

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

No 138.

MacDonald et al. vs. *Molleur.*

HELD:—1. That however unjust a condemnation for costs in the court below may seem to be, the Court of Review cannot afford relief to the party aggrieved.

2.—That although the judgment of the Court below be in all respects confirmed, the Court of Review may nevertheless refuse costs to the party succeeding.

This was a hearing in review of a judgment rendered by the Superior Court for the district of Iberville (MR. JUSTICE SICOTTE presiding) dismissing the plaintiffs' action with costs.

McDonald vs. Molleur.

The plaintiffs' action was an hypothecary one.

The defendant pleaded, that he was not, at the time of the institution of the action, possessed as proprietor of any part of the immoveables described in the declaration.

The defendant having, by notarial tender made by him (paper 16 of the Record) on the 4th day of January, 1868 (only six days before action brought), declared that he was then possessed of the said immoveables, as the owner and proprietor thereof, and the registrar of the county having certified (paper 22 of the Record), that no deed conveying these immoveables by the defendant was recorded, since the 3rd of January 1868, the plaintiffs, on the 10th of February 1868 (2 days after the fyling of the plea), served a Notarial demand (paper 15 of the Record) calling on defendant to disclose how and in what manner he had ceased to become possessed as proprietor of the said immoveables as admitted in his own tender, and on the 18th of February 1868, a similar demand (paper 17 of Record) was served on the attorney *ad litem* of the Defendant.

Neither the defendant nor his attorney made any response to these demands.

In consequence of their silence, the plaintiffs who had fyled, at the return of the action, the defendant's title deeds, answered the defendant's plea specially, by setting out the foregoing facts and circumstances, and then stating, that under the circumstances they could do no more than deny the truth of the allegation contained in the plea.

The defendant and his attorney continued to withhold all information on the subject, until during the *enquête*, when they produced two title deeds of sale from the defendant, executed long previous to the 4th of January, 1868, one of which was only registered on the 16th of April, 1868, (paper 34 of Record), and also proved by witnesses that the purchasers had been in possession previous to and at the time of the institution of the action.

Under the circumstances, the plaintiffs contended, that the action ought to be dismissed with costs against the defendant, on the ground that he had unduly (if not fraudulently) led the plaintiffs into error, or at least that the plaintiffs should be relieved from the payment of any costs to the defendant.

The Hon. Mr. Justice Sicotte, however, condemned plaintiffs to pay the full costs of suit to the defendant's attorney. The plaintiffs thereupon inscribed the case for revision, and, in the Court of Review, contended that they had a right to be relieved from the condemnation for costs, and asked that the desired relief should be afforded in such manner as the court might deem just under the circumstances.

The majority of the Court (JUSTICES BERTHELOT and TORRANCE) were of opinion, that the judgment complained of was clearly erroneous, and that had they sat at the original hearing of the case they would have condemned the defendant to pay the plaintiffs, at the very least, a proportion of the costs of suit, but, in view of their position, sitting as a Court of Review, they thought they had no right to interfere with a mere condemnation for costs, and they, therefore, concurred with MR. JUSTICE MONDELET, (who was of opinion that the judgment complained of was in all respects correct) in confirming the judgment purely and simply. The majority of the Court, however, (MR. JUSTICE MONDELET,

dissenting) refused, under the circumstances, to allow any costs in Review to the defendant.

The following was the *considérant* of the judgment:— "La Cour * * * con-"sidérant qu'il n'y a pas d'erreur dans le jugement, confirme par les présentes le "dit jugement, sans frais. L'Hon. juge Mondelet ne concourt pas dans ce juge-"ment."

Judgment of S. C. confirmed.

Strachan Bethune, Q. C., for plaintiffs.
Leblanc & Cassidy, for defendant.

(S. B.)

SUPERIOR COURT, 1869.

In Insolvency.

MONTREAL, 14th JULY, 1[illegible]

Coram MACKAY, J.

No. 935.

In the matter of WILLIAM B. BOWIE,

An Insolvent.

AND

PATRICK ROONEY,

Respondent.

HELD:—That a creditor is not debarred from his right to examine the insolvent under oath, before a judge, by the mere fact that a composition deed (purporting to be duly executed) has been deposited with the prothonotary, and that notice has been given by the insolvent of his intention to seek its confirmation.

This was an application, by Patrick Rooney, an admitted creditor, to examine the insolvent under oath, as to his estate and effects.

The application had been granted upon petition, without notice to the insolvent, and on the day fixed for his examination he appeared, assisted by counsel, and refused to be sworn, on the ground that he was no longer an insolvent, in consequence of the execution, by the necessary number of his creditors, of a deed of composition and discharge, which had been fyled in the office of the prothonotary, and the confirmation of which was in course of being applied for from the Court.

Abbott, Q. C., for the insolvent, contended, that the effect of the execution of the deed was to free and discharge the insolvent from all his liabilities, and that he was consequently no longer an insolvent, and was therefore not amenable to the summary jurisdiction of the Court. That all the insolvent could be called upon, under the circumstances, to do, was to prove the due execution of the deed of composition by a competent number of his creditors, and that the insolvent was quite prepared and now offered to go into proof of that fact.

Bowie and Rooney.

Bethune, Q. C., for Rooney, argued, that the deed was only conditional in its terms, and could not operate as an absolute discharge until the accomplishment of the conditions stipulated in the deed. That whether the deed really did confer a present absolute discharge or not, the creditor, nevertheless, had a right to examine the insolvent, under the provisions of the 2nd subsection of sec. 10 of the Insolvent Act of 1864. And that the provision of the 3rd subsection, to the effect, that the Insolvent could be examined, even at any stage of his application for a confirmation of his discharge, clearly proved that the party was still an insolvent within the meaning of the Act, and therefore liable to examination like any other insolvent.

Per Curiam: —On the 14th of October, 1868, the insolvent made a voluntary assignment under the Insolvent Acts. On the 21st of the same month he obtained a discharge from the requisite number (it is said) of his creditors; he is, in September, to apply for a confirmation of it. Notice of his intention to apply has been given, in the Canada Gazette.

Rooney, a creditor, wants to examine him now, before me, and it is objected that I have no power to examine him as proposed. "Termination of liability to be examined is, when discharge has been obtained, as here," says the insolvent's counsel.

I hold the contrary, and our Insolvent Act warrants me. I have no doubt of my having jurisdiction; it is clearly enough given and is necessary for the attainment of justice, and the proper working of our insolvency system.

[Here the Judge read from the Act of 1864, and from Rex vs. Perrot, p. 1123, 2 Burrow's R.; also from "Anonymous" P. 449 of 14 Vesey, junior.]

Surely an insolvent, even after such a discharge as shown in this case, cannot be allowed to say, "though I may be reproached with having suppressed amounts of my assets;" "though some of the majority whose discharge I am invoking may be fictitious;" "though my assignee, or a creditor, may wish to know where a person debtor to my estate is to be found;" "though my knowledge may be wanted in the investigation by my assignee, or by a creditor, of a disputable debt," I cannot be asked questions." Yet this is what the insolvent's argument might lead to.

Discharges may be set aside, for fraud, for consent to them having been purchased &c., (13 subsection of sec 9, Act of 1864,) but this law might be rendered nugatory under the system of the insolvent here.

I order the examination to proceed, and if the insolvent persist in refusing to be sworn I must deal with him as with any ordinary witness, in such case.

Insolvent ordered to answer.

J. J. C. Abbott, Q. C., for insolvent.
Strachan Bethune, Q. C., for creditor.
(S. B.)

COURT OF QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 29th FEBRUARY, 1868.

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

Regina vs. *John Downey.*

HELD:—That an indictment signed by an advocate prosecuting for the Crown and as representing the attorney-general for the Province of Quebec, and not as representing the Minister of Justice of the Dominion; is valid.

The following was the case reserved by Lafontaine J., on the 27th January 1868, when presiding in the Court of Queen's Bench, crown side:

"The prisoner was tried before me at this term for the wilful murder of Timothy Sullivan, upon an indictment signed as follows: "G. Ouimet, Attorney General, Province of Quebec, by Thomas J. Walsh advocate prosecuting for the Crown" and the prosecution was throughout conducted by Mr. Walsh, as representing the attorney general of Quebec, and not as representing the Minister of Justice of the Dominion.

The evidence of the medical man who examined the body went to show that he had not at all examined the brain, and examined the organs of the abdomen without cutting into any of them. That the fact of his having found the common carotid artery and jugular vein severed left him in no doubt but that such severance had caused the death.

Being asked on cross-examination if he had examined the cavity of the head, might not such examination have revealed some other cause of death, he replied:

"There might have been, but the probabilities are against it."

At the trial the Counsel for the prisoner took the following objections:

First.—That under section ninety-one, subsection twenty-seven of the "British North American act, 1867" which places the criminal law, including the procedure in criminal cases, under the exclusive control of the general government, the indictment should have been signed and the prosecution conducted by the Minister of Justice or by some one on his behalf.

Secondly.—That the Crown was bound to give the best evidence the case might admit, of the cause of death, and in the present advanced state of medical science the crown should have placed itself by medical examination of the brain in a position to negative, beyond all reasonable doubt the hypothesis of death from any other cause, than the gun-shot wound.

The Counsel, in connection with the second objection, urged me to charge the jury that, in this case, there was a reasonable doubt of the cause of death. I declined to adopt the course suggested by the Counsel for the defence, but having doubts upon both the points raised as questions of law, I reserved them for the consideration of the Court of Queen's Bench on the appeal side.

The prisoner was convicted of manslaughter and, on the fifth day of February one thousand eight hundred and sixty-eight, I sentenced him to be committed to the penitentiary for life; but respited the execution of the judgment on such conviction, until the said questions should be considered and decided by the said Court of Queen's Bench on the appeal side."

Regina vs. Downey.

The judgment of the Court of appeals is as follows:

This reserved case being called for hearing Attorney General Ouimet on behalf of the Crown and Mr. Fleming on behalf of the prisoner were heard, whereupon:

After hearing Counsel as well on behalf of the prisoner as for the Crown and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench sitting on the crown side at Aylmer.

It is considered, adjudged, and finally determined by the Court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect, that in the opinion of this Court, the proceedings had and taken in the said Court at Aylmer are regular, that the evidence adduced on the part of our sovereign Lady the Queen is sufficient in Law to justify the verdict rendered, and that no reason hath been assigned by and on behalf of the said John Downey sufficient to set aside the final sentence or judgment on the indictment in this cause, it is therefore ordered that the said judgment be and the same is hereby affirmed and that it do stand in full force and effect.

Thomas J. Walsh, prosecuting for the Crown.

The Hon. G. Ouimet, Attorney General. Conviction affirmed.

Fleming, attorney for the prisoner.

(P. R. L.)

MONTREAL, 9 DECEMBRE 1868.

Coram DUVAL, JUGE EN CHEF, CARON J., BADGLEY J., MONK J., LORANGER, J.

No. 53.

EPHREM CHAPLEAU, APPELANT;

JEAN BAPTISTE DEBIEN, INTIME.

JUGE:—Que l'acheteur ne possede point l'action rescisoire pour faire rescinder le contrat de vente pour cause de lésion d'outre-moitié du juste prix.

Le demandeur demandait la rescision d'un contrat de vente d'un immeuble que lui avait consenti le défendeur le 31 Août 1860, pour cause de lésion d'outre-moitié du juste prix.

Cette action ayant été contestée par le défendeur, le jugement de la Cour Supérieure à Montréal, (Monk J.) fut rendu le 31 Octobre 1866, déboutant le demandeur de sa demande.

Ce jugement est motivé comme suit:

The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings, evidence of record and having upon the whole duly and maturely deliberated;

Considering that the plaintiff had resided on the property adjoining the lot of land in question in this cause, for and during a long period of time previous to the thirty first day of August one thousand eight hundred and sixty, the date of his purchase thereof from the defendant, and therefore had the best opportunities of knowing the value thereof;

Chapleau and Deblois.

Considering that the lot of land in question in this cause adjoins the property of the said plaintiff, and that from that fact as is proved it is and was of more value to him, the plaintiff, than to any party whose property it did not adjoin;

Considering that there is no fraud or fraudulent *manœuvre* on the part of the said defendant in the sale of the said lot of land to the plaintiff proved in this cause, but on the contrary it is established that it was at the special solicitation of the plaintiff that defendant was induced to sell the said lot of land to the said plaintiff, and that the negotiations for the purchase and sale of the same extended over a considerable period of time; seeing that the plaintiff remained in the peaceable possession and enjoyment of the said lot of land, from the said 31st day of August, 1860, till the 25th day of April, 1865, without seeking to set aside the said deed of sale for the reasons alleged in his declaration or for any other cause, that he removed the fences between his property and that acquired from the defendant, and cultivated and occupied the said land and that although such possession and occupation during the period of time last aforesaid does not establish prescription in law against plaintiff's action, yet that fact creates a presumption that he acted with full *connaissance de cause*, when he made such purchase from defendant, and moreover that the defendant in such sale acted in good faith;

Considering that there is no evidence establishing the value of the property of which the land in question in this cause formed a part at the time of the defendant's purchase thereof, under and by virtue of the deed of sale to him, dated the 30th March, 1853;

Considering that the evidence adduced by the defendant is not materially affected by the testimony adduced by plaintiff to neutralise the proof and destroy the character of the defendant's witnesses, seeing that the plaintiff has not established, by legal and sufficient evidence, the value of the lot of land in question in this cause, at the time of the purchase of the same by him, from the defendant on the said 31st day of August, 1860 or at any other time;

Considering that evidence adduced in this cause by the parties thereto is conflicting and inconclusive in so far as regards the value of the said lot of land;

Considering that under the circumstances of this case, no action could or can be maintained in law by the plaintiff, purchaser, against the defendant, the vendor of the lot of land described in plaintiff's declaration; doth dismiss this said action.

En appel ce jugement fut confirmé.

BADGLEY, J.—There is one subject of valuation by the respondent's witnesses which has been omitted by those of the appellant, and which is derived from the situation of the land purchased by him as adjoining his own, and which he stated he had purchased for that reason: *il aimait avoir cette terre là parce qu'elle touchait celle qu'il avait déjà et qu'il voulait agrandir son bien.* This constitutes *un prix d'affection*, which has been estimated at 1000 *livres* for the appellant, and which added to the *moitié* of the value established by his witnesses, would reduce the amount to less than the half required by the law to constitute *lésion d'outre moitié*. Now, even admitting this fact as fatal to the action, it would appear that on principle and in law this form of action is not

Chapleau and Debien.

competent to the purchaser. It is true that Pothier in his *Traité de Vente*, No 373 does hold it favourably to the purchaser as well as to the vendor, upon the principle that equality is the substance of commutative contracts which include that of sale. Notwithstanding the high authority of Pothier, the jurisprudence in France was otherwise and against the purchaser, and that jurisprudence was settled there by the *arrêt* of 10th July, 1675, 1 *Jour. du Palais* 1687, subsequently confirmed in principle by that of 29th April, 1760. There were previous *arrêts* in 1592 and 1603 which held the same rule. The matter is fully treated in the *arrêt* of 1675. The reasons for the rule against the purchaser are briefly as follows:—In purchase and sale the general rule is that both vendor and purchaser are allowed to *se surprendre l'un et l'autre*, that is to make the best bargain they may, the seller to get as much, the purchaser to pay as little as possible, and therefore as a general rule restitution was allowed to neither. The rule was afterwards relaxed in favour of the vendor, upon the presumption that his sale for less than the half value was of necessity a presumption which could not attach to a purchaser who is not compelled to purchase, and only acquires from motives of speculation or self interest to increase his wealth, or from reasons particular to himself such as the locality of the property, its convenient situation for himself, forming in the purchaser's mind *un prix d'affection qui n'a point de bornes ni de règle certaine*, wherefore restitution was not allowed to purchasers. It was also shown that the rule of correlatives was frequently false, *plerumque dispar diversaque ratio est*, and that Dumoulin had finally supported the rule against the purchaser, and that it was so treated by Mornac, &c. The same rule is explained in Ferrière *Dict. de droit* Vo. Lésion, who cites several other authorities in addition to the above. Such being the jurisprudence of France, it has also been so held by decisions, at least at Montreal in the case of Champagny and Phaneuf, the Court composed of Judges Rolland, Gale and Day by their judgment of 20th April, 1843, dismissed the plaintiff's action which was in every respect similar to this, &c.

The code has placed the right of rescision upon the only proper or reasonable ground that could exist in such cases, namely fraud upon the purchaser. The price of the property at any time would be a very uncertain indication of proof, and in this country especially where real property changes hands like a marketable commodity, and its price is subject to rapid and almost momentary fluctuations, the price, as a criterion, would be unjust. Under all the circumstances of the case the appeal must be rejected.

Action renvoyée.

Jetté & Archambault, avocats de l'Appelant.
Moreau Ouimet & Chapleau, avocats de l'Intimé.
(P. R. L.)

SUPERIOR COURT, 1869.

MONTREAL, 26th APRIL, 1869.

Coram BEAUDRY, A. J.

No. 2201.

Morland et al. vs. *Torrance.*

Evidence in rebuttal.

HELD:—That evidence adduced by plaintiffs in rebuttal tending merely to strengthen and confirm their original case is inadmissible and will be rejected.

This was an action against a ship owner to recover the sum of $900 for damage alleged to have been caused to a quantity of iron belonging to plaintiffs through improper stowage, while on the voyage from Liverpool to Montreal. The "Oncida" sailed from Liverpool in March, 1868, with a general cargo, consisting in great part of iron and soda. The iron was in three lots, consigned to three different consignees, of whom the plaintiffs were one. The soda consisted of the kinds known as soda ash, sal soda, bi-carbonate of soda, and caustic soda: the three first being packed in casks and kegs, and the last in iron drums. The iron, being the heaviest article, was placed lowest in the hold,—the plaintiffs' lot being underneath, and the two other lots immediately above. On the upper lot of iron, casks and kegs of soda and crates of earthenware were stowed. On unloading the vessel, the cargo was found to be in good order until the plaintiffs' lot was reached, a part of which was found to be in a damaged condition. A survey was thereupon held by the Port Warden, which was attended on behalf of the plaintiffs by Messrs. Ireland and Bellhouse, and on behalf of the defendant by the Harbour Master and Dr. Edwards, chemist. The report made by the Port Warden, and concurred in by the Harbor Master and Dr. Edwards, stated that "after close examination we found the cargo well "stowed and dunnaged, and that the damage done to the iron has been caused "by salt water, the presence of sal soda in our opinion not adding anything to "the injury of said iron."

The plaintiffs not being satisfied with this result, on the 2nd September following, instituted the present action. The principal allegation of their declaration was that "the defendant did not safely carry and convey the said iron in "and on board of the said ship, but so negligently and improperly stowed the "same that a large quantity of carbonate of soda or other similar chemical sub-"stance came in contact with said iron and corroded, crusted and damaged the "said iron and rendered the same unmerchantable.....the whole through the "fault and negligence of the defendant, his agents and servants, and not by the "dangers or accidents of the sea and navigation referred to and excepted in the "said bill of lading."

To this the defendant pleaded in substance that the damage complained of was caused by salt water forced into the vessel by stress of weather during the voyage: that the cargo was well and properly stowed and all necessary care and precautions taken, but that carbonate of soda or sal soda "was to a slight extent "dissolved by said salt water, and to some extent discoloured portions of said

Morkill & Wm. Jones et al.

"iron, but nothing was thereby added to the injury occasioned to the said iron "by said salt water, and the salt water forced into the said vessel by the stress "of weather was the cause, and the sole cause of the damage thereto, being a cause "within the aforesaid exception so contained in the said bill of lading."

The plaintiffs having examined a number of witnesses closed their *Enquête* without reserve. The defendant also examined witnesses in support of his defence. After closing of defendant's *Enquête*, the plaintiffs brought up two witnesses in rebuttal named Manson and Harte. The following objection was taken to their evidence:

"The defendant objects to all evidence tending to prove damage to plaintiffs "iron from soda, or tending to prove a property or effect of soda to damage iron "in any manner whatever, or to depreciate its value, inasmuch as such evidence "is not legally admissible as evidence in rebuttal in this cause, and inasmuch "as plaintiffs have already adduced evidence in support of their pretensions on "these points in their *Enquête*-in-chief, and closed their *Enquête* without "reserve."

Lunn, for the defendant, now moved that the objections taken at *Enquête* be maintained, and that the evidence of Manson and Harte be rejected. The plaintiffs' action was based on the allegation that soda was the cause of damage, and that the soda came in contact with the iron through improper stowage. The defendant on his part denied the plaintiffs' allegations in regard to soda and bad stowage, and alleged that salt water was the cause of damage. As regards the question of soda, therefore, the defence was purely negative, while as regards that of salt water, it was affirmative. It was necessary for the plaintiffs, in order to support their action, to shew that soda was the real cause of damage, for this formed the very gist and ground of their claim; and to do this, it was of course necessary to shew that soda had the power of damaging iron. On both these points (which cannot indeed well be separated, as the one is implied in the other), evidence had been adduced. C. C. Snowdon said: "The damage was in my opinion done by the presence of soda" —"My opinion is that the soda or other chemical would attract sufficient "moisture from the atmosphere to cause it to corrode the iron." H. W. Ireland said:—"The damage to the iron in question was in my opinion "caused mainly by the damp air in the vessel and the soda mixing with it, "which causes injury to all descriptions of iron."

Other citations might be made to the same effect; in fact almost all the evidence adduced on behalf of the plaintiffs, with the exception of that of Mr. Bellhouse, had for its object to show that no salt water had touched the iron, and that the damage was entirely caused by soda, and that soda therefore necessarily possessed the power of producing the rust or corrosion by which the iron was affected.

The evidence adduced on the part of the defendant was designed to meet the plaintiffs' case as proved, and also to support the allegations of the defence. It was therefore, like the plea, partly negative and partly affirmative:—that is—, the witnesses state, 1st, that the damage was in their opinion caused by salt water. 2nd, that the soda found on parts of the iron did not add to the damage; and in

proof of this, two scientific chemists were examined who state as a fact, well known in chemistry and verified by experiment that soda does not possess the property of rusting or corroding iron. Their evidence is corroborated by that of hardware merchants and stevedores, who give the results of their own practical experience leading them to the same conclusion. It will be seen from the foregoing statement that on the question of soda as a cause of damage the evidence of defendant's witnesses is merely counter-evidence; on the question of salt water, it tends to establish a new or affirmative fact. This affirmative evidence might have been properly answered by evidence in rebuttal tending to prove that salt water had not the property of rusting or corroding iron, if such proof were possible; but no evidence can be adduced in rebuttal to prove that soda was the cause of damage, or that it has the property of rusting, or corroding iron, or depreciating its value. This would be simply to add to and strengthen the proof already made by plaintiffs in their *Enquête*-in-chief. It would be manifestly unfair to the defendant who had closed his case believing he had adduced sufficient evidence to meet the plaintiffs' case as proved.

As to the argument that plaintiffs have a right to rebut the scientific testimony adduced by the defendant, this is not the ground on which the question can be argued. The allegation on which their action rests is that soda coming into contact with the iron, through improper stowage, was the cause of damage. Unless therefore, they, could prove this allegation, their action must fail; but how could they prove it without shewing that soda had the power of damaging the iron in the manner described? This surely is too self-evident a proposition to require any argument.

On what ground, then, can they claim the right of proving over again their original case under pretence of rebutting the scientific evidence of defendant's witnesses?

If Manson and Harte had been examined during the plaintiffs' *Enquête*-in-chief, as they ought to have been, the defendant would have had an opportunity of shewing by practical as well as scientific testimony the errors and mis-statements into which they had fallen; but by keeping them back until the defendant's *Enquete* was closed, it was probably hoped that their crude theories would avail to overthrow the best-established facts of science and the surest results of experience.

The rule of law on the subject is to be found in Chitty, Gen. Pract. V. 3, p. 908.—"In all cases, after the speech and evidence of the defendant's counsel "and before a plaintiff's counsel replies, he may produce evidence to disprove "any part of the defence set up by the defendant, but not evidence merely to "strengthen or confirm the plaintiff's original case."

The rule of the French law is the same, allowance being made for the difference of procedure. Under their system all the facts to be proved on each side must be defined or *articulated* beforehand, and allowed by the judge, and no evidence can be adduced in proof of any other facts, unless they are *negative* facts. Thus the defendant will be allowed by a *contre-Enquête* to prove facts, not previously articulated, tending to contradict or disprove the plaintiff's case, but he will not be allowed to prove any new *affirmative* facts. So the plaintiff is entitled to a

Morland vs. Torrance.

contre-Enquête to contradict or rebut the *affirmative* evidence adduced on the part of the defendant, but not to contradict the merely *negative* evidence adduced to disprove or contradict the plaintiff's own proof. (*Bonnin, Proced. civ.* p. 222 No. 250, *Bonnier, Preuves, tom.* 1 p. 331 *in fine.*) The Court will see, on reading the depositions of Manson and Harte, that their evidence tends merely to contradict the *negative* fact proved by the defendant that soda has not the power of rusting or corroding iron. The converse or *affirmative* of this fact it was incumbent on the plaintiffs to have proved, if such proof were possible, in their *Enquete*-in-chief. To adduce evidence of this kind now would be simply to "strengthen and confirm their original case." It is submitted that on no principle of law or of justice and fairness between the parties can such evidence be considered admissible at this stage of the case.

Rose, contra, contended that scientific evidence from the mouths of professedly scientific men had been brought into the record by the defendant for the first time. Plaintiffs could not possibly have foreseen that defendant was going to adduce such evidence, and, until adduced, it would have been manifestly absurd to combat a shadow by dragging scientific men into their case to disprove assertions and opinions not yet uttered. That it was quite competent for plaintiffs to rebut or contradict the evidence of these scientific men, defendant's witnesses, by proving through other men of science that defendant's witnesses were in fact not *experts* at all, the opinions expressed by them as to the properties of soda being totally erroneous; that this strong expression of opinion moreover was affirmative evidence, and as such could be rebutted.

Lunn, in reply, said plaintiffs were fully aware that scientific evidence would be adduced in the case, for Dr. Edwards attended the survey, as a chemist, for the purpose of giving his opinion as to the cause of damage and signed the report. The opinion then arrived at by him was that the damage was caused by salt water, and that the soda had no effect in increasing the damage. The plaintiffs' pretension was that the damage was caused by soda, and it was therefore absolutely incumbent on them to prove that soda had the power of rusting or corroding iron. They had in fact endeavoured to do so by bringing up as witnesses, hardware merchants, who knew nothing about chemistry, or the effect of soda on iron. The question was one to be determined not by ignorant men, but by men possessing a knowledge of the subject on which they were talking. The evidence of scientific witnesses, therefore, was most proper to be adduced, and under the circumstances of the case could hardly be dispensed with. If the plaintiffs could have found any scientific man prepared to support their pretensions and to endorse the statements made by their witnesses, he ought to have been forthcoming at the proper time; but to bring forward as witnesses in rebuttal two men like Manson and Harte, mere druggists and tradesmen, not chemists, is an attempt to embarrass and mislead the judgment of the court, and to throw an air of uncertainty about the case by the number and variety of opinions expressed.

As to the distinction between negative and affirmative facts, it is well pointed out in the French authorities already cited. The defendant denies that the iron was corroded or damaged by soda, and in support of his denial he proves

that soda does not have the effect of corroding or damaging iron,—what better example could be given of a negative fact, or negative evidence than this? Morland vs. Torrance.

BEAUDRY, A. J., in rendering judgment, said—I have examined the pleadings and evidence in this case, and am of opinion that the evidence of Manson and Harte is inadmissible as evidence in rebuttal; it merely tends to strengthen and confirm the evidence already adduced by the plaintiffs in their *Enquête* in-chief.

Motion granted and evidence rejected.

Ritchie, Morris & Rose, for plaintiffs.
Cross & Lunn, for defendant.
(A. H. L.)

MONTREAL 28 AVRIL 1868.

Coram MONDELET, J.

No. 1444.

Génier vs. *Woodman* et al.

JUGE:—Que plusieurs débiteurs condamnés à payer diverses sommes de deniers individuellement pour dommages sont tenus de payer solidairement les frais de l'action.

Le jugement rendu en cette cause sur une action *ex delicto* pour $2,000, condamna l'un des défendeurs, Woodman à payer au demandeur £5 et les frais conjointement et solidairement avec l'autre défendeur Hainault, et condamna ce dernier à payer au demandeur $4,472.66 de dommages et les frais conjointement et solidairement avec le défendeur Woodman.

Le jugement est motivé sur ce point, comme suit:

Enfin, la Cour condamne les défendeurs à payer au demandeur conjointement et solidairement tous les dépens qu'ils ont occasionnés par leurs mauvaises "défenses et exceptions."

Jugement pour le demandeur.

Doutre & Doutre, pour le demandeur.
A. & W. Robertson, pour Woodman.
Leblanc & Cassidy, pour Hainault.
(L. R. L.)

EN REVISION.

MONTREAL 20 JANVIER 1869.

Coram MONDELET, J., BERTHELOT, J., ET BEAUDRY, A. J.

No. 2029.

Hon. C. Wilson vs. *Cyrille Leblanc, et Charles Leblanc, ès-qualité,*

Opposant.

JUGE:—Que la substitution n'étant pas ouverte, le curateur à la substitution n'a aucun droit ni intérêt à formuler une opposition afin d'annuler la saisie d'un immeuble substitué.

Le jugement de la Cour Supérieure rendu le 30 octobre 1868, a déclaré bien fondée l'opposition faite par le curateur à la substitution d'un immeuble saisi sur le défendeur.

Wilson vs. Leblanc.

Le jugement est motivé comme suit :

" La Cour, après avoir entendu l'opposant et le demandeur contestant par leurs avocats sur le mérite de l'opposition *afin d'annuler* faite et produite par le dit opposant à l'encontre du Bref de *Fieri Facias de Bonis et de Terris* émané de cette Cour contre le défendeur en cette cause, le vingt décembre mil huit cent soixante et sept, et de la contestation d'icelle par le dit demandeur, avoir examiné la procédure, pièces produites et sur le tout avoir délibéré.

" Considérant qu'aux termes du testament solennel de feue Julie Carrière, " alors veuve de feu François Leblanc, reçu devant Houle et son confrère, " notaires, le vingt août mil huit cent soixante et trois, confirmé par un codi- " cille du douze décembre mil huit cent soixante et cinq, fait par devant Maître " Lighthall et son confrère, notaires, le dit Cyrille Leblanc, le défendeur, n'est- " que légataire universel en usufruit des biens meubles et immeubles délaissés " par sa mère la dite Julie Carrière lors de son décès ; "

" Considérant par conséquent, que le dit Cyrille Leblanc n'est pas, et lors de " la saisie faite en cette cause de l'immeuble et dépendances dont il est question, " n'était pas propriétaire d'icelui, et que la saisie qui en a été faite par le deman- " deur, est nulle ; "

" Cette Cour, sans aucunement décider sur la qualité assumée par l'opposant, " dans son opposition, déclare bien fondée la dite opposition, en autant que la " dite saisie est nulle ; Et adjugeant que la contestation que le demandeur a faite " de la dite opposition, est mal fondée, la dite contestation est déboutée."

" En conséquence, la Cour déclare nulle la dite saisie, en donne main-levée à " l'opposant, et condamne le demandeur contestant à tous les dépens."

Le demandeur soumet en révision la question suivante :

Le curateur, la substitution n'étant pas ouverte, peut-il empêcher la vente d'un immeuble substitué ?

La question s'est présentée dans deux causes à la Cour Supérieure, et a été résolue dans la négative. L'une d'elles (The Trust and Loan & Vadeboncœur) est rapportée au volume 4 du L.C. Jurist, page 358. L'autre n'a pas été rapportée. Elle a été jugée en 1859 par les Honorables Juges Day, Smith et Mondelet entre le Trust and Loan & Cherrier.

L'ordonnance de 1747 qui pourvoit à la nomination du curateur à une substitution, enseigne à l'article 5, quelles sont ses attributions et l'étendue de ses pouvoirs.

" En cas que le premier substitué soit sous puissance paternelle dans [illegible] " où elle a lieu, et que le père soit chargé de substitution envers lui, [illegible] " nommé un tuteur ou curateur à l'effet du dit inventaire ; et si le premier " substitué n'est pas encore né, il sera nommé un curateur à la substitution qui " assistera au dit inventaire."

L'article 495 de notre Code Civil n'est que la reproduction de l'ordonnance. Il y est dit que le curateur n'a qu'un simple droit de surveillance sur les actes du grevé. Il assiste aux inventaires, partage et autres actes où les droits des appelés peuvent être [illegible] ceux du grevé.

S'il en était autrement, et que le curateur fut un personnage indispensable dans l'administration des biens substitués, pourquoi la loi l'aurait-elle exempté

de la formalité de l'enregistrement de sa curatelle, tandis qu'elle en fait une loi impérieuse pour la tutelle ?

Son intervention dans la vente des biens substitués ne peut en aucune manière être effective aux appelés. Ou la substitution a été enregistrée ou elle ne l'a pas été. Dans le premier cas, les appelés à la substitution, la recueillent toujours nonobstant toutes les aliénations du grevé ; si elle n'a pas été enregistrée, la loi protégeant en ce cas la bonne foi des tiers, rien n'empêchera que la vente soit bonne à l'encontre des appelés, et la présence du curateur ne peut point améliorer leur position.

Marcombe, vol. 2, p. 410, Meslé, des curatelles, p. 522, 525.

L'opposant cita les autorités suivantes : Code Civil, art. 959, rapport des codificateurs, vol. 2, p. 196 à l'art. 213; Pigeau, Proc. Civile (Ed: 1779), tome 2, p. 506 et p. 507; Guyot, vo. Substitution, p. 545, sur les arts. 50, 51 et 52, du Tit. 2, de l'Ord. de 1747 et p. 522 ; Thevenot D'Essaulles, Sub. No. 1258. Pothier, Sub ; p. 541 et 543.

Ce jugement fut porté devant la Cour de Révision à Montréal.

MONDELET J.—The plaintiff contesting the opposition of Charles Leblanc submits to the Court of Review a judgment rendered the 30th October, 1868, by the Superior Court of Montreal, maintaining the opposition made by a curator named to a substitution *non ouverte*, to the sale of an immoveable alleged to be substituted. At the time of the hearing of this cause before the Superior Court, though there was no proof, it was admitted that the immoveable seized was the same that had been given to the defendant, Cyrille Leblanc, by the will of his mother. By this will the defendant is instituted universal legataire, in usufruct, of the testatrix, and charged to convey the immoveable property, forming part of the succession, to the children, issue of his marriage. The opposant, Charles Leblanc, being named curator to this substitution *non ouverte*, made an opposition as such curator, and claimed that the defendant being universal legataire in usufruct the immoveable in question could not be sold upon him. The judgment appealed from appears to proceed upon the supposition that the defendant was the proprietor of the immoveable in question of which seizure had been made by the plaintiff, and that, in consequence, the said seizure was null. There appears to be a triple error in this judgment, first, there is no legal proof that the immoveable seized in this case is a part of the property left by Julia Carriere, the mother of defendant ; second, that the substitution not being open, the opposant had neither right nor interest to set up the opposition in question ; third, that the defendant, by the will of his mother, was charged with the *créance* of the plaintiff by the very document adduced by the opposant in support of his opposition.

Le jugement de la Cour de Révision est motivé comme suit :

"La Cour Supérieure, siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties intéressées par leurs avocats respectifs sur le jugement rendu dans et par la Cour Supérieure du District de Montréal, le 30 octobre 1868, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré ; considérant qu'il n'y a aucune preuve juridique que l'immeuble saisi en cette cause, soit un bien provenant de la substitution créée par le testament de feue Julie Carrière, mère du défendeur, en date du 20 août 1863, produit au dossier ;

Wilson vs. Lebitac.

Considérant que la dite substitution n'étant pas ouverte, l'opposant n'a aucun droit ni intérêt à formuler la présente opposition ;

Considérant qu'y eut-il preuve que l'immeuble saisi en cette cause, fit partie de la substitution créée par le dit testament, le défendeur étant chargé par le dit testament qu'a produit et invoqué l'opposant, de la créance du demandeur ; cet immeuble qui en est grevé, a pu valablement comme il l'a été, saisi en cette dite cause ;

Considérant, par conséquent, qu'il y a mal jugé par le jugement dont est appel, savoir : le jugement du dit 30 octobre 1868, cette Cour casse, annulle et met au néant le dit jugement, et rendant celui qu'aurait dû rendre la dite Cour Supérieure, déboute l'opposition du dit Charles Leblanc, avec dépens, tant en la dite Cour Supérieure qu'en la présente Cour de Révision.

Loranger et Loranger, pour le demandeur. Judgment reversed.
Doutre et Doutre, pour l'opposant.

(P. R. L.)

COUR DE REVISION, 1869.

QUEBEC 5 MARS 1869.

Coram, MEREDITH, C. J., STUART, J., TASCHEREAU, J.

No. 463.

Beland vs. *Dionne* et al.

JUGE:—Que le certifical d'enregistrement, écrit sur la copie d'une obligation hypothécaire, consentie par Antoine *Declos*, alias *Decleau*, mais inscrit sous le nom d'Antoine *Dechêne* dans les livres du registrateur, ne prévaudra pas à l'encontre d'un tiers-détenteur, qui a acquis d'Antoine Declos *alias* Decleau, sur la foi d'un certificat du registrateur attestant qu'aucune hypothèque n'existe sur la terre de ce dernier, et qu'en conséquence l'action hypothécaire doit être renvoyée.

En Cour Inférieure (Circuit de Trois Rivières, 26 décembre 1868) ;

POLETTE, J.—L'action est en déclaration d'hypothèque. Le demandeur allègue, entr'autres choses, que par acte d'obligation passé devant Bazin et confrère, notaires, le 11 novembre 1861, Antoine Declos, *alias* Antoine *Decleau*, a connu lui devoir et promis lui payer en quatre termes annuels, à commencer à la Toussaint de 1862, £25 avec intérêt de huit pour cent, et que pour sureté du paiement, Declos a spécialement hypothéqué une terre en la paroisse St. Barnabé, de 6 arpents et 7 perches de front sur 20 arpents de profondeur ; que cet acte a été enregistré au Bureau d'Enregistrement de la Division d'Enregistrement des Trois Rivières, le 13 décembre 1861 ; que par acte de ente passé devant Boucher et confrère, notaires, le 1 août 1862, les défendeurs ont acquis moitié de la terre hypothéquée par l'acte d'obligation, et en sont en possession.

Les conclusions sont celles de l'action en déclaration d'hypothèque.

Les défendeurs opposent à cette demande plusieurs exceptions, par lesquelles ils plaident entr'autres choses :

1o. Que de fait ils ont acquis l'immeuble au sujet duquel ils sont poursuivis, d'Antoine Declos par acte de vente du 1 août 1862, passé devant B o u c h e r confrère, pour $300, dont $200 payées comptant, et le reste plus tard, suivant

qu'il appert en la quittance finale et générale à eux donnée par Declos, le 29 juin 1863, devant Sicard de Carufel et confrère, notaires; que par l'acte de vente, Declos a déclaré l'immeuble qu'il vendait, quitte de toutes dettes et hypothèques; que ce acte et la quittance ont été enregistrés au Bureau d'Enregistrement de la Division d'Enregistrement des Trois Rivières, le 2 septembre 1863;

2o. Que longtemps après, viz. vers le 13 janvier 1865, le demandeur prétendant auprès des défendeurs, avoir une hypothèque sur leur immeuble, ces derniers s'en sont enquis au Bureau d'Enregistrement, et ont obtenu du registrateur un certificat faisant voir que le demandeur n'a pas l'hypothèque qu'il veut faire valoir par son action;

3o. Que si le demandeur s'est fait consentir l'acte d'obligation par Antoine Declos, leur auteur, ce qu'eux défendeurs ignorent, cet acte n'a pas été enregistré contre Antoine Declos, mais bien contre un nommé Antoine Dechêne, et que ce document est entré dans l'Index du Bureau d'Enregistrement sous le nom d'Antoine Dechêne, et non sous celui d'Antoine Declos;

4o. Que si toutefois cet acte d'obligation a été consenti par Antoine Declos leur auteur, ce qu'ils ignorent, le demandeur ne peut aujourd'hui en invoquer l'enregistrement fait sous un autre nom, à l'encontre de leurs droits, attendu qu'il doit s'imputer à lui-même sa propre faute, et que cette faute ne peut porter préjudice à eux, défendeurs.

Ils concluent au débouté de l'action.

La Cour n'a pas à s'occuper de la dernière exception qui contient des conclusions spéciales; les deux premières suffisent pour la mettre en état d'en venir à une décision.

Que dirons-nous du nom du débiteur entré en l'expédition de l'acte d'obligation produite par le demandeur et qui porte le certificat d'enregistrement? Le demandeur dit que c'est Declos (Decleau), les défendeurs disent que c'est Dechêne. S'il n'y a pas d'ortographe dans les noms d'hommes, du moins faut-il dire qu'il se rencontre souvent de ces noms qui sont aussi des noms de choses, et comme il y a une ortographe dans ceux-ci; l'on peut croire qu'elle devrait être observée dans un nom d'homme qui se prononce de la même manière. Ainsi, dans le nom "Declos," la dernière syllabe ne devrait-elle pas s'écrire "clos," et n'est-elle pas supposée s'écrire comme le mot "clos": espace de terre cultivée et fermée de murailles, de haies, de fossés, etc.? qui s'avisera de l'écrire "cleau," à moins que ce ne soit un nom bien connu pour s'écrire ainsi? mais la preuve établit le contraire, voir le témoignage de M. Duval. C'est bien "Declos" que le notaire a voulu écrire comme débiteur en l'acte d'obligation, mais il l'écrit "Decleau," avec des lettres formées de jambages sans liasions, de manière à faire lire plutôt Dechêne que Decleau. C'est ainsi que l'a lû le registrateur, les deux témoins entendus par les défendeurs le lisent de même, et le témoin entendu par le demandeur en contrepreuve, ne le lit pas autrement. La Cour elle-même, qui a une assez longue habitude de lire différentes espèces d'écritures, le lit comme le registrateur et les témoins. Cette pièce est donc loin de nous offrir la certitude qu'elle a été consentie par Antoine Declos.

Ces observations n'auraient pas l'importance qu'elles ont, si le registrateur avait entré dans son registre le nom d'Antoine Declos, car alors les défendeurs

Beland vs. Dionne.

n'auraient pas pu être trompés, en consultant ce registre public, comme l'on peut présumer qu'ils l'ont fait par prudence, avant d'acquérir. Le registrateur a entré, comme débiteur de l'obligation, Antoine Dechêne, non-seulement dans son registre qui contient la transcription de l'acte, mais aussi dans son index. Ce fait est prouvé, 1o. par un certificat qu'il donne le 13 janvier 1865, par lequel il certifie que nulle hypothèque n'a été enregistré dans son Bureau contre Antoine Declos en faveur de Pierre Beland; 2o. par une copie par lui certifiée le 11 février 1867, de la transcription au long dans son registre, de l'acte d'obligation en question, et qui porte le nom d'Antoine Dechêne, comme débiteur, et non celui d'Antoine Declos, et 3o. par son témoignage, comme témoin, qui corrobore tout cela. Lorsqu'on lui demande, si, par les registres de son Bureau et les index aux noms, il apparait qu'il y a eu d'enregistré le 11 novembre 1861, l'obligation consentie par Antoine Declos à Pierre Beland, devant Bazin et confrère, notaires, il répond positivement, non; que cette obligation n'a pas été enregistrée. Il dit encore que l'exhibit qui lui est montré est une obligation consentie par Antoine Dechêne à Pierre Beland; qu'il l'a fait entrer sous le nom d'Antoine Dechêne et contre lui; que l'ortographe du nom de Declos, et il en a enrégistré plusieurs de ce nom, est toujours "Declos" invariablement; que les noms des parties aux actes doivent être mentionnés dans un index, qu'on appelle "index aux noms," ce qu'il a toujours fait; que les recherches, tel que la loi le veut, se font toujours *au nom* dans les Bureaux d'Enregistrement.

Cette erreur, si c'en est une, qui porte sur le nom du débiteur, sur son nom principal, son nom de famille, est-elle de nature à nullifier l'hypothèque réclamée vis-à-vis des défendeurs qui ont acquis de bonne foi depuis, qui ont payé le prix de vente et fait enregistrer, longtemps avant l'action, leurs actes d'acquisition et de quittance?

Répondons de suite que l'acte 27, 28, Vic. cap. 49, contient dans sa 7e section, une disposition déclaratoire qui, prise avec le §2, de la sec. 12, cap. 37 des Statuts Refondus du B. C., décide notre question dans le sens de la nullité. Cette sec. 7 de l'acte 27, 28 Vic. cap. 40, déclare que nulle erreur d'omission ou de commission dans l'enregistrement au long d'aucun acte, etc., ne sera censé affecter la validité de l'enregistrement, si telle erreur ne tombe pas sur quelque *disposition essentielle* qui doive être consignée dans un sommaire à registrer ou dans le certificat du registrateur. Or, le §2 de la sec 12, cap. 37 des S. R. B. C., dit que le sommaire d'une obligation *doit indiquer* les *noms*, domiciles et qualités du créancier et du *débiteur* y nommés. Ainsi, la loi prescrit comme formalité substantielle l'enregistrement du nom du débiteur, et frappe par là même de nullité l'enregistrement qui ne le contiendrait pas. Pourquoi? parce que c'est le seul, l'unique moyen de donner publicité aux hypothèques qu'il a créés.

Ce n'est pas en indiquant au registrateur la désignation de l'immeuble que l'on pourra trouver s'il est grevé ou non d'hypothèque, parce que nous n'avons pas de cadastre pour y faire les recherches nécessaires, même, s'il y avait un cadastre, la difficulté de faire une telle recherche eut été grande, tant la désignation donnée dans l'acte d'obligation, et celle qu'on trouve dans l'acte de vente aux défendeurs, sont différentes. Dans l'acte d'obligation il est dit: "une terre

"sise et située en la paroisse St. Barnabé, concession de Castowne, contenant, "etc." Dans l'acte de vente: "La juste moitié côté nord du certain lot de "terre connu et désigné comme le lo tNo. six, dans le cinquième rang du town-"ship de Caxton, etc." Dans l'acte d'obligation: "Joignant d'un côté au nord-"est à Olivier Dechêne, (ou Decleau) et d'autre côté au sud à Léandre Guilmette "fils, avec la maison, grange, étable et autres dépendances dessus construites." Dans l'acte de vente: "au sud à l'autre moité du dit lot à Charles Pratte, au "nord au vendeur (Antoine Declos.)"

Mais, c'est au moyen du nom du débiteur que l'on peut obtenir le résultat désiré, et c'est pour faire faire les recherches en indiquant le nom, que la loi oblige les registrateurs à tenir un index des noms,—S. R. B. C., cap. 37, sec. 61: "Si on a bien compris ce mécanisme de la publicité, on a pu voir qu'il est "organisé non point sur la désignation individuelle ou cadastrale des immeubles "eux-mêmes, mais sur les *noms*, prénoms et domicile des propriétaires. Les "conservateurs n'ont point, en effet, de tables alphabétiques des divers biens "situés dans leurs bureaux, avec annotations des actes dont ils ont pu être l'objet "ou des charges hypothécaires qui les grèvent. On a, il est vrai, et à plusieurs "époques, proposé de rattacher le cadastre aux conservations hypothécaires, mais "l'imperfection de l'atlas cadastral n'a point permis de tenter cette innovation.

"Ce n'est donc point par l'immeuble qu'il est donné de découvrir les mutations "qui s'y rapportent et le bilan de ses charges hypothécaires; on ne peut se ren-"seigner à cet égard qu'en désignant au conservateur les *noms* des personnes "qui en ont eu la propriété. Il serait impossible, dit M. Ducruet, de vérifier "avec une parfaite exactitude la situation hypothécaire *d'un tel immeuble*, sans "y joindre les *noms* de tous ceux qui l'ont possédé. En somme, les *propriétaires* "et non les *biens*, ont des comptes ouverts au Bureau des Hypothèques....."

1er Mourlon, de la Transcription, p. 429, No. 210.

"Lorsqu'on demande au conservateur un certificat de transcription relatif à "telle ou à telle propriété, ce n'est pas l'immeuble qu'il faut désigner aux "recherches du préposé, mais le *propriétaire* de cet immeuble; et si l'on veut un "état général des transcriptions dont ce même immeuble a été l'objet il faut "indiquer, en remontant la chaîne des mutations, chacun des *propriétaires* qui "l'ont successivement possédé. J'ai dit, en effet, suprà No. 886, qu'il n'existe "pas dans le bureau de la conservation des hypothèques, en France, comme cela "est pratiqué en Allemagne, et comme cela a été établi plus récemment à "Genève, de registres ouverts aux immeubles, et sur lesquels soient portés les "transcriptions se référant à ces immeubles. Les Tables ou Répertoires de ces "registres, (ce qu'on appelle ici "index aux noms") ne sont pas, non plus, "dressés par nature et désignation d'immeubles, mais par *noms de propriétaires*."

2e Flandin, de la Transcription, pp. 449, 450, No. 1303.

"Quatre conditions sont donc absolument indispensables pour qu'elle (la "transcription) soit conforme à son objet et remplisse le but dans lequel elle a "été créée; il faut: 1o qu'elle soit effectuée au Bureau de la situation des biens "désignés dans l'acte qu'elle doit rendre public; 2o qu'elle contienne des énon-"ciations propres à les distinguer de tout autre bien; 3o qu'elle *désigne individuellement le propriétaire qui en a disposé*; 4o enfin, qu'elle indique la nature

Beland vs. Dionne.

" et l'étendu du droit dont il s'est dépouillé.....l'absence de l'une ou de " l'autre des quatres conditions qui tiennent à la substance de la transcription, " la réduit *ad non esse.*"

1 Mourlon, pp. 475, 476, No. 257, 259, voir aussi p. 477, No, 260.

" Ce n'est que lorsque la profession du débiteur n'est pas connue que l'ins- " crivant peut substituer, à la place de la profession, une désignation individuelle " et spéciale; mais rien ne peut suppléer à la désignation des *noms*, prénoms et " domicile du débiteur, tel est le sens de la loi, et de toutes les formalités qu'elle " a établies, c'est une de celles dont l'observation doit être exigée le plus rigou- " reusement. Le débiteur est dénoncé au public comme ayant des biens grevés " d'hypothèques, et il faut qu'il soit désigné d'une manière si positive que le " conservateur ne puisse, en aucun cas, équivoquer, lorsqu'un intéressé quelconque " viendra l'interroger. Ce débiteur doit donc se trouver désigné par *ses noms*, " prénoms et domicile..... "

8 Répertoire de Merlin, vo. Inscription hypothécaire §5, p. 222, col. 1 et 2.

Parlant des formalités substantielles, Troplong, Privilèges et hypothèques, vol. 3, pp. 72, 73, 75, 74 Nos. 668, et 668 bis, dit:

" Suivant M. Merlin, ce sont celles qui désignent le créancier et le *débiteur*, " l'immeuble hypothéqué, la date et la nature du titre, et la qualité et l'exigibilité " de la dette.

" M. Tarrible est du même avis.

" Or, que doit-on entendre par formalités substantielles? ce sont celles qui " sont indispensables pour remplir le but pour lequel l'acte a été institué. In- " troduite par l'équité naturelle pour protéger des droits, elles sont violées toutes " les fois que par leur omission ce but n'a pas été atteint. Alors l'acte se trouve " vicié dans sa substance, et il est réduit *ad non esse.*

" Eh bien! quelles sont les choses que doit nécessairement connaître celui qui " veut contracter avec le débiteur? quelles sont les omissions préjudiciables qui " l'induiront en erreur et ne rempliront pas le vœu de la loi? La raison dit " qu'il n'y en a que trois,—d'abord, il doit trouver dans l'inscription la désigna- " tion de celui des immeubles appartenant au débiteur qui est déjà hypothéqué; " ensuite l'indication des sommes pour lesquells cet immeuble est grevé; enfin " *l'indication du débiteur.*

" Il doit connaître le débiteur! et en effet plusieurs immeubles peuvent porter " le même nom. Alors c'est le *nom du propriétaire* qui les distingue les uns des " autres. Celui qui cherche sur le registre des hypothèques les charges pesant " sur tel fonds de terre appartenant à Paul, et trouve dans l'inscription qui le " grève la désignation de Jacques, comme propriétaire, est autorisé à croire que " ce fonds n'est pas celui sur lequel Paul lui offre une hypothèque, et voyant " qu'il n'y a pas d'inscription qui s'applique à celui-ci, il se persuade qu'il sera " le premier en hypothèque, tandis que par le fait il ne sera que le second. On " voit dans quelles erreurs fâcheuses peut faire tomber l'indication vicieuse du " propriétaire; cette indication est donc une formalité substantielle de l'inscrip- " tion hypothécaire....."

Troplong, de la Transcription, pp. 230, 231, No. 191.

" Non seulement un acte transcrit peut être inefficace par suite des vices qui

" l'infectent; mais il peut aussi être critiqué et écarté, à cause des défectuosités " de la transcription même.

" Nous disons de même que la transcription défectueuse ne sera nulle que si " l'omission est de nature à nuire à quelqu'un ; et l'action en nullité ne sera " ouverte qu'à ceux dont l'intérêt a été blessé par cette omission ou par cette " inexactitude. Ainsi, une erreur dans la *désignation de la personne* du vendeur, " si elle est telle que le vendeur ne soit pas *reconnaissable*, entraînera la nullité " de la transcription à l'égard de ceux qui contractent avec lui, le croyant " encore propriétaire....."

Le débiteur *Declos* n'est certainement pas reconnaissable sous le nom de *Dechêne*.

" Est *nulle*, au regard des tiers postérieurement inscrits, l'inscription qui ne " contient pas la désignation claire et précise des *noms* du débiteur.

1er Hervieu, Privilèges et hypothèques, §3, p. 389."

Arrêt de Caen, 21 février 1846, Denis vs. Lair Dubreuil, déclarant nulle une inscription sur Jean Baptiste *François* Lauvet, tandis que Lauvet, sur lequel a été tenu l'état d'ordre donnant lieu à la contestation, n'a que les prénoms de *Jean Baptiste*.

Journal du Palais, vol. 2, de 1847, pp. 489, 490.

Ces citations nous expliquent aussi clairement qu'il est possible de le désirer et avec un raisonnement sans réplique, les omissions, les erreurs substantielles qui doivent donner lieu à la nullité d'une transcription ou d'une inscription, elles justifieraient pleinement, s'il en était besoin, la sec. 7, de l'acte 27, 28 Vic. cap. 40 qui n'excuse les erreurs d'omission ou de commission, que lorsqu'elles ne portent pas sur quelque chose d'essentiel à enregistrer. Est-il quelque chose de plus essentiel, de plus nécessaire à publier, à faire connaître, que le nom d'un débiteur, afin de pouvoir s'assurer si son bien est grevé de quelques charges, avant de traiter avec lui. Comment obtiendrait-on cette connaissance, si on n'avait pas son nom ?

On demande au registrateur, s'il y a d'enregistré à son Bureau, des hypothèques, des charges affectant les biens d'Antoine Declos. Recherches faites, le régistrateur répond, non ; de fait, il n'y en a pas, Il s'en rencontre bien sous le nom d'Antoine Dechêne ; mais, on n'y regarde pas, parcequ'il n'est pas question de Dechêne, ni de ses biens, ce n'est pas avec lui qu'on veut traiter, c'est avec Declos. L'on n'a pas dû, l'on n'a pas pû reconnaître Declos sous le nom de Dechêne.

S'il est fâcheux pour le demandeur de se trouver privé d'une hypothèque qu'il croyait avoir, il serait souverainement injuste de faire peser cette hypothèque sur les défendeurs qui ont acquis et payé de bonne foi un bien qu'ils croyaient libre de charge, et qui l'était de fait, puisqu'il n'y a rien d'enregistrer contre celui qui le leur a vendu.

Le jugement fut motivé dans les termes suivants :

La Cour, etc. Considérant que l'acte d'obligation consentie par Antoine Decleau au demandeur devant Mtre Bazin et confrère notaires, le onze de novembre 1861, et sur lequel l'action en cette cause est fondée, a été enregistrée le treize de décembre de la même année au Bureau d'Enregistrement de Trois

Beland vs. Dionne.

Rivières sous le nom d'Antoine Dechêne, au lieu d'être sous celui d'Antoine Decleau, comme débiteur obligé au paiement de la somme portée en cet acte et ayant consenti l'hypothèque y mentionnée, de sorte que les défendeurs qui ont acquis du dit Antoine Decleau une partie de l'immeuble hypothéqué par ce même acte et au sujet duquel ils sont poursuivi hypothécairement, n'ont pas trouvé au dit Bureau cette hypothèque enregistrée au nom du débiteur Antoine Decleau et ont dû croire que l'immeuble par eux acquis était libre d'hypothèque, qu'ainsi la transcription de cet acte d'obligation au dit Bureau d'Enregistrement est nulle vis-à-vis des défendeurs et ne soumet pas leur immeuble à l'hypothèque réclamée par le demandeur; déboute en conséquence le demandeur de son action en cette cause et le condamne aux dépens d'icelle envers les défendeurs.

Ce jugement a été confirmé en Révision.

Alexis L. Désaulniers, avocat du demandeur.

C. B. Genest, avocat du défendeur.

(G. D.)

COUR SUPERIEURE.

En Revision.

MONTREAL 29 JANVIER 1869.

Coram Mondelet, J., et Beaudry, A. J.

No. 949.

Sauvageau vs. *Larivière.*

Juge—Que le Syndic est bien fondée à répéter le montant d'un paiement fait dans les trente jours précédant l'exécution d'un acte de cession.

Le 24 octobre 1867, l'appelant fit émaner de la Cour Supérieure, à Montréal, un bref de *Capias* contre un nommé William St. Laurent, désigné au bref comme domicilié en la cité de Québec, et alors à Montréal, pour une somme de £33 6s 2d, avec intérêt sur £26 5s 0d, à compter du 21 mai 1864, sur allégation qu'il était sur le point de quitter la Province dans le but de frauder ses créanciers; le dit St. Laurent fut appréhender le 26 octobre, et pour se libérer paya à l'huisser le montant porté au bref et les frais; mais le même jour, il fit une cession de biens au demandeur.

Le syndic intenta alors la présente action, alléguant la nullité du paiement, vû l'état d'insolvabilité du dit St. Laurent.

Le défendeur contesta cette demande en niant sous de telles circonstances le droit d'action de demandeur et en alléguant que lui, le défendeur, n'avait aucune connaissance que St. Laurent fut insolvable.

Le jugement de la Cour Supérieure (Berthelot, J.) rendu à Montréal le 30 septembre 1868, a maintenu l'action et ce jugement est motivé comme suit:

" La Cour, après avoir entendu les parties par leurs avocats, au mérite de cette " cause, examiné la procédure, pièces et preuve, vû les admissions faites et pro- " duites par le défendeur et sur le tout avoir mûrement délibéré:

" Considérant que le défendeur n'a pas prouvé les allégués de sa première " exception et qu'il est mal fondé en celle par lui plaidée en second lieu;

Sauvageau vs. Larivière.

" Considérant que le premier paiement fait par le nommé William St. Laurent, " résidant, au vingt-six octobre mil huit cent soixante et sept, en la cité de " Montréal, où il avait son domicile et faisait affaires depuis longtemps aupara- " vant, de la somme de cent cinquante piastres et soixante treize centins, au " défendeur en cette cause, un des créanciers du dit William St. Laurent, est " nul et de nul effet, vis-à-vis de ses autres créanciers, à raison de l'état d'insol- " vabilité dans lequel il était alors, et vu l'acte de cession de biens, fait le dit jour " vingt-six octobre mil huit cent soixante et sept, par le dit William St. Laurent, " devant Maître Normandeau et son confrère, Notaires, au demandeur en cette " dite cause, en sa qualité de Syndic d'office, demeurant en la cité de Montréal, " district de Montréal cette Cour condamne le dit défendeur à payer au dit " demandeur, ès-qualité, la dite somme de cent cinquante quatre piastres et " soixante et treize centins, cours actuel, avec intérêt sur icelle depuis le onze de " décembre mil huit cent soixante et sept, et les dépens, distraits à Messieurs " Dorion, Dorion et Geoffrion, avocats du demandeur."

Ce jugement a été confirmé en Révision.

MONDELET, J. The plaintiff in this case is Official Assignee to the insolvent estate of Wm. St. Laurent, formerly a merchant, doing business in Quebec and now of the city of Montreal. The plaintiff brought the present action for the recovery of $154.73, which the said insolvent had paid to the defendant within the thirty days preceding his assignment. The defendant pleaded first to the jurisdiction of the Court, claiming that the domicile of the plaintiff was in Quebec, and secondly to the merits, that the said William St. Laurent was not insolvent when he made the said payment. The very opposite of both of these allegations, however, was established by the proof, and therefore the judgment of the Superior Court in favour of plaintiff is affirmed in review.

" La Cour Supérieure siégeant à Montréal présentement en Cour de Révision, " ayant entendu les parties par leurs avocats respectifs, sur le jugement rendu le " trente septembre, mil huit cent soixante et huit, dans et pour la Cour de Cir- " cuit pour le district de Montréal, ayant examiné la procédure et pièces au dos- " sier en cette cause, et ayant pleinement délibéré ;

" Considérant qu'il n'y a point d'erreur dans le dit jugement, confirme par les " présentes, le dit jugement en tous points, avec dépens contre le défendeur."

Dorion, Dorion & Geoffrion, avocats du demandeur. Jugement confirmé.

Barnard & Pagnuelo, avocats du défendeur.

(P. R. L.)

COUR DE CIRCUIT.

MONTREAL 30 NOVEMBRE 1868.

coram MACKAY, J.

No. 73.

Desormeaux vs. *Cadotte.*

JUGE:—Que l'action pour séduction intentée par une fille majeure sans aucune allégation d'une promesse de mariage, est mal fondée en loi.

La demanderesse réclamait $200.00 de dommages pour séduction de la part du défendeur.

Desormeaux vs. Cadotte.

La demanderesse alléguait qu'elle était fille majeure à l'époque de sa séduction par le demandeur et ne démontrait point que le défendeur lui avait jamais fait aucune promesse de mariage.

De plus elle alléguait simplement sa séduction non suivie d'accouchement, mais prête à rester malade des suite de sa grossesse. (1)

Le défendeur rencontra cette demande par une défense au fond en droit par laquelle il prétendait que la demanderesse était mal fondée en sa demande parce " que la dite action repose sur des faits d'une immoralité flagrante chez la dite " demanderesse et qu'il ne lui est résulté de ces faits aucuns dommages actuels "qu'elle puisse réclamer en justice."

Autorités citées par la demanderesse.

Poulin du Parc, 8 vol. p. 104, sec. 21.

Dareau, Traité des Injures, 2 vol. p. 179, sect. 9, p. 182, sect. 18.

Autorités citées par le défendeur.

Fournel, Traité de la séduction, p. 7 et 8, 9, 11, 29, 34, 110.

La Cour a maintenue la défense en droit et a renvoyé l'action sur ce principe qu'aucune action ne compète à une fille majeure qui a été séduite sans aucune promesse de mariage

Le Jugement de la Cour est comme suit :

" La Cour, ayant entendu les parties par leurs avocats sur la défense en droit

(1) Vide Beauvais vs. De Montigny, No. 1060 ; 30 novembre 1868, coram Mondelet, J., Berthelot, J., Mackay, J., jugement accordant à la demanderesse £3.0.0 par mois jusqu'à son accouchement. Mondelet, J., dissentiens prétendant que la jurisprudence ne donne aucun droit d'action avant l'accouchement, en supposant même qu'une promesse de mariage fut prouvée.

MONDELET, J., dissentient, said, that in this case a judgment had been given by way of provision or pension for the plaintiff, a widow, who had complained that she had been seduced under promise of marriage, and was with child. The judgment awarded her a sum of £3 per month till her accouchment. She finally was delivered of a child, and then there was a second judgment of a further monthly allowance for the support of the child, His Honour considered the first judgment ought to be reversed. It was true that the plaintiff had proved that she was really with child by the fact that she afterwards gave birth to one ; but he held that the indications of her supposed condition were necessarily doubtful, and often deceived the most skilful physicians, so that evidence on that subject was manifestly a most dangerous thing on which to base a judgment. The jurisprudence of the country gave no right of action in a case like this until the accouchment had actually taken place, even if a promise of marriage were proved as the ground of the seduction. In this case there was no action but a petition.

BERTHELOT, J., in giving the judgment to sustain the previous order of the Court, said tha there was no final judgment ; but one of a provisional character which might be granted at the discretion of a Judge to assist an unfortunate party to a suit, such as a widow, orphan, or woman separated from her husband. There was no doubt this woman was *enceinte*, and she had brought an action for breach of promise of marriage, reserving to herself subsequently the right to sue *en paternité* ; and the reputed father had admitted the intercourse. After the child was born there was a new order of the same kind, for the woman could not work to support the children of her first marriage with one hand, and nurse this child with the other. He thought, therefore, that he did not give too much in awarding her £3 per month. There was a technical error in the judgment to be reformed. The other parts of it would be confirmed.

"plaidée par le défendeur à cette action, ayant examiné le dossier et la procédure "dans cette cause et ayant délibéré, maintient la dite défense en droit, et déboute "cette dite action, avec dépens."

Desormeaux vs. Cadotte.

Défense en droit maintenue.

J. C. Gagnon, avocat de la demanderesse.
Doutre, Doutre & Doutre, avocats du défendeur.
(P. R. L.)

COUR SUPERIEURE, EN REVISION.

MONTREAL, 27 FEVRIER 1869.

Coram MONDELET, J., BERTHELOT, J., et BEAUDRY, A. J.

No. 1449.

Voyer vs. *Richer*.

JUGE :—Qu'un certificat de dépôt dans une banque n'est pas un effet de commerce et qu'il n'est pas transférable par endossement.

Le 7 septembre 1863, le défendeur dépose la somme de $2,000 à la Banque du Peuple, laquelle émane son certificat dans la forme suivante :

"No. 240, La Banque du Peuple, Montréal, 7 septembre 1863, O. A. Richer, Ecr., a déposé dans cette Banque, à intérêt à quatre pour cent par an, la somme de deux mille dollars, payable à l'ordre de Dame Marie Anne Ste. Marie, veuve Voyer, lors de la remise du présent certificat. Cette somme pour porter intérêt, devra rester au moins trois mois dans cette banque et le porteur de ce certificat ne pourra le retirer qu'après quinze jours d'avis, l'intérêt cessant du jour de cet avis."

Le 14 avril 1867, Madame Voyer décéda après avoir fait un testament portant substitution.

Le 7 juin suivant, le défendeur se présente à la banque et, sur la remise du certificat, en obtint le paiement en capital et intérêt, pour lequel intérêt il donne son chèque dans la forme suivante :

"Deposit on interest, La Banque du Peuple, $61.37 Montréal *Juin* 7, 1867, Pay to *intérêt à jour* or bearer *soixante et une* 37–100 dollars, For account of O. A. Richer, *porteur du certificat de dépôt* No. 249."

Les demandeurs, disant avoir seuls renoncé aux legs de leur grand'mère et se prétendant ses uniques héritiers, réclament du défendeur la dite somme de $2,000 et les $61.37 d'intérêt, retirées de la banque.

Le défendeur a rencontré l'action des demandeurs par quatre défenses qu'il résume comme suit :

1o Le certificat de dépôt est un effet négociable, et il lui a été transporté par Madame Voyer en l'endossant et le lui livrant, et en conséquence il en devint le porteur et propriétaire.

2o Madame Voyer lui a fait donation de ce certificat de dépôt.

3o Elle le lui a donné pour le récompenser de ses services comme son procureur.

Voyer vs. Richer.

4o Enfin, les demandeurs ne sont pas les héritiers de Madame Voyer.

Le certificat de dépôt est-il un effet de commerce. Est-il transférable par endossement?

Le défendeur soumet d'abord comme proposition légale que le certificat de dépôt en question n'est pas un contrat de dépôt, mais un vrai billet promissoire.

Le Code, article 2344, et les auteurs tant français qu'anglais et américains définissent le billet promissoire "une promesse par écrit pour le paiement d'une somme d'argent à tout évènement et sans condition."

Remarquons bien que le Code et la jurisprudence n'exigent aucune forme particulière de billet; de là le principe bien connu: "No special form is necessary to constitute a promissory note." Parsons on Bills, Vol 1, p. 21; Morris v. Lee. 1. Stra. 629; 2 Ld. Raym. 1396; Brooks v. Elkins, 2 Mees. & W. 74; Wheatley v. Williams, 1 M. & W. 533; Walker vs. Roberts, 1 Carr. & Marsh, 620; Herschel vs. Mahler, 3 Hill 132; 10 Wend. 671; Ellis vs. Mason, 1 Eng. Jur. 380, Ballard vs. Burnside, 49 Barb. 102. Tout ce qui est nécessaire, c'est que les conditions prescrites par le Code soient accomplies.

Encore il ne faut pas perdre de vue, comme on l'observait dans les causes de Kilgore v. Bulkely et de Muller v. Austen, que "the great commercial advantages growing out of negotiable instruments have induced the Courts to adopt a most liberal rule in construing them;" et s'il est un cas où cette interprétation libérale doit recevoir son application c'est surtout le cas actuel où tout, l'intention des parties comme l'usage du commerce, concourt à donner à l'écrit en question tous les caractères d'un effet négociable. Il est fait payable *à ordre*; le *porteur* ne pourra se présenter qu'après quinze jours d'avis, et de fait la somme est payée au *porteur*; ces expressions et ces circonstances n'emportent-elles pas nécessairement l'idée de négociabilité? On prétend que le mot *à ordre* n'a son effet qu'entre la banque et le porteur, et non entre celui-ci et son endosseur; qu'entre ces derniers il ne vaut que comme procuration. Mais connait-on dans notre droit des procurations par endossement? Et cette procuration, comment pourrait-elle être une garantie pour la banque, puisque comme tout autre procuration, elle deviendrait éteinte et serait révoquée par le décès de l'endosseur?

Voyons si réellement le certificat de dépôt possède toutes les qualités essentielles d'un billet promissoire.

D'abord c'est une promesse de payer une somme d'argent, et c'est ce qui résulte du mot "payable" qui se trouve au certificat. "It is settled" dit Parsons on Bills and Notes, vol. 1, p. 24, "that a Note need not contain the words *promise to pay*, if there are other words of equivalent import." De mot "payable" est équipollent. Pepoom v. Stagg, 1 Nott & McC. 102; Mitchell vs. Rome R. R. Co., 17 Ga. 574; Kimball v. Huntingdon, 10 Wend. 675; Waithman v. Elsee, 1 Car. & K. 35; Casborne v. Dutton, Selw. N. P. (11 ed) 401; Morris v. Lee, 2 Ld. Raym. 1396; Brooks v. Elkins, 2 M. & W. 74; Russell v. Whipple, 2 Cowen, 536.

Ces décisions sont d'une grande justice: car il n'est que trop raisonnable que la banque s'oblige de rembourser l'équivalent de ce qu'elle a reçu.

2o La promesse est par écrit et signée des officiers de la banque.

3o C'est une promesse de payer une somme d'argent déterminée, savoir la somme de deux milles piastres. Voyer vs. Rioler.

4o Cette promesse est à tout évènement et sans condition. On ne peut rien trouver dans ce document qui puisse rendre l'obligation de la banque conditionnelle et incertaine.

On objecte que le fait qu'elle n'est payable "qu'après quinze jours d'avis" est une condition. Evidemment cette clause ne se rapporte qu'au terme de l'engagement. La banque s'oblige de payer la somme à tout évènement et sans condition à quinze jours d'avis. C'est l'équipollent du terme *à tant de jours de vue*, si souvent stipulé dans les lettres de change. La jurisprudence a d'ailleurs consacré cette règle—Walter vs. Roberts, 1 Carr. & Marsh, 590; Clayton & Gosling, 5 Barn. & Cr. 360.

On prétend encore que le fait que la somme n'est payable que "lors de la remise du présent certificat" est un autre évènement incertain. Il est clair que ces expressions ne sont que de pure forme et de style. La formule en usage des billets promissoires ne contient rien de semblable, parce que ces termes y sont toujours sous-entendus. Soutiendra-t-on que dans le cas de perte d'un certificat de dépôt la banque ne pourrait être forcée au paiement enluidonnant caution? Il suffit de considérer les conséquences de cette objection pour en apercevoir la futilité. C'est encore ce qu'est venu consacrer la jurisprudence. Miller vs. Austen, 13 How. 218; Laughlin vs. Marshall, 19 Ill. 390; Carey vs. McDougall, 7 Gil. 84; Kilgore vs. Bukley, 14 Conn. 362; Bank of Orleans vs. Merrill, 2, Hill 295, Welton vs. Adams, 4 Calif. 37; Johnson vs. Barney, 1 Iowa, 531; Hulbert vs. Carver, 40 Barb. 245; The People vs. The Contracting Board, 46, Id. 245; Bank of Peru vs. Fansworth, 18 Ill. 553; Leavit vs. Palmer, 3 Coms. 19; Tracy vs. Talmage, 4 Kern. 178; Hodges vs. Shuler, 24 Barb. 68.

Enfin, on soutient, sur l'autorité de Bailey on Bills, 4e éd. sect. 4, pp. 8 et 12, que la condition se trouve dans ces autres termes du certificat: "Cette somme, pour porter intérêt, devra rester au moins trois mois dans cette banque." L'exemple tiré de Bailey ne s'applique aucunement à l'espèce qui nous occupe. Là, la promesse était de payer "£65 with all other such sums that may be due him." Evidemment, il y avait incertitude dans la somme. Mais ici, il s'agit d'une somme déterminée. La stipulation, que l'intérêt ne sera dû que dans un cas, n'a pas pour effet de rendre la banque maîtresse de payer ou de ne pas payer les deux milles piastres et l'intérêt. Etant au pouvoir du porteur de laisser l'argent à la banque durant les trois mois, le paiement de l'effet en capital et intérêt est toujours certain; il ne dépend d'aucun évènement ni d'aucune condition. Si le créancier se présente avant trois mois, il n'aura pas d'intérêt; si c'est après il aura droit à l'intérêt de quatre par cent stipulé. Les trois mois en question, en un mot, ne sont qu'un terme à compter duquel l'intérêt devra courir. Ici donc tout est déterminé; il ne peut exister de doute et d'incertitude dans le marché commercial sur la promesse absolue et précise du paiement; et comme l'observait Lord Kenyon, C.J. dans la cause de Carlos vs. Fancourt (1 Ross, Lead. Cases 14), la condition du paiement absolu et à tout évènement d'un billet promissoire n'a été introduite que pour assurer la négociation de ces effets. It would

Veyer vs. Richer.

perplex"—disait le savant juge—"the commercial transactions of mankind if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to enquire when these uncertain events would probably be reduced to a certainty." Dans le cas actuel aucune recherche ou perquisition n'est nécessaire. Le tiers n'a qu'à lire si les trois mois sont expirés pour s'assurer si l'intérêt est dû ou non.

Nous trouvons encore sur ce point des précédents parfaitement applicables ici. Dans une cause de Doggett vs. Pratt, 15 Mass. 177, l'action était portée sur quatre billets, dont trois étaient payables "with interest at three per cent per annum if paid at maturity.—If not, six per cent interest to be paid," et le quatrième "without interest until the note is out; if not paid then, lawful interest until paid." La Cour ne les jugea pas moins des billets promissoires portant intérêt, les trois premiers à six par cent de l'échéance, et le dernier au taux légal.

Dans la cause de Hodges vs. Shuler, décidée en 1857, par la Cour Suprême, de l'Etat de New-York et rapportée au 24e vol. de Barbour, p. 68, la demande était faite sur le billet suivant:

"Rutland & Burlington Rail Road Company, No. 253—$1000. Boston, April 1st, 1850. In four years from date, for value received, the Rutland & Burlington Rail Road Company promises to pay, in Boston, to Messrs. W. S. & D. W. Shuler or order, one thousand dollars, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due, or upon the surrender of this note, together with the interest warrants not due, to the treasurer, at any time until within six months of its maturity, he shall issue to the holder thereof, ten shares in the capital stock in said Company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the said period. T. Follett, President; Sam. Henshaw, Treasurer."

Le mémoire suivant ou *interest warrant* était annexé au dit billet.

"Interest warrant, No. 8. On the first day of April, 1854, The Rutland & Burlington Rail Road Company will pay the bearer, at the office of its Treasurer in Boston, thirty dollars for interest on its Note No. 253. Sam. Henshaw Treasurer."

By the Court, Gould, J.—"The very strictest rule as to what constitutes a promissory note, is that it must be a written promise to pay (to a person named in it), absolutely and unconditionally, a certain sum of money at a certain specified time. In this case there is no claim that the contract is not a written promise to pay (to a person named in it) a certain sum of money at a certain specified time. But (say the defendants) there is a subsequent provision, that "this note," up to a time six months before the money was payable, might (at the election of the holder) be surrendered; and the holder, on such surrender, should be entitled to receive its amount in stock of the Company, instead of money. And it is claimed that this provision takes away the essential quality, that the money must be payable absolutely and unconditionally. To this the answer is, that to the promise to pay the money there is attached no condition and no uncertainty.

Voyez Supra, Richer

Unless (not later than six months *before* the money was to be paid) the holder saw fit to surrender and cancel the promise; if it remained in existence to the time when it promised to pay anything, it remained an *absolute* and *unconditional* promise to *pay money only*. From its inception there was no instance at which it could have been paid by anything but money. And there never was any *promise* to pay anything else than money.

"With these views, I, of course, hold the primary contract to be a promissory note, negotiable; and the contract made by endorsing it to be the usual one of an endorser of negotiable paper."

Il semble tout d'abord étonnant que les tribunaux anglais n'offrent aucune décision, mais la raison en est que les certificats de dépôts, comme celui qui fait l'objet de la présente difficulté, ont une origine toute américaine. Comme l'ont établi plusieurs témoins entendus dans cette cause, les banques anglaises n'émettent que des "deposit receipts" payables à la personne seulement, et non à ordre; et étant ainsi privés de leur négociabilité, ils n'ont pu donner lieu à aucune contestation. Ces mêmes témoins constatent encore que plusieurs de nos banques ont adopté la pratique anglaise, ce qui expliquerait encore le défaut de tout précédent dans le pays sur le question. Aux Etats-Unis ces effets sont fort en circulation depuis une trentaine d'années. Aussi les rapports des Cours présentent plusieurs cas que nous n'allons qu'indiquer sans commentaire. Toutes ces décisions sont unanimes dans le sens que nous soutenons, à l'exception de deux, qui ont depuis cédé à la force et à l'uniformité des décisions plus récentes; nous faisons allusion aux causes de Patterson vs. Poindexter, 6 Watts & S. 227, Charnley v. Dulles, 8 Watts & S. 353, 361.

Dans la cause de Miller v. Austen, décidée en 1851 par la Cour Suprême des Etats-Unis et rapportée au 12e vol. de Howard, p. 218, M. le Juge Catron, pour la Cour, observa: "The established doctrine is, that a promise to deliver or to be accountable for so much money, is a good bill or note. Here the sum is certain and the promise direct. Every reason exists why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the State courts generally have treated certificates of deposit payable to order; and the principles adopted by the State Courts in coming to this conclusion are fully sustained by the writers of treatises on Bills and notes."

La même règle a été consacrée dans les causes suivantes: Bank of Orleans v Merrill, 2 Hill, 295; Laughlin v. Marshall, 19 Ill. 390; Carey v. McDougald, 7 Ga. 84; Kilgore v. Buckley, 14 Conn. 362; Welton v. Adams. 4 Calif. 37; Hulbert v. Carver, 40 Barb. 245; The People v. The Contracting Board, 46 id, 254; Leavitt v. Palmer, 3 Coms. 19; Tracy v. Talmage, 4 Kernan. 178; Shermerhorn v. Talman, 14 N. Y. Rep. 93; see also 7 id. 313, 17 id, 521.

Mais admettons même que le certificat ne soit pas un billet promissoire. Est-il pour cette raison moins négociable? N'y a-t-il pas aujourd'hui dans le commerce une foule d'écrits qui circulent constamment sur le marché par endossement ou la simple déliverance, sans être des billets promissoires? Le connaissement, le récépissé ou *warehouse receipt*, la lettre de credit, la lettre de garantie, et une foule

Voyer vs. Richer.

d'autres, ne sont-ils pas négociables lorsqu'ils sont fait à ordre ou au porteur; et la législature, à propos de l'impôt du timbre, en plaçant sur le même pied la lettre de change, le billet promissoire, la lettre de crédit "and every receipt for money, given by any Bank or person, which shall entitle the person paying such money, or the *bearer of such receipt* to receive the like sum from any third person," n'a-t-elle pas considéré tous ces effets comme également négociables? Est-il possible de ne pas reconnaître dans ce "receipt for money" le certificat de dépôt dont il est question dans cette cause?

Que veut dire encore cet article du Code du Bas-Canada: "Notes for the delivery of grain or other things, or for the payment of money, and payable to order or bearer, may be transferred by indorsement or delivery without notice (signification), *whether they are payable absolutely or subject to a condition*," (art. 1572)? Cette disposition, qui n'est pas indiquée comme de droit nouveau, doit satisfaire les demandeurs qu'une promesse même conditionelle peut être négociable par endossement.

Code du B. C. art. 1016, 1017, 2291, 2354; Rivière, Répétitions Ecrites sur le Code de commerce, p. 9 *et seq.*; Massé, 3 Droit Com. p. 21; Bateman, Commercial Law, pp. 115 et 152; Smith, 1 Lead. Cases, p. 842; Edie v. East India Co., 1 Ross, Lead. Cas., pp. 217, 218, per Foster J., et Wilmot, J.

Enfin, ne peut-on pas soutenir à bon droit qu'en vertu de ces expressions, "payable à l'ordre de Dame Marie Anne Ste. Marie," la promesse en question était transférable par endossement? Cette stipulation n'est-elle pas susceptible d'exécution dans le sens et en la manière ordinaire des affaires? La jurisprudence moderne ne tend-elle pas à accorder à ces termes stipulés dans n'importe quel contrat, tous les effets qu'elle leur donne lorsqu'ils se trouvent sur un billet promissoire? Tel est en effet le sentiment de plusieurs jurisconsultes, entr'autres, de Pardessus, Duvergier, Massé et Merlin. "Il a passé l'année dernière," dit Merlin, Rép. vol. 7, pp. 419, 420, sous les yeux de la Cour de Cassation, dans une affaire sur laquelle je portais la parole, un contrat de vente notarié dont le prix était *stipulé payable à l'ordre du vendeur;* celui-ci avait en conséquence endossé l'expédition, et c'était son endosseur qui agissait en paiement contre l'acquéreur. Le point litigieux était indépendant de cette circonstance; mais il n'est venu à la pensée de personne que cette circonstance pût donner lieu à aucune difficulté. L'endossement fut considéré par les parties, par leurs défenseurs et par les magistrats, comme ayant subrogé celui qui en était le porteur aux droits du vendeur."

Les demandeurs soumirent les propositions suivantes:

1o. Le certificat de dépôt dont il est question, ne pouvait pas être transporté par endossement.

Ce n'est ni un billet promissoire ni aucun autre document négociable par endossement.

Code Civil B. C. Art. 2344 et Art 2279.

Bailey on Bills, 3 Ed., sec. 4, p. 12., par. 8.

Ce n'est qu'un contrat par lequel la banque promet de rembourser le montant déposé avec ou sans intérêt suivant que les conditions stipulées seront accomplies ou non.

Ces conditions sont que le paiement n'est pas obligatoire d'une manière absolue, du moins quant aux intérêts.

Ce certificat ne peut donc pas être considéré comme étant un billet promissoire pas même pour les $2000, car il ne peut pas être ni billet pour une partie et un autre contrat pour le surplus.

Le jugement de la Cour Supérioure à Montréal (Monk, J.) avait maintenu les défenses du défendeur sur ce point et avait débouté les demandeurs de leur action, le 31 Octobre 1868. Ce jugement est motivé sur ce point comme suit:

The Court having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings, proof of record and having deliberated, considering that the certificate of deposit referred to in said plaintiff's declaration was and is a negotiable instrument, and that the indorsement of the same by the late Dame Marie Anne St. Marie was and is by law a valid transfer and cession to all intents and purposes of the sum of money specified in the said certificate of deposit, in principal and interest, by the said Dame Marie Anne St. Marie to the defendant, and that the said indorsement cannot be viewed as a mere order or procuration in favor of the holder of the said certificate of deposit to draw or collect the said sum from *La Banque du Peuple* as contended for by the said plaintiffs, &c.

Ce jugement fut porté en révision et y fut infirmé.

En Révision.—MONDELET, J.:—

The plaintiffs, heirs of Madame Antoine Voyer, claim from the defendant the sum of $2,061.37, to wit: $2,000 that the defendant deposited in the Banque du Peuple on the 9th September, 1863, for Marie Anne St. Marie, widow of Antoine Voyer, his grandmother, and of whom he was the *procureur* by virtue of a general procuration, of date 19th January, 1859. It is alleged and proved that at the time of this deposit the Banque du Peuple gave to the defendant a receipt or certificate in the following terms, and it is this receipt which is in question in this cause:—

"A. O. Richer has deposited in this Bank, at four per cent interest, the sum of $2,000, payable to the order of Dame Marie Anne St. Marie, widow Voyer. This sum, in order to bear interest, must remain, at least, three months in the Bank, and the bearer of this certificate cannot withdraw it until after fifteen days' notice, the interest to cease from the day of the notice."

Madame Voyer died on the 14th April, 1867. On the 7th of June following the defendat withdrew from the Bank $2,000 and also $61.37 interest. The other interest which had previously accrued he had drawn at different times mentioned on the back of the certificate. The question in dispute is whether the plaintiffs, who, as heirs of Mdme. Voyer, claim the sum of $2,061.37, are well founded in their action, or if the defendant has a right to retain it as his. He pretends,

1st. That Mdme. Voyer transferred the property in the certificate to him by endorsing it to him for value received on the very day when he made the deposit.

2nd. That she gave it to him without conditions, and

Voyer vs. Richer.

3rd. That she gave it to him as a recompense for his services. He also denies that the plaintiffs are the heirs of Madame Voyer. The first question which presents itself is purely a question of law,—whether the said certificate, by the signature of Madame Voyer being endorsed on its back, became negotiable and transferable in the same manner as a promissory note by a simple indorsement in blank. Article 2344 Civil Code defines a promissory note to be a promise in writing for the payment of a sum of money in any event and without condition. It must contain the name of the maker and be made only for a determinate sum of money. Article 2349 defines a cheque to be an order in writing upon a bank or banker for the payment of a sum of money. By Article 2346 the provisions relative to bills of exchange apply to promissory notes as to the matters in dispute. In Article 2279 a bill of exchange is defined to be a written order by one person to another for the payment of a sum of money absolutely and in anyevent.

Let us see now as to what things can be legally negotiated by indorsement in blank. The Code, after having in Articles 1571 and 1572 established in what cases with regard to third persons, there must be signification of the transfer, goes on to say in Article 1573, "That the two preceding Articles do not apply to bills of exchange, notes or bank checks payable to order or bearer of which the transfer does not require notification." Now this certificate is not a bill of exchange; it is not a note nor a bank cheque; neither is it a note for the delivery of money or grain or other things payable to order or bearer, which by Article 1573 may be transferred by indorsement or delivery without notice, whether made absolutely or under a condition. So by the terms of our Code the certificate in question cannot be held to be transferable without notice. Notwithstanding what some of the witnesses say concerning *the custom of merchants*, the certificate of the Bank, which is nothing more than a memorandum that on such a day the defendant deposited $2,000 in the name of Mdme Voyer, cannot legally become the property of the defendant by the signature only of Mdme. Voyer, which signature, it was proved, was necessary to enable the defendant to draw the interest. The defendant, then, is ill-founded in law as to the claim which he makes upon the $2,000. It is necessary now to consult the proof and the circumstances of the case. Even supposing the certificate in question were transferable without notice, by the simple signature of Mdme. Voyer, it would not affect the question with regard to defendant. Defendant was acting for Mdme Voyer, as her *procureur*; he deposited the money in her name, and it was payable to her order; her signature was necessary to enable the defendant to act as such *procureur* in drawing the interest, and the defendant cannot have the slightest right to the sum which he claims. Nor is his position better in respect of the facts of the case. The following are the principal of them: 1st. The certificate was endorsed only to enable Richer to draw the interest. 2nd. If, as Richer pretends, the $2,000 were given to him on the very day of the deposit, how does it happen that during four years he left in the Bank this certificate, which establishes that the deposit was made for Mdme. Voyer and payable to her? 3rd. How can it be believed that this donation of $2,000 was made to the defendant, and only six months

after another donation of $150, which it is proved was made by Mdme. Voyer to defendant in consideration of his services for six months, and that his annual services were worth $300? 4th. If the $2,000 were his property from the day of the deposit, how can we explain the fact that he did not draw it until after the death of Mdme. Voyer, by means of the endorsement in blank, although in the meantime he was obliged to borrow money? I am of opinion that the judgment appealed from (Sup. Court, Montreal, 31st October, 1868, Monk J). ought to be reversed. The plaintiffs have a right to judgment according to the conclusion of their declaration. Judgment for $2,061,37 and interest and costs.

Le jugement de la Cour de Révision 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 jugement rendu le 31 octobre 1868, dans et par la Cour Supérieure du district de Montréal, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré; Considérant que les demandeurs ont prouvé et établi les allégations essentielles de leur déclaration et nommément qu'en leurs qualités d'héritiers de feu Marie Anne Ste. Marie, veuve Antoine Voyer, ils ont droit de recouvrer du défendeur la somme de $2,061.37 courant, savoir $2000, que le défendeur a, le 7 septembre 1863, déposées à la Banque du Peuple, en la cité de Montréal, pour et au nom de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, sa grand'mère, dont il était le procureur et agissait comme tel, en faisant le dit dépôt, la dite Marie Anne Ste. Marie, veuve Antoine Voyer, ayant constitué le dit défendeur son procureur, par et vertu d'une procuration générale en date du 19 janvier 1859, laquelle n'avait aucunement été révoquée ou modifiée lors du susdit dépôt, et en sus $61.37 d'intérêt dus alors sur la dite somme de $2000, par la dite Banque du Peuple à la dite Marie Anne Ste. Marie, veuve Antoine Voyer;

Considérant que la dite Marie Anne Ste. Marie, veuve Antoine Voyer est décédée, en la cité de Montréal, le 14 avril 1867, étant alors comme elle n'avait cessé de l'être depuis et durant près de quatre années qui sont écoulées depuis le dit dépôt, jusqu'au dit 14 avril 1867, propriétaire de la dite somme de $2000, et du dit intérêt échus sur icelle somme;

Considérant que ce ne fut que le sept du mois de juin 1867 que le défendeur retira de la Banque du Peuple, les dites sommes d'argent, laquelle dite somme de $2000, y était déposée au nom de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, depuis le sept septembre 1863, et payable à cette dernière, comme le constate le reçu ou certificat qu'en retira lors du dépôt, le défendeur en date du dit 7 septembre 1863, le défendeur agissant alors comme le procureur de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, lequel reçu ou certificat est au dossier;

Considérant qu'indépendamment de la dite procuration, et du fait que le défendeur, lorsqu'il déposa à la Banque du Peuple la dite somme de $2000, était le procureur de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, à laquelle appartenait la dite somme de $2000, comme dit est, et ne la déposait que comme tel procureur, ce dépôt eut lieu et fut fait par le défendeur, six mois seulement après que la dite Dame Marie Anne Ste. Marie, Veuve Antoine Voyer lui avait,

Voyer vs. Richer.

en reconnaissance de certains services, qu'il lui avait rendus, fait donation d'un terrain valant au moins quinze cents louis du cours actuel, ce qui fait toucher du doigt l'insoutenable prétention du défendeur, que les services qu'il aurait rendus durant ces six mois, vaudraient $2000, tandis qu'il est prouvé que de tels services, s'ils ont toutefois été rendus, ne valaient que trois cents piastres par année, et par conséquent $150.00 seulement pour les dits six mois ;

Considérant, qu'il est déraisonnable de supposer que le défendeur a reçu de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, le jour même qu'il l'a déposée à la Banque du Peuple, comme dit est, la dite somme de deux mille piastres, comme don manuel *inter vivos* ou autrement, attendu que le fait est là, que la dite somme de deux mille piastres est demeurée, en la dite Banque du Peuple, par le fait même du défendeur, au nom de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, jusqu'au 7 juin 1867, peu de temps après la mort de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, arrivée comme dit est, le dit 14 avril 1867, le défendeur s'étant bien donné de garde de retirer cette somme d'argent et les intérêts accrus sur icelle, durant la vie de la dite Marie Anne Ste. Marie, veuve Antoine Voyer ;

Considérant que l'endossement opéré sur le certificat de dépôt susdit par la signature de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, apposée le jour même du dépôt était acquis par la Banque pour mettre le défendeur procureur de sa dite grand'mère, en état de retirer les intérêts sur la dite somme de $2000.00, et que cet endossement a été donné à cet effet, ce qui est rendu encore plus évident par le fait que le défendeur, durant la vie de la dite Marie Anne Ste. Marie, veuve Antoine Voyer, n'a jamais réclamé le droit de retirer, comme en étant le propriétaire, la dite somme de $2000.00, de la Banque du Peuple, où il l'avait déposée comme procureur.

Considérant qu'il est acquis en preuve au dossier, que le défendeur, durant le temps que la dite somme de $2000.00, était en dépôt à la Banque du Peuple, comme dit est, était en frais de bâtir et bâtissait, et empruntait de l'argent, lorsqu'il eut pu, en eut-il été le propriétaire, retirer de la Banque du Peuple, et en faire usage, la dite somme de deux mille piastres ;

Considérant qu'un procureur ou mandataire ne peut de lui-même, et par son propre fait, et sans l'intervention et l'autorisation expresse de son commettant, se convertir en principal en se servant d'un titre qu'il tient en main, comme procureur ou mandataire, et prétendre qu'il le tient comme propriétaire ;

Considérant que de ce qui précède, et de toutes les circonstances de la présente cause, il résulte que le défendeur est entièrement mal fondé en ses exceptions et défenses, et considérant aussi, que le défendeur n'a en loi ni en fait, établi par titres ni par aucune preuve quelconque, les allégations de ses dites exceptions et défenses, la Cour l'en déboute avec dépens ;

Considérant par conséquent, que par le jugement dont est appel, savoir le dit jugement du 31 octobre 1868, déboutant l'action des demandeurs, il y a mal jugé, cette cour infirme, casse et met au néant, le dit jugement, et rendant celui qui aurait dû être rendu, condamne le défendeur à payer aux demandeurs la dite somme de $2061.37, cours actue avec intérêt du 7

Juin 1867, le tout avec les dépens tant en la dite Cour Supérieure qu'en la présente Cour de Révision.

Voyez vs. Richer.

Jugement renversé.

Dorion, Dorion et Geoffrion, procureurs des demandeurs.

D. Girouard, avocat du défendeur.

(P. R. L.)

MONTREAL, 30 AVRIL 1869.

Coram TORRANCE, J.

No. 2438.

Verdon vs. Verdon.

JUGE :—Qu'un acte notarié consenti dans un état d'ivresse causé par le dol pratiqué par l'autre partie contractante, est sujet à rescision.

TORRANCE, J.—This is an action by a person to set aside a deed of donation which he made to his brother. He alleges that he had been made drunk by his brother in order to get him to make this donation. The Court is of opinion that the case of the plaintiff is made out. An *arrêt* is referred to in Solon, *Nullité*, vol. 1, n. 39, pp. 21, 22, by which a deed was set aside on similar grounds.

Le jugement de la Cour, sur les conclusions de la demande contestée par le défendeur, est motivé comme suit :

La Cour, après avoir entendu les parties par leurs avocats, sur le mérite de cette cause, examiné la procédure, pièce produite, et preuve, et avoir sur le tout mûrement délibéré ; considérant que le demandeur a établi par une preuve légale et suffisante les allégués essentiels de sa déclaration, et plus particulièrement qu'au moment où le prétendu acte de donation mentionné en la déclaration en cette cause a été consenti par le dit demandeur, ce dernier n'avait pas sa connaissance et ne jouissait pas de sa liberté intellectuelle, étant à ce moment là, dans un état d'ivresse, et qu'il n'a été amené à donner un prétendu consentement à cet acte, que par le dol et les manœuvres pratiqués par le défendeur à cet égard la Cour en conséquence maintient la demande du dit demandeur, et déclare nul et de nul effet, rescinde, annulle, casse et met au néant le dit acte de donation mentionné en la déclaration du demandeur en cette cause, reçu devant Maître LeCavalier, notaire public et témoin, et portant date le vingt novembre 1866, et ordonne que les parties en cette cause soient mises en même et semblable état qu'elles étaient avant la passation du dit acte de donation. Et la Cour déclare la terre décrite au dit acte de donation et dans la déclaration en cette cause, être la propriété du dit demandeur, et condamne le dit défendeur au cas où il a pris possession, de délaisser la dite terre, maison et dépendances sous quinze jours de la signification à lui faite du présent jugement, et à livrer la possession et paisible jouissance de la dite terre et premises au dit demandeur.

Jugement pour le demandeur.

Houle, avocat du demandeur.

Bélanger & Desnoyers, avocats du défendeur.

(P. R. L.)

Voyer vs. Richer.

MONTREAL, 28 NOVEMBRE 1867.

Coram BERTHELOT, J.

No. 1902.

Hoppock et al., vs. *Demers.*

JUGE :—Qu'attendu le défaut par un demandeur de produire un compte détaillé des marchandises vendues et livrées, mentionné en un jugement rendu en pays étranger, son action fondée sur ce jugement forain sera renvoyée avec dépens.

Les demandeurs réclamèrent du défendeur en cette cause le montant d'un jugement rendu par la Cour de Circuit pour le comté de Fond du Lac dans l'Etat du Wisconsin, un des Etat-Unis de l'Amérique du Nord pour la valeur de marchandises vendues et livrées.

Le 20 avril 1866, le défendeur fit motion que les demandeurs fussent tenus de produire le compte détaillé des marchandises et effets mentionnés dans leur déclaration comme vendus et livrés au défendeur comme faisant la base du jugement y relaté, et que toutes procédures en cette cause, fussent suspendues jusqu'à ce que tel compte détaillé (bill of particulars) fut produit. Cette motion fut accordée le 30 avril 1866.

Le 17 avril 1867, les défendeurs firent de nouveau motion, qu'attendu que les demandeurs avaient fait défaut de produire ce compte détaillé (bill of particulars.) ainsi qu'il leur avait été ordonné de le faire par jugement interlocutoire en date du trente avril 1866, un délai fut fixé par la cour dans lequel les demandeurs devaient produire le dit compte et que faute par eux de le produire dans le dit délai, l'action fut renvoyée avec dépens. Sur cette motion, un délai d'un mois fut accordé.

Le 21 mai 1867, le défendeur firent motion qu'attendu le défaut par les demandeurs de produire le compte détaillé, l'action fut renvoyée avec dépens.

Les demandeurs, de leur côté, avaient fait motion le 17 mai 1867, pour faire réviser les jugements interlocutoires leur ordonnant de produire ce compte détaillé.

Le jugement de la Cour du 28 novembre 1867, est comme suit :

La Cour, ayant entendu les parties par leurs avocats premièrement sur la motion des demandeurs du 17 mai dernier, demandent que les deux jugements interlocutoires rendus en cette cause par cette Cour, l'un en date du 30 avril 1866, soient révisés par cette Cour, et qu'iceux soient annullés, cassés, et mis au néant, et secondement sur la motion du défendeur du 21 mai dernier, qu'attendu le défaut par les dits demandeurs de produire le compte détaillé, des marchandises vendues et livrées par les dits demandeurs au dit défendeur, mentionné en la déclaration et ce conformément au jugement du trente avril 1866 ; cette action soit renvoyée et déboutée avec dépens, ayant examiné la procédure en cette dite cause, et ayant délibéré, a rejeté la motion des demandeurs avec dépens et a accordé la motion du dit défendeur, en conséquence a renvoyé et débouté la dite action des demandeurs avec dépens.

Action renvoyée.

Leblanc, Cassidy & Leblanc, avocats des demandeurs.
D. Girouard, avocat du défendeur.
(P. R. L.)

COUR DU BANC DE LA REINE EN APPEL.

MONTREAL, 8 JUIN, 1869

Coram DUVAL, J. EN CHEF, CARON, J., BADGLEY, J., MONK, J., et MACKAY, J. A.

No. 81.

Le Révérend Messire Rémi Robert et al., Appellants et Thomas Bean, Intimé.

JUGE :—Qu'un Curé ne peut être poursuivi en justice pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions ; à moins qu'avis de telle poursuite ne lui ait été donné au moins un mois avant l'émanation du bref d'assignation (1).

L'intimé avait poursuivi les appellants devant la Cour Supérieure siégeant à St. Jean, pour le District d'Iberville, pour dommages intérêts résultant de ce qu'ils ont, sans le consentement de l'intimé, le 4 août 1864, célébré le mariage de Robert Bean, fils mineur de l'intimé, avec Mary McDonald.

Les appellants ont plaidé, en substance, admettant le fait que Robert Bean était mineur lors de son mariage, qu'ils avaient agi de bon foi, le croyant majeur et ayant tout raison de le croire tel ; que lorsqu'ils célébraient un mariage, ils n'agissaient pas seulement comme prêtres de leur Eglise, mais bien aussi comme officiers publics ; que, ayant agi *bona fide* dans l'exécution de leurs devoirs comme officiers publics en permettant et célébrant le dit mariage, ils avaient droit à la protection de la loi, et ne pouvaient être poursuivis sans qu'un avis spécial leur eût été donné un mois avant l'institution de l'action.

Après enquête et audition, les appellants ont été condamné à payer à l'intimé $100 de dommages-intérêts, et les dépens de l'action intentée pour $2,000.

Le jugement de la Cour Supérieure est motivé comme suit :

La Cour, après avoir entendu les parties par leur avocats, examiné la preuve, les papiers produits et la procédure :

Considérant que le quatre avril, mil-huit cent soixante-et-quatre, dans la paroisse de Ste. Marguerite de Blairfindie, il a été procédé à la célébration du mariage de Robert Bean et de Mary McDonald, par Messire Rémi Robert, curé de la paroisse, et par Messire Coutu, prêtre, vicaire dans la paroisse.

Considérant qu'ils est constaté que le contractant, Robert Bean, était un protestant domicilé chez son père dans un autre paroisse, et n'était alors âgé que de dix-sept ans.

Considérant qu'il est prouvé que le mariage a été fait hors l'avou et sans le consentement du père du contractant et qu'il est même prouvé que le curé n'a pas demandé à ce fils de famille s'il avait le consentement de son père, tout en exprimant la crainte que ce père trouverait à redire à ce mariage ;

Considérant qu'il est prouvé que nonobstant la jeunesse de Robert Bean le curé s'est contenté de sa déclaration qu'il était majeur, sans réquérir autre preuve pour s'assurer du fait de la majorité ou du consentement des parents, avant de procéder au mariage ;

Considérant que tout fils de famille, même majeur, doit justifier du consentement de ses père et mère, ou de sommations respectueuses, s'il y a refus avant

(1) C. P. C. art. 22.

Robert et Heap.

qu'il soit procédé à leur mariage, et que les mineurs, faute de tel consentement, ne peuvent passer outre à leur mariage ;

Considérant que le mariage a eu lieu sans les publications ordinaires et que les lettres de dispense ont été accordées hors la connaissance et sans le consentement du père ;

Considérant qu'il y a eu violation de la loi et contravention aux formalités requises pour la célébration du mariage ;

Considérant que l'absence des parents au mariage de leur enfants mineurs est considérée une présomption de séduction, dont ceux qui ont assisté et célébré tel mariage sont par ordonnances déclaré les fauteurs ;

Considérant que le demandeur, comme le père du contractant, a le droit de se plaindre contre le mariage comme faux procédé et célébré abusivement ;

Considérant qu'en procédant à célébrer le mariage du fils mineur du demandeur, hors son aveu et sans son consentement, les défendeurs lui ont causé un préjudice considérable par les suites funeste d'un mariage secret condamné par un père, et lui ont fait une injure grave, en mettant de côté et méprisant son autorité paternelle, et l'empêchant de pouvoir aviser son enfant sur le fait le plus important de sa vie ;

Considérant qu'il est prouvé que le mariage est accompagné de circonstances qui rendent l'injure et le préjudice plus graves ;

Considérant que les défendeurs ayant agi dans la célébration du mariage conjointement par une action commune et simulantée, et ayant procédé et participé tous deux, Messire Robert, comme curé de la paroisse, et Messire Coutu, comme son vicaire et commis par ce dernier à la célébration du mariage, il y a lieu de les déclarer solidaires, du fait préjudiciable ; Attendu que le prêtre catholique dans la célébration du mariage remplit un ministère d'un caractère spirituel et religieux, et non un acte d'officier public, ou de témoin officiel, que par sa mission comme par sa nature de son institution sacrée, il n'est assujetti à la loi que comme tout citoyen sans charge publique, et qui ne dépend ni quant à sa nomination, ni quant à sa destitution de l'autorité civile, il ne peut être un officier de cette autorité quant à ses devoirs et à ses actes comme prêtre, il n'y avait pas lieu de donner aux défendeurs l'avis préalable que requiert le Statut invoqué par la défense : Attendu que le moyen invoqué quant au délai de six mois, ne ne peut valoir et qu'il est du reste comme celui fondé sur le défaut d'avis malfondé en fait ;

Considérant que les défenses des défendeur sont mal fondées la Cour les en déboute ;

Considérant que le demandeur a justifié des faits de sa demande, la Cour condamne les défendeurs solidairement à payer au demandeur, pour ses dommages intérêts, la somme de cent piastres avec intérêt, et les dépens comme dans une action pour deux mille piastres distraits à M. Hungerford, avocat du demandeur.

Dans leur factum en appel, les appellants ont exposé leurs prétentions comme suit :

Les appelants croient que ce jugement est erronée, contraire à la preuve faite, contraire à la loi et à la justice, et qu'il devrait être infirmé pour les raisons suivantes :

Robert et Bean.

Dans cette Province, le prêtre qui célèbre un mariage n'agit pas seulement comme prêtre de son Eglise administrant un sacrement, mais il agit encore, dans tout ce qui se rapporte à cette célébration, comme officier public, remplissant et exécutant un devoir public. S'il agit comme tel *bonâ fide*, il a droit aux avantages conférés aux officiers publics, par la loi de cette Province, quand ils agissent de bonne foi, et spécialement il ne peut être poursuivi sans un avis à lui signifié un mois auparavant.

Or, la preuve démontre clairement la bonne foi avec laquelle les appelants ont agi en célébrant le mariage de Robert Bean avec Mary McDonald, de sorte qu'ils avaient droit à un avis préalable.

La Cour Supérieure leur a erronément dénié ce droit, en maintenant l'action de l'intimé.

Le Jugement de la Cour Supérieure a été en outre rendu sans une preuve suffisante et légale de la part de l'intimé.

L'intimé a exposé sa cause comme suit :

La seule question que les appelants avaient soulevée était l'absence d'avis requis par le statut Chapitre 121 des Statuts Refondus du Bas-Canada, comme préliminaire indispensable à toute action intentée contre un officier public pour aucun fait de son office.

Le Juge a mis de côté cette prétention comme mal fondée, et cette décision est conforme à la loi. Le prêtre n'est officier public que comme gardien des registres de l'état civil et non pas lorsqu'il célèbre le mariage. Les appelants ne voudront pas admettre que le mariage qu'ils célébraient était un contrat purement civil et que leur ministère est une émanation du pouvoir civil, condition essentielle pour les faire reconnaître comme officiers publics aux termes du Statut. C'est pour l'abus fait de leur ministère seulement qu'ils ont été poursuivis et que la condamnation a été prononcée contre eux.

Ce jugement est inattaquable et doit être maintenu.

CARON, J.—Action en dommages par le demandeur Bean contre les deux défendeurs, Curé et Vicaire de la paroisse de Napierville, pour, le Curé, avoir permis à son vicaire, l'autre défendeur, de marier le fils du demandeur, mineur, sans son consentement, et le vicaire pour avoir célébré ce mariage.

Je pense qu'au mérite, le curé avait tort de faire faire par son vicaire, et celui-ci avait aussi tort de célébrer, ave l'ordre du curé, le mariage du fils du demandeur, sans se faire présenter l'extrait baptistaire et les autres documents pour constater soit la majorité, soit le consentement du père.

Ce qui est certain d'après la preuve, c'est que les deux défendeurs ont agit avec toute la bonne foi possible, ce qui pourtant, dans les cas ordinaires, ne suffirait pas pour les justifier d'avoir violé la loi, et fait injure à un père de famille, en ne prenant pas les précautions nécessaire et requises par la loi.

Mais cette bonne foi de la part des deux défendeurs, et surtout de la part du vicaire, qui n'a fait qu'exécuter l'ordre de son supérieur, et aussi la supercherie que l'on parait avoir voulu pratiquer, en faisant, lors de l'enquête, couper au jeune homme la forte barbe qu'il avait lorsqu'il s'est présenté au curé pour se faire marier, sont des considérations qui me font croire que les défendeurs appelants ont droit, sous les circonstances, à toute la protection que peut leur fournir la loi.

Robert et Bean.

Or ne se trouvent-ils pas dans la catégorie des " officiers *ou autres personnes remplissant des devoirs publics*," à la protection desquels il est pourvu par l'acte ch. 101 du S. R. B. C., et aussi par l'art. 22 du Code de Procédure Civile. Sûrement le prêtre, de même que le ministre, auquel la loi non seulement confère le droit de célébrer les mariages, d'enregistrer les actes et d'en conserver les régistres, mais leur impose ce devoir à peine d'une grave pénalité, doivent, quant à cela, être regardés comme fonctionnaires publics, officiers ou personnes remplissant un devoir public. Que l'on réfère, pour se convaincre qu'il en est ainsi, à notre Code Civil, art. 46, 64, 128, 129, 157, 158, et au 22 de la cédule, toutes dispositions, qui, sans déroger au droit antérieur, auquel, au contraire, elles sont conformes, établissent au-delà de tout doute, que les curés et ministres, obligés de célébrer les mariages, agissent en cela comme fonctionnaires, indépendamment du devoir spirituel que le prêtre a à remplir et qui, pour lui, est la partie principale, mais non la seule qu'il soit de son devoir d'accomplir.

Je suis donc d'avis qu'il n'est pas nécessaire d'entrer dans le mérite de la contestation, savoir si les défendeurs sont tenus solidairement, si ce n'est pas le curé seul, ou le vicaire seul, qui aurait dû être poursuivi ;—non plus si sous les circonstances, ils étaient en faute, et si la déception pratiquée ne serait pas de nature à faire douter de la sincérité du demandeur dans l'action qu'il a portée ; l'examen attentif de toutes ces considération et autres que suggèrent les faits prouvés dans la cause, pourrait bien être de nature à donner à la cause du demandeur, une couleur moins favorable que celle que lui accorde le jugement dont est appel, et les motifs sur lesquels il est fondé, couleur, suivant moi, bien différente de celle que j'ai trouvée si mauvaise dans la conduite du curé, dans la cause de Larocque et Michon, citée par les parties (II Jurist 270).

Dans cette dernière cause le privilége de recevoir notice comme officier public n'a pas été soulevé et quant à la présente cause, elle ne crée aucun préjugé.

Pour en finir, je suis d'avis que les défendeurs avaient droit à l'avis du statut, qu'ils en ont pris avantage par leur défense et qu'ils auraient dû en obtenir le bénéfice ; pour cette raison seule, et sans entrer dans les autres questions, je pense que l'action du demandeur aurait dû être envoyée.

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

La Cour, après avoir entendu les parties par leurs avocats sur le mérite, examiné le dossier de la prodéduro en Cour de première instance, les griefs d'appel et les réponses à iceux et sur le tout mûrement déliberé :

Considérant que dans la part que chacun de appelants a prise dans la célébration du mariage, qui fait le sujet de la présente action, ils ont tous deux agi comme officier ou fonctionnaires remplissant un devoir public et que comme tels ils avaient droit á la protection accordée à ces personnes d'après le chapitre centunième des Statuts Refondus du Bas-Canada et l'article vingt-deuxième du Code de Procédure Civile ;

Considérant que d'après ces dispositions les dits appelants ne pouvaient être poursuivis en dommages pour avoir célébrer le dits mariage, sans qu'un préalable avis de cette poursuite leur eût été donné au moins un mois avant l'émanation du bref de sommation ;

Considérant que tel avis n'a pas été donné aux appelants et que pour cette raison l'action de l'intimé était prématurée et illégalement porté ;

Considérant que sans entrer dans le mérite des questions soulevées il y a mal jugé dans le jugement dont est appel, savoir dans le jugement rendu par la Cour Supérieure siégeant à St. Jean, dans le district d'Iberville en date du vingt-unième jour de Septembre, mil huit cent soixante et cinq, casse et annulle le dit jugement, et procédant à juger comme aurait dû faire la Cour de première instance que sur le présent appel.

Robert et Rean.

Jugement renversé.

Laberge, Jetté & Archambault, avocats des Appellants.
R. & G. Laflamme, avocats de l'Intimé.
(P. B. L.)

SUPERIOR COURT, 1869.

MONTREAL, 31st MAY, 1869.

Coram TORRANCE, J.

No. 470.

Mathewson vs. *The Royal Insurance Company*, and *William Darling*, petitioner.

HELD:—That members of the Council of the Montreal Board of Trade are not exempt from serving as jurors in civil and criminal cases.

The petitioner, William Darling, had been summoned to serve as a special juror in the above case, and, having been fined for non-attendance, petitioned for remission of the fine.

The petitioner set out that for more than five years he had been a member of the Council of the Board of Trade of Montreal, and as such had been advised that by law he was exempt from serving on juries.

That ever since the passing of the statute 4 and 5 Vic., c. 90, by the 23 sec. of which it is enacted: "That the members of the council and of the Board of "arbitration shall, during the time they respectively remain in office, be exempt "from serving as jurors in any case civil or criminal," the said members of council and of the Board of arbitration had considered themselves exempt from serving on juries, and had not understood that said exemption was repealed or abolished by any statute or law.

The petitioner, when summoned, had sent in the necessary certificate and affidavit to prove he was exempt, but had been fined $20 by the presiding judge. He now prayed that this fine be remitted.*

TORRANCE, J. The petitioner claims to be exempted from fine, as a member of the council of the Board of Trade. He relies on the stat. 4 and 5 Vic. c. 90;

* The Montreal Board of Trade also presented a petition, setting out the same facts, and praying that it be adjudged that Mr. Darling was exempt as a member of the Council of the Board of Trade. This petition was rejected the same day as not in order.—*Reporter's note.*

Matheweson vs. The Royal Ins. Company.

but a new law has since been passed, 27 and 28 Vic., cap. 41 : C. C. P. 360, which omits to give any exemption to this class of persons. The petition must therefore be rejected.

Petition rejected.

Cross & Lunn, for the petitioner.
(J. K.)

MONTREAL 30TH JUIN, 1869.

Coram MACKAY, J.

No. 368.

Duhaut vs. *Lacombe et al.*, et *Morrison*, *Opposant*.

JUGE:—Que l'exécution du jugement rendu en appel ne peut avoir lieu avant l'expiration de quinze jours à compter de sa date (1).

La présente cause ayant été portée en appel, le jugement rendu par la Cour Supérieure à Montréal (Monk J.), portant contre les défendeurs condamnation au paiement d'une somme de deniers, fut modifié par la Cour d'Appel qui réduisit le montant de la condamnation.

Le demandeur fit émaner une saisie-exécution pour le montant de ce jugement ainsi réduit par la Cour d'Appel, avant l'expiration des 15 jours à compter de la date du jugement de la Cour d'appel qui avait confirmé ce jugement tout en le modifiant quant au montant.

L'un de défendeurs saisi s'opposa à la saisie pour diverses raisons et entr'autres sur le principe que cette saisie était prématurée.

Les parties ayant été entendues sur ce point-là, comme sur les autres objection soulevées par l'opposant, la Cour donna gain de cause à l'opposant.

Le jugement de la Cour est motivé comme suit :—

The Court adjudging upon the merits of said opposition, considering that the writ of execution in this case issued, and under which the said Opposant's goods and chattels have been seized and the seizure whereof is opposed, was issued for satisfaction of a certain judgment of the 9th day of June, 1868, rendered by the Court of Queen's Bench, (appeal side), considering that the only *titre exécutoire* set forth in the writ of execution in this cause issued, under which the Opposant's goods and chattels have been seized in this cause was and is a certain judgment of the Court of Queen's Bench (appeal side) rendered on the 9th June, 1868. Considering that the *commandement* or demand upon the opposant made by the bailiff before seising, was a *commandement* or demand to pay according to the exigence of the said writ of execution issued in satisfaction of a certain judgment therein named, to wit, that of the Court of Queen's Bench, (appeal side) of June 9th, 1868; Considering that the said judgment condemnation amount had never before said judgment been *liquidé* as appears by said judgment, and that opposant had a right to 15 days from said judgment to pay it;

Considering that by law execution upon said judgment as issued and made

(1) C. P. C., art. 551.

in this cause against the now opposant's goods and chattels was premature and unwarranted, inasmuch as 15 days had not passed from date of said judgment before the issuing of said execution, and said execution had not been allowed by any judge to issue before the expiration of such fifteen days:

Considering that at the date of the seizure of opposant's goods and chattels, 15 days had not passed from date of said judgment of the Court of Queen's Bench, (appeal side): Considering the opposition of said Reverend C. F. C. Morrison in this cause, to wit the opposition by him filed in this cause, is well founded in fact and law,—doth maintain the same * * * * doth declare the execution in this cause issued irregular, premature, null and void, and doth grant *main levée* of the seizure;

The whole with costs to opposant against plaintiff.

Opposition maintenue.

E. U. Piché, avocat du demandeur.
P. Ryan, avocat de l'opposant.
B rnard & Pagnuelo, conseils.
(P. R. L.)

Dubeau vs. Lacoste.

COUR SUPÉRIEURE, EN REVISION, 1868.

MONTRÉAL, 30 OCTOBRE. 1868.

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

No. 544.

L de d it Latreille vs. *Parent, et Bourbonnais,*

OPPOSANT;

et Paul Parent ès qualité et al.,

CONTESTANTS.

JUGE:—Que tant qu'il n'y a pas eu de partage de la communauté et continuation de communauté, le mari survivant peut valablement hypothéquer tant comme chef de la communauté que comme lui étant un bien propre, un immeuble qu'il n'avait ameubli que pour les fins de cette communauté.

L'opposant Michel Bourbonnais ayant été colloqué pour le montant d'une obligation consentie par le défendeur le 12 janvier 1859, maître Anger, N. P., après la dissolution de la communauté du défendeur avec sa défunte épouse; le défendeur ès-qualité de tuteur à ses enfants mineurs a contesté cette collocation en prétendant que lui, le défendeur, n'avait pu, après la dissolution de sa communauté, hypothéquer que la moitié de l'immeuble qu'il avait ameubli par son contrat de mariage, vû que l'autre moitié appartenait alors aux héritiers de sa défunte épouse et que des hypothèques antérieures à celle pour laquelle le dit Bourbonnais était colloqué absorbaient plus que la moitié du produit de la vente de l'immeuble.

Le jugement de la Cour Supérieure a été rendu comme suit:

La Cour (MONK, J.,) après avoir entendu les parties par leurs avocats respectifs sur le mérite des contestations et moyens de contestation faites par les dits opposants Paul Parent, ès-qualité, Mathilde Parent, Joseph Parent, Gilbert Parent et Dame Adéline Parent *et vir*, au Rapport de Distribution préparé en

Latreille vs. Parent.

cette cause, le vingt-sept mai dernier, en autant que le dit opposant y est colloqué au 12me item du dit Rapport, avoir examiné la procédure, pièces produites, les dites oppositions et contestations, et sur le tout délibéré, considérant que les dits opposants ont établi par preuve suffisante les moyens de leurs contestations, maintient les dites contestations, comme bonnes et valables, avec dépens. Et la Cour ordonne au Protonotaire de préparer un nouvel ordre quant au dit 12me item du dit Rapport, suivant les droits des parties.

En Révision, Paul Parent contestant prétendait, que la principale question soulevée sur la contestation était de savoir si un titre de propriété antérieur à l'ordonnance des bureaux d'enregistrement était soumis à la nécessité de l'enregistrement pour conserver les droits du propriétaire à l'encontre d'hypothèques subséquentes enregistrées. (1)

Le défendeur, par son contrat de mariage en date du 23 janvier 1838, avait ameubli cet immeuble. Ce contrat de mariage n'a pas été enregistré.

L'épouse du défendeur est décédée en 1855.

Il n'y a jamais eu de partage de la communauté, et plusieurs des enfants sont encore mineurs. Le défendeur a créé des hypothèques tant pendant la communauté que depuis sa dissolution sur cet immeuble ameubli.

Les enfants, comme représentant leur mère, se sont pourvus par opposition afin de conserver; réclamant la moitié des deniers provenant de la vente de la totalité de cet immeuble.

Par le rapport de collocation, les hypothèques créées durant la communauté ont été colloquées et Bourbonnais a été ensuite colloqué.

Le jugement de la Cour Supérieure a été renversé en Révision et le jugement de la Cour de Révision est motivé comme suit:

La Cour Supérieure, siégeant à Montréal, présentement en Cour de Révision, ayant entendu l'opposant Michel Bourbonnais et les dits Paul Parent *ès-qualité* et autres contestants, la douzième collocation du Rapport de Distribution accordé au dit Bourbonnais, par leurs avocats respectifs sur le Jugement rendu le 27 de Novembre 1867, dans la Cour Supérieure du District de Montréal, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré;

Considérant que l'immeuble vendu par décret en cette cause et dont le produit est maintenant devant la dite Cour Supérieure, est un immeuble que le dit Paul Parent, le défendeur, avait ameubli par ameublissement particulier par et en vertu de son contrat de mariage du 23 de Janvier 1838, avec Angélique Bissonnette, sa défunte épouse, et que cet ameublissement n'était que pour les fins de la communauté, le dit immeuble devant reprendre sa nature de propre au dit Paul Parent, aussitôt la dissolution de la dite communauté;

Considérant qu'il y a eu continuation de communauté entre le dit défendeur Paul Parent et ses enfants, tant majeurs que mineurs, jusqu'à l'inventaire de la dite communauté, fait et dressé devant Maître Forgette et son confrère notaires, le 11 de Novembre 1862, et dont la clôture a été faite le 6 Mars 1863;

Considérant qu'il n'y a jamais eu de partage de la dite communauté et continuation de communauté, et que par conséquent et pour ces raisons toutes les obli-

(1) 2 L. C. R. p.196, Nadeau & Dumond.

gations et hypothèques que le dit défendeur a consenties durant la dite communauté et la continuation d'icelle, ont valablement affecté l'immeuble susdit, que le dit défendeur pouvait hypothéquer tant comme chef de la dite communauté, que comme étant un bien propre à lui, et qu'il n'avait ameubli que pour les fins de la dite communauté;

Considérant que pour toutes ces raisons la contestation de la dite douzième collocation faite par les dite Paul Parent *ès-qualité* et autres respectivement est mal fondée, a renvoyée la dite contestation, sans frais, et a confirmé et confirme et homologue le susdit rapport de distribution préparé par le Protonotaire de cette Cour en date du vingt-sept Mai mil huit cent soixante et sept, pour être suivi et exécuté suivant sa forme et teneur.

Contestation renvoyée

Dorion, Dorion et Geoffrion, avocats de Parent ès-qualité, contestant.

Bondyck Fauteux, avocats de l'opposant Bourbonnais.

(P.R.L.)

COUR SUPERIEURE, 1869.

MONTREAL, 27 FEVRIER 1869.

Coram TORRANCE, J.

No. 1880.

Bénard et al vs *Bourdon.*

Jugé:—1o Que plusieurs créanciers sur une demande *ex delicto* ne peuvent poursuivre ensemble pour le recouvrement de leurs dommages respectif. (1)

2o Que deux propriétaires réels dans une municipalité peuvent poursuivre par l'actions populaire pour faire démolir sur une rue un quai construit sans autorité. (2)

Les Demandeurs poursuivaient pour l'enlèvement de certains obstructions et pour dommages et intérêts.

Cette demande fut contestée

La Cour accorda les conclusions des Demandeurs à l'exception des dommages réclamés.

TORRANCE, J.—This was an action by a number of proprietors in the neighbourhood of a wharf erected by the defendant on a river in the village of Boucherville to compel the proprietors to remove the obstructions and to pay the damages which they affirmed they had suffered in consequence of it. The grievance was that the wharf encroached several feet on a public street in the village. The Court maintains the action with costs, ordering the defendants to remove the said obstructions, within three months. The action fails, however, as far as damages are concerned. The Court holds that the plaintiffs might very well sue jointly to compel the defendant to do a certain act in the accomplishment of which they had an interest like the present, but the obligation of damages was a personal obligation, and they could not sue jointly for their recovery. One man's damage would amount to more than another man's, and

(1) 3 L. C. Jurist, p. 52.

(2) *Vide Johnson* v. *Archambault*, Q. B. Montreal in Appeal, 8 L. C. Jur. 317.

Benard vs. Bourdon.

consequently they must each sue separately for the amount of such damages due to each. In 1849 there was a similar case, No. 2631, *Vallée* v. *Mallet*, instituted Q. B. Montreal, A.D. 1847, decided 16th April, 1849, in the same sense.

Le Jugement de la Cour est motivé comme suit: La Cour, après avoir entendu les parties par leurs avocats respectifs tant sur la défense en droit que sur le mérite de cette cause, examiné la procédure, pièces produites et preuve, et avoir sur le tout mûrement délibéré; Considérant que les dispositions du chapitre 61 des Statues du Canada, passés dans la session tenue dans la 23e année du Règne de Sa Majesté La Reine Victoria, n'ont pas changé les droits alors existants des propriétaires dans les limites de la Corporation du Village de la paroisse Boucherville; Considérant que les résolutions de la dite Corporation, donnant au défendeur délai pour l'enlèvement des obstructions, dont se plaignent les demandeurs, dans et par leur déclaration en cette cause ne peuvent avoir aucun effet, dans la présente cause, a renvoyé et renvoie les défenses plaidées par le dit défendeur, et considérant que les demandeurs, comme propriétaires en possession des immeubles situés sur les rues St Louis et Ste. Famille, dans le village de Boucherville, ont intérêt à se plaindre de ces obstructions et à demander qu'elles soient ôtés de la dite rue St. Louis et nommément sur une largeur de quatre pieds sur trente-trois pieds de longueur, à partir de la dite rue Ste. Famille jusqu'au fleuve; et Considérant que les demandeurs ont prouvé les allégués essentiels de leur déclaration, condamne le défendeur sous trois mois de la date du présent jugement, à défaire et enlever cette partie du quai qui se trouve sur le terrain de la dite rue St. Louis, savoir: quatre pieds de large sur trente-trois de longueur, et de rendre et remettre la dite rue libre de toute obstruction à raison du dit quai, et dans le même et semblable état qu'elle était avant la construction du quai du dit défendeur, et qu'à défaut par le défendeur de se conformer au premier jugement dans le dit délai, il est permis aux dits demandeurs de défaire ou faire défaire eux-mêmes la dite partie du dit quai du défendeur, aux frais de ce dernier, le tout avec dépens à être taxés de la première classe d'actions dans cette Cour. Et la Cour a débouté et déboute l'action des demandeurs pour les dommages et intérêts.

Action renvoyée quant aux dommages.

Dorion, Dorion & Geoffrion, avocats des demandeurs.
Leblanc & Cassidy, avocats du défendeur.
(P.R.L.)

CIRCUIT COURT, 1869.

MONTREAL, SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 1608.

The Mayor, Aldermen and Citizens of the City of Montreal vs. *Ranson.*

HELD:—That the service of a notice of motion to be made by the plaintiff is a valid interruption of *péremption d'instance* under C. C. P. 468.

TORRANCE, J. This cause is before the Court on the motion of the plaintiffs that delay be granted them until the 1st October next, to fyle an answer to the

The Mayor, Aldermen and Citizens of the City of Montreal vs. Ranson.

plea of the defendant. Notice of the motion was given the defendant on the 24th June last. On the 4th September, the defendant procured from the clerk of the Court a certificate that the plaintiffs had taken no proceedings in the cause since the 11th October, 1865. On the 9th September, the defendant gave notice of a motion, and on the 11th September he moved for *peremption d'instance* in consequence of no proceeding had by plaintiffs for three years. The question for the Court to decide is simply whether the notice given by the plaintiffs on the 24th June was an interruption of the peremption. C. C. P. 458. The Court is of opinion that the notice is an interruption, and accordingly rejects defendant's motion and grants that of plaintiffs. Motion rejected.

Stuart & Roy, for plaintiffs.

Kelly & Dorion, for defendant.

(J. K.)

COUR DU BANC DE LA REINE, 1866.

En Appel.

QUEBEC, 19 DECEMBRE, 1866.

Coram Duv[illegible] J., Aylwin, J., Drummond, J., Mondelet, J.

No. 80.

CYRILLE GOUDREAULT,

(*Demandeur en Cour Inférieure,*)

Appellant;

ET

PASCHAL POISSON ET OLIVIER GOUDREAULT,

(*Défendeur en Cour Inférieure,*)

Intimés.

Jugé:—Que l'aveu sous serment est divisible, lorsqu'une partie de la réponse est combattue par des indices de fraude ou de simulation, ou ne concorde pas avec les plaidoiries de la partie interrogée.

Le 25 Octobre 1862, l'appelant (demandeur) avait obtenu contre Olivier Goudreault, l'un des intimés et défendeurs en Cour Inférieure, jugement pour $126, avec intérêt et dépens, à la Cour de Circuit, aux Trois-Rivières; pour se payer de ce jugement, il fit saisir une terre appartenant au dit Olivier Goudreault, laquelle fut vendue par le shérif le deux Mars, 1864. L'intimé Poisson en devint l'adjudicataire.

L'appelant demande, par son action portée à la Cour de Circuit des Trois Rivières, la nullité de ce décret, alléguant:

"Que les dits défendeurs, lors de la dite vente au décret, savoir, les dits P. "Poisson & Olivier Goudreault, profitant de l'absence du demandeur et de ses "agents qui auraient pu veiller à ses intérêts, s'entendirent ensemble pour "écarter les enchérisseurs dans le but de racheter la dite propriété au décret à "vil prix.

"Qu'en conséquence la dite propriété fut adjugée au dit Paschal Poisson, pour "une somme de £19, laquelle n'était nullement en rapport avec la vraie valeur "de la dite propriété et n'a pas suffi à payer au demandeur ses frais subsé-"quents.

Goudreault vs. Poisson.

"Que le dit Paschal Poisson a pris du shérif de ce district son titre de la "dite acquisition au décret, savoir, le cinquième jours de mars, mil huit cent "soixante-et-quatre.

"Et le dit demandeur allègue que le dit titre a été ainsi obtenu par le dit "Paschal Poisson pour le profit et avantage du dit Olivier Goudreault, qui seul "a payé et déboursé ce qu'il en a coûté pour obtenir le dit titre, et que la dite "transaction était feinte, frauduleuse et simulée, le dit Paschal Poisson n'étant "que le prête-nom du dit Goudreault, qui est resté en possession du dit "immeuble.

"Que le dit Olivier Goudreault n'a aucun bien, meuble ni immeuble apparent "que le demandeur puisse saisir en exécution de son dit jugement, et qu'il a "intérêt de faire déclarer le dit titre nul et simulé, et que le dit défendeur a "toujours été et est encore le seul propriétaire du dit immeuble.

"Pourquoi le demandeur conclut à ce que le dit titre du Shérif en faveur du "dit Paschal Poisson soit, en autant que le demandeur y a intérêt, déclaré simulé "et nul et partant annullé et mis à néant, et qu'en conséquence, le dit Olivier "Goudreault soit déclaré le seul propriétaire légitime du dit immeuble; le tout "avec dépens distraits en faveur du soussigné."

Les défendeurs (Intimés) rencontrèrent d'abord cette action par une exception déclinatoire. Cette exception ayant été déboutée, ils produisirent la défense suivante:

"Les défendeurs pour défense à l'action du demandeur disent:

"Qu'il est vrai que le demandeur a obtenu jugement contre le défendeur "Olivier Goudreault, et qu'il a fait vendre en exécution du celui la terre désignée "en la déclaration en cette cause.

"Mais les dits défendeur plaident spécialement:

"Qu'ils n'ont jamais profité de l'absence du demandeur ou de ses agents, qui "étaient informés suivant la loi du jour de la vente de la terre du dit Olivier "Goudreault, désignée en la déclaration en cette cause, pour en faire l'acquisi-"tion.

"Qu'il est vrai que le dit Paschal Poisson, l'un des défendeurs, a acquis du "shérif la dite terre, mais qu'il l'a acquise de bonne foi, pour son propre profit "et avantage: et qu'il ne l'a pas acquise des deniers du dit Olivier Goudreault, "l'autre défendeur.

"Que le dit défendeur Olivier Goudreault n'a pas pu, le jour de la vente, "s'entendre avec Paschal Poisson, l'autre défendeur pour écarter les enchéris-"seurs, étant alors absent de cette province.

"Les dits défendeurs nient spécialement tous les autre allégués contenus en "la déclaration du demandeur qui ne sont pas ci-dessus spécialement admis.

"Pourquoi, les dits défendeur concluent au débouté de l'action du demandeur "avec dépens dont distraction au soussigné."

Cette défense était accompagnée d'un défense en fait.

Dans leurs articulations de faits les Intimés répétent les allégations de leur défense.

La cause fut inscrite pour enquête et audition au mérite en même temps.

L'appelant examina Paschal Poisson sur faits et articles et ce dernier répondit *vivâ voce* en présence du juge.

1e Interrogatoire.—" N'est-il pas vrai que vous êtes un des défendeurs en " cette cause ?—Réponse : Oui.

2e Interrogatoire.—" N'est- pas vrai que dans le décret et acquisition du " shérif mentionnés en cette cause, le défendeur Pascal Poission n'était que le " prête-nom du défendeur Goudreault ?—Réponse : Non.

3e Interrogatoire.—" N'est-il pas vrai que le prix fut payé par le défendeur " Olivier Goudreault pour lui et dans son intérêt et à même ses moyens et ceux " de sa famille ?—Réponse : J'ai eu l'argent pour faire l'acquisition en question " du shérif de ce district, de l'épouse du dit Olivier Goudreault, l'autre défen- " deur, pour acheter la terre en question et mentionnée en la déclaration au nom " du défendeur ; j'ai voulu la mettre lors du décret au nom du fils du défendeur ; " mais on m'a dit que je n'avais pas le droit, vu que la terre m'a été adjugée. " Je n'ai fait encore aucun arrangement par rapport à cette terre et j'en suis " encore en possession (1) et elle est encore à mon nom. Il n'y a rien de réglé " encore entre le fils du défendeur et moi par rapport à la dite terre.

4e Interrogatoire.—" N'est-il pas vrai que l'argent fut payé avec le produit " d'une traite sur Onésime Brunelle, Ecuier, Avocat, des Trois-Rivières, et que " la dite traite fut remise au défendeur Poisson par la femme du défendeur " Goudreault ?—Réponse : Qui—l'argent fut payé avec le produit d'une traite " sur Onésime Brunelle, Ecuier, et la dite traite m'a été remise par la femme du " dit Olivier Goudreault soit à moi ou au dit Onésime Brunelle, Ecuier.

5e Interrogatoire.—N'est-il pas vrai que depuis le décret, la famille du " défendeur Goudreault a toujours été en possession de la dite propriété vendue " comme susdit par le shérif?—Réponse : La famille du dit Olivier Goudreault " demeure maintenant sur la dite terre, mais elle n'y était pas au temps du dit " décret.

6e Interrogatoire.—" N'est-il pas vrai que vous avez pris avantage de l'absence " du demandeur et de ses agens lors de la vente pour dissuader ou décourager " des enchérisseurs de bonne foi et les empêcher d'enchérir ?—Réponse : Non.

7e Interrogatoire.—" N'est-il pas vrai que la dite propriété a été vendue à " vil prix et que le montant ne fut pas suffisant pour payer les frais du deman- " deur dans la cause ?—Réponse : Je crois que la dite terre valait un peu plus " que la somme pour laquelle elle m'a été adjugée, mais pas beaucoup plus.

Le demandeur ne fit pas d'autre preuve, et les défendeurs présentèrent alors la motion suivante :

" Motion des défendeurs que l'Enquête en cette cause soit continué au pre- " mier jour du terme des Enquêtes de septembre prochain, afin de permettre aux " défendeurs de faire entendre Marcelin Goudreault, maintenant absent de cette " Province, attendu qu'il est impossible de se procurer ce témoin avant ce temps, " et ce pour constater que la traite qui a été payée par Onésime Brunelle, était " des argents de Marcelin Goudreault, fils du défendeur Goudreault."

Cette motion fut rejetée par la Cour qui décida que dans tous les cas elle ne pouvait être reçue, n'étant accompagnée d'aucun affidavit. Sur ce, les défen-

(1) La date du décret est le 5 Mars, 1864, la date des réponses le 28 Juin, 1865, ce qui fait à peu près 15 mois d'intervalle.

Goudreault et Poisson.

deurs prouvèrent par deux témoins, que lors du décret Olivier Goudreault était absent de la province, et déclarèrent leur enquête close, et la Cour procéda à rendre le jugement suivant:

" Le trentième jour de juin, 1865. (Jour d'enquête et d'audition.)
(Présent l'Honorable juge Polette, J. C. S.)

" La Cour, après avoir entendu les parties par leurs avocats au mérite, examiné la procédure, la preuve et les pièces produites, et sur le tout délibéré, " déclare le titre ou acte de vente consenti par le shérif de ce district sous son " seing et le sceau de son office de shérif, au dit Paschal Poisson, l'un des défendeurs, à Trois-Rivières, le cinq mars, de l'immeuble ci-après désigné, saisi et " vendu par décret à la poursuite du présent demandeur contre le dit Olivier " Goudreault, l'autre défendeur en cette cause, pour payer le montant d'un " jugement obtenu contre ce dernier en cette Cour, le vingt-cinq octobre 1862, " simulé et nul, attendu que les derniers pour payer le prix du dit immeuble ont " été fournis par le dit Olivier Goudreault, sur qui cet immeuble a été vendu au " dit Paschal Poisson qui ne l'acquérait pas pour lui-même; annule et met à " néant le dit titre ou acte de vente, déclare le dit Olivier Goudreault seul et " légitime propriétaire du dit immeuble dont la désignation est comme suit, &c., " et condamne les défendeurs solidairement aux dépens que le Cour accorde, &c."

Les intimés ayant soumis ce jugement à la Cour de Révision ce dernier tribunal rendit le jugement suivant:

Présents les Honorables Juges Badgley, Stuart et Taschereau.

" La Cour, considérant que le demandeur n'a pas prouvé les allégations de sa " déclaration; considérant qu'il n'y a pas eu de complot entre les défendeurs pour " empêcher les enchères sur le lot de terre vendu par décret tel que mentionné " en la dite déclaration; considérant que le dit défendeur Paschal Poisson n'a " pas acheté le dit lot de terre pour le défendeur Olivier Goudreault, et que le " dit lot a été vendu à sa valeur lors du dit décret; considérant que pour ces raisons, il y a eu mal jugé dans le jugement rendu en cette cause le trente juin, " 1865 par la Cour de Circuit, pour le District des Trois-Rivières, siégeant aux " Trois-Rivières, renverse le dit jugement, et procédant à rendre le jugement que " la dite Cour aurait dû rendre, déboute la dite action du demandeur avec " dépens de la dite action, et en outre avec dépens de cette Cour de Révision; " et sur motion à cet effet, distraction de dépens en Révision est accordée, etc."*

(*) L'Hon. Juge Taschereau, en rendant le jugement de la Cour de Révision, dit que le demandeur avait complètement failli dans la preuve des allégations de sa déclaration, et que soit que l'aveu du défendeur fut divisible ou indivisible, le demandeur ne s'en trouverait pas plus avantageusement situé; il était d'opinion, ainsi que ses collègues, qu'il n'y avait pas eu de contradiction chez le défendeur; en disant d'abord avoir acheté pour lui-même, tel que le constate le titre du Shérif, il pouvait, sans se contredire, avouer que son intention était d'acheter pour le fils du défendeur; les trois juges étaient d'opinion que si l'aveu du défendeur pouvait se diviser, le résultat serait que le fils du défendeur, et non le défendeur lui-même, serait devenu acquéreur de l'immeuble; et que s'il y avait eu simulation, elle n'avait eu lieu que pour favoriser le fils du défendeur; ils n'ont attaché aucune importance au fait que le prix fut payé par le produit d'une traite remise par la femme du défendeur Goudreault, parce que rien ne constate que la traite provint du défendeur Goudreault, et au contraire le dossier semble indique que la traite venait du fils, et que sa mère n'avait agi que comme son agent.

Goudreault et Poisson.

Bernard, pour l'appelant.—Sur le présent appel il faut d'abord remarquer que le jugement que la Cour de Révision a renversé et revisé ne disait pas qu'il y avait eu concours frauduleux des défendeurs pour écarter les enchérisseurs ou que la propriété avait été achetée à vil prix. De fait l'appelant qui avait allégué ces deux moyens dans son action pour le cas où il ne réussirait pas à établir la simulation, les avait abandonnés du moment qu'il avait jugé la preuve de la simulation complète; et en effet l'on doit voir que ces deux moyens étaient superflus, si la simulation était établie.

De sorte que quelque soit le bien ou le mal jugé de la Cour Inférieure sur la question de simulation, la Cour de Révision n'a pas eu raison, lorsqu'elle a basé sur l'absence de preuve de conspiration pour écarter les enchérisseurs et sur l'absence de preuve de vilité de prix un de ses considérants pour renverser le jugement.

Reste donc uniquement la question de simulation.

Les Honorables juges en Révision n'ont pas dit de quelle manière ils arrivaient à la conclusion que Paschal Poisson n'avait pas acheté le lot de terre en question pour Olivier Goudreault; et conséquemment, l'Appelant ne peut connaître positivement le motif du jugement ou le raisonnement au moyen duquel le résultat a été obtenu. Mais ce qu'on peut raisonnablement présumer néanmoins, c'est que les Honorables Juges ont décidé, non que l'aveu était essentiellement et toujours indivisible, car aujourd'hui il n'entrerait probablement dans l'idée de personne d'aller si loin, mais que dans le cas actuel, il n'y avait pas lieu à diviser l'aveu. Il est également possible qu'ils aient été d'opinion que, même en divisant l'aveu et en donnant à l'appelant le bénéfice de l'admission de Poisson qu'il n'avait pas acheté pour lui-même, la preuve de l'appelant était encore incomplète; soit parce que les Honorables Juges étaient d'avis qu'il aurait dû prouver que Poisson n'avait pas acheté pour le fils, soit parce qu'ils pensaient du moins qu'il devait y avoir une preuve directe que c'était pour Olivier Goudreault que Poisson avait acheté et qu'ils étaient d'opinion que cette preuve n'existait pas au dossier.

L'appelant sur le présent appel s'attachera à démontrer que l'aveu dans le cas actuel était divisible;

En second lieu que du moment que Poisson admettait qu'il n'avait pas acheté pour lui-même, l'appelant n'avait pas d'autre preuve à faire;

En troisième lieu que si l'appelant était obligé de faire une preuve additionnelle, cette preuve additionnelle résultait des faits de la cause et de présomptions reconnues par la loi.

Quant au 1er point, il n'y aurait qu'une raison à donner pour soutenir que l'aveu dans le cas actuel était indivisible—et ce serait de dire que l'admission de Poisson n'avait rapport qu'à un seul fait, à savoir, qu'il avait acheté non pour lui mais pour le fils, et que dans ce cas l'aveu n'est pas divisible. On trouve en effet une opinion de ce genre formulée dans certains auteurs d'une manière plus ou moins précise. (*Voy*, Merlin Quest. de Droit, V° *Confession*—10 Toullier, No. 336—Marcadé, Tit: des Obligations, Art. 1356.)

L'Appelant pourrait, non sans raison peut-être, soutenir qu'il n'y a aucune analogie entre les cas cités par les auteurs en question à propos d'actes continus

Goudreault et Poisson.

et connexes et le cas actuel ; mais il préfère prouver que la règle que l'aveu est indivisible s'il a rapport à un acte continu, n'est pas une règle absolue, ou mieux encore n'est pas une règle du tout, et que l'indivisibilité de l'aveu repose sur un principe tout-à-fait différent, à savoir, sur l'entière bonne foi et la vraisemblance des déclarations de l'avouant, c'est-à-dire que l'aveu n'est indivisible que lorsqu'on considère qu'on n'a pas de raison de le diviser, lorsqu'on est sans raison et sans prétexte de croire qu'une partie de la déclaration est moins vraie que l'autre.

D'abord, si l'on réfère aux anciens auteurs qui font la distinction des actes continus et des actes non-continus, l'on trouvera qu'ils s'attachent à prouver non pas que l'aveu est indivisible toutes les fois que l'acte est continu, mais spécialement que l'aveu est divisible si l'acte est non-continu, comme ils s'attachent à établir que l'aveu est divisible lorsqu'il est démenti par son invraisemblance ou par une présomption de droit, ou par des indices de fraude ou de simulation, ou par des commencements de preuve. Les règles données par Merlin comme l'expression de tous les auteurs sous le Droit Romain et le Droit Français sur ce point, sont dans les termes suivants :

L'aveu pouvait être divisé :

"1o. Lorsqu'il portait sur des faits, même connexes, qui ne se référaient pas "à une seule et même époque, et ne formaient pas, par conséquent, ce que les "jurisconsultes appellent *un acte continu*. Tel était l'avis de Voët, de Zoesius, "etc. A plus forte raison, si les faits étaient séparés et non connexes, comme "dans la loi ci-dessus citée ; (*)

"2o. Lorsque l'article contesté de l'aveu se trouvait combattu par sa propre "invraisemblance, ou par une présomption de droit. C'était encore l'avis de "Voët, celui de Henrys, tom. III, pag. 180, et tom. IV, 6o quest. posth, et des "nouveaux éditeurs de Dénisart ;

"3o. Lorsque la partie qui avait fait l'aveu avait contre elle des indices de "dol, de fraude ou de simulation. Des arrêts des 1er août 1630, 3 août 1678, "1er septembre 1730, et 7 septembre 1778, l'avaient ainsi jugé. *Voy.* Bardet, "le nouveau Dénisart et Merlin, *loco citato*, pag. 584 ;

"4o. Lorsqu'il existait, contre cette même partie, des commencements de "preuve. C'était l'avis de Henrys."

Nulle part trouvera-t-on dans le Droit Romain ou dans les anciens auteurs français que l'aveu qui réfère à un fait continu est indivisible quoique suspect ou invraisemblable. Rien en effet de plus facile à concevoir qu'un aveu référant à un seul fait, dont les circonstances de la cause exigent impérieusement la divisibilité si l'on ne veut pas tomber dans l'injustice, l'absurdité même ; et comme on le verra dans l'instant, dans la pratique on en est venu à diviser de pareils aveux sans la moindre hésitation, chaque fois qu'on a eu des raisons de la faire.

Mais citons d'abord ce que dit le Nouveau Dénisart sur la question : (Voo *confession* No. 10.) :

(*) La loi en question est la loi 28, §. 2. ff. *depositi*, 16. 3. Il s'agit dans cette loi d'une lettre dans laquelle Titius reconnait avoir reçu en dépôt, des frères Sempronius, dix livres d'or, plus ou moins, deux plats et un sac cacheté ; sur quoi, ajoute-t-il, vous me devez dix livres que vous avez déposées chez Titius, dix livres déposés chez Trophime, et dix livres du compte de votre père, *ex ratione patris tui.*

Goudreault et Poisson.

" Le principe de l'indivisibilité de la confession ne souffre aucune difficulté " lorsque les deux parties de la confession sont également vraisemblables, ou du " moins également possibles. Mais si l'une des deux était absurde ou prouvée " fausse ou infectée de quelque mensonge qui donnât lieu d'en suspecter la " vérité, alors la confession se diviserait et le juge suivant les circonstances pour- " rait ou déférer le serment au demandeur ou même lui adjuger ses conclusions " sur le champ."

Il n'est pas question ici, comme l'on voit, d'aucune exception en faveur des actes continus ou connexes, et quelques-uns des arrêt qu'ils cite à l'appui de son opinion sinon tous, réfèrent spécialement à des cas où l'acte était continu.

Depuis la révolution la question parait s'être présentée plusieurs fois en France D'abord les Cours paraissent y avoir vu des difficultés. Il y a un arrêt de la Cour de Cassation du 30 avril 1807, rapporté par Sirey (VII. 2,779) qui dit que l'aveu est indivisible si en même temps que la fausseté de la cause portée dans l'obligation est admise par l'avouant, il soutient qu'il y a une cause légitime.

Mais cette décision fut vivement critiquée. Il faut convenir " disent Carré et Chauveau, Q. 1262 " qu'en plusieurs circonstances les juges seraient autori- " sés à diviser des réponses données sur un même fait, lorsque ces réponses éta- " bliraient elles-mêmes des faits différent. Par exemples," (*ce cas est en principe* " *parfaitement analogue au cas actuel*) " il s'agit du fait de l'existence d'une obli- " gation d'abord contestée: elle est avouée dans l'interrogatoire. Mais l'inter- " rogé maintient l'avoir acquittée: cette allégation n'est plus qu'une exception proposée par le débiteur—ne devrait-on pas diviser cette allégation? Ne pour- " rait-on pas soumettre celui qui l'a fait à en fournir la preuve?" et ils citent Gabriel, " Des Preuves," " Nous croyons aussi," ajoutent-ils, " qu'on pourrait " distinguer aussi dans le cas de plusieurs réponses sur le même fait, si parmi " elles il en est qui soient justificatives, mais évidemment fausses, et rejeter celles- " ci, en sorte que l'indisibilité des réponses ne soit maintenue qu'en autant " qu'elles seraient tout vraisemblables," et ils citent Pothier à l'appui. " Celui " qui fait interroger," dit ce dernier, " ne le fait pas dans l'intention de faire " dépendre la décision de la question de ce que la partie répondra, mais pour " tirer à son profit quelques preuves ou présomption des aveux ou des contradic- " tions *ou confitendo vel mentiendo se oneret.*" Ils citent également Pigeau qui remarque " qu'il y a une grande différence entre le cas où une partie n'ayant " aucune preuve en mains ou dans l'interrogatoire, de la fausseté de la déclara- " tion, cas où l'aveu ne peut être divisée, et celui où elles a des preuves, ou semi " preuves. Dans ce dernier cas, ou même lorsqu'il n'existe que des raisons d'in- " vraisemblance et des présomptions, l'aveu peut être divisé." Voir également Serpillon à l'art. 1 du titre 10, No. 13, et Merlin, Quest. de Dr., Vo. *Supp., de titres*—Favard, Tom. 3. p. 117, et 118 No. 12.

Cédant à ces arguments dont ils semble impossible de méconnaître la force, la Cour de Cassation a changé sa première doctrine, (voir l'arrêt du 8 Avril 1835 rapportée et commentée par Bédarride Tom. 1er. 247.) Il résulte de cet arrêt, dit Bedarride, que lorsque le créancier reconnait la simulation de la cause exprimée au titre, il est obligée non pas seulement d'indiquer mais encore de prouver qu'il en existe une autre valables, que le débiteur peut prouver le contraire, que

Gaudreault et Poisson.

les tribunaux peuvent se décider même par des présomptions, et annuler l'acte même en l'absence de tout commencement de preuve par écrit.

On peut voir également un arrut de la Cour de Cassation d'une date plus ancienne mentionné dans Chardon Tom. 1 p. 754. Lemire réclamait de Letellier 300 livres pour le prix d'un cheval qu'il prétendait lui avoir vendu. Letellier avouait avoir eu le cheval mais à titre de prêt, et non de vente. Sur le motif *qu'il résultait des plaidoieries des parties une apparence de libération*, Letellier fut condamné en par Lemire affirmant qu'il avait réclement vendu le cheval.

"Ainsi" dit Chardon, "quelles qu'aient été les déclarations de Letellier, il "attestait avoir emprunté et non acheté; il ne résultait de l'instruction qu'une "apparence de livraison: les juges n'avaient pas la certitude que Lemire dit la "vérité, puiqu'ils ont exigé de lui le serment supplétif, mais probablement les "apparance de bonne foi étaient de son côté; les réponses de Letellier étaient "évasives et suspectes, et sa déclaration a été rejetée."

On pourrait citer d'autres arrêts de la Cour de Cassation également favorables à l'appellant, mais on croit préférables de citer quelques décisions de nos propres tribunaux dans le même sens.

Dans la cause de Seymour et al. vs. Wright & al. 3 L. C. Reg. p. 454, Lois Wright était poursuivie pour avoir endossé au fait endosser un billet. La signature était *L. Wright per G. F. Wright*. Le plaidoyer était, qu'elle, la défenderesse, n'avait pas endossé le billet et ne l'avait pas fait endosser.

Sur *Faits et Articles* elle fut obligée d'admettre que c'était elle qui avait écrit la signature *L. Wright per G. F. Wright*, mais elle ajouta que c'était par erreur qu'elle avait signé ainsi, son intention étant de signer comme agente seulement de G. F. Wright dont elle était, disait-elle, la fondée de procuration. La majorité de la Cour (Smith & Vanfelson,) néanmoins la condamna. "The general rule is" paraît avoir remarqué Son Honneur M. le juge Smith, "that where "a party holds himself out to the world as an endorser *unles she can show mani-* "*fest error*, and that somebody else is the real debtor, he is liable. This is a "case in which the plaintiffs are entitled to have the answers to interrogatories "divided, and therefore, that part of the answer in which the defendants seeks "to explain the character in which she signed the Note, must be rejected, the "facts not having been pleaded."

Il est vrai que le rapporteur marque que Son Honneur M. le juge Mondelet dans cette cause différait sur le principe que l'aveu était indivisible; mais les opinions du savant juge sont trop bien connues pour qu'il soit possible de croire que ce fut là la raison de son dissentiment.

Dans la cause de Ford et Butler (6 L. C. Jur. p. 132,) l'action était pour $400 argent prêté. Le défendeur niait devoir et prétendait qu'au contraire c'était le demandeur qui lui devait. Sur faits et articles le défendeur admit qu'il avait reçu $400 de l'auteur du demandeur, mais que cette somme lui était due à lui, le défendeur, pour logement, etc.. Sur ce, la preuve testimoniale fut admise; mais il ne paraît pas que cette preuve ait eu aucune influence sur la cause. Le principal considérant du jugement est comme suit:

"Considering that the said defendant hath admitted *sur faits et articles* that "he did receive the said sum of $400 from the said late Dame McMullins and

" hath failed to shew the existence of any account against the said Dame McMul- Cassidy et Poisson.
" lins, or any indebtedness on the part of the said Dame McMullins by reason of
" which it can be declared or presumed that the said sum of $400 was received
" by the said defendant otherwise than as a loan, the Court doth condemn, &c."

Dans la cause de St. Germain et Gladu (7 L. C. Jur. p. 99) le demandeur réclamait du défendeur un lot de terre qu'il disait avoir acheté à une vente pour taxes dues à une municipalité. Le défendeur plaida que la convention entre son auteur et le demandeur était que le lot serait acheté dans l'intérêt des deux et qu'ils paieraient chacun la moitié du prix, que son auteur avait payé la moitié du prix et avait droit à la moitié du lot et que le défendeur, son représentant, avait droit d'obtenir un titre. Le demandeur à ce plaidoyer ne fila aucune réponse. " Mais sur faits et articles et lorsque le défendeur avait toute raison " de ne pas s'y attendre, voilà que le demandeur déclare qu'en effet il a promis " un titre mais qu'il devait avoir le premier choix ; la Cour peut-elle admettre " de semblables réponse ou plutôt cette réponse à l'exception du défendeur, si " toutefois c'en est une ? la pratique n'est-elle pas de les éliminer ? " Telles furent les raisons exprimées en Cour d'Appel par son Son Honneur M. le juge Duval en rendant jugement pour le défendeur.

Une cause plus récente est celle de Thayer et Wilscam, 9 L. C. Jur. p. 1.

Le demandeur poursuivait sur un compte de médecin. Le défendeur avait fylé un plaidoyer de prescription accompagné d'une offre de faire serment qu'il avait payé, et d'une défense en fait. Sur serment décisoire on lui fit deux questions. La première : " Have you paid the amount sought to be recovered by " this action, and if so, in what manner ?" Il répond : " by contra-account." La deuxième : " Being asked the amount of that contra-account," Il répond " that he has not yet made it up, but always supposed that the plaintiff was in his debt."

Sir Louis H. Lafontaine, J. C., remarqua en rendant jugement, " Par la pre- " mière de ces réponses, il admet le compte du demandeur. Cela suffit pour éta- " blir la réclamation de ce dernier. Quant au compte qu'il prétend avoir contre " le demandeur, il ne le produit pas, il ne l'a pas même encore fait. Si un tel " compte existe, que ne l'a-t-il pas plaidé en compensation ? Que ne l'a-t-il pas " produit ? Il aurait fourni à son adversaire l'occasion de débattre ce compte, " et d'établir que le chiffre en était bien au-dessous de celui du compte qui fait " l'objet de l'action. On ne peut pas ainsi déclarer, sur la simple supposition, " que le défendeur exprime, que le demandeur lui a dû, et que même il est en- " core endetté envers lui."

" He sets up a contra-account," remarqua Son Honneur M. le Juge Duval, " and gave no particulars of that account. If he had a set off, it should have " been pleaded in order that the plaintiff could answer it."

Et Son Honneur M. le Juge Mondelet s'exprima d'une manière plus forte encore :

" Now the defendant," dit-il, " never pleaded a set-off, he, therefore, cannot " oppose any.

" If he has not pleaded payment, as he maintains, then he cannot upon the " *serment décisoire* be allowed the benefit of an answer of payment as if he had " pleaded it.

Goudreault et Poisson.

" But it is preposterous for the defendant to pretend that by his answer he " has made out the payment. No such thing: he goes no further than to say " he always supposed plaintiff was in his debt. That will not do. He has fully " admitted that he owed, but has failed to prove he has paid. I am clearly of " opinion that the judgment of the Court below ought to be affirmed."

Et pourtant c'était un cas où il y avait de fortes raisons à faire valoir en faveur de celui qui invoquait l'indivisibilité de l'aveu, comme on peut s'en convaincre en référant aux remarques de Son Honneur M. le Juge Meredith, qui différait d'avec la majorité de la Cour. Mais les motifs du dissentiment de l'Honorable Juge, bien loin d'être favorables aux intimés, leur sont fatals: " Where " there are good grounds for so doing," remarque l'Honorable Juge, " a Court " or Jury may believe one part of a statement, and reject the remainder; but I " cannot see any sufficient grounds for adopting that course in the present in- " stance, and I feel the less disposed to do so in consequence of, as I conceive, " the illegality of the questions put to the defendant."

Dans ces quatre causes, on le voit, nos tribunaux se sont uniquement basés sur les raisons qui existaient de soupçonner la bonne foi de l'avouant: il n'a pas été question d'actes continus ou connexes. Ils ont tout simplement décidé que s'il existait quelque circonstance de nature à détruire l'effet de l'obligation admise par l'avouant, telle circonstance aurait dû faire la matière d'un plaidoyer, et conséquemment, être prouvée par l'avouant.

Ces causes, l'appelant les a prises en parcourant quelques volumes de Rapports. Un examen plus attentif lui en aurait probablement fait découvrir un grand nombre d'autres du même genre. Dans tous les cas, il est présumable, d'après la manière dont les Honorables Juges se sont exprimés dans ces quatre causes, qu'ils avaient toujours décidé la question dans le même sens, qu'ils n'avaient jamais pensé qu'il pouvait y avoir de difficulté, et qu'ils considéraient la jurisprudence bien établie sur ce point. Et du reste, qui peut douter que ce ne soit là en réalité le mode le plus raisonnable, le plus juste, et surtout qui peut douter que ce ne soit là un mode indispensable si l'on veut assurer une procédure simple et efficace, empêcher des contestations commencées avec mauvaise foi et conduites de même?

Maintenant, si l'on fait l'application des principes qui viennent d'être développés au cas actuel, que trouve-t-on?

1o. Que la déclaration de Poisson qu'il avait acheté pour le fils, avait pour unique but de détruire l'effet de l'aveu qu'on venait de lui arracher, à savoir que c'était faussement qu'il avait allégué dans sa défense et dans son articulation de faits, qu'il avait acheté pour lui-même.

2o. Que l'objet d'Olivier Goudreault en plaidant conjointement avec Poisson, d'abord par une exception déclinatoire et ensuite au mérite, était de conserver la propriété pour lui-même.

3o. Que c'est la femme d'Olivier Goudreault qui a remis l'argent à Poisson.

4o. Que la famille d'Olivier Goudreault est restée en possession.

5o. Que le fils, dont l'existence n'est pas même prouvée, dont au reste Poisson n'a aucune misson légale de protéger les intérêts, n'a encore fait aucun arrangement avec lui quoique 16 mois se soient écoulés.

Goudreault et Poisson.

L'appelant soutient humblement que l'espèce est infiniment plus forte qu'aucune de celles ci-dessus citées; qu'ici, la mauvaise foi de Paschal Poisson et les contradictions entre son plaidoyer et ses réponses sont évidentes, que ses déclarations sont invraisemblables, qu'elles sont combattues par des présomptions légale, et que la preuve de leur fausseté résulte des autres parties de l'interrogatoire lui-même, et qu'en conséquence, il ne saurait y avoir de doute que l'aveu doit être divisé, que l'admission de Poisson qu'il n'a pas acheté pour lui-même doit seule rester et le reste être rejeté.

Maintenant quant au second point de la cause.

Même si les intimés eussent été en état de prouver que Poisson avait acheté pour le fils, la Cour n'aurait pu leur permettre de faire cette preuve, car c'eût été prouver le contraire des allégations de la défense, car il est évident qu'en affirmant qu'il avait acheté pour lui-même, Poisson affirmait en même temps qu'il n'avait acheté ni pour le fils ni pour d'autres. De sortes que d'après la contestation telle qu'elle était liée entre les parties il n'y avait qu'une seule alternative possible, ou Poisson avait acheté pour [illegible] ou il avait acheté pour Olivier Goudreault; non-seulement aux [illegible] de la défense il n'était pas, mais il ne pouvait être question d'aucun autre [illegible] du moment par conséquent que Poisson confessait qu'il n'avait pas [illegible] pour lui-même, le demandeur se trouvait avoir prouvé sa cause, car il se trouvait par là même avoir la preuve que Poisson avait acheté pour Olivier Goudreault.

Mais, dira-t-on peut-être, les intimés avaient en outre de leur premier plaidoyer fylé une défense en fait, et le demandeur était obligé de prouver sa cause indépendamment de toute admission directe ou indirecte que pouvait contenir le premier plaidoyer. A cecl l'appelant répond que ce n'est pas le cas ordinaire d'une défense en fait accompagnant une exception. Dans le cas actuel le premier plaidoyer n'était pas une exception, ce n'était réellement qu'un plaidoyer négatif, précisément de la même nature qu'une défense en fait, seulement qu'il était formulé dans des termes affirmatifs, la mauvaise foi des intimés étant par là plus apparente qu'elle ne l'aurait été s'ils eussent filé une simple défense en fait. Passe pour un homme qui plaide paiement et qui fyle une défense en fait, et qui par là met son adversaire dans l'obligation de prouver la dette avant que lui ne soit tenu de prouver le paiement. On tolère cette manière de plaider, parce qu'elle a ses avantages dans la pratique et qu'on est convenu de fermer les yeux sur ce qu'elle peut avoir d'illogique. Mais l'appelant ne croit pas qu'on soit également disposé d'admettre simultanément deux plaidoyers dont l'un à l'effet que Poisson aurait acheté pour lui-même et l'autre à l'effet qu'il aurait acheté pour un tiers. Sans compter qu'il n'est nullement certain que les défendeurs en fylant une simple défense en fait eussent obligé le demandeur de faire une preuve plus ample que celle que leur premier plaidoyer l'obligeait de faire Car une défense en fait n'eût pas autorisé les défendeurs eux-mêmes à prouver que Poisson avait acheté pour un tiers, pour cela évidemment il eut fallu un plaidoyer affirmatif: l'effet pratique par conséquent d'une défense en fait n'eût été ce semble, que de lier contestation sur la question de savoir si Poisson avait acheté pour lui-même ou non. De sorte qu'à ce point de vue les deux plaidoyers fylés pas les intimés auraient été en réalité précisément semblables quant à leur effet.

Goudreault et Poisson.

Et dans l'un comme l'autre cas les défendeurs n'auraient pu être admis à prouver que Poisson avait acheté pour le fils. Pour cela, l'appelant le répète, il aurait fallu, comme l'établissent toute les autorités et les décision déjà citées, que les défendeurs eussent commencé par fyler un plaidoyer spécial alléguant que Poisson avait acheté pour le fils. Et ce qui montre d'une manière frappante combien est défavorable leur position, c'est que si les défendeurs avaient fylé un semblable plaidoyer, le demandeur l'aurait fait rejeter sur le principe que les défendeurs n'avaient ni intérêt ni raison d'argumenter du droit d'autrui. Qu'importe en effet à Poisson qui n'a rien déboursé et qui n'a pas acheté pour lui-même, à qui appartient la propriété; et quant à Olivier Goudreault, son intérêt n'est-il pas d'être déclaré propriétaire.

Mais, quoiqu'il en soit, l'appelant soumet, et c'est le troisième moyen, que même en supposant qu'il était obligé de prouver directement que Poisson avait acheté pour Olivier Goudreault, cette preuve existe au dossier d'une manière suffisante. En effet les auteurs qui ont écrit sur la fraude et la simulation, considèrent qu'en pareille matière, des présomptions suffisent, (3 Bédarride No. 1450 —2 Chardon Vol. No. 13) Pareillement les auteurs qui ont écrit sur l'aveu, même ceux qui soutiennent qu'il est indivisible lorsqu'il a rapport à un seul fait, admettent qu'on peut, par de simples présomptions, contredire la déclaration que l'avouant a faite en sa faveur. (Marcadé sur l'art. 1356.) Or y a-t-il en loi de plus forte présomptions que celles qui existent dans la présente cause. C'est pour le fils d'Olivier Goudreault que Poisson prétend avoir acheté, c'est la femme d'Olivier Goudreault qui fournit l'argent, cette femme en loi est censée commune en bien avec son mari, et en l'absence de preuve au contraire l'argent par elle fourni est censé être l'argent du mari, et c'est finalement Olivier Goudreault et sa famille qui restent en possession.

Les considérations qui précèdent sont des considérations strictement légales. Mais l'appelant croit que le résultat serait le même si la cause était décidée au simple point de vue du bon sens en dehors de tout moyen technique.

La Cour de Révision déclare que l'appelant n'a pas acheté pour Olivier Goudreault; c'est très bien: mais de son côté Poisson déclare qu'il n'a pas acheté pour lui-même: alors, on se le demande, pour qui a-t-il acheté? La Cour de Révision n'en dit rien; car on le remarquera, les Honorables Juges se sont gardés d'affirmer que Poisson eut acheté pour le fils, et pourtant, ce n'est que dans ce dernier cas que la Cour de Révision pouvait être justifiable de renverser le jugement de la Cour Inférieure. Car l'alternative se trouvait nécessairement être entre Olivier Goudreault et le fils, vue que si l'on prétend que Poisson n'a pas acheté pour Olivier Goudreault ça ne peut être que parcequ'il a parlé du fils. Si une telle déclaration de sa part ne peut constituer une preuve, comme les autorités et les décisions déjà citées l'établissent, qu'y a-t-il pour justifier qui que ce soit, non pas d'affirmer, (car ce que la Cour de Révision n'a pas osé faire personne ne voudrait le faire,) mais même de supposer que Poisson a acheté pour le fils. Poisson dit bien que la femme d'Olivier Goudreault lui a remis de l'argent pour qu'il achetât pour le fils, mais quel fils, est-il majeur ou mineur? Poisson lui-même le connait-il, l'a-t-il jamais vu? Il n'en dit rien; de fait il n'y a pas l'ombre d'une preuve au dossier qui permettrait à qui que ce soit de déclarer que

le fils existe ou a jamais existé. Prétendra-t-on que le demandeur était obligé de prouver que Poisson n'avait pas acheté pour un fils dont non-seulement il n'était nullement question dans la défense, mais au contraire dont la défense indiquait qu'il ne pouvait être question, pour un fils dont le nom n'était pas même mentionné par Poisson dans sa réponse sous serment. Dans tous les cas n'aurait-ce pas été à Poisson et à Olivier Goudreault à prouver un fait de cette nature qui leur était parfaitement connu et dont la preuve devait leur être des plus faciles, pendant que la preuve que Poisson *n'avait pas acheté pour le fils* c'est-à-dire la preuve d'une négative était plus ou moins impossible à l'appelant, (1) et c'est au reste ce que les Intimés ont reconnu par leur motion. Mais en outre qui croira que si Poisson avait réellement eu l'intention d'acheter pour le fils, il aurait pris le titre en son nom, qui croira que le Shérif lui aurait refusé un titre au nom du fils, qui croira que le fils, apprenant que Poisson avait pris le titre en son propre nom, aurait laissé passer 16 mois sans faire aucun arrangement avec Poisson: pense-t-on que si le fils eût été le véritable acquéreur, Poisson et Olivier Goudreault auraient donné à leur avocats les instructions qu'ils lui ont données, pense-t-on qu'ils auraient filé une Exception déclinatoire et consulte auraient affirmé et répété que Poisson avait acheté pour lui-même de bonne foi, pour son propre compte, profit et avantage. Pense-t-on que le fils aurait longtemps tardé à intervenir pour défendre ses intérêts. Pense-t-on surtout qu'après la réponse de Poisson sur faits et articles, l'avocat des Intimés, s'il eût cru la réponse de son client sincère, n'aurait pas au moins tenté d'amender ses plaidoyers ou n'aurait pas eu l'urgente nécessité de fyler une intervention au nom du fils—pense-t-on qu'il n'aurait pu offrir de meilleurs témoins que le fils lui-même pour prouver que Poisson avait acheté pour le fils, croit-on qu'il n'aurait pu, s'il lui fallait faire sa motion telle quelle, trouver personne qui aurait au moins donné un affidavit à l'appui des faits allégués dans cette motion. L'Honorable Juge en Cour Inférieure a lui-même entendu les réponses de Poisson, il a vu son maintien et sa conduite en général pendant qu'il répondait, et qui ne sait que dans des cas de ce genre la réponse, telle qu'elle est entrée par le greffier, n'est e plus souvent qu'un résumé, et souvent un résumé plus ou moins faible et incolore de ce que la partie répond. Sous ces circonstances l'Honorable Juge a décidé que la preuve de l'Appelante était suffisante, et qui mieux que lui pouvait en juger. Est-ce qu'il est sage, est-ce qu'il est d'usage dans un cas semblable de renverser un jugement sur une question de preuve. En outre il pourrait être établi au besoin que la cause a été porté en Revision par les Intimés non sur la question de simulation dont les Intimés n'ont parlé que d'une manière tout à fait incidente, mais réellement sur la question de juridiction. En rendant jugement, les Honorables Juges en Révision ont déclaré qu'ils n'avaient pas cru

Goudreault et Poisson.

(1) Taylor on Evidence p. 852, No, 247. "The Legislature has adopted a principle "which the common law also recognises, and which may here be noticed as a second exception to the general rule, that the burthen of proof lies on the party who substantially "alleges the affirmative. The exception is this that where the subject matter of the "allegation lies peculiarly within the knowledge of one of the parties, that party must "prove it, whether it be of an affirmative or negative character, and even though there be a presumption of law in his favour."

Goudreault et Poisson.

nécessaire de décider la question de juridiction parce qu'ils étaient arrivées à la conclusion que sur le mérite l'action du demandeur devait être déboutée. (1)

L'Appelant ayant malheureusement contre lui la décision de la Cour de Révision il a été de son devoir de traiter avec plus de détails qu'il ne l'aurait fait autrement les diverses questions qui se présentent sur la présente cause. Ces questions au reste sont, il croit qu'on l'admettra, d'un grand intérêt en autant qu'elles se présentent tous les jours dans la conduite des causes, et il est important que la profession sache laquelle des deux décision—de la Cour Inférieure ou de la Cour de Révision on doit suivre.

L'Appelant a pleine et entière confiance dans sa cause, mais en terminant il croit néanmoins de son devoir d'ajouter que si l'Honorable Tribunal d'Appel était d'avis que la preuve de l'Appelant n'était pas entièrement suffisante, le jugement de la Cour de Révision ne devrait pas, même en ce cas, être confirmé; les parties alors devraient être renvoyées en Cour Inférieure pour donner à l'Appelant l'occasion de produire telles autres et plus amples preuves qu'il peut avoir et que la Cour Inférieure a jugé qu'il n'était pas nécessaire qu'il fournit. C'est ce qu'a fait la Cour de Cassation dans un cas analogue. (1)

Les intimés exposent leurs prétentions comme suit, dans leur factum:

L'action est en rescision de contrat, et n'aurait pu être prise, en France, sans l'obtention préalable de *lettre de chancellerie*; que si elle peut l'être ici, sans cette formalité, ce n'est que devant les tribunaux auxquels la loi a spécialement conféré ce privilége, savoir, la Cour Supérieure, (Status Refondus du B. C., Ch. 78, Sec. 6); que la Cour de Circuit n'a pas ce privilége et ne peut pas connaître de ces demandes.

La Sec. 2 du Ch. 70, même Status, qui détermine la jurisdiction de la Cour de Circuit, y soumet toutes les actions et poursuites civiles dans lesquelles la valeur de la chose demandée n'excède pas $200. Ces termes, tous généraux qu'ils soient, ne peuvent certainement pas comprendre les actions qui ne pouvaient, en France, s'intenter qu'après en avoir obtenu l'autorisation du Souverain.

(1) L'appelant ne croit pas nécessaire de montrer que la Cour de Circuit avait juridiction—car la Cour de Révision n'a pu décider la cause au mérite sans en même temps, qu'elle l'ait voulu ou non, décider la question de juridiction en faveur de l'appellant: de sorte que pour pourvoir soulever la question de jusidiction devant cette Cour les Intimés eussent dû appeler du jugement de la Cour de Révision sur ce point, ce qu'ils n'ont pas fait.

(2) "Balceus réclame de Durlet la restitution de divers outils: celui-ci répond qu'il "les détient à titre de gage pour les sommes que Balceus lui doit et dont il demande "reconventionnellement le paiement.

"Sur ce, jugement du 5 mai 1829, qui condamne Durlet à la restitution des outils "réclamés. Appel de Durlet. Arrêt du 29 juin 1859.

"Considérant • • • que s'il résulte d'une partie de cet aveu que ce dernier est effectivement détenteur de certains objets qu'il indique, il résulte d'une partie qu'il en est "détenteur pour sûreté des sommes qu'il affirme lui être dues. • • • La Cour réforme "et achemine Balceus à justifier ces conclusions par tous autres et nouveaux moyens qu'il "jugera convenables. Boncenne, Procéd. Civ. pp. 272-3."

La Sec. 2 du Ch. 78, fixant la juridiction de la Cour Supérieure est toute aussi générale, toute aussi illimitée. Si ces termes généraux eussent compris les actions en rescision, pourquoi les dispositions de la Sec. 6 relatives aux actions en rescision ?

La Sec. 3 du Ch. 79 donne bien à la Cour de Circuit, dans les poursuites pendantes devant elle, tous les pouvoirs de la Cour Supérieure; mais ce n'est que pour certaines procédures *subséquentes à l'institution de l'action*, et qu'elle mentionne; quant aux formalités qui doivent précéder l'action et dont celles portées devant la Cour Supérieure sont affranchies, il n'en est pas dit un seul mot. Prétendre que ces actions peuvent être instituées à la Cour de Circuit, c'est affirmer qu'il n'y a pas d'appel d'un jugement en rescision d'un contrat pour une chose valant moins de $100.

En second lieu les intimés soumettent qu'au mérite même le demandeur ne pouvait pas réussir.

Remarquons d'abord qu'il ne prétend pas que les enchérisseurs ont été écartés, mais que l'on s'est entendu pour cet objet.

Les tribunaux ne scrutinent pas les pensées, ils ne jugent que les actes; or quelqu'aient été les projets et les intentions des défendeurs, s'ils ne les ont pas exécutés, l'acte reste sous ce rapport intact.

Mais il est prouvé que Olivier Goudreault était absent de la Province.

Il n'a pas pu par conséquent écarter les enchérisseurs; et par là même ce moyen tombe.

Un autre moyen invoqué par le demandeur, est la vilité du prix.

On sait qu'aux ventes par le shérif les propriétés ne se vendent jamais à leur valeur réelle. Il est prouvé que celle dont il s'agit ne valait qu'un peu plus que le prix d'adjudication.

Un troisième moyen est que Goudreault est resté en possession. Il était lui-même absent de la Province; sa famille qui occupait auparavant une autre propriété est, après la vente, allée occuper celle vendue. Rien là de bien étonnant. La propriété a été achetée pour le fils du défendeur Goudreault; il résidait aux Etats-Unis et il ne pouvait acheter cette propriété que pour y loger ses vieux parents. Que sa mère soit allée y résider y a-t-il là rien qui étonne ? Si on eut commis une fraude on aurait certainement pris plus de précaution.

Le coût du contrat a été, dit le demandeur, payé par le défendeur Goudreault: Le paiement du titre du shérif ne serait certainement pas seul un motif suffisant pour annuler un décret. Le demandeur a probablement voulu dire le prix de vente; mais, outre pas la Cour ne peut pas suppléer aux erreurs ou aux omissions de sa demande, où est la preuve de ce fait ? C'est la femme du défendeur qui a remis l'argent à l'acquéreur, ou mieux la traite dont ce dernier a touché le montant. Mais à qui le fils absent du pays pouvait-il mieux adresser cet argent qu'à sa mère ! Encore une fois s'il y avait eu fraude on aurait été sur ses gardes; on aurait employé des moyens détournés et plus étudiés. Au reste, on a offert de prouver que l'argent avait été fourni par le fils, la Cour n'a pas voulu le permettre.

Mais dit l'Appelant dans sa requête, c'était changer la position prise par la défense et la Cour ne pouvait pas vous le permettre. N'était-ce pas au demandeur

Goudreault et Poisson.

à établir sa demande ? Un de ses moyens, et le seul qu'il invoque maintenant, est que les deniers ont été fournis par le défendeur Goudreault. Prouver qu'ils l'avaient été par un autre n'était-ce pas répondre à son action ? La défense en fait ne permettait-elle pas cette réponse ?

L'Appelant invoque ici l'absence d'affidavit au soutien de cette motion. D'après les instructions transmises par le procureur des défendeurs en Cour Inférieure, il aurait offert d'en dresser et produire un ; mais on aurait consenti à montrer cause sans cet affidavit, et le demandeur aurait seulement appuyé sur ce que semblable preuve changeait, comme il le prétend dans sa requête, la contestation liée. On voudra bien remarquer qu'il n'a aucune autre preuve que les réponses à des Interrogatoires sur Faits et Articles qui n'avaient pas été signifiés et qui ont été soumis à l'audience à l'un des défendeurs présents en Cour. Il eut pu refuser d'y répondre, et s'il y avait eu fraude, il l'eût fait. La encore git la bonne foi des parties et de la transaction. Mais l'affidavit requis, les défendeurs l'ont dans ses réponses ; l'argent était le produit d'une traite ; si le juge n'était pas satisfait qu'il avait été fourni par le fils du défendeur pour qui Poisson avait acheté, n'eut-il pas dû permettre de l'établir d'une manière plus satisfaisante ?

L'Hon juge *Drummond*, en rendant le jugement de la Cour, dit en substance : Les auteurs et la jurisprudence ont depuis longtemps établi la doctrine de la divisibilité de l'aveu judiciaire, lorsque la partie de la réponse contestée est combattue par des indices de fraude ou de simulation de même que lorsqu'elle est en contradition avec les plaidoyers. Nos propres tribunaux ont toujours reconnu la nécessité de diviser l'aveu dans ce dernier cas. Les jugements et les opinions des juges, dans les causes de *Ford & Butler*, *St. Germain & Gladu*, et surtout celle de *Thayer & Wilsam*, citées par l'appelant, sont aussi explicites qu'il est possible sur ce point.

La réponse de l'intimé Poisson aux 3e et 4e interrogatoires sur faits et articles, contient-elle une contradiction suffisante pour en permettre la division ; la partie dont on demande le rejet, contient-elle des indices de fraude et de simulation, ainsi que le prétend l'appelant ? Il ne peut y avoir lieu d'en douter. La contradiction est évidente, et la simulation ne peut s'établir plus clairement.

Les défendeurs plaident conjointement que " Poisson a acquis la terre du " shérif, de bonne foi, pour son propre profit et avantage, et qu'il ne l'a pas " acquise des deniers du dit Olivier Goudreault, l'autre défendeur." Sous serment. Poisson avoue " qu'il a eu l'argent pour faire l'acquisition, de l'épouse " d'Olivier Goudreault, l'autre défendeur ; qu'il a voulu la mettre, lors du décret, " au nom du fils du défendeur ; mais on lui a dit qu'il n'avait pas ce droit, vû " que la terre lui avait été adjugée." La prétention des intimés que la terre avait été adjugée à Poisson pour son propre profit et avantage, de bonne foi, est donc clairemnt contredite par Poisson lui-même, & maintenant ils soutiennent qu'elle a été achetée pour le fils de Goudreault, et avec son argent. Mais outre qu'il n'y a pas de preuve de ce dernier avancé, les présomptions lui sont contraires. L'argent, de l'aveu de Poisson, lui a été remis par la femme du défendeur Goudreault ; or la communauté de biens est toujours supposée établi entre le mari et la femme, jusqu'à preuve du contraire. La femme Goudreault a donc acheté, par l'entremise de Poisson, la terre de son mari avec l'argent de son

Goudreault et Poisson.

mari. Cet argent n'a pas été remis à Poisson, par la femme Goudreault, à titre de prêt pour lui permettre d'acquérir la propriété en son nom, ainsi qu'il alléguait dans son plaidoyer; ce n'était donc que dans le but d'acheter pour Goudreault que la femme de celui-ci lui a remis cet argent. La simulation et la fraude percent, chez les défendeurs, dans tout le cours de leurs transactions et de leurs procédés. Poisson plaide qu'il a acheté la propriété en son nom et pour son propre compte; il la croit donc à l'abri du jugement de l'appelant contre l'intimé Goudreault; mais il s'aperçoit que l'argent qui lui a été remis par la femme de celui-ci, et dont il est obligé d'admettre la source, parce que l'appelant possède les moyens de la retracer, va tomber sous les coups de ce jugement; il obvie à cette difficulté en donnant le nom du fils du défendeur comme étant la personne pour qui et des deniers de qui il a acheté. Mais qu'est-ce que ce fils dont l'existence même n'est pas prouvée, et dont on n'a pas cherché sérieusement à prouver l'existence; dont on ne connait ni le nom ni le domicile. Cet enchaînement de contradictions et de transactions suspectes sont les preuves les plus irrécusables de la simulation, telle qu'établie par tous les auteurs, et il ne laisse aucun doute dans mon esprit.

Quant à ceux qui ne se rendraient pas de suite à des preuves aussi fortes, il suffit d'ajouter, pour achever de les convaincre, que depuis la dite acquisition du shérif au nom de Poisson, la famille Goudreault a continué d'en jouir comme avant la vente, et y a même fixé complètement sa résidence qui était auparavant sur une autre terre: que le prétendu acquéreur Poisson n'a fait aucun acte de possession, depuis qu'il a signé le contract du shérif, et ne s'est pas plus occupé de cette propriété qu'avant cette acquisition; et que le substitut qu'il veut se donner, dans le prétendu fils de Goudreault, laisse depuis seize mois, au nom de Poisson, une propriété qui aurait été acquise de ses deniers et pour son compte. Une pareille conduite, de par d'un acquéreur sérieux, est invraisemblable.

Le jugement de la Cour d'appel est motivé comme suit:

La Cour, après avoir entendu les parties par leurs avocats sur le mérite, examiné tant le dossier de la procédure en cour de première instance que la requête en appel produite par le dit appelant, et sur le tout mûrement délibéré:

"Considérant que le titre ou acte de vente consenti par le shérif du District des Trois-Rivières, à Paschal Poisson, l'un des intimés (défendeur en cour inférieure, le cinq mars mil huit cent soixante quatre, de l'immeuble, désigné en la déclaration de l'appelant, (demandeur en Cour Inférieure) et dans le jugement de la Cour de Circuit du dit District, siégeant aux Trois Rivières le trentième jour de juin, 1865, est simulé et nul en autant que le dit Paschal Poisson n'a pas acquis le dit immeuble pour lui-même ni avec ses propres deniers, mais pour Olivier Goudreault, l'autre des intimées, et avec les deniers du dit Olivier Goudreault dont la famille avait possession, comme propriétaire, du dit immeuble lors de l'institution de l'action, et en autant que le dit Paschal Poisson, de son propre aveu, ne prétend avoir aucun droit ou intérêt personnel au dit immeuble.

"Considérant partant que dans le jugement de la Cour de Révision prononcé à Québec le quatrième jour de novembre 1865, déboutant l'action de l'appelant il y a erreur: Cette Cour casse, annule et met au néant, le jugement de la dite Cour de Révision, confirme le jugement de la dite Cour de Circuit avec dépens

Goudreault et Poisson.

dans les [illegible] Cours. Et enfin, la Cour ordonne le renvoi du dossier à la dite Cour de [illegible]nit aux Trois-Rivières:" *Dissentiente* l'Honorable M. le Juge Mondelet.

Jugement renversé.

E. Barnard, avocat de l'appelant.
Casault, Languois & Angers, avocats des intimés.
(S.P.)

COURT OF QUEEN'S BENCH, 1869.

MONTREAL, 4TH SEPTEMBER, 1869.

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

No. 89.

JOHN T. HALL,
(*Plaintiff in Court below,*)
APPELLANT;

AND

THOMAS C. BRIGHAM,
(*Defendant in Court below,*)
RESPONDENT.

HELD:—That a Judge leaving another Court in similar suit between the same parties expressed his opinion, and rendered judgment in accordance therewith upon the pretensions of the parties, which pretensions were to be urged before this Court, should refrain from sitting in the cause.

The only difference between this cause and one between the same parties decided in the Court of Review by Judges Badgley and Monk, was that a different quarter's rent was claimed. In other respects, the suits were precisely alike.

Declarations of Judges therefore filed.

Cross & Lunn, for appellant.
Perkins & Stephens, for respondent.
(J.A.P.)

CIRCUIT COURT, 1869.

MONTREAL, 30TH SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 2760.

Serrurier v. *Lagarde* et al.

HELD:—That as between landlord and tenant the *saisie gagerie par droit de suite* may be made after eight days from the removal of the goods from the leased premises.

TORRANCE, J.—The defendant, Joseph Lagarde, seeks to withdraw his goods from a seizure made by his landlord more than eight days after the removal from the leased premises. C. C. 1623. The Court, applying the [illegible]n in *Mondelet* v. *Power*, 1 L. C. Jur. 276, is against this pretension.

Duhamel & Rainville, for plaintiff.
T. & C. C. De Lorimier, for defendant.
(J.K.)

SUPERIOR COURT, 1869.

MONTREAL, 20TH SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 130.

The Quebec Bank vs. *Cook.*

HELD:—1st. That in an action demanding a sum of money due on a promissory note, and for money lent, the defendant cannot plead compensation by unliquidated damages claimed to be due by the plaintiff to a partnership of which the defendant is a partner.

2nd.—That a pleading is bad, which sets up in compensation unliquidated damages alleged to be due as well to the defendant personally as to the partnership of which he is member, without stating how much of the damages have been sustained by himself personally, and how much by the Company.

TORRANCE, J. This case is before the Court on a demurrer made by the plaintiff to the second plea and to the incidental demand of the defendant. The action of the plaintiff is to recover $10,002, and interest, being amount of a promissory note, and costs of protest and interest, and $12,665,50, claimed by money counts for money lent and interest on the same, and the conclusion of the declaration is for a condemnation to pay $12,665.50. The declaration of the plaintiff alleged the promissory note to have been jointly and severally signed by the defendant and other persons named.

The defendant meets the action by several pleas and by an incidental demand. The second plea sets forth that the plaintiff on or about the 21st July, 1868, began an action, No. 1968, against the defendant and other *persons* named in the plea as members of a co-partnership known as the Drummondville Bark Extract Manufacturing Company for the same causes as the present action so far as the promissory note for $10,000 is concerned. That the plaintiffs in said action caused one William Rhind to make an affidavit as their agent, against the said Company, in which affidavit, *inter alia*, it was alleged that the said Company and the partners were insolvent, and were secreting their property with intent to defraud its creditors; and upon this affidavit a *saisie-arrêt* before judgment issued against the said Company, and their property as well in their own hands as in the hands of garnishees, was seized under said *saisie-arrêt*. That by reason of this *saisie-arrêt*, the business of the Company was stopped and put an end to, and the Company was in fact ruined. That at the time of the institution of the said action, the defendant was a trader doing a profitable business and was also a member of the said Company. That the allegation of the affidavit that the Company and the partners were insolvent, was untrue, and the defendant was then solvent and in good credit and circumstances. That on the 20th October, 1868, the attachment was set aside by a judgment of this Court. That by reason of the statements contained in the affidavit and by the seizure and proceedings of the plaintiff in the action No. 1968, the defendant as well individually as in the capacity of one of the partners of the said Company was and is greatly injured and damaged in his said business, and the credit of the defendant was and is greatly injured, whereby the defendant suffered damage to the amount of $15,000, and the defendant further sustained great loss of time, and was necessarily obliged to incur great costs in travelling expenses, and in retaining and paying counsel, and otherwise in defending the said suit, to wit,

The Quebec Bank vs. Cook.

to the extent of the further sum of $1000, making in all the sum of $16,000. The plea concluded with the prayer that the defendant be allowed to compensate this sum, so far as necessary against the amount of the plaintiff's demand.

The incidental demand of the defendant contained similar allegations, and further alleged that the incidental plaintiff was intitled to claim from the incidental defendant the balance of the amount alleged to be owing, $16,000, over the amount found to be owing to the incidental defendant, such balance being $7,000, and the incidental demand prayed judgment for $7,000. The reasons of demurrer, urged by the plaintiff, to which the attention of the Court has been specially directed, are in effect that the defendant cannot set off against the plaintiff's demand against himself, a claim for unliquidated damages accruing to a Company in which he was partner, and further that the plea demurred to, and the incidental demand, do not specify how much of the damages have been suffered by the defendant as an individual, and how much by him as a member of the Company. The Court is with the plaintiff on these demurrers. The leading case on the subject would appear to be Hall vs. Beaudet, 6 L. C. R. 75, decided by the Court of Queen's Bench.

The judgment is *motivé* as follows:

The Court having heard &c., on the merits of the *défense en droit* fyled by the plaintiffs to the 2nd plea of the defendant, and also on the merits of the *défense en droit* fyled by plaintiffs to the incidental demand of the defendant; considering that the defendant by the said second plea and incidental demand, has pleaded matters which are only available to the co-partnership set forth in said plea, as the Drummondville Bark Extract Manufacturing Company; considering that the defendant cannot plead and set off in answer to a demand for a debt personal to himself a debt or claim for unliquidated damages due to the co-partnership of which he is a member; considering further that his said pleadings allege damages incurred by himself as an individual, and also as a member of the said partnership, without specifying what portion of said damages were suffered by himself and what portion by the said copartnership; Considering that the allegations of said plea and incidental *demande* are vague and insufficient in law, doth maintain the said several *défenses en droit* to the said second plea and to the said incidental *demande*, and the Court doth dismiss said second plea with costs, &c., and said incidental *demande* with costs.

Demurrers maintained.

Welch & Bullock, for plaintiff.
J. J. C. Abbott, Q.C., for defendant.

Authorities cited by plaintiff:—

Hall vs. Beaudet, 6 L. C. R. 75.
Cout. Paris; Art. 105, Ferriere Grand Cout.
C. C. 1187, 1188, 1191; and Poth. Oblig. n. 628, 630.
Ryan vs. Hunt, 10 L. C. 474. Chapedelaine vs. Morrison, 6 L. C. R. 491.
Howard vs. Smith, 6 L. C. Jur. 456.
Batten vs. Desbarats, Law Reporter.

(J. K.)

SUPERIOR COURT, 1869.

MONTREAL, 23rd SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 867.

Molson vs. The Moisie Company, and Dufresne, opposant, and the plaintiff, contesting.

HELD—That in a matter of urgency under the C. C. P. Art. 240, notice given the previous evening for the following morning is sufficient.

2nd.—That an affidavit to the effect that a witness was the next evening to leave for the *Moisie*, a distance of 500 miles from Montreal, with which there was no regular communication; that he would be there at least a month, and that on his return he proposed to set off for the United States, to remain there an indefinite time, is sufficient to justify an order for the immediate examination of the witness, under C. C. P., 240.

TORRANCE, J.—The case is inscribed for evidence and hearing on the contestation raised by the plaintiff to the opposition, for the 25th inst., and the opposant applies supported by affidavit, to be allowed under the provisions of C. C. P., 240, to examine a witness, who is to leave for the River Moisie, several hundred miles distant, this evening; to remain there a month and afterwards to proceed forthwith to the United States. The plaintiff objects. 1st: That the circumstances do not justify the application on its merits under the code, and 2nd: That he has not had "due notice" required by the code. On the first objection, the Court thinks that substantial justice requires that the application should be granted. As to the notice, the circumstances are such that short notice like the present should be allowed in the present case, which is an exceptional one, like many similar applications.

Petition granted.

Ritchie, Morris & Rose, for plaintiff.
Doutre, Doutre & Doutre, for opposant, petitioner.
(J. L. M.)

IN THE COURT OF QUEEN'S BENCH, 1869.

(APPEAL SIDE.)

MONTREAL, 7th SEPTEMBER, 1869.

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

ROBERT NOTMAN, *Plaintiff in Error,*

AND

THE QUEEN, *Defendant in Error.*

HELD:—That the Court of Queen's Bench sitting in Appeal cannot grant a writ of Error in a criminal case, without the fiat of the Attorney-General.

The plaintiff in error, Robert Notman, was on the 22nd April, 1868, convicted upon an indictment charging that he had "feloniously counselled, procured "and commanded a person to administer a noxious thing with intent to procure "a miscarriage."

After the prisoner had been sentenced, an application was made on his behalf to the Attorney-General for his fiat for a writ of error, the application being

Notman and The Queen.

founded on the allegation that while the Jury were deliberating upon the verdict, a copy of the *Montreal Herald* newspaper, containing a partial report of the evidence adduced at the trial, was handed to the Jury by an officer of the Court. The Attorney-General opposed the application, because it did not appear of record that such communication to the Jury had taken place.

The prisoner now petitioned the Court of Queen's Bench, sitting as a Court of Appeal and Error, for a writ of error. (As the application was rejected on a preliminary objection, it is unnecessary to give here the authorities cited in support of the petition.) Judgment was rendered as follows:

MONK, J., (dissenting).—This case is [redacted] derable importance, but one which, in my opinion, admits of very little doubt of discussion. I have the misfortune to dissent from the judgment about to be rendered by the Court; and although I entertain the opinion that the case may be very briefly disposed of, the presumption is that I am in error. The first point to be determined is, whether this Court has the power to issue a writ of error in criminal cases after the refusal by the Attorney-General to allow such writ. As I understand our law, the case does not admit of the slightest difficulty. In the Consolidated Statutes of Lower Canada, cap. 77, sec. 56, is to be found the following enactment: — "The Court of Queen's Bench sitting in appeal and error shall be a Court of Error in criminal as well as in civil cases, and shall have jurisdiction in error in all criminal cases before the said Court on the Crown side thereof, or before any Court of Oyer and Terminer, or Court of Quarter Sessions; and the writ of error shall operate a stay of execution of the judgment of the Court below."

By another clause it is enacted, "If in any criminal case brought before it by writ of error, the Court is of opinion that the conviction was bad from some cause not depending upon the merits of the case, it may, by its judgment, declare the same, and direct that the party convicted be tried again as if no trial had been had in such case."

Now, it is the practice in England, and it has been so here, for parties aggrieved to apply to the Attorney-General for his *fiat* for a writ of error. There is no positive law here for that practice, it is a usage which we are supposed to have received from England, and whatever may be the force of that usage in the old country, I cannot for a moment suppose that the authority of the Attorney-General in cases of error should so far supersede the powers of this Court, that in any case where he has refused a *fiat* for a writ of error we should be powerless as a Court of Error.

The Attorney-General who is the public prosecutor, would, in this view of the law, be himself the sole judge, whether a case should or should not be reviewed in error by this Court. There would be a judicial authority in this very matter higher than we possess. It is hardly credible that such a pretension should be seriously entertained, unless we had express law modifying the jurisdiction of this Court, and conferring upon the Attorney-General for the time being, judicial powers, from the exercise of which there is no appeal, and against whose decisions, if erroneous, there is no remedy. We have no such law, and for my part I cannot abdicate the powers with which this Court is vested upon a mere

usage as it obtains in England. It is scarcely necessary to dwell at greater length on this subject—it is too plain to admit of doubt as I view the law. If we have jurisdiction in error in criminal cases, parties aggrieved by decisions affecting their lives and liberty, must have some means of redress independent of the caprice or even the conscientious decisions of an Attorney-General. It is my opinion, when he refuses to grant his *fiat*, this Court may order a writ to issue, if we should find that there has been manifest error in the Court below. Then as to the question whether a *prima facie* case has been made out, there can be no doubt. When the case is brought up on the merits, a new complexion may be given to the facts; but it does appear to me that an irregularity so grave as that alleged, and occurring in a trial for felony, should be enquired into by this Court.

BADGLEY, J.—The wording of the statute says, this Court shall be a Court of Error for civil as well as for criminal matters. It does not, in fact, so far as criminal matters are concerned, give any more power than the Court had before, nor does it confer an absolute independent power intended to supersede the practice connected with criminal law. It merely declares that the constituted Court of Queen's Bench shall have the same privilege as a Court of Error. Let us look at the constituents of the Court of Queen's Bench or King's Bench as it was in olden time. The English criminal law introduced in the Act of 1774 was given to us *in toto*, in law as well as in practice as it existed in England at that time, and there is nothing in the subsequent legislation or in the existing jurisprudence of this country which goes to abolish the practice which was then introduced. The Act of 1774 introduced the English law bodily as it existed at that time. We must, upon this occasion, examine the practice, in relation to the [illegible]ly of the criminal law. It would have been idle to give us that criminal law and not the practice under the law. Procedure is equally as important in criminal law as in civil law. I think this is too plain to require elaborate discussion. Looking, then, into our statute law, we find the Act of 1794, whereby the Courts were separately established in each district for judicial purposes, and the then Court of King's Bench having all the powers and authority of criminal law in England. The criminal law of England was distinctly confirmed and affirmed by the Act of 1794, and the practice under that law was also by that act specially affirmed. Our provincial legislation has only modified our criminal practice by adopting the amended and improved practice of England, but this modification does not touch upon the point connected with this case. The application for a writ of error must be accompanied by the fiat of the Attorney-General, which is wanting here. It may have been refused, and that high officer had a legal right to exercise his discretion or authority under the law of England and refuse his signature to such an application. We have nothing to do with the discretion of the Attorney-General, we cannot control him or compel him to put his signature to an application for a writ of error. He is the representative of the prerogative of the Crown, and when present, is the only person capable of advising the Crown as to the exercise of its prerogative in case of such an application. There is no absolute power in this Court to set aside the judgment, the punishment of which is already in part enforced, and is being enforced upon

Notman and The Queen.

the applicant in this instance. This prerogative power of the Attorney-General is one that the Court cannot interfere with, and this brings me to the point to consider what is the practice in England in a matter of this kind. From the long period from 1774 down to 1866, when the last application of this kind was made to and refused by the Court of Queen's Bench in England, we find the same uniform and consistent practice, through all the various changes of individual judges constituting that Court, and we never find a change with reference to the necessity of obtaining the fiat of the Attorney-General in the matter of such an application for a writ of error. We find that Lord Mansfield, and I need not go farther than Lord Mansfield, for no one enlightened the bench more than he, refused an application for a writ of error which had not the fiat of the Attorney General, and other Chief Justices of eminence have followed him giving the same judgment, and they have been supported by the Privy Council which has given similar decisions on two or three different occasions, a Court constituted by two or three different sets of judges all agreeing as to the necessity of having the fiat of the Attorney General to the application. It would not do for us to run counter to our final appellate jurisdiction. What would be the use or common sense of our undertaking to assume an authority counter to English criminal practice, and independent of the decisions of our own Court recorded over and over again with reference to the necessity of this fiat. We should merely stultify ourselves in the eyes of England. It seems to me so utterly impossible to allow this claim before this court for a writ of error that it is unnecessary for me to enforce my opinion by further citations. I do not want to touch the merits of the case. I must confess that I entertain very heterodox opinions with reference to the power of the Court of Queen's Bench to grant a new trial in Canada, in trials for felony, but that is a very different thing from the present matter, in which as I have already said, we require the fiat of the Attorney-General to the application. Whether this practice shall be continued or not, I do not pretend to say, that is for the Legislature to decide, but I cannot favour this application; it would be contravening the law, and in fact putting this Court in direct antagonism with the jurisprudence and decisions of our own Supreme appellate controlling Court which we are bound to submit to.

DUVAL, C. J.—I do not sit here to judge whether the law is right or wrong. If the law is wrong let the Legislature interfere. At present it is an incontestable fact that there has not been a single application of this kind granted in England, but all have been positively refused. In the last case (O'Byrne) the Court did not grant the writ, but it abstained from expressing any opinion upon it. Now we have no new law upon the subject. What do our statutes say? They make no exception from the jurisprudence of England, and if our legislature thought this power of granting a writ of error should be retained, it would have said so in constituting this court a court of error,—it would have enacted that this court should have the power to issue a writ without the consent of the Attorney-General. It has said no such thing. If this writ were granted without regard to English procedure the result would be that every colonial judge would introduce new laws, and in the course of five or six years the criminal law of England as it now applies to this country would be entirely changed. There

Notman and The Queen.

would be new trials out of every case, according to the opinion of the judge presiding at the moment. Is it not better to refer to the English law, and follow the rule by which these applications have been refused over and over again. I do not speak upon the merits of the case. If a paper was improperly introduced to the jury, the person introducing it should be held responsible. If the jury wanted information, they should have come to the Court for it and to no one else. I do not want to express an opinion censuring what Mr. Devlin has been pleased to call gross irregularity of proceeding. The decision of the law of England is before me and I will look at that. The decisions of the law of England are ample upon the subject, and I do not see the necessity of travelling all over France, and other parts of the Continent and every one of the thirty-one United States, for the purpose of finding a decision favourable to the application. In criminal matters, foreign law should not be brought before the court. When I want authority in this country I can find it in the English law, and if it is not there, the Legislature should be advised to interfere. The sooner, in such cases the judges request the Legislature to interfere the better.

The judgment was as follows :

" Having heard counsel as well on behalf of the prisoner as for the Crown, on the said Robert Notman's petition for a writ of error, and due deliberation on the same being had, it is ordered that the said Robert Notman take nothing by his said petition." Monk, J., dissenting.

Petition rejected.

B. Devlin, for the Petitioner.
The Attorney General, for the Crown.
(J. K.)

MONTREAL, 10TH SEPTEMBER, 1869.

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

THE QUEEN,

vs.

MARTIN LACOMBE.

HELD:—That on a trial for a felony, the Crown may, without shewing cause, direct a juror, on his name being called by the Clerk of the Court, to " stand aside," and, on the panel being read over a second time, may, without shewing cause for challenge, direct the same juror to stand aside a second time, and so on, till the panel is exhausted, *i. e.*, till it appears that a jury cannot be got without such juror.

A case was reserved by Mr. Justice MACKAY, while presiding at the Queen's Bench, Crown side, at Ste. Scholastique, in the July term, 1869, as follows :—

" INDICTMENT FOR ARSON.

" The prisoner was tried before me, on the 3rd and 5th July, 1869, at the term of the Court of Queen's Bench, Crown side, then being held at Ste. Scholastique, District of Terrebonne.

The Queen vs. Lacombe.

At the commencement of the trial on the 3rd of July, while the petty jury was being formed, and the jurors called for this trial, numbers of jurors were ordered to "stand aside" on the prayer of the Crown Prosecutor. So many jurors had been so made "stand aside," and so many had been challenged peremptorily by the prisoner that before a complete jury was formed, the whole list was gone through once: resort had then to be to those who just before had been made "stand aside." I ordered them to be called in order.

On the first of these, namely Adolphe Masson, being called, he answered, and was advancing to the jury box, when he was ordered to "stand aside," by the Crown Prosecutor; the prisoner's counsel objected, insisting that Masson should be sworn, unless the Crown had cause for challenging him, and did then state sufficient cause. This the Crown refused to do. I ruled in favor of the Crown, and Masson was ordered to "stand aside," and he was not sworn. Others were called afterwards, sworn, and the trial proceeded.

I intimated at the time, that, in the event of the prisoner's being convicted, I would state a case and reserve for the Court in term to say whether my ruling just referred to, to wit, by which the said Masson was excluded from the jury, was correct and legal, or was erroneous. The prisoner was convicted on the 5th of July, and sentenced to be imprisoned for five years in the Provincial Penitentiary, where, I believe, he is at the present time.

The opinion of the Honorable Judges of the Court of Queen's Bench is requested as to whether the conviction of Lacombe, the prisoner, is to be maintained, under the circumstances. Was the ordering of Adolphe Masson to stand aside proper and legal? It will, of course, have been observed that Masson was twice made "stand aside," but it was not difficult to form a Jury without him, for several others were in attendance.

Montreal, 25th Aug. 1869."

DRUMMOND, J., dissenting, after reading the case stated for the Court, said: The question is, was the order to stand aside, a second time, legal? It is said that the custom has been adopted here of ordering jurors to stand aside, and that the Judges presiding have permitted the practice. I never heard the words "stand aside" used, in former times, in our Courts. Mr. Schiller, Deputy Clerk of the Crown, says he never heard of it till the time of the Blossom case. Mr. Delisle, late Clerk of the Crown, writes to the following effect:—If the panel was exhausted the Crown was called on to give grounds, and then those ordered to stand aside went in. "Stand aside," I hold the same as "challenge" when the panel is exhausted. The Crown Prosecutor must then shew cause, and I hold that the panel is exhausted as soon as the Clerk of the Court ceases to call the names of jurors. I am of opinion that no juror can be ordered to stand aside a second time, and that the proceedings in this case were irregular, as the Crown should have been required to state the objection to Masson, when his name was called the second time.

MONK, J.—This is a very plain case and I have no doubt whatever. It was the practice formerly in this District to "challenge," but the challenge was not tried immediately; it was tried only when it was found that a jury could not be obtained without doing so. When the word "challenge" was used by the Crown

Prosecutor, it simply meant "stand aside" till we see whether a jury can be obtained or not. Then it became the practice, instead of using the word challenge (which meant no more than "wait") to say "stand aside." I know that in my time such was the fact. Now, in the case before us, the Judge says the list was called over once, and it is contended that calling the list over once is exhausting the panel. I am of opinion that reading the list over once was not exhausting the panel, and that if the challenge had been tried before calling the list over again, it would have been premature. But we have more in this case. The Judge at the end of the reserved case says: It was unnecessary that the Crown should be called upon to assign cause for the challenge, because a ry cou be got without it. I know as a matter of fact from long experience, that such has been the practice for over thirty years, the only difference being that formerly the word challenge was used instead of "stand aside." The Court is not to be fettered by these little distinctions.

CARON, J., observed that the practice in the District of Quebec was the same as that stated by Mr. Justice Monk. Archbold says: The panel is not to be considered gone through till it has been called over not once, but exhausted.

BADGLEY, J.—I think the decision of Mr. Justice Mackay is perfectly sustained by the law and the practice of the Court. To pretend a mistrial in such a case is absurd, because all the jurors on the panel are good jurors to try the case until disqualified by the effect of a challenge duly established. The direction to "stand aside" is not in fact a challenge. In order to ascertain whether a challenge is a good challenge, it must be so found by triers; and it is to avoid all the delay and interruption that would be thereby occasioned, that this practice of directing a juror to stand aside has been adopted and followed for years. See case of Mansel, where the decisions and practice since the time of Edw. dmay be found.

DUVAL, C. J.—I fully concur in the judgment. "In order that the inquest be [illegible]ntaken" are the words used in the Statute of Edward I.

The judgment was as follows:

"The reserved case being called for hearing, *Mr. Piché* on behalf of the Crown, and the *Hon. Mr. Dorion* on behalf of the prisoner appeared, and were heard, whereupon, after due deliberation had on the case transmitted to this Court from the Court of Queen's Bench sitting on the Crown side at Ste. Scholastique for the District of Terrebonne, it is considered and adjudged, and finally determined by the Court now here, that an entry be made on the record of the fact that in the opinion of this Court, the proceedings had and taken by the said Court at Ste. Scholastique are regular and sufficient in law to justify the verdict rendered, and that no reason hath been assigned by and on behalf of the said Lacombe, sufficient to set aside the final sentence and judgment on the indictment in this cause. It is therefore ordered that the said judgment be, and the same is hereby affirmed, and that it do stand in full force and effect."

Conviction affirmed.

E. U. Piché, Q.C., for the Crown.

A. A. Dorion, Q.C., for the prisoner.

(J. K.)

MONTREAL, 9TH SEPTEMBER, 1869.

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

No. 47.

CANFIELD DORWIN, & *al.*,
(*Plaintiffs in Court below*),
APPELLANTS;

AND

JOHNSTON THOMSON,
(*Defendant in Court below*),
RESPONDENT.

HELD.—That if an endorser sign his name on the back of a note, having spaces to the left of the amount sufficient to permit of alteration by the maker, and deliver the note in that condition to the maker, and the maker afterwards increase the amount of the note, by filling in the blank spaces with an additional word and figure, and pass the note in its altered state to a *bona fide* holder for value, and if the said note so altered appear, on the face thereof to be genuine, the endorser is liable to pay the full amount of the note as altered to such *bona fide* holder for value.

This was an appeal from a judgment rendered in the Superior Court, at Montreal, on the 28th day of November, 1867, dismissing the appellants' action.

The action in the Court below was brought to recover the amount of a promissory note, *ostensibly* for $2,500cy., made by one D. McNevin, payable to the order of and endorsed by the respondent.

The respondent pleaded as follows:—"The said defendant for plea to the declaration and action of the said plaintiffs saith, that true it is the signature "Johnston Thomson" endorsed on the paper-writing fyled in this cause by the Plaintiffs as their Exhibit number one, and alleged in the said Declaration to be a promissory note made by one Daniel McNevin for $2,500, and endorsed by the said defendant, is the defendant's genuine signature, but the said defendant avers that the said endorsement was so made and signed by the said defendant as a mere accommodation for the said Daniel McNevin, and without any value whatsoever being received therefor from the said Daniel McNevin, or any one else.

And the said defendant hereby expressly denies the genuineness of the said paper-writing, and avers that when he signed the said signature, the said paper-writing was so filled up as to purport to be, and was then in fact, a promissory note of the said Daniel McNevin for five hundred dollars, payable to the order of the said Johnston Thomson, and that after the said defendant so signed the said signature, the said paper-writing was altered, in a material part thereof, without the privity, knowledge, or consent of the defendant, by the introduction of the word "twenty" before the said words five hundred, and by the introduction of the figure "2" before the figures "500" which appear at the head of such paper-writing, by reason whereof the said paper-writing became and was and is null and void.

And the said defendant avers, that the said note for $500cy., was so endorsed by the defendant, on the understanding that it was, as it in fact was, a renewal note intended to be discounted by the said Daniel McNevin in retiring another

note of a somewhat similar amount also endorsed by the defendant for the accommodation of the said Daniel McNevin.

And the said defendant further saith, that the said note for $500cy., was one of a number of notes which were endorsed by the defendant, for the accommodation of the said Daniel McNevin during the last nine months, which were all, when so endorsed, of the denomination of hundreds, and including the said note for $500cy., amounted in the aggregate to $8,069cy., and that all of the said notes were altered, after being so endorsed, from the denomination of hundreds into that of thousands, by the insertion (so far as defendant has been enabled to learn) sometimes of the word "twenty" and the figure "2," sometimes of the word "thirty" and the figure "3," and sometimes of the word "forty" and of the figure "4;" thus increasing the amount of the said notes to upwards of $45,000cy., all which alterations were effected without the knowledge, privity or consent of the defendant.

And the said defendant further saith that when the said paper-writing, (plaintiffs' Exhibit number one) came into the possession of the said plaintiffs, they had notice and were well aware that the said endorsement so written thereon was an accommodation endorsement.

And the said defendant lastly saith, that all and every the matters, allegations and things set forth and contained in the plaintiffs' declaration, except in so far as they are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said defendant hereby expressly denies the same and each and every thereof."

The plea was accompanied by the affidavit of the respondent, testifying to the alteration pleaded as required by sub-section 2 of section 86 of ch. 83, of the Con. Stat. of L. C.

To this plea the appellants fyled a general answer,—adding thereto the following:—"And plaintiff says, that if, after defendant's signing as he did upon the note sued on, the said note was altered, as alleged, the defendant is liable not the less in the circumstances of this case, having signed upon a note so made and with such blank spaces as to facilitate alteration."

The following were the *motifs* of the judgment in the Superior Court:—

"Considering that in and by the 86th section of chapter 83, of the Consolidated Statutes of Lower Canada, the said promissory note is to be presumed to be genuine unless with his plea denying such note to be genuine the defendant or some person cognizant of the facts, in such capacity files an affidavit and swears therein that such promissory note, or some material part thereof is not genuine;

Considering that the defendant hath in this case fyled such affidavit in support of his plea specially and formally denying the genuineness of the said note, and namely that part thereof which contains an amount of twenty-five hundred dollars, whereas and in truth, the said note, when he, the defendant indorsed it, was and had been made and signed by one Daniel McNevin in favor of defendant for a sum of $500 and no more;

Considering that by law the genuineness of the said promissory note ceased to be presumed since and after the fyling by the defendant of his said affidavit in support of his said plea;

Dorwin and Thomson.

Considering that the plaintiffs have failed to prove the material allegations of their declaration and namely, that the defendant ever endorsed the said promissory note for the amount therein specified, and as in and by the plaintiff's declaration alleged and set forth;

Considering that the defendant hath proved the material allegations of his plea, and namely that the said promissory note has since, and subsequent to the defendant's endorsation thereof, been altered and forged, to wit, that the said promissory note which was originally made and signed by one Daniel McNevin, in favor of defendant for $500 was subsequently to such endorsation altered and transformed into a promissory note for the sum of $2500, and thereby the said promissory note now sued upon, is in that respect a forgery, and is, in consequence, of no value and cannot before this Court be recognized as a valid and legal instrument whereupon and for the recovery of the amount whereof a judgment can be obtained from this Court;

Considering that in view of the dismissal of plaintiffs' action it becomes unnecessary specially to adjudicate upon the several objections to parts of defendant's evidence whether in chief or on cross-examination, and on motions of plaintiffs for the rejection of certain papers from the record;

Considering, further that the defendant is in no way to be made responsible, nor to suffer any loss in consequence of any act of his, with respect to the alteration and forgery of the above-mentioned parts of the said promissory note, but that such loss should be borne by the plaintiffs; It is hereby adjudged that the plea fyled by the defendant should be maintained and the plaintiffs' action is dismissed with costs."

Austin, for Appellants:—The defendant assumed the *onus probandi*, and commenced his *enquête* by leading as his principal witness Daniel McNevin, the maker of the note, who proves his own and the defendant's signatures and later, the very contrary of defendant's plea. He swears that the defendant's endorsement was given to him upon the note while blank in amount and that before using the note he filled up the amount as now appearing in it, and "I state positively," he says "that all the words twenty five hundred in the body of said "note, plaintiffs' Exhibit number one, were written at one and the same moment "of time."

In the face of this positive evidence, and the admissions of defendant, the Court below, (dismissing plaintiffs' action,) has found that defendant has proved the material allegations of his plea. It has erred so, and also in other particulars, to the great injury of the appellants, particularly in its interpretation of the new law eighty sixth section of chapter eighty three, of the Consolidated Statutes of Lower Canada, the motives for which and reason of it the Court misconceived.

The evidence of the defendant, apart from that of McNevin, is of the most vague and uncertain character. Against the positive evidence of the only man who speaks of what was the original filling up of the note sued upon, are opposed writings and statements not under oath of McNevin, speculations of medical men aiding themselves with glasses, and of personal friends of the defendant to the effect that he has always been "a very shrewd, cautious man of business," that

they "do not believe that he would endorse a blank note," and so forth, ought such evidences to have had superior weight given to them?

The defendant was asked on *faits et articles*, whether he denounced McNevin to justice at any time up to or before leading him as his witness in this cause? he answered that he did not.

This is rather strange, considering that afterwards McNevin *was* denounced by the defendant and indicted and tried for forgery of this note held by plaintiffs.

The appellants do not care to state the result, being matter foreign. They submit respectfully that upon their Reasons of Appeal this Court cannot but reverse the Judgment complained of and condemn respondent to pay the note referred to.

Bethune, Q. C., for respondent, argued, in effect, as follows:—The attention of the Court is here called to the language of the statute above referred to, and which really governs the question of *evidence*, as to the *genuineness*, or otherwise, of the note sued on, in consequence of respondent's affidavit:—"If in any such action any defendant denies * * * the *genuineness* of such instrument *or of any part thereof*, * * * such instrument * * shall nevertheless be *presumed* to be *genuine*, * * * *unless* with such plea there be fyled an *affidavit* of such defendant * * * that such instrument, *or some material part* thereof, is *not genuine*,"—just such an affidavit as was made and fyled in the present case.

It would seem then, from this enactment, that the *presumption* which might otherwise have existed, as to the *genuineness* of the note here in question, as regards the material part thereof attacked by the affidavit, has been *destroyed*, by reason of such affidavit having been made and fyled. In other words, the note thereby *ceased* to be *presumed* to be *genuine*.

The appellants declined to adduce any evidence to supply the want of such presumption of genuineness.

Apart from the mere want of presumption of genuineness, an examination of the note itself (paper 3 of the Record) establishes a distinct presumption that the note is not genuine, and that it was really altered as stated in the plea.

And the presumption of alteration arising from an inspection of the note itself is corroborated by the following evidence:—

The respondent's endorsement was purely for the accommodation of said McNevin, and was one of a number of like endorsements which respondent had granted to McNevin during some years. Paper 16 b. of the Record establishes, that on the 7th of January, 1865, the whole of the notes thus endorsed by respondent, for the accommodation of McNevin, *did not exceed* $8000.

By this paper it is declared, that the respondent was willing to endorse *renewals* of said amount, for one year or thereabouts, and that McNevin, being desirous of *guaranteeing* respondent against *all risk or loss* which he might thereby sustain, mortgaged certain real estate therein described.

McNevin (who was examined) admits that a certain portion of the endorsements granted to him by the respondent, after the execution of said paper 16 b, (including the one in question here) were in *renewal* of the endorsements so previously granted.

Dorwin and Thomson.

Whenever the respondent so endorsed for McNevin, he *took note* of the transaction *in writing*.

In the respondent's Bill Book, the note in question here is entered as a note for $500 only, and in McNevin's own Bill Book, the note is likewise entered as of that amount, and the entry in this latter Bill Book was made by McNevin's son, from *memoranda* furnished him by McNevin, "either on the back of envelopes or on pieces of ordinary paper."

Then McNevin admitted *in writing* (Paper 16 c.) that he had *altered* the note in question here, from $500 to $2,500.

The *unusual* denomination of *twenty-five hundred*, instead of *two thousand five hundred*, is also a grave cause of suspicion that the note was really tampered with.

And Dr. Girdwood, who subjected the note to a microscopical examination proves, indubitably, that the word "twenty" and the figure "2" *must* have been written *after* the other words and figures in the said note.

McNevin's theory, as derived from his deposition, was, that when the respondent endorsed his name, the amount of the note was entirely in blank.

Now, that a careful business man like the respondent would endorse notes in blank, is in the last degree improbable, and no less than *four* witnesses, who have had business relations with the respondent for years, have sworn, that they believed he would not do so for any one.

Then, not only the note in question here, but *all* the other notes endorsed by respondent since January, 1866, were regularly entered in respondent's bill book, at their proper dates, and they are *all* of the denomination of *hundreds*, and *all* of such notes as were entered in McNevin's Bill Book were entered in the same way, yet this same McNevin admits, that they are all *now* of the denomination of *thousands*, and that "in the aggregate they must exceed *forty thousand dollars*."

And, on being pressed, as to *when* the word "twenty" was written, he answered. "On the same *day* that the *rest of the sum* was filled in, *sometimes* it was "on the *same day*, *sometimes* a *week* after."

It is also to be borne in mind, that by paper 16 c, he *admitted*, that he had really *altered* the note as pleaded.

Then McNevin's son attests, that some of the respondent's endorsements during the spring of 1866, were obtained by him, and the notes that *he* thus got endorsed were "*for five hundred dollars, or five hundred and fifty dollars, or there-*"*abouts.*

Dr. Girdwood also proves, that *all* the other notes so endorsed since January, 1866, have been *altered* since they were originally written, in the same manner as the note in question here.

The Honorable Judge who heard the case in the Court below, was clearly of opinion, upon the whole case, that the note sued on, had really been altered, as pleaded, and he consequently dismissed the action; and the respondent confidently submits, that that judgment was in all respects correct and ought to be confirmed by this Court.

The following was the judgment in Appeal:—

"Considering that the promissory note, the subject of this contention, bearing date the second day of March, 1866, and payable five months after date, was ori-

ginally made by the maker thereof for the sum of $500, with blanks and spaces on the said note, whereby the said original sum thereon was enabled to be filled up and increased to the sum of $2,500, as the same appears on the face of the said note;—Considering that the said promissory note with the said blanks and spaces thereon was duly endorsed by the said respondent and by him delivered and turned to the said maker, by whom the said blanks and spaces were filled up to the amount on the face of the said note, without the knowledge of the said respondent;—Considering that the said note was passed to the said plaintiff by the said maker in the usual course of trade and business, in the condition it then was and now is, filled up to the said sum of $2,500, and without notice to the appellants of any defects, blanks or alterations therein made;—Considering that the said note on the face thereof appeared to be genuine, and was taken and received by the appellants in good faith;—Considering that the alterations on the said note were caused by and owing to the negligence of the respondent, in allowing the said blanks and spaces to remain and be on the said note, and upon his endorsement thereof as aforesaid, and his return and delivery of the said note, with the said blanks and spaces thereon, to the said maker thereof, inviting by such his, the respondent's negligence, the said alterations to be made as aforesaid;—Considering that thereby and by law the said respondent became and was liable to the said appellants, for the said amount of $2,500 appearing on the face of the said note;—Considering that in the judgment of the Superior Court * * * there was error, doth reverse and set aside the said judgment, and * * * doth condemn the respondent to pay to the appellants the sum of $2,500.52, to wit * * * with interest * * * with costs of the Superior Court and also of this Court."*

Judgment of ~~Superior~~ Court reversed.

Mackay & Austin, for Appellants.

Strachan Bethune, Q.C., for Respondent.

[S. B.]

QUEBEC, 10TH MARCH, 1869.

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

THE QUEBEC MARINE INSURANCE COMPANY,
(*Defendants in the Court below*),
APPELLANTS;

AND

THE COMMERCIAL BANK OF CANADA,
(*Plaintiffs in the Court below*),
RESPONDENTS.

HELD:—That the implied warranty of seaworthiness applies to the state of the vessel at the commencement of the voyage, and if seaworthy then, the insurer is responsible for all the ordinary incidents arising in the course of the voyage; and it is no breach of this warranty, (1) that defects existed in the boiler at the time of sailing rendering repairs to it after sailing necessary, where, in the opinion of the Court, it is not proved that the loss was occasioned by the originally defective boiler, or by the repaired boiler, (2) that the chief engineer had never before been to sea and was ignorant of the management of boilers in salt water, where, in the opinion of the Court, it is not proved that the loss was occasioned or influenced thereby.

BADGLEY, J. This action was brought upon a policy of Marine Insurance;

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* Similar judgments were rendered in three other Appeals, in two of which Robert Wood was appellant, and in the other A. W. Ogilvie & *al.* were appellants, and Johnston Thomson was respondent.—[Reporter's note.]

The Quebec Marine Insurance Co. and The Com. Bank of Canada

issued by the appellants on the 10th of November, 1864, for $6000 upon the body, tackle, apparel and other furniture of the propeller, *West*, valued by the policy at $24,000, upon her voyage from Montreal to Halifax in Nova Scotia, during which she was lost in the lower St. Lawrence opposite to Matane.

The proved facts of the case will be given in narrative form to avoid repetitions hereafter. The vessel was five years old at the time of her loss, had been built at Montreal for river and upper lake navigation, and during the three last years had navigated as a freight steamer between Chicago and Montreal, and had successfully resisted some severe lake storms during that service. She was thoroughly examined on the 12th April 1864, together with her boiler, at that time two years old, by the Government inspector of steamboats and then received his official certificate of soundness and seaworthiness, in which the boiler was also certified to have been tested by hydraulic pressure of 150 pounds to the square inch and found sound and fit for use. Shortly after in the same Spring of 1864, she was again examined by the inspector of the Canadian Board of Underwriters, and classed by him A 2, being one class above B 1, the standard class for seaworthy vessels, and insurable at about one per cent. less premium than a B 1 vessel. In preparation for her voyage to Halifax she was perfectly repaired in October at Montreal and fitted for sea navigation, and in all respects considered in sea-going order, and literally seaworthy for her voyage; the boiler was also examined and found in order, but not tested, as that operation had been performed in the previous April, only six months before. She left Montreal with her cargo at the appointed time of the policy, the 21st of November, in all respects fitted for the voyage, with two engineers on board, one who had had the charge of the engine for the three last years, and another, engaged at Montreal expressly as being acquainted with the management of engines and boilers in salt water, the other engineer not having been at sea. She arrived at Quebec on the 23rd November, in perfect order in every respect, and there shipped her sea-going master and a competent sea crew and left Quebec on the morning of the 25th November in like good order and soundness, as proved of record, and proceeded on her voyage down the river until, on the evening of the 27th, having arrived at Bic about 50 leagues below Quebec, she reached salt water. Its increased pressure was first felt in causing water to escape from the boiler into the fire box and damping the fires, when the engineers advised the master to have her taken into a safe place where the defect might be repaired. She was in consequence taken into Hatte's Cove, near Bic, whence the insured at Montreal were notified by telegraph of the circumstances. Competent workmen were immediately sent from Montreal to the Cove where she was lying, who completely repaired the defects, consisting of a small crack in the couplings of the corner of the fire box, which became a defect only by the salt water pressure, and the tightening of three or four rivets on the upper part of the boiler, rendering the boiler in fact, after these repairs, as good as if the defects had never existed. Steam was then got up and the boiler tested with the salt water before the workmen left on their return to Montreal, and no leak or defect of any kind could be discovered. The repairs were completed on the 30th November, but the low tide prevented the vessel getting away until the high tide of the 14th December, when she left the

The Quebec Marine Insurance Co. and The Com. Bank of Canada.

Cove, and again proceeded on her voyage in salt water, and when, as it was proved by Janes, an experienced witness, she was properly manned and equipped for her voyage as well as sound and seaworthy. She continued on her voyage under sail and steam during the entire 11th and into the night, the engine working well and the boiler perfectly sound, under the charge of the engineer, when during that night she was assailed by a violent storm accompanied with snow, by which the rudder became broken, which the hands on board were unable to repair from the violence of the storm and waves; when with her sails blown away, she became unmanageable, and the master, to save the lives of all on board and for the chance of saving the vessel herself, had her directed to the shore, which she reached by the power of steam alone, and where she was stranded, the boiler continuing in perfect order all the time, until the vessel broke up on the morning of the 12th and went to pieces.

The appellants having refused to pay the amount insured, this action followed. The declaration sets out the policy, the timely sailing of the *West* from Montreal, the perils assumed by the respondents under the policy, the defects of the boiler and its repair, the detention at the Cove and subsequent voyage, with the other particulars of the voyage to the time of her total loss by the perils of the sea insured against, concluding for a condemnation against the appellants. The appellants denied their liability by reason of the unseaworthiness of the vessel at the time of her sailing from Montreal and which unseaworthiness they aver was as follows: 1st. The engineer employed by the parties navigatin; the vessel was ignorant of the management of boilers in salt water. 2nd. The *West's* insufficient outfit in anchors and chain cables. 3rd. The rottenness of her timbers and specially of the knees of her bows. 4th. The inherent defects of her boiler and rudder at the time of her sailing to encounter the ordinary perils of her voyage. 5th. She was not in a navigable state at the time she sailed on her voyage because of her boiler requiring repairs and her rudder wanting proper chains and service coupling. The appellants further aver that after the vessel had been about six hours in salt water the boiler burst in consequence of the alleged defect, and that after a detention at the River Ratté where the boiler was insufficiently repaired, she proceeded on her voyage and *was wrecked in consequence of the defective condition of the rudder.*

And concluding with a general traverse of the averments of the declaration and particular traverses of the making of the policy by them as alleged, and of the insureable interest of the respondent.

Upon the issues joined on these pleadings, and after evidence adduced on both sides, the case was argued and submitted for the judgment of the Superior Court, who adjudged in favour of the respondent against the appellants for the amount demanded less certain deductions mentioned in the judgment. This appeal followed, but the case has been submitted to this Court in a modified and reduced form, the appellants having restricted their objections against the demand, to two heads only as constituents of the unseaworthiness pleaded by them, and which they set out in the following statement extracted from their factum as filed in this Court and here given in their own words: "The appellants when they pleaded "to the respondent's declaration, relied upon a variety of circumstances which it

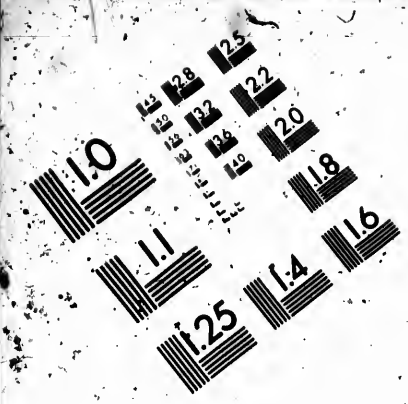
The Quebec Marine Insurance Co. and The Com. Bank of Canada.

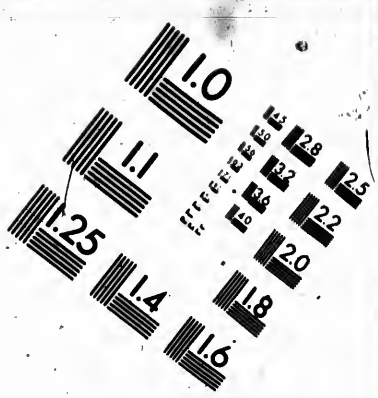
"was understood could be brought out in evidence, establishing unfitness of the "vessel for a sea voyage; and in their plea of perpetual exception they disclosed "these circumstances; *it is now however admitted, that there were only two "heads of objection to the respondent's action clearly substantiated by the evi-"dence adduced in the cause, and consequently the others are now abandoned, "and these two, upon which the appellants now confidently rely, as having "been clearly established in the Court below, are*: 1st. Incompetency of the "crew for a sea voyage, because the chief engineer had never before been to sea, "and was ignorant of the management of boilers in salt water. 2nd. The exis-"tence of defects in the boiler of the steamer, rendering repairs to it absolutely "necessary before she should have started on her voyage."

These two particular objections are therefore the plea to the action and are briefly resumed by the appellants in another part of their factum as follows: "because her engineer was ignorant of the management of engines in salt water, "and because of defects in her boiler which rendered repairs to it absolutely "necessary." It is proper to add that the appellants' demurrer previously dismissed by the Superior Court, has not been submitted to this Court. This Court has therefore been relieved from considering any other constituents of unseaworthiness than those expressly mentioned and limited as above by the appellants and by them argued upon here. By the law of England the risk of insurance attaches from its date at the home port where the insured vessel is lying, whether she be *at and from* such port and continues during the whole time she remains in the home port in a course of preparation for her voyage or whilst taking in cargo, and also necessarily when she sails from the port on her voyage. The French law attaches the risk only from the day she sails on her voyage from the port of loading unless otherwise stipulated in the policy. But insurable interest or risk is not seaworthiness, which attaches only from the commencement of the voyage, that is, sailing from the port. Graham and Barras 5 B. & Ald. 1011, and is so settled distinctly in English, French and American jurispradence, and could not be otherwise from the meaning of the word, which is a vessel being in a navigable state when she does sail. Now although the commencement of the insurable risk, the date of the policy, has been pleaded as the time of seaworthiness, namely the 10th of November, that date can have no possible application to the unfituess or unseaworthiness of the vessel when the voyage commenced on the 21st November. Again, the restricted objections apply to two different constituents of unseaworthiness, the one that of the defects of the boiler "*before she should have started on her voyage*" could have no effect whatever as unseaworthiness whilst she was lying at her home port before her departure; the other, that of the ignorance of the engineer of the management of boilers in salt water, could only apply when the *West* reached salt water, and could have no effect of unseaworthiness whilst she was in fresh water, with which both engineers had many years experience. The time, as to these alleged constituents of unseaworthiness, is clearly distinct for each.

There is no express warranty of seaworthiness in this policy, but in every policy of marine insurance there is an implied warranty presumed from the very act of procuring the insurance, that the vessel at the commencement of the voyage

is seaworthy, which is defined to be a fit state as to repairs, equipment and crew, to encounter the ordinary perils of the proposed voyage insured against at the time of sailing on it. 1 Arnould No. 243 and authorities cited as in the words of the 2508 art. of our Civil Code: "It is implied warranty in any "contract of marine insurance that the ship [illegible] the time of "sailing. She is seaworthy when she is in a [illegible], equipments, "crew, and in all other respects to undertake the voyage [illegible] worthiness has been held to be a condition on which depends the [illegible]ing of the policy for loss insured in course of the voyage. [illegible] rule of required seaworthiness for the attaching of the policy from the [illegible] parture admits, however, of several well established exceptions, but which of themselves do not violate the policy warranty so as to defeat the insurance; as, among other examples, a merely incidental temporary defect or deficiency at the commencement in the fitness for the voyage or in its course that may be readily and easily remedied and which is soon remedied. Phillips on Insurance 726, 3 Mass. Rep. 334, 11 Pick. Rep. 56, Weir and Aberdeen 2 B. and Ald. 320, L. C. J. Tenterden remarks, that the proposition of the non-liability of insurers for original unseaworthiness at the commencement of the voyage, but subsequently removed, would go to the length of establishing, that if a vessel at the outset of her voyage be by mistake or accident unseaworthy owing to some defect which is immediately discovered and remedied before any loss happens in consequence of it, still that the policy would be void and the underwriters not liable, and surprised him as a proposition, because, if true in point of law, many cases indeed would be found where it would turn out that the assured would have no claim upon the underwriters because something was wanting or something was excessive at "the instant of the ship's departure, although the want had been supplied or the "excess removed before the loss happened" etc.; and his Lordship added, "I think therefore this proposition cannot be maintained." And his opinion was confirmed by his colleagues, JJ. Bayley and Holroyd, and has become a rule of jurisprudence both in Britain and the United States and is so cited as approved by authors treating of the matter. The implied warranty therefore does admit, and with reason, of the exception as to easily reparable defects upon their discovery after the sailing on the voyage, provided the repairs are made before the loss occurs. Now one of the objected grounds constituting the alleged unseaworthiness in this case, is the defective state of the boiler requiring repairs "before the *West* should have started on her voyage" But this and other requisites to constitute seaworthiness depend upon the intended use and service of the vessel and differ accordingly at different times and under different circumstances. What would satisfy this implied warranty, simply because it is not an express warranty, for lying in port for temporary purposes, for short coasting voyages, for navigating a lake or river, vary from those demanded for navigating the open sea on long voyages (1 Phillips 726,) as to and from Europe, to the Cape of Good Hope (Arnould p. 653.) Indeed, as in policies at and from, if the insurance risk attaches before sailing and the ship while in port is in a state of seaworthiness commensurate with her then risk, her subsequent sailing in a state of unseaworthiness for the voyage will not avoid the policy *ab initio* 3 Taunt. 209, and in the





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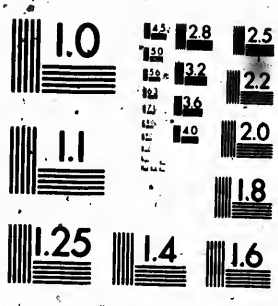

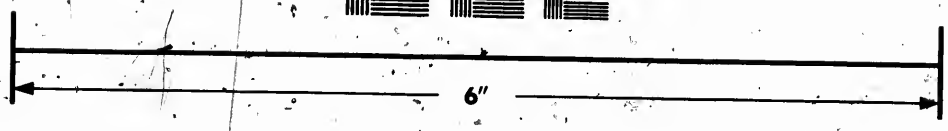

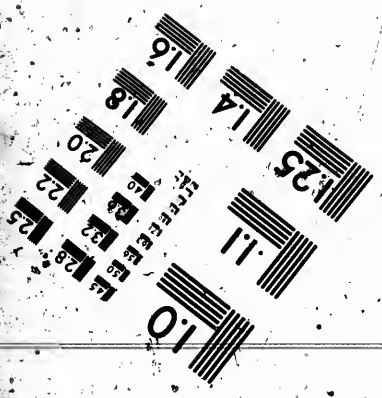

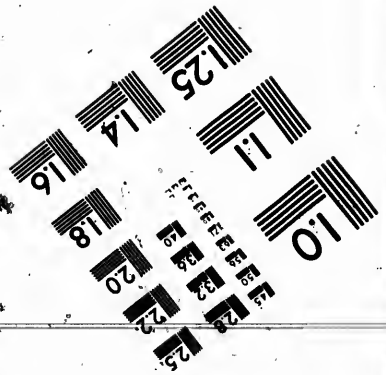

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The Quebec Marine Insurance Co. and The Com. Bank of Canada.

same way, if she be lost in the course of river navigation, the underwriters will be liable, provided her then state of equipment was adequate to her then risk, although it might not be such as to constitute a state of seaworthiness for a sea voyage. Dixon & Saddler 5 M. & W. 414 and per Parke B. for the Court of Exchequer, "if the assurance attached before the voyage commenced, it is "enough that the state of the vessel be commensurate to the then risk, and if "the voyage be such as to require a different complement of men or state of "equipment in different parts of it, as if it were a voyage down a river and "thence across the open sea, it would be enough, if the vessel were at the com-"mencement of each stage of the navigation properly manned and equipped for "it." This judgment was afterwards affirmed in the Exchequer Chamber 8 M. & W. See also 1 Park on Insurance p. 299, 6 Ed. by Shee. The great principle established by the decisions is, that if the vessel, crew and equipments be originally sufficient for her then state, the assured has done all he contracted to do. And this case of successive stages was exemplified by Sir W. Erle, in the case of Thompson & Hopper 4, El. & Bl. p. 181, where he instanced the case of "a policy on a ship at and from London to the North Sea on a whaling voyage, which he said was "almost too trite to be quoted, in which this implied or presumed warranty was "for four gradations, fit for dock in London, fit for river to Gravesend, fit for sea "to Shetland, then fit for whaling." Similar gradations of fitness have been proved in this case. The *West* was fit at Montreal where she took in her cargo and took on board a sea going engineer and whence she sailed on her voyage, she was fit for river navigation to Quebec where she took on board her sea going master and crew, she was fit for river navigation to Bic where she first entered salt water and where the boiler defects caused thereby were discovered and completely repaired, and after the repairs, she was fit for salt water navigation from Bic until her loss: all these successive gradations coming within the requisites of seaworthiness. Moreover it is laid down that a vessel might repair at each stage of the navigation, 1 Phillips 400 as at the place where the voyage commenced, 1 Arnould 627. Her boiler was sound at Montreal, on the River to Quebec, at Quebec and on the River to Bic, and after repair, from Bic to the place of her loss. This principle of successive gradations was finally settled in 1861 in the case of Biccard & Sheppard on appeal to the Privy Council 14 Moore P. C. R. p. 471, in which Lord Wensleydale giving the judgment affirmed the rule in 5 M & W, as affirmed in Exch. Chamber in 8 M & W in Dixon & Saddler, above referred to, which principle, His Lordship observed, was founded upon many cases, and amongst them Busk & Royal Insurance Company, 2 B & Ald 72, Walker & Maitland 5 B & Ald 171, Holdsworth & Wise 7 B & C 794. Bishop & Pentland Ib 219. Shore and Rendall Ib. 798 note.

This system of successive gradations for fitness of navigation also necessarily implies that repairs may be made at each, and therefore the rule is plainly accompanied with the obligation upon the assured to keep the vessel seaworthy, if it be possible, as far as depends upon him, 1 Phillips 731, that is, to procure the necessary and reasonable repairs in the successive stages of the voyage, according to the means that can be had for the purpose, 5 Burr 280, 282 p. Lord Mansfield, 11 Pick 227 p. Ch. J. Shaw. It would be absurd to inquire in the

face of these authorities, if the boiler, proved to have been tested at Montreal and proved sound from Montreal to Bic for 100 leagues of fresh water navigation, became a constituent of unseaworthiness because of a defect only discoverable and discovered in fact at first reaching salt water and then immediately repaired. Such a defect so repaired is not unseaworthiness becoming a violation of the warranty, nor could it relieve the appellants by reason thereof from their liability, because it is an elementary principle that after the policy has once attached, a compliance with the warranty ceases to be a condition precedent to the liability of the insurer, see Douglas R. p. 708, 755 p. Lord Mansfield, 1 Dow Parl. Cases 344 per. Lord Eldon, both holding, that the assured could not escape from his obligation to repair and keep his vessel seaworthy and failing to do so, the liability of the underwriter goes, but his liability holds, when the subsequent loss is unconnected with the original unseaworthiness. As where a vessel is out of trim during the voyage, but before a loss happens, is put in proper trim, the insurer will be held, 1 Arnould p. 655 note 2, so, the necessity for repairs during the voyage on account of wear and tear, does not impair the original seaworthiness, Ibid 656 note 1, and a great number of similar instances might be mentioned. Now Arnould's *wear and tear*, is nothing but the effect on the boiler by salt water, which could not have been so tested at Montreal before the commencement of the voyage nor even at Quebec because the salt water test could only have been made at Bic where the salt water commenced. The objection in this respect is unreasonable, because no salt water test could be applied or was required at Montreal where fresh water alone exists, it might as well have been required at Chicago whence she had come to Montreal. It has been observed that the boiler continued sound until the vessel was stranded, and this is proved by both the engineers. Lauzon says that after the storm had set in and injured the rudder, the vessel became unmanageable and the intention of continuing the voyage was abandoned, he adds, "nous avons toujours gardé le steam afin de nous sauver. "Nous sommes arrivés à terre le lundi à trois heures du matin et à six heures "nous étions tous à terre." And Vincent, after saying that the repairs at Hatté cove made the boiler in perfect order, and that they proceeded on their voyage until the height of the storm at 9 o'clock at night, when the wind was blowing a perfect gale with snow and the sails were all carried away, when the rudder broke; and that the captain tried to keep the ship's head to the south shore, to get her ashore there, to save their lives, he adds there were no means of managing the ship: we kept the machinery working slowly until about four o'clock in the morning when the ship commenced to strike on the rocks. The Captain then told me to blow the steam off and let the water out of the boiler so that she might be lighter to get nearer the shore. He adds he went to do so, but in the confusion the working of the ship broke the steam pipe and the steam escaped of itself. It only remains to observe upon this first of the objections, that it is not complete in itself and does not go far enough: it does not aver that the loss of the *West* was occasioned by the originally defective boiler nor by the repaired boiler: whilst on the contrary, the soundness of the boiler up to the last has been proved and it was by that soundness that the vessel was enabled to be stranded at Matane, whereby the lives of the crew were saved. This objection

The Quebec Marine Insurance Co. and The Com. Bank of Canada.

The Quebec Marine Insurance Co. and The Com. Bank of Canada.

of unseaworthiness is quite untenable in law and fact, and insufficient to relieve the appellants from their liability.

The second objection, because the chief engineer had never been at sea and was ignorant of the management of boilers in salt water, is also defective, because it is not averred that the loss was occasioned or influenced thereby. He had had the charge of the engine and boiler of the *West* for the three last years and was proved to be an experienced and competent engineer of many years standing, but he had not been at sea, whilst again it is proved, that Vincent, another experienced engineer had been engaged and shipped at Montreal, expressly for the voyage, because he did know the management of boilers in salt water. In this respect the assured had done all they had contracted to do, and the obligation upon them was no larger than it would have been for the master of the vessel, as to whom it is held to be sufficient if the owners provide one generally competent. 5 B. and Ald. 171, 14 East 481, 7 B. and C. 219, M. and R. 49. The competency of Vincent as a salt water engineer has not been questioned, and from the evidence adduced there is no mystery about the management of boilers in salt water, even by experienced fresh water engineers who would require little more than a hint to become proficients in salt water. Now Vincent in his evidence says :

I have been an engineer for nearly thirty years, in all kinds of vessels. I have never been to Europe, but I understand how to manage a boiler in salt water. I made a voyage to New-York from Montreal as engineer of a steamer.

I was engaged for the *West* expressly because I understood the management of an engine and boiler in salt water, which the chief engineer did not. There is no difficulty in learning how to manage a boiler in salt water; any man can learn what is necessary to know in three or four hours. All that you have to do is to let off the water and steam together wherever you see that it begins to foam, so as to blow off the salt.

This requires to be done at intervals according to circumstances, sometimes it might be every ten and sometimes every fifteen minutes.

I do not see what difference it would make in the safety of the vessel that the chief engineer was not accustomed to salt water, if the assistant engineer knew how to manage the boilers and knew how to show the other how to do it.

Mr. Tucker, another witness, says :

I am chief engineer of Her Majesty's ship *Aurora* and I have been twenty years at sea in the Royal Navy, as an engineer.

In coming from fresh water into salt, it is necessary in the first place to watch the guage glass to see that the water is kept at a proper height, so that it may be seen that the boilers are not "priming" which is caused by the mixing of the salt and fresh water. I think that a vessel is perfectly safe to go to sea with one engineer who has not been in salt water, if the other has been accustomed to it ; if for a short voyage, such as going to Halifax, I think a vessel would be safe even if neither engineer had ever been in salt water. All engineers, if they are fit to be engineers, know that when they go to salt water it is necessary to blow off the boilers, and that is a very simple matter. It is usually done two or three times every four hours.

I decidedly would not consider a vessel unseaworthy sailing from Quebec to Halifax, because one of the engineers had never been in salt water.

Cross-Examined.—I should say the same thing supposing neither of them had ever been to sea.

William Barbour, the engineer of the Provincial Government steamer, says:

I have been an engineer since the year eighteen hundred and forty-seven. I served my time with the Napiers, of Glasgow, and I have been employed in the Allan's line of steamers and was out at the Crimea on board the *Canadian*. I consider myself competent to give an opinion on any subject connected with the business of an engineer. There is no difference in the manner of working an engine in salt or fresh water; there is a difference in the manner of working the boiler. The difference is that in salt water at regular periods it is necessary to blow the steam off the boilers, so as to prevent incrustation of salt, and not to allow more than a certain quantity of salt to accumulate.

An engineer accustomed only to fresh water can easily acquire sufficient information to enable him to take necessary charge of a steamer moving in salt water.

I should consider a vessel perfectly safe, in going to sea with a first class engineer, who has never been in salt water, if he had a second engineer who had made voyages on salt water in that capacity. A great many vessels have come from Upper Canada, on their voyage to New-York, and their engineers have been instructed by me how to tend their boilers in salt water and I consider that they left this (Quebec) in perfect safety; and the engineer would be perfectly competent, provided he attended to my instructions, and in these cases they had no second engineer who was accustomed to salt water.

Cross Examined.—He says, I do not consider a fresh water engineer would be competent to navigate on the Ocean unless he had received the proper instructions, or that he afterwards obtained them from his second engineer.

All these witnesses testify almost as experts, are men of great practical experience and the weight of their testimony is conclusive. They show that no long practice is required to know how the boiler is to be managed in salt water, and it is manifest that Lauzon did acquire that knowledge, because Vincent swears, "the chief engineer and myself took it turn about to attend to the boiler." And Lauzon swears that he knew the difference in effect between fresh and salt water upon boilers although he had not been to sea; and in fact he did practice his knowledge by attending to the boiler by turns, with Vincent, when the *West* was in salt water. All this evidence and the mere fact of Lauzon's having worked the boiler in salt water, are a disproof and an exclusion of this objection and are plainly conclusive against the appellants' averment of Lauzon's ignorance and the incompetency of the crew by reason thereof. Now, as it has been held as to the master, so it may be held as to the engineer, both being professional and practically scientific men, that if the alleged incompetency is founded on the fact of the master's ignorance of navigation, it was incumbent on the objector to show that such ignorance was a disqualification and that it was not considered safe to make the voyage without having a scientific navigator on board. 6 Cowen R. 270. The objection cannot avail here, because there was a scientific engineer on board, competent to manage the boiler in salt water, and moreover

The Quebec Marine Insurance Co. and The Com. Bank of Canada.

because Lauzon has been proved to have been equally competent to do the same. The appellants aver Lauzon's ignorance, but they do not aver that his presence was indispensable.

It is clear therefore upon the case submitted that the *West* was not unseaworthy as averred on these two grounds of objection, and that the alleged warranty at the commencement of the risk is not sufficient to bar a recovery for the loss which happened after the original defect had been removed and repaired 2 B. & Ald 320. The only means of relief for insurers as to a ship according to Emerigon Ch. 12 & 2.9.38 & 1 Valin 459-2 Ib. 80.81 are an entire failure or irremediable defect of the vessel rendering her incapable of existing as a ship; an entire innavigability at the time of the insurance, as stated by Emerigon and as qualified by Lord Tenterden, a congeries of planks; or, applying the objection to the boiler here, an irremediable state of the boiler rendering the engine useless, a boiler that could not hold either steam or water and was in pieces. The complete innavigability of a vessel is the protection of insurers, so also is the failure or neglect of the insured to put her in a seaworthy state after she had suffered damage; and the reason for this is manifest, 19 Pick. 200, because a necessity of repairs must be within the contemplation of the parties and every unavoidable delay and deviation, occasioned thereby, is therefore constructively permitted in a contract of Marine Insurance. Motteux and London Assurance Co., 2 Atk. 545, cited in Park on Insurance per Shee, which was the case of a known defect existing at the commencement of the risk insured and where a resort to another port for necessary repairs, was found to be unavoidable and therefore held not a deviation prejudicial to the insurance. In the present case the going into Hatté Cove for the purpose of repairing the boiler was most advisable and necessary, and upon principle was not prejudicial to the insurance effected with the Appellants.

All the particulars of unseaworthiness pleaded by the appellants, including the averment of her innavigable state when she sailed on her voyage because her rudder was wanting proper chains and secure couplings, having been specially abandoned as above, with the exception of the two special grounds above discussed it is not necessary to refer to that respecting the rudder, except to show that it is not founded in fact. Power, the ship builder who repaired and prepared the vessel at Montreal for her voyage, proves that the rudder was put into proper order for a sea voyage to Halifax, that a new iron tiller was fitted on and a heavier wooden rudder post fit for sea replaced the former river one, that the post was coupled and secured by a cast-iron ring, more than a foot long, keyed on by a large piece of iron, and that was the kind of tiller and rudder post made for sea-going vessels; that the outside river gear for steering had been replaced by necessary chains and gear fixed inside for sea navigation. He states further particulars and proves that, after the repairs made, the *West* was perfectly seaworthy for the voyage to Halifax; and this is confirmed *aliunde* and not disproved by the appellants who on the contrary abandoned the objection. As matter of fact therefore, her rudder was fit and in that respect she sailed from Montreal in a navigable state for her voyage and was therefore seaworthy. The judgment of the Superior Court, therefore, upon consideration of the case as submitted to that tribunal is correct, and must be supported by this Court, upon the grounds of

The Quebec Marine Insurance Co. and The Com. Bank of Canada.

contention submitted here. The loss was plainly disconnected with either of the reserved objections of alleged unseaworthiness, and the injury suffered by the rudder was an incident of the voyage, and caused by the storm. It is a rule that the implied warranty of unseaworthiness applies to the state of the vessel at the commencement of the voyage and that if seaworthy then, the insurer is responsible for all the ordinary incidents arising in the course of the voyage as per C. J. Erle, JJ. Lane and Nixon, And it is a further rule to look to the proximate cause of the loss, which in this case is simply the storm which she encountered and suffered from on her voyage, namely the marine perils insured against, the insurers the appellants, having agreed to indemnify the insured against loss by the perils of the navigation. The appellants cannot be relieved from their liability in this cause, and the judgment of the Superior Court must therefore be confirmed, with the deduction of the amount realized from the sale of the wreck, $235.17, the whole with costs of both Courts.

Duval C. J., and *Monk J.*, concurred, *Caron, J.*, dissentient.*

Judgment confirmed.

Andrews, Caron & Andrews, for Appellants.

Holt & Irvine, for Respondents.

(J. K.)

COUR SUPERIEURE, 1869.

DISTRICT D'ARTHABASKA, 1 SEPTEMBRE, 1869.

Coram POLETTE, J.

No. 874.

David Blais, fils, Demandeur, vs. *Joseph Blais, Défendeur,* et *le dit Joseph Blais, Demandeur en Garantie,* et *Louis Napoléon Larochelle, Défendeur en Garantie.*

JUGE: — Que l'action en dommage et pour démolition d'une chaussée de moulin construite sur un pouvoir d'eau qui fait répandre l'eau sur les terres adjacentes et avoisinantes, ne peut être intentée que sur l'expertise faite en vertu des Statuts Refondus du Bas-Canada, chap: 51.

Le lot de terre No. 3 Rang 7 du Township d'Arthabaska, dont une partie appartient à David Blais, fils, le demandeur principal, est traversé par un cours d'eau avec chute, sur lequel Louis Napoléon Larochelle, le défendeur en garantie, avait construit une chaussée de huit pieds de hauteur pour retenir l'eau et faire marcher un moulin à carder, à fouler et à scier qu'il avait construits. Cette eau, ainsi retenue sur son passage, se répandait sur les terres voisines et sur celle du demandeur principal.

Louis Napoléon Larochelle avait vendu cette propriété à Joseph Blais qui en était le propriétaire détenteur depuis le 10 Février 1866, et c'était contre ce dernier que David Blais, fils, avait dirigé son action par laquelle il concluait à

* The reporter has been unable to procure any report of the remarks of the dissentient judge.—*Reporter's Note.*

Blais et Blais.

$250 de dommages, " si mieux n'aime le dit défendeur," disent les conclusions, " sous quinze jours de la signification du jugement à intervenir démolir sa dite " chaussée et dans ce cas, n'être condamné à payer au dit demandeur que la " somme de trente piastres, montant des profits que le demandeur aurait retirés " de ses dix arpents de terre submergés par la dite chaussée du dit défendeur et " dont il a été privé depuis que le dit défendeur est en possession de l'immeuble " ci-haut décrit, avec les dépens."

Joseph Auger dénonça cette action à Louis Napoléon Larochelle comme étant son garant et après avoir pris son *fait et cause*, Larochelle plaida à l'action principale par une *défense au fond en droit*, dont suivent les principaux moyens, savoir :

1. Parce que par la loi, tout propriétaire est autorisé à utiliser et exploiter tout cours d'eau, qui borde, longe ou traverse sa propriété, en y construisant et établissant des usines, moulins, manufactures, machines de toutes espèces, et pour cette fin y faire et pratiquer toutes les opérations nécessaires à son fonctionnement, tels que écluses, canaux, murs, chaussées, digues et autres travaux semblables.

2o. Parce que, quant aux dommages qu'en peuvent résulter à autrui, soit par la trop grande élévation des écluses ou autrement, la loi règle la manière spéciale dont ces dommages doivent être constatés à dire d'experts, qui doivent être nommés et doivent agir et faire rapport ainsi qu'il est pourvu spécialement par la dite loi.

3o. Parce qu'aucune action de la nature de celle portée par le demandeur principal ne peut être intentée soit pour dommages soit pour la démolition d'une chaussée ou autres travaux, sans que les dits experts aient fait leur rapport, et seulement à défaut de paiement des dommages par eux constatés, dans les six mois de la date de leur rapport.

4o. Parce qu'il n'appert pas par la déclaration du demandeur principal, que lui, le demandeur principal, se soit aucunement conformé aux dispositions de la dite loi ; ait fait nommer des experts et que ces experts aient fait aucun rapport, constatant son droit de réclamer des dommages ou une indemnité quelconque.

5. Parce que le dit demandeur principal ne fait pas apparaître un droit suffisant de propriété sur l'immeuble dont il se prétend en possession, lui donnant le droit de porter la présente action, et parcequ'il ne conclut pas à être déclaré propriétaire du dit immeuble.

6. Parce que le dit demandeur ne pouvait pas porter la présente action *après l'an et jour* à compter de la confection de la chaussée et autres travaux dont il se plaint :

7o. Parce que le dit demandeur principal ne conclut pas à être déclaré le seul et légitime possesseur à titre de propriétaire de l'immeuble dont il est en possession.

8o. Parce que le dit demandeur principal ne peut conclure à des dommages, si mieux n'aime le dit défendeur principal démolir la chaussée mentionnée dans la déclaration et que telle conclusion est vicieuse et illégale.

11o. Parce qu'en fait d'immeubles, la loi ne permet pas de réclamer des dommages autrement que par *l'action pétitoire* ou par *l'action possessoire*, et que la

déclaration en cette cause ne contient ni les allégations ni les conclusions d'une *action pétitoire*, ni les allégations ni les conclusions d'une action possessoire. Blais et Blais

La cause fut inscrite et plaidée sur cette défense *au fond en droit*.

La Cour fit procéder son jugement par les remarques suivantes :

POLETTE, J. L'acte des Statuts Refondus pour le Bas-Canada, c. 51, permet la construction des moulins, machines, etc., sur les pouvoirs d'eau, et si les Aconstructions de barrages dans les rivières et cours d'eau, causent des dommages, le propriétaire en est responsable ; mais il faut que ces dommages soient constatés par des experts avant d'avoir recours à l'action. Les termes du Statut, surtout la version anglaise, sont impératifs à cet égard : " *Ces dommages seront constatés à dire d'experts.*" Ces termes ne laissent pas d'alternative, Statuts Refondus B.-C., Chap. 1., Sect. 13. §3. Le demandeur, avant d'intenter son action, devait nommer un expert et requérir le défendeur d'en nommer un autre, et sur son refus, s'adresser au Préfet du Comté, pour faire nommer un des experts de la municipalité. Il a été dit par le demandeur qu'il n'y avait pas tel expert de la municipalité : Les conseils municipaux ne sont-ils pas autorisés à nommer tous les officiers nécessaires ? tous les officiers qu'un Statut quelconque a créés, mis sous leur contrôle, S. R. B.-C., Chap. 24, Sect. 20, §19.

Le Chap. 51 suffirait pour les autoriser à nommer des experts ; s'ils n'en avaient pas déjà nommés, ne pourrait-on pas les y contraindre par un bref de *Mandamus ?* Mais ils ont des experts qu'ils nomment en vertu de la Sect. 22, §5 de l'acte municipal, sous le nom *d'estimateurs ; Estimateur et expert* y sont nommés en toute lettre ; et voici leurs attributions :

Ils voyent l'immeuble, et la chose cotisable du propriétaire ; ils l'estiment pour la faire taxer :

Ils voyent et estiment le terrain pour y construire un Hôtel de Ville, pour des carrés, parcs ou places publiques ; pour des chemins, pont, ou pour le site d'un édifice nécessaire ou pour tout autre ouvrage public, etc.

Chap. 24. Sect. 24 §16.
" " 27 4.
" " 50 1. 2. 3. 4. et 5.

Même pour les portes de bâtisses ou autres propriétés aux incendies, idem : Sect. 24 §18. Enfin ils estiment, ils évaluent tout ; et c'était un de ceux-là qu'il fallait prendre, si une des parties ne voulait pas nommer son expert, car ces estimateurs sont les experts nommés par les municipalités. Il y avait donc dans la municipalité l'officier dont le demandeur avait besoin ; mais qui au lieu de s'appeler expert, s'appelle estimateur, quoi qu'il soit le même officier avec les mêmes attributions.

Le demandeur n'allègue pas même, dans son action, que le défendeur a refusé de nommer un expert. Si le demandeur avait suivi les ordonnances du chap. 51, il aurait eu une bonne action, mais fondée sur le rapport des experts, qui équivaut à une sentence arbitrale. Ce procédé par le Chap. 51 est bien différent de la présente action ; ces dommages doivent être constatés, promptement et à peu de frais, dans l'intérêt de l'industrie, tandis que par la présente action, outre les longueurs de la procédure, il y aurait des frais considérables, deux dangers que

Blais et Blais.

le Législateur a voulu éviter dans l'intérêt de l'industrie dont le pays a un si grand besoin, et cette volonté doit être respectée.

Jugement:—La Cour ..... " considérant 1o que par l'acte des Statuts Refondus pour le Bas Canada, chapitre 51, le défendeur en garantie avait le droit d'utiliser la rivière traversant son immeuble, et celui du demandeur principal, en y construisant chez lui, les trois moulins et la chaussée sus-mentionnées et de les vendre ensuite comme il l'a fait au défendeur principal et demandeur en garantie, qui lui aussi avait et a encore le droit de les exploiter:

2o Que si cette chaussée a causé, par sa trop grande élévation, des dommages au demandeur principal et nommément ceux dont il se plaint, il devait les faire constater par des experts à être nommés par lui et le défendeur principal et demandeur en garantie, et à défaut par l'un d'eux d'en nommer, par l'un des experts de la Municipalité, à être désigné par le Préfet du Comté, lesquels experts en évaluant les dommages et fixant une indemnité auraient pu, s'il y avait lieu, établir une compensation en tout ou en partie, avec la plus value qui pouvait résulter à l'immeuble du demandeur principal de l'établissement de ces moulins:

3o Que cela fait, et à défaut de paiement de ces dommages ainsi constatés et fixés dans les six mois de la date du rapport des experts avec l'intérêt légal à compter de la date date, le demandeur principal aurait eu alors le droit de poursuivre pour le recouvrement du montant déjà fixé de ces dommages avec intérêt, et pour faire démolir la chaussée ou se faire autoriser à la démolir aux frais et dépens du défendeur principal et demandeur en garantie.

4o Qu'il résulte de ce que ci-dessus, que le demandeur principal n'a pas droit d'action contre le défendeur principal et demandeur en garantie pour faire constater s'il a ou non souffert des dommages; s'il y en a, à combien ils se montent, attendu que l'acte sus-mentionné prescrit un mode différent de le faire, lequel mode est plus prompt et plus économique et a en outre l'effet de soustraire le défendeur principal et demandeur en garantie aux embarras et aux difficultés d'un procès; et qu'il ne peut demander la démolition de la chaussée qu'en autant qu'il aura été constaté par experts qu'il a droit à des dommages; que ces dommages ont été évalués et qu'ils n'auront pas été payés, avec l'intérêt légal et dans les six mois de la date du rapport des mêmes experts; qu'ainsi l'action du demandeur principal n'est pas fondée en droit. Pour ces motifs, déboute le demandeur principal David Blais fils, de son action principale en la présente cause, le condamne aux dépens d'icelle, ainsi que ceux de la demande en garantie envers le dit défendeur principal et demandeur en garantie, Joseph Auger, le défendeur en garantie, Louis Napoléon Larochelle tant en chacun en droit soi tant en demandant que defendant que de la sommation et dénonciation.

Laurier & Crépeau, pour David Blais, fils.

E. L. Pacaud, pour Joseph Auger.

Montambeault & Taschereau, pour Louis Napoléon Larochelle.

(E. L. P.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 1191.

In the matter of the Mayor, Aldermen and Citizens of the City of Montreal,

AND

Bonaventure Street,

AND

Patrice M. Guy, & al.,

AND *Proprietors.*

Louis J. A. Papineau,

Mis en cause.

HELD:—1. That an order or judgment of the Superior Court, enjoining "the *late* Prothonotary of "this Court, Messrs. Monk, Coffin and Papineau, to wit Samuel Wentworth Monk, William "C. H. Coffin and Louis J. A. Papineau, *or their representatives,*" to pay a certain sum of money deposited with "Monk, Coffin and Papineau, Prothonotary," Mr. Papineau being still Prothonotary with other associates, is valid, and this, notwithstanding that both Monk and Coffin were dead when such judgment or order was pronounced, and that the same was pronounced, without any one of the said three individuals, or their representatives, being in any way parties to the case.

2. That under the circumstances above related the said Papineau is still an officer of the Court, and, as such, liable to be summarily impleaded, by rule for *contrainte par corps*, for non-compliance with said order or judgment.

3. That notwithstanding the fact that said Papineau, by the terms of his appointment by the Government and the consequent notarial agreement between himself and his colleagues, had no control over the business of the said Superior Court, or the moneys received by said Prothonotary, and abstained from exercising any such control, and did not participate in the emoluments of said office, (his powers and remuneration being limited to the business and emoluments of the Circuit Court), he nevertheless is liable and responsible for all moneys which may at any time have been deposited with the said Prothonotary.

This was a rule for *contrainte par corps*, against Louis J. A. Papineau, as the sole survivor of the three gentlemen who acted some years since as the joint Prothonotary of the Superior Court, at Montreal, for non-compliance with an order or judgment of the Superior Court, rendered on the 25th day of November, 1867, enjoining "the late Prothonotary of this Court, Messrs. Monk, Coffin "and Papineau, to wit, Samuel Wentworth Monk, William C. H. Coffin and "Louis J. A. Papineau, or their representatives," to pay to the said Patrice M. Guy & al., the sum of $200 cy. which had long previously been lodged by the Corporation of Montreal, in this case, with the then Prothonotary of the Court, Messrs. Monk, Coffin and Papineau.

Mr. Papineau appeared by counsel and, by permission of the Court, answered the rule in writing, as follows:—

1.—That the pretended judgment, alleged to have been rendered by this Honorable Court on the 25th day of November, 1867, and on which said rule was and is based, purports on its face to have been and was in fact rendered, not against Monk, Coffin and Papineau as the then Prothonotary of this Court and as such an officer of the Court, but against certain individuals, to wit, Samuel Wentworth Monk, William C. H. Coffin (both of whom were then dead) and Louis J. A. Papineau, as having been "the late Prothonotary of this Court," or their representatives, without any one of such individuals or their representa-

The Mayor, &c. and Papineau

tives being in any way parties to the cause in which said pretended judgment was so rendered, or being in any way summoned or notified to appear and become such parties thereto, or otherwise howsoever.

That long before and at the time of the rendering of said pretended judgment the said Samuel Wentworth Monk and William C. H. Coffin were dead, and they, the said Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau, had long previously ceased to be joint Prothonotary of this Court.

That by reason of the said several premises and by law the said pretended judgment so made and rendered as aforesaid was, and is null and void, and the said Louis J. A. Papineau was not and is not consequently liable to *contrainte par corps* for any alleged disobedience of or non-compliance with the order in the said pretended judgment set forth and contained.

And the said Louis J. A. Papineau further saith, that all and every the allegations, matters and things set forth and contained in the said rule except in so far as the same are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said Louis J. A. Papineau hereby expressly denies the same and each and every thereof, and that the same are moreover wholly insufficient in law.

2.—And the said Louis J. A. Papineau without waiver of the foregoing answer but on the contrary reserving to himself all the benefit and advantage thereof, for further answer to the said rule saith:

That the pretended judgment alleged to have been rendered by this Hon. Court on the 25th day of November, 1867, and on which said rule was and is based, purports on its face to have been and was in fact rendered, not against Monk, Coffin and Papineau as the then Prothonotary of this Court and as such an officer of the Court, but against certain individuals, to wit, Samuel Wentworth Monk, William C. H. Coffin (both of whom were then dead) and Louis J. A. Papineau, as having been "the late Prothonotary of this Court" or their representatives, without any one of such individuals or their representatives being in any way parties to the cause in which said pretended judgment was so rendered, or being in any way summoned or notified to appear and become such parties thereto, or otherwise howsoever.

That long before and at the time of the rendering of said pretended judgment the said Samuel Wentworth Monk and William C. H. Coffin were dead, and they, the said Samuel Wentworth Monk, and William C. H. Coffin and Louis J. A. Papineau, had long previously ceased to be joint Prothonotary of this Court.

That at the time of the rendering of the said pretended judgment the said office of Prothonotary was held and exercised by the persons who presently hold and exercise that office, and that consequently the said "Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau, or their representatives" were not and could not be held to be in any sense either collectively or otherwise officers of this Court, and consequently he, the said Louis J. A. Papineau was not and is not liable to be impleaded by rule, for any alleged disobedience of, or non-compliance with, the order in the said alleged judgment contained and set forth.

And the said Louis J. A. Papineau further saith, that all and every the allegations, matters and things set forth and contained in the said rule, except in so far as the same are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said Louis J. A. Papineau hereby expressly denies the same and each and every thereof, and that the same are moreover wholly insufficient in law.

3.—And the said Louis J. A. Papineau, without waiver of the foregoing answers, but on the contrary reserving to himself all the benefit and advantage thereof, for further answer to the said rule saith:

That Samuel Wentworth Monk, William C. H. Coffin, and Louis J. A. Papineau in the said rule mentioned had ceased to be the joint Prothonotary of this Court, long previous to the date of the alleged judgment in the said rule referred to and on which it is based, by reason of the death of the said Samuel Wentworth Monk; that subsequently the said office was held and exercised by the said William C. H. Coffin, Louis J. A. Papineau and John Sleep Honey, who also ceased to be such joint Prothonotary long before the rendering of said pretended judgment by reason of the death of the said William C. H. Coffin; and that at the time of the rendering of said alleged judgment the persons who presently hold and exercise said office did also hold and exercise the same.

That the said Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau, never received any special commission or appointment as joint Prothonotary of this Court, but having been previously joint Prothonotary of the late Court of Queen's Bench, they were declared by Statute to be as such the joint Prothonotary of this Court.

That when the said Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau were originally appointed to be such joint Prothonotary of the said Court of Queen's Bench they were specially informed and instructed by the then Provincial Government, as explanatory of their relative duties and responsibilities, that the business of the Superior Term of the said Court should be conducted and the emoluments accruing from it divided by the said Samuel Wentworth Monk and William C. H. Coffin, and that the said Louis J. A. Papineau should conduct the business and receive the emoluments of the Inferior Term of the said Court. And when the said Court of Queen's Bench was abolished and the present Superior Court and Circuit Court created instead, and fixed salaries also substituted for the fees which the said parties formerly received, they were also instructed and informed by the then Provincial Government that the salaries awarded to the said parties respectively were based on the terms and conditions annexed to their said original appointment, and as representing the revenue which each of them would have otherwise received.

That during the tenure of their said office the said Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau acted in strict accordance with the aforesaid instructions and on the 13th day of March, 1845, by notarial agreement executed on that day between themselves, before George Weeks and colleague Notaries Public (of which an authentic copy is herewith fyled), covenanted and agreed accordingly, and that consequently the said Monk and Coffin should alone be responsible for moneys deposited in the Superior Terms of the

The Mayor, &c. and Papineau.

said Court, and for errors and omissions committed or done in the said Superior Terms.

That in consequence of such instructions and agreement he, the said Louis J. A. Papineau, at all times abstained from handling, interfering with, or exercising any control over any moneys at any time deposited in the hands of the joint Prothonotary of this Court, as such, or with their payment or expenditure, and that he, the said Louis J. A. Papineau, never was, at any time whatever, the depositary of such moneys.

That at the time of the death of the said Samuel Wentworth Monk and at all times since, any moneys which may have been deposited previously in the hands of the said Prothonotary were subject to be dealt with by the representatives of the said Samuel Wentworth Monk and by the said William C. H. Coffin and his representatives alone, and that such moneys never were in the hands of, or under the control of the said Louis J. A. Papineau.

And the said Louis J. A. Papineau further saith: — That all books, papers, and vouchers generally connected with the affairs of the said office of joint Prothonotary so held and exercised by the said Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau have been long since taken possession of by Joseph A. Defoy, commissioner, named to that end by the Government of the Province of Quebec in whose hands they still are. And further that the said Patrice M. Guy & al., have by their own means and neglect in not intervening as they were allowed to do by this Court on their own motion to that effect in the cause No. 1607, The Trust and Loan Company of Upper Canada against the Hon. Samuel W. Monk executor, lost the sum of money claimed by said rule which they could have secured had they so intervened.

And the said Louis J. A. Papineau lastly saith:—That all and every the allegations, matters and things set forth and contained in the said rule, except in so far as the same are hereinbefore expressly admitted to be true, are false, untrue and unfounded in fact, and the said Louis J. A. Papineau hereby expressly denies the same and each and every thereof, and that the same are moreover wholly insufficient in law.

PER CURIAM:—This case is before the Court on a rule for *contrainte par corps* against L. J. A. Papineau, Esquire, one of the Prothonotaries of this Court. In order to understand the case it is necessary to retrace the previous proceedings in the cause. On the 25th November, 1867, the Court (Berthelot, J.,) gave judgment on the petition of the proprietors, Guy & al., ordering "the late Prothonotary of this Court, Messrs. Monk, Coffin and Papineau, to wit, Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau or their representatives, to pay to the petitioners, Patrice M. Guy & al., the sum of two hundred dollars, amount deposited as aforesaid, as the price and compensation for the said strips of land acquired by forced expropriation from the said petitioners, parties expropriated, and also to pay to them the further sum of $2 deposited for the parties interested, and to the payment of the said sums of money, the said parties shall be held and constrained by all legal ways and means, and upon payment thereof duly and legally discharged."

The amount not having been paid, the petitioners on the 17th June, 1868,

made a motion that a writ of *contrainte par corps* issue against the said Papineau until he should have paid the amount to the petitioners. On the 25th June, the Court ordered a rule to issue returnable on the 27th June. The Mayor, &c. and Papineau.

Mr. Papineau was allowed to answer the rule in writing, and for a first answer said that the judgment, of date the 25th November, 1867, was rendered not against Monk, Coffin and Papineau, as the then Prothonotary of this Court, but against certain individuals, to wit, Samuel Wentworth Monk, William C. H. Coffin, both of whom were then dead) and Louis J. A. Papineau as having been "the late prothonotary of this Court" or their representatives, without any one of such individuals or their representatives being in any way parties to the cause in which said pretended judgment was so rendered, or being in any way summoned or notified to appear and become such parties thereto or otherwise, howsoever. That the said Monk, Coffin and Papineau had long previous to the rendering of this judgment ceased to be joint Prothonotary of this Court.

By a second answer Mr. Papineau alleged that he was not at the date of the judgment an officer of this Court as member of the firm of Monk, Coffin and Papineau, that the only course of the petitioners to take against him was an action, and not a rule.

By a third answer Mr. Papineau alleged that by the instructions of the then government of the country, in accepting the office of Prothonotary jointly with Messrs. Monk and Coffin, his duties and responsibilities were limited to the Inferior Term of the late Court of Queen's Bench, and to the Circuit Court, which took its place: that by an agreement made by Messrs. Monk, Coffin and Papineau together before George Weekes, N.P., of date 13th March, 1845, the duties and responsibilities of Mr. Papineau were so defined and restricted.

As to the first and second answers the Court may here say that neither of them is a sufficient answer to the rule. The judgment is clearly in its terms against Mr. Papineau, individually, and must stand. As to the proceeding by a rule against Mr. Papineau, it is only reasonable that a summary proceeding like a rule should be allowed against a person who has been officer of the Court, though he has ceased to be such functionary, so long as his liabilities as such have not been discharged. In fact, Mr. Papineau has been since 1844, and still is Prothonotary, although with different associates.

It is necessary in the next place to refer to the documentary and parol proof of record.

A letter, of date 4th July, 1844, was addressed to Mr. Papineau by the then Provincial government, indicating the basis of the agreement with it and his colleagues in the office of Prothonotary and clerk of the Court. "You will understand," says this letter, "it to be His Excellency's intention that the business of the Superior Term should be conducted and the emoluments accrued from it divided by Messrs. Monk and Coffin, and that you should conduct the business and receive the emoluments of the Inferior Terms."

On the following day, the 5th July, 1844, letters patent were issued under the great seal of the Province appointing Samuel Wentworth Monk, William Craigie Holmes Coffin and Louis Joseph Amédée Papineau to be jointly Prothonotary and clerk of the Court of Queen's Bench for the District of Montreal,

The Mayor, &c. and Papineau.

and say the letters patent, "all and every the records, process and proceedings in civil pleas and causes in our said Court to keep and preserve and all and singular other the duties of the said office in civil pleas, aforesaid, to execute and perform, to have, hold, exercise and enjoy the said office of Prothonotary and clerk of our said Court of Queen's Bench together with all and every the rights, privileges, fees, profits, emoluments and advantages to the said office appertaining, and which to the same shall or may lawfully appertain unto them, the said Samuel Wentworth Monk, William Craigie Holmes Coffin and Louis Joseph Amédée Papineau, jointly for and during our Royal pleasure and the residence of the said Samuel Wentworth Monk, William Craigie Holmes Coffin and Louis Joseph Amédée Papineau respectively in our said District of Montreal. And it is our Royal will and pleasure that in case of the death of any one or more of the said Samuel Wentworth Monk, William Craigie Holmes Coffin and Louis Joseph Amédée Papineau, the survivors and survivor of them, the said Samuel Wentworth Monk, William Craigie Holmes Coffin and Louis Joseph Amédée Papineau shall continue to perform the duties of the said office of Prothonotary and clerk of our said Court of Queen's Bench until our Royal pleasure shall be made known respecting the same."

Early in the following year, on the 13th March, 1845, an agreement (George Weekes, N.P.) was made between Messrs. Monk, Coffin and Papineau on the basis of the letter from the Government, of date 4th July, 1844. This agreement in its preamble declared that upon their appointment as joint Prothonotary it was well understood between the Government and Messrs. Monk, Coffin and Papineau that Messrs. Monk and Coffin should alone perform the duties of Prothonotary and should also alone receive the emoluments of and profits arising therefrom, and that Mr. Papineau should alone perform the duties of Prothonotary in the inferior terms, and should also alone receive the emoluments and profits to be derived from the said inferior terms, and it was agreed that Messrs. Monk and Coffin should not account to Mr. Papineau for fees or emoluments of the Superior Terms, and so likewise Mr. Papineau should not be bound to account to them for fees or emoluments of the Inferior Term, the whole conformably to the full intent and meaning of the above-mentioned letter of Mr. Secretary Daly conveying to Messrs. Monk, Coffin and Papineau the views and decision of His Excellency the Governor General in relation thereto, and further the said Monk and Coffin should alone be responsible for moneys deposited in the Superior Terms of the said Court; also for errors and omissions committed or done in the said Superior Terms; and that in like manner the said Papineau should alone be responsible for moneys deposited in the said Inferior Terms of the said Court and for all errors and omissions (if there be any) committed or done in the said Inferior Terms.

In the year 1849 a change was made by Statute in the constitution of the Courts; and Messrs. Monk, Coffin and Papineau without having received any new commission were by Statute declared to be joint Prothonotary of this Court. The fees of their offices were funded in 1850, and on the 2nd December, 1850, a letter was addressed to the joint Prothonotary and clerk of the Circuit Court reciting the instructions contained in Mr. Secretary Daly's letter of July

4th, 1844. And I do not notice any change in the relative positions of Messrs. Monk, Coffin and Papineau except that Mr. Papineau was allowed to share in the fees of the Greffe de tutelles till the funding of these fees. The Mayor, &c. and Papineau.

I shall now read an extract from the deposition of Mr. John Honey which explains how it was that the joint Prothonotary has not obeyed the order of the Court by the payment of the petitioners. Mr. Honey says: "I have a personal knowledge that Mr. Monk drew largely on the funds of the office which were lodged in the banks as well as those retained in the office, for his own private use, as may be seen from the cheque books and the cheques themselves and also from the petty cash accounts kept by me against Mr. Monk. As far as I know and recollect Mr. Monk did so without the knowledge of Mr. Papineau. I do not recollect that Mr. Papineau ever spoke to me on the subject. In fact Mr. Monk had the sole management of the finances of the office of the Superior Court, and neither Mr. Coffin nor Mr. Papineau drew on the bank funds or took from the deposit funds in the office anything for their own private use.

The funds so deposited in the banks or retained in the office have long since been exhausted in a great measure by Mr. Monk's appropriati them to his own private purposes."

I have shown the terms on which Mr. Papineau received from the government the appointment of joint Prothonotary with Messrs. Monk and Coffin. Mr. Papineau did not use or control, in any way, the funds deposited in the Superior Court such as was the money deposited in the present s and claimed by the petitioners, yet it is my duty to say that Mr. Papineau, in the terms of the commission appointing him on the 5th July, 1844, became responsible to the public and to the suitors of the Court, for moneys deposited with the Prothonotary. He must, therefore, submit to imprisonment if these moneys are not paid, leaving him to his recourse, if he have any, in other quarters. Is not the government of the country morally bound to indemnify him for the defalcations of an associate who took the money of the suitors and gave rise to the present controversy? A scandal is now made known to the world. Unfortunately such lamentable occurrences are not novelties. In England in the last 100 years, the public have had to make good, to the amount of many thousands of pounds, the deficiencies of officials intrusted with the money of suitors under a system similar to the system regulating our own Courts in this matter. The deficiencies in England gave rise to a new system by which the officers of the Court have been obliged to deposit in a special place of deposit, and the funds so deposited can only be withdrawn by a compliance with wise formalities. It is to be hoped that the deplorable revelations of the present case will induce amendments in the law by which our present unsatisfactory system will be reformed, and a system established as safe as that which has of late years obtained in the Mother country. Such a system would withdraw from the Court officers, however respectable and honorable they may be, the temptation into which some otherwise honorable men have fallen of appropriating to their own use trust funds of which the law made them depositaries.

The following was the judgment of the Court:—

The Court considering that by letters patent, of date the fifth day of July,

The Mayor, &c. and Papineau.

one thousand eight hundred and forty-four, the said Louis J. A. Papineau was appointed Prothonotary of the late Court of Queen's Bench, conjointly with the late Samuel Wentworth Monk and William Craigie Holmes Coffin, mentioned in the said rule, and they were, as such joint Prothonotary, declared by Statute of the late Province of Canada, to be the joint Prothonotary of this Court;

Considering that under and by virtue of his said appointment to the said office, and acceptance of the same, the said Louis J. A. Papineau became custodian of all moneys deposited with the said Prothonotary, and responsible to the persons depositing or entitled to the same, for the safe custody thereof.

Considering that his responsibility was not restricted or removed by any agreement or understanding with the government appointing him, or with his colleagues in the said office of Prothonotary, the Court doth dismiss the answers made by the said Louis J. A. Papineau to the said rule, with costs, and doth declare the said rule absolute, and it is ordered and adjudged that a Writ of *Contrainte par corps* do issue from this Court, addressed to the Sheriff of the District of Montreal, commanding the said Sheriff to take the body of the said Louis J. A. Papineau and to incarcerate him in the common gaol of the District, there to detain him until he shall have paid to the said Patrice M. Guy, Dame Catherine Hélène Guy and Etienne Guy, the said proprietors expropriated, the sum of two hundred and two dollars currency, mentioned in the said rule, and the said costs."

Rule absolute.

J. A. Belle, for Guy & al.

Strachan Bethune, Q. C., for Papineau.

(S. B.)

MONTREAL, 30TH SEPTEMBER, 1869.

Coram MACKAY, J.

No. 1213.

Brown, ès qualité vs. *Smith*.

HELD:—1. That an action lies by the assignee to recover damages caused to an insolvent estate by an opposition founded on a simulated sale from the insolvent to opposant, defendant.

2. That the assignee does not require to be specially authorized to bring such action by the creditors holding hypothecary claims on the real estate.

The action was brought by T. S. Brown, official assignee, in his quality of assignee to the insolvent estate of James Dagg, trader, to recover $1000 damages from Andrew M. Smith, insurance agent, of Sherbrooke.

The declaration of the plaintiff set out the facts as follows:—

That on the 29th of May, 1866, James Dagg was insolvent, that defendant was Dagg's son-in-law, and the defendant well knowing Dagg's insolvency, conspired with him to defraud his creditors, and with this end in view they agreed together that Dagg should make a simulated sale before notaries of all his property to the defendant without any consideration given by defendant, in order to put the defendant in a position to oppose the seizure and sale of Dagg's property. That subsequently, on the 4th of August, 1866, when Dagg had become notoriously insolvent, La Banque du Peuple, a creditor of Dagg to a large amount,

instituted proceedings against him under the Insolvent Act, attaching his estate, including the immoveable property transferred by him to the defendant, and the plaintiff was appointed guardian and afterwards assignee. The plaintiff took possession of all the property, and proceeded to advertise it for sale in the usual course. Defendant opposed the sale and caused the suspension of proceedings. Plaintiff contested the opposition on the ground of fraud and collusion between Dagg and the defendant, and the contestation was maintained, the Court holding that the deed of transfer was made in fraud of Dagg's creditors. Thereupon the plaintiff again advertised the property for sale. But the proceedings had been suspended for eleven months and fifteen days, by the opposition, and the plaintiff had been obliged to expend $694 for insurance, advertising, law costs guardian and watchman's fees, in preserving the property. This sum had been lost to the estate through the proceedings taken by the defendant. Conclusions for $1000 damages.

Plea denying the allegations of fraud and collusion; that the plaintiff's action was unauthorized by the creditors, and that plaintiff was not entitled to urge the privileges of hypothecary creditors, and more particularly the rights of Edwin Atwater, the sole hypothecary creditor. That the real estate in question did not vest in Dagg, but in the defendant till the deed of transfer had been set aside, and the plaintiff had no right to advertise it for sale. That in fyling his opposition to the sale, the defendant exercised a legal right in good faith, and the judgment dismissing his opposition could not be held to be *chose jugée* in respect to the ground-work of plaintiff's allegations of fraud, conspiracy and collusion.

General answer and replication.

The parties went to *enquête*, the plaintiff making proof of the facts alleged. The defendant examined no witnesses.

MACKAY, J. The plaintiff sues as assignee of Dagg's estate to recover $1000 damages from the defendant who is son-in-law of Dagg. The declaration sets up that on the 29th of May, 1866, the defendant and Dagg conspired to cheat Dagg's creditors. That on this day, by deed before Devlin, N. P., Dagg, being insolvent, made a simulated sale to the defendant of lands, grist mill, dwelling, &c. On the 4th of August, 1866, proceedings in insolvency were instituted against Dagg by the Banque du Peuple, and his whole estate was attached. The plaintiff was afterwards named official assignee, and a sale was advertised of the above lands for the 13th of February, 1867. An opposition was made by the defendant, and the plaintiff contested it on the ground of fraud and collusion. On the 28th November, 1867, judgment was rendered dismissing the opposition. The assignee then advertised the sale for 28th January, 1868. The delay caused by the opposition was of eleven months and fifteen days, and the assignee now brings an action for damages done to the estate, claiming $694 for insurance, advertising, law costs, &c., and $220.63, interest on $3000, the *prix de vente*, making altogether, $814.63 damages caused by the defendant; conclusion for $1000 damages.

The plea is that the action is unauthorized by the creditors, that the plaintiff has not the rights of Edwin Atwater, the mortgage creditor, who alone was interested in the sale; that plaintiff could have no right to Dagg's real estate till the

Brown vs. Smith.

deed before Devlin had been set aside, and that when the plaintiff illegally advertised the sale, the defendant had a right to fyle his opposition as he did; and that the judgment dismissing the opposition was not *chose jugée* as to the basis of the plaintiff's claim.

The plaintiff's case is good in law, and made out by the evidence. The defendant's opposition was in bad faith, and himself in fault. He has to answer in damages, (C. C. 1053). But I cannot give the plaintiff judgment for some of the items of his claim, such as fees paid to Counsel, (not attorneys of record,) for advice. Striking these items out, I reduce the demand to $695.20.

Judgment for plaintiff.

M. Doherty, for the plaintiff.
A. & W. Robertson, for the defendant.
(J. K.)

MONTREAL, 21st SEPTEMBER, 1869.

Coram MACKAY, J.

No. 2239.

Grange vs. *Benning*.

HELD:—That an action of damages lies for breach of promise of marriage, and the *préjudice moral* caused to the plaintiff may be regarded.

The action was brought by Maria Sophia Grange, of St. Ignace du Coteau du Lac, *fille majeure et usante de ses droits*, against James Benning, of the City of Montreal, auctioneer, to recover $40,000 for breach of promise of marriage.

The declaration was to the following effect: That on or about the 5th of April, 1868, at St. Ignace du Coteau du Lac, in consideration that the plaintiff being then and there sole and unmarried, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the said defendant to marry him, the said defendant, he, the said defendant, undertook, and then and there faithfully promised and agreed, to marry her, the said plaintiff. And the said plaintiff avers that she, confiding in the said promise and undertaking of the said defendant, hath always from thence hitherto remained and continued and still is sole and unmarried, and hath been for and during all the time aforesaid and still is ready and willing to marry him, the said defendant, to wit, at St. Ignace du Coteau du Lac aforesaid, and although a reasonable time for the said defendant to marry the said plaintiff hath elapsed since the making of the said promise and undertaking of the said defendant, to wit, on or about the 3rd day of the month of June last past, at St. Ignace du Coteau du Lac aforesaid, upon which last mentioned day it had previously been agreed upon by and between the said plaintiff and the said defendant that the contemplated marriage between them should take place and be solemnised according to law, requested the said defendant to marry her, the said plaintiff; yet the said defendant not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the said plaintiff in this respect, did not nor would at the said time when he was so requested as aforesaid, or at any time before or afterwards, marry the said plaintiff, but on the

contrary, he, the said defendant, at the said time, when he was so requested as aforesaid, wholly and peremptorily refused then or ever to marry her, the said plaintiff, to wit, at St. Ignace du Coteau du Lac aforesaid or elsewhere, and at divers times, since the said last mentioned day, hath reiterated and persisted in such refusal, the whole without any lawful or reasonable cause or excuse for so refusing, and hath, without any just or lawful cause since the last mentioned period, ceased visiting the plaintiff, and corresponding with her, the said plaintiff, as he, the defendant, hath been accustomed to do for a long period of time previous thereto, and as will appear by the several letters by him written, addressed and sent to the said plaintiff.

And the said plaintiff further avers that the fact that a marriage had been agreed upon to take place between the defendant and her, and the fact that it was appointed by the said defendant with the consent of the plaintiff to take place and be solemnized on or about the said 3rd day of June, 1868, was publicly known, as well as the fact that it was to take place on or about the said 3rd of June, and that she, the plaintiff, had made all necessary arrangements and preparations on her part therefor, and that by reason of the refusal of the said defendant to marry her, the plaintiff, as he had promised and undertaken, she, the plaintiff, hath been grievously wounded in her feelings, and hath, moreover, been greatly injured in her good name and reputation, and hath by reason of the premises sustained damage to the amount of $40,000, of all which she puts herself upon the country.

Conclusion (declaring her option of a trial by jury) for $40,000.

Pleas. 1st. Demurrer: That the allegations of plaintiff's declaration are insufficient in law to justify the conclusions:—

1. Because the plaintiff's declaration does not set forth any cause of action known to the laws of the Province of Quebec.

2. Because the simple breach of promise of marriage, stated in said declaration, is not actionable.

3. Because the nature and object of the said action are in restraint of marriage, and against public order and morals.

4. Because the pretended offer of marriage was illegal and not binding.

10. Because the said declaration does not show that any special and real damage had resulted to plaintiff from the alleged inexecution of the said pretended breach of promise.

13. Because the said plaintiff's declaration does not show that the plaintiffs' good name and reputation had been damaged and injured in any specific manner or form.

14. Because the said plaintiff does not set up any fact or facts and circumstances to justify her claim for damages to the amount of $40,000, nor to any amount whatever.

The second plea, *exception péremptoire*, alleged that the plaintiff had never loved the defendant, but had agreed to marry him from interested motives, and that she had previously been engaged to other men.

Third plea, *défense en fait*.

Joinder in demurrer, and general answer and replication.

Grange vs. Benning.

The demurrer was dismissed by the Superior Court, and this decision was confirmed in review (13 L. C. Jurist, 126), and leave to appeal was refused (13 L. C. Jurist, 153).

The case was tried before a special jury on the 9th and 10th of September, 1869, and a verdict found for plaintiff for $3,500.

On the 17th of September, 1869, the defendant, in term, moved that judgment be rendered, dismissing the plaintiff's action with costs, notwithstanding the verdict, for the following reasons:—

1. Because the allegations of plaintiff's declaration are not sufficient in law to sustain the verdict.

2. Because the plaintiff did not allege in her declaration nor prove that the breach of promise of marriage complained of has been the cause of any special or material injury to her, the plaintiff.

3. Because the plaintiff failed to allege and prove that she has suffered any damages by reason of the said breach of promise of marriage.

4. Because the verdict is contrary to the issue joined and the evidence adduced in this cause.

5. Because the charge of the Honorable Judge was contrary to both the facts and the law of the case.

MACKAY, J. The first thing to be considered is what a motion for judgment *non obstante veredicto* involves. C. C. P., 433, says: "Whenever the verdict of a jury is upon matters of fact in accordance with the allegations of one of the parties, the Court may, notwithstanding such verdict, render judgment in favor of the other party, if the allegations of the former party are not sufficient in law to sustain his pretensions." If the plaintiff's allegations here are such, the defendant's motion must be granted.

Upon this motion we have not to consider whether the verdict be reasonable, or excessive, nor to ask upon what proof it rests, nor as to whether there was misdirection of the jury by the Judge at the trial. Such considerations would be proper upon a motion for new trial, but none is made; the verdict is submitted to; but the defendant contends that, notwithstanding it, no judgment ought to be for the plaintiff, because his declaration does not set forth legal cause of action.

"No action lies for inexecution of a promise of marriage," says the defendant. "Such a promise is contrary to morality and to the law; for it tends to restrain liberty of marriage;" "the only action that *possibly* could be for breach of such a promise would be *assumpsit* for material losses and money expenditure by plaintiff, in consequence of the promise, but (says defendant,) no specification of such material losses is made by plaintiff's declaration."

In a printed paper submitted to me the defendant says:

"On ne saurait pour la même raison soutenir que les promesses de mariage participent de la nature des obligations en général. Notre Code, art. 1062, déclare: 'L'objet d'une obligation doit être une chose possible, qui ne soit ni prohibée par la loi, ni contraire aux bonnes mœurs.' Puis l'art. 1059 dit: 'Il n'y a que les choses qui sont dans le commerce qui puissent être l'objet d'une obligation.' Assurément que nos adversaires ne soutiendront pas que l'objet des

promesses de mariage soit une chose dans le commerce. Non, le mariage étant une institution divine, ne saurait être dans le commerce, même au prix de $40,000.—Voir aussi art. 907, 1080."

Grange vs. Benning.

"L'immoralité des actions pour inexécution de promesses de mariage est tellement palpable, qu'elle est peinte en gros caractères à la face même de la Déclaration. Voici une jeune fille qui vient afficher les souffrances de sa sensibilité et de son honneur pour un montant aussi fabuleux, se plaint d'avoir été abandonnée *fraudulently, craftily and subtilely*, et qui nonobstant toutes ces horreurs, déclare qu'elle est encore prête à marier le défendeur, *had been for and during all the time aforesaid* AND STILL IS READY AND WILLING TO MARRY HIM, THE SAID DEFENDANT. Un tribunal peut-il décemment recevoir une telle demande? Souffrira-t-il une offre aussi monstrueuse et son acceptation? Ordonnera-t-il alors aux parties de se retirer et d'aller régler leurs différends sous le toit conjugal? Voilà néanmoins où peut conduire l'action *for breach of promise*."

We have to deal with the plaintiff's declaration. Of course, we cannot determine whether it sets forth legal cause of action without considering the state of the law upon the matters of fact alleged. Much has been said by the defendant of the modern jurisprudence in France.

Arrêts are referred to holding promises of marriage not to be enforceable, but illegal, as hampering proper marriage and hindering free choice. At the end of one of these *arrêts le Journal du Palais* observes: "La jurisprudence paraît se fixer dans ce sens; il importe de remarquer que sur ce point les principes de la loi romaine et des arrêts des parlements sont modifiés."

And yet the Imperial Courts are giving damages in France frequently, e. g. Caen, 1850, Nismes, 1855, and giving them for mere *préjudice moral*. Toullier would support this; look at what he says, Vol. 6, No. 293 to 297 inclusively. As to Louisiana, is its jurisprudence settling into that of France? This does not appear, but the contrary does; that action lies, and damages have to be allowed.

But decisions in modern France, or elsewhere than in Lower Canada, are not to control. We have to deal with this case upon the principles of our own law, and what do we find? that actions like the present have been common for hundreds of years. Journal du Palais, folio, tome 2, p. 177, 179. Ancn. Denisart, Vo. Mariage. Code Matrimonial, (Léridant) 3rd part, p. 821, edit. of 1770; and Pothier, Mariage, Nos. 50 to 54.

From the times of the *arrêts* of the *Journal du Palais* to the present, such actions have been recognized. As to jurisprudence to the contrary, not a judgment of Lower Canada can be discovered holding that the action does *not* lie. I can see right of action too from our Code Civil, art. 1053 and 1065.

Has our old law suffered the "modifications profondes" alleged by defendant? not at all. Defendant says: "D'ailleurs, depuis que ces actions auraient été décidées (referring to our own adjudged cases,) notre droit et notre jurisprudence ont subi des modifications profondes et nombreuses dans la codification des lois. Le défendeur prétend donc que sous le Code, sous l'empire duquel la présente demande a originé, quelqu'ait été l'ancien droit, quelque soit aussi le droit commun anglais ou américain, les promesses de mariage sont absolu[illegible] nulles, et

Grange vs. Benning.

qu'étant ainsi nulles, elles ne peuvent résulter en des dommages-intérêts, suivant la maxime: *Quod nullum est, nullum producit effectum.*"

"On ne saurait soutenir que la jurisprudence qui a prévalu sous l'ancien droit, soit en France, soit en Canada, peut suppléer au silence du Code. L'art. 2613 déclare en effet que 'les lois en force lors de la mise en force de ce Code, sont abrogées dans le cas ..... où elles sont contraires ou incompatibles avec quelques dispositions qu'il contient.' Or, nous l'avons vu, les promesses de mariage sont incompatibles avec les dispositions du Code sur le mariage et les obligations en général."

"Enfin, veut-on s'assurer de l'hostilité des codificateurs à la validité des promesses de mariage? On la trouve exprimée en toutes lettres dans leur rapport sur l'art. 62: 'Au cas d'opposition au mariage,' disent-ils (rapport 2e, page 24), 'il doit être sursis à la célébration jusqu'après main levée, à moins que cette opposition ne soit fondée SUR UNE SIMPLE PROMESSE DE MARIAGE QUI DOIT ETRE TRAITEE COMME NULLE ET SANS EFFET.'"

As to this Art. 62, I would err egregiously if I held it of any weight for this case. What is meant by it? No. 298, 6 Toullier tells us: A certain particular force was in a promise of marriage formerly. The promise, for instance by a woman to marry a man, was a kind of *empêchement prohibitif* to her marriage with another. Our Code, to prevent difficulty, removes all doubts. It says it shall not be *empêchement prohibitif*. That is all. Unless I overrule our adjudged cases, old and more modern ones, and also disavow *Pothier*, I cannot grant defendant's motion. No good reason has been shown, and it would require a strong one, to induce me to rule as requested. I see no reason alleged by defendant's counsel that has not been frequently urged in the last 200 years on behalf of defendants in the situation of the present one, and all have been disregarded and overruled. I must administer the law as I find it. Defendant's counsel have dwelt on the immorality of plaintiff's action; where is the defendant's morality, engaging the affections of a young woman and shaking her off without reason? The morality of such defendants is described on p. 334, 6 Toullier.

Defendant says: "Si l'action de la demanderesse existe en droit, la demanderesse était tenue d'alléguer qu'elle mit le défendeur en demeure d'exécuter la promesse, et que cette mise en demeure a été faite *par écrit*, la promesse de mariage ne pouvant être prouvée par témoins; mais c'est ce qu'elle n'a pas fait.

"La promesse de mariage, si elle est valable, ne peut être prouvée que par écrit, ou au moyen du serment de la partie adverse; art. 1233. Elle ne peut donc être considérée comme un contrat verbal: il faut donc une réquisition écrite, et comment peut-on la prouver, si elle n'est pas alléguée?"

Putting *en demeure* is alleged, and well enough. It might be a question at *enquête* as to what kind of requisition was required. I cannot doubt that the admission of defendant, under oath, that he had been put *en demeure* verbally, but that he had determined and expressed determination not to marry the plaintiff, is equivalent to the most formal written requisition.

As to the damages not merely the *damnum emergens* may be. (See p. 326, 6 Toullier, but a *préjudice moral* is to be regarded. Poth. Mar., No. 53, says the affront is considered. I have already shown that, in France even, the jurispru-

dence is not settled, and that in Caen and Nismes, damages have been given for mere *préjudice moral*.

Grange vs. Benoleg.

Some of the modern cases in France, referred to by Defendant's counsel, have been connected with *dédits*, e. g. the case of 1836. That was a case in the law of bills more than anything else. An old man gave a note for $5,999 to a young woman "pour vrai and légal prêt" by her to him "en pièces d'or et d'argent." There was cause fausse, and that was pleaded.

There is no question of *dédit* in this case; For myself I do not see how a *dédit* more detracts from liberty of marriage than action of damages does. Both warn the man (whom a woman is asking to marry her) of money that he may lose. If the principal obligation is good, why not the *dédit*?

As I said at the outset, I have only a motion for judgment n. ob. ver. before me. The verdict is not attacked, I mean by the motion; though it is by some of the reasons, which are bad for inconsistency. I find that plaintiff is entitled to judgment dismissing defendant's motion, for she shows a legal cause of action; her declaration is good.

Judgment: "Considering that the declaration of the plaintiff in this cause sets forth and shows legal cause of action, and that the conclusions of said declaration are sustainable under the allegations thereof, which allegations are sufficient, the Court rejects the said motion of the defendant with costs."

Motion for judgment *non obs. ver.* rejected with costs.*

B. Devlin for the plaintiff.

D. Girouard for the defendant.

(J. K.)

MONTREAL, 30TH OCTOBER, 1869.

Coram MACKAY, J.

No. 1045.

Ex parte *John B. Morrison*,

Petitioner for *Certiorari*,

and

Edward N. deLorimier,

Magistrate, *ad hoc*.

HELD:—1. That proceedings had under section 18 of the Act 31 Vict., ch. 42, are of such a character as to be susceptible of being removed by *Certiorari*; and that a writ of *Certiorari* will be granted, notwithstanding the same is expressly taken away by the Statute, (Sec. 21) provided there be ground for the belief that the conviction was had without proof, where the Act provides that it shall be on proof to the satisfaction of the Magistrate.

2. That full faith and credit will be given to a Magistrate or officers' return to a writ of *Certiorari*, and if the return show that the conviction was had upon the confession of the defendant, the defendant will not be permitted to go behind the return and shew by affidavits of parties present that he made no confession and that the return is false, and that the conviction was really had without any proof or confession whatever.

The petitioner in this case, a school master at Caughnawaga, was convicted there on the 27th August last, before Edward N. deLorimier acting as deputy

* The defendant subsequently made two motions, one in arrest of judgment and the other that the verdict be reduced to £50, which were both rejected, and the plaintiff's motion for judgment on the verdict was granted. The case is now in appeal. *Reporter's note.*

Morrison and DeLorimier.

for the Secretary of State of Canada under the Act 31 Vict. ch. 42, of being an occupant of Indian land contrary to the provisions of section 18 of said Act.

The defendant feeling aggrieved by this conviction applied to the Superior Court on the 17th September for a writ of *Certiorari* to remove the conviction and proceedings into that Court, on the ground that section 18 of the Act only authorized the officer to convict upon proof, and that the conviction was had without any proof or confession whatever. Affidavits to this effect were fyled by the petitioner in support of his application.

Trenholme, for the petitioner:—As the Act, section 18, gives the officer no power to convict except upon proof, if he does convict without proof the conviction cannot be said to be a conviction or proceeding had under or pursuant to the Act, and he acts without jurisdiction, and the case is *coram non judice*, and a *Certiorari* will lie notwithstanding section 21 of the Act expressly takes it away; otherwise there would be no such thing as limited jurisdiction. In the case in question there is nothing to show that the officer was acting under the Act at all, or had any jurisdiction, which he could only have if Morrison occupied Indian land, or that he was not usurping the functions of two justices of the peace under chapter 14 of the C.S.L.C., who were the proper parties to convict for simple residence among Indians.

The petitioner cited Paley on Convictions by McNamara, 5th Ed. pp. 17, 46, 64, 103, 114, 115, 120, 121, 410; also Grady and Scotland Certiorari, p. 152.

Pominville, Q.C., for the prosecution, based his opposition to the granting of the writ mainly on the ground, that it was expressly taken away by section 21 of the Act, 31 Vict. cap. 42. The Court (MACKAY, J.) was of opinion the writ should be granted, which it accordingly was, returnable on the 18th October.

On the 18th October the writ was returned, and on the same day a rule was served upon the petitioner at the instance of the officer and complainant, calling upon him to shew cause why the *Certiorari* should not be quashed. This was met by a motion by the petitioner to quash the conviction on the ground that it was had without proof or confession. Affidavits of parties who were present at the proceedings before the Magistrate were fyled, shewing that the return, alleging that the judgment had been rendered on the defendant's confession, was untrue.

Trenholme, for the petitioner, contended that the Court could not look at that part of the return purporting to be minutes of the proceedings before the Magistrate, and in which it was stated the defendant made confession of all the charges of the complaint against him, inasmuch as such minutes formed no part of the record and were incompetent in the matter and could not cure the conviction if bad. That the proceeding being under a special Act, the general form of conviction given in the Magistrates' Manual did not apply, and if the evidence or confession did not appear on the face of the conviction itself, the Court could only look at the evidence that was brought before it by affidavit, which the petitioner alone had done. The petitioner cited in support of this head of the argument Paley, pp. 434, 136. 2nd. It was contended

Morrison and DeLorimier.

on behalf of the petitioner, that even if the conviction were cured and was good *prima facie*, still it was allowable to go behind the conviction and shew by affidavits that there was really no evidence or confession before the Magistrate of any kind to justify the conviction, or of the occupation of Indian land, which was a fact essential to give him jurisdiction. Petitioner here cited Paley, pp. 410, 434, 400 and 401, as referred to on p. 431; also pp. 431, 127, 66 note; 182 and 183, 291. On page 434 Paley says: "It may be shewn by affidavits that there was no evidence of that which is required to form the basis of his jurisdiction."

Pominville, Q.C., for the prosecution, relied upon the return which stated the conviction to be on the defendant's confession. This was conclusive and the conviction must be maintained.

MACKAY, J. The prosecution was brought by a public officer against Morrison under a recent Act, giving the Secretary of State remarkable powers for the removal of unauthorized persons settling on Indian lands. An officer deputed by the Secretary of State took proceedings under this Act, for the removal of a school master, named Morrison, who was charged with having settled on Indian land without leave, and convicted him. Morrison applied to this Court for a writ of *Certiorari*, and as it was suggested that the Magistrate had convicted without any evidence, whereas the statute requires that proof shall be made, I allowed the writ of *Certiorari* to issue. In answer to the *Certiorari* the Magistrate brings up the whole record, and if it is true, the *Certiorari* must fail, for the Magistrate has recorded, and states in his return, that the defendant confessed the facts, and asked for delay to quit the village; nothing then remained but for the Magistrate to pass judgment. The confession supplied the want of evidence. Paley, p. 86, Fourth edition. The return is said to be untrue, and affidavits are offered to contradict the record. But I cannot look to this evidence. I must give the public officer here credit for the truth of the facts stated. P. 149, Paley, 4th edition. His record, as a Magistrate's, usually, "shall not be gainsaid; otherwise there would be no end of things." (Burns Justice.) The Court leans rather to support convictions. The petitioner asks what is he to do, what recourse has he under the circumstances. I am not to say what he is to do. The motion to quash the conviction is rejected with costs, and the rule made absolute with costs. Certiorari quashed.

Cushing & Trenholme, for the petitioner.

F. P. Pominville, Q.C., for the prosecution.

(J. K.)

MONTREAL, 30TH SEPTEMBER, 1869.

Coram TORRANCE, J.

No. 1771.

Baltzar et al. v. *Grewing* et al. Defendants, and *Hutchison* et vir. Opposants.

HELD:—That an opposant whose opposition *à fin de distraire* is contested by the (foreign) plaintiff may demand of him—1. Security for costs. 2. Production of a power of attorney to the attorney *ad litem*.

TORRANCE, J. This case comes before the Court on the motion of the opposants *à fin de distraire*, that plaintiffs be ordered to furnish security for costs, and

Baltzer vs. Grewing.

that their attorneys *ad litem* exhibit a power of attorney under which they have made the present contestation. The plaintiffs resist the motion on the ground that a contestant of an opposition is not under any obligation to give such security, citing *Morrill* v. *McDonald* et al., and *Ross* et al. 6 L. C. Jur. 40, and *Brigham* v. *McDonnell*, 10 L. C. Reports, 452; and that as regards the production of the power of attorney, the demand should have been made by an *exception dilatoire*, C. C. P. 120. The Court is against the plaintiffs on both points. It regards the plaintiff as the aggressor and holds that on general principles, and by the terms of C. C. 29, the security should be given. *Mahoney* v. *Tomkins* and *Geddes*, 9 L. C. R. 72. It holds also that the application for production of the power is rightly made by motion, though it may also be made by *exception dilatoire*.

Motion granted.

Ritchie, Morris & Rose, for plaintiffs.
J. Duhamel, for opposants.
(J. K.)

EN REVISION.

MONTREAL, 30 OCTOBRE, 1869.

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

No. 254.

Sargent vs. *Johnston, et al.*

JUGE:—Que la caution qui ne requiert point sur les premières poursuites dirigées contre elle le bénéfice de discussion doit être condamnée au paiement de la créance dans la même poursuite avec le débiteur principal. (1).

MONDELET, J. The plaintiff, Lucy Sargent, sued the defendants before the Superior Court for the District of St. Francis for $900, which Johnston, one of the defendants, received from her in 1863, and which he agreed to account for in four years with interest at the rate of eight per cent. Johnston did not pay, and the judgment appealed from condemned him in consequence, but relieved Brooks, the other defendant, who was Johnston's surety, on the ground that Johnston's property should be discussed before Brooks could be condemned. But Brooks did not demand such discussion and therefore he should also have been condemned.

The judgment must, therefore, be reversed for the part dismissing the action as against Brooks and confirmed for the remainder.

Le jugement de la Cour de Révision est motivé comme suit:

The Court now here sitting as a Court of Review, having heard the parties by their respective counsel, upon the judgment rendered in the Superior Court of the District of St. Francis on the 26th day of December, 1868; having examined the record and proceedings had in this cause and maturely deliberated; considering that in that part of the judgment appealed from, to wit, the said judgment of the 26th day of December, 1868, condemning the defendant, Samuel Johnston, as therein, and thereby appears, there is no error, this Court doth confirm said part

(1) C. C. Art. 1942.

of the said judgment with costs in the Court below, and of this Court of Review; considering that there is error in the latter part of the said judgment wherein and whereby the said Superior Court reserving to the plaintiff such recourse, rights and actions as he may have against the other defendant, Charles Brooks, doth for the present dismiss the action against him with costs, this Court doth reverse, annul and set aside the said latter part of said judgment, and rendering in the premises the judgment which should have been rendered; It is hereby ordered and adjudged that the said Charles Brooks be, and he is with the said Samuel Johnston, condemned to pay to the plaintiff the said sum of nine hundred dollars, the payment to plaintiff whereof was in and by the said acknowledgment in writing of the 18th day of September, 1863, and is bound with the other defendant to pay and account for to plaintiff within four years from the said 18th of September, 1863, with interest payable annually at the rate of eight per cent., with costs against said Charles Brooks, as well in the Court below as in the Court of Review. (2).

Jugement renversé en partie.

Hall & Johnson, avocats de la demanderesse.

Sanborn & Brooks, avocats des défendeurs.

(P.R.L.)

COURT OF QUEEN'S BENCH, 1869.

(CROWN SIDE.)

MONTREAL, 22ND OCTOBER, 1869.

Coram DRUMMOND, J.

THE QUEEN vs. ROBERT D. BATHGATE, ET AL.

The 31 Vic., cap. 6., sec. 80, provides that persons committing certain offences with regard to warehoused goods, shall incur the *penalties* imposed on persons for smuggling. By sec. 75 of the same Act, smuggling is made a *misdemeanor* punishable by a *penalty* not exceeding $200, or by *imprisonment* for a term not exceeding one year, or by *both*.

HELD:—1. That an indictment will not lie under sec. 80 for the misdemeanor created by sec. 75.

2. That a defective indictment may be quashed on motion, as well as on demurrer.

The defendants were indicted for knowingly, wilfully and fraudulently removing goods from a private warehouse. There were several indictments for similar offences, and they were drawn in the following form:—"The jurors for our Lady the Queen, upon their oath, present that Robert Dundas Bathgate, late of the city of Montreal, in the District of Montreal, merchant, William Bathgate, late of the city of Montreal aforesaid, in the District aforesaid, merchant, and Robert Gerrie, late of the city of Montreal aforesaid, in the District aforesaid, merchant, on the 15th day of September in the year of our Lord 1869, knowingly, wilfully and fraudulently did remove from a certain warehouse, to wit, a private warehouse situate in John street in the city of Montreal aforesaid, in the

(2) Citations de la demanderesse:

1 L. C. R., p. 354.
2 Rev. de Jur., p. 169.
15 L. C. R., p. 110.
13 L. C. R., p. 229.
11 L. C. Jurist, p. 168.

The Queen vs. Bathgate.

District aforesaid, certain warehoused goods, to wit, fifty packages of tobacco weighing 1000 pounds of the value of $230, which said warehoused goods had been theretofore imported into Canada, and which were then and there lodged and kept in the said warehouse, the same then and there being goods for and in respect of which a certain duty of customs was then and there by law imposed, and upon which said warehoused goods a duty of $152 was then and there payable to our Lady the Queen, and which said duty was then and there unpaid, with intent to defraud the revenue of Canada, against the form," etc.

DRUMMOND, J. There are four indictments now under consideration, varying only as to the quantity of warehoused goods alleged to have been illegally removed and as to the dates of the alleged removals. These indictments are said to have been laid under the authority of the 80th clause of the Act respecting the Customs, 31st Vic., c. 6, which reads as follows:—

"If any warehoused goods are fraudulently concealed in, or removed from, any "public or private warehouse in Canada, such goods shall be forfeited; and any "person fraudulently concealing or removing such goods, or abetting such remo- "vals, shall incur the *penalties imposed on persons* illegally importing or smug- "gling goods into Canada."

To ascertain what are the penalties imposed upon persons so importing or smuggling goods into Canada, reference must be had to the 75th clause of the same Act, which runs thus:—

"If any person knowingly and wilfully, with intent to defraud the Revenue "of Canada, smuggles, or clandestinely introduces into Canada, any goods subject "to duty, without paying or accounting for the duty thereon, &c.... *Every such "person* shall, in addition to any *other penalty* or forfeiture to which he may be "subject for such offence, be deemed guilty of a misdemeanour, and on convic- "tion shall be liable to a penalty not exceeding $200, or to imprisonment for "a term not exceeding one year, or both, in the discretion of the Court, before "whom the conviction is had."

Motions have been made in all these cases to quash the indictments.

The course adopted by the Counsel for the defence to impugn them has been assailed, without reason, by the Counsel for the Crown. For, according to the practice of this Court from time immemorial, if the defence had merely called the attention of the Court to any material defect in the indictments, without any motion or demurrer, the Court would have been bound to take the matter into consideration, and this practice is not peculiar to our Courts, for we find the following in Archbold, p. 54.—"In criminal cases the defendant may object to it, "(meaning the indictment), by special demurrer, perhaps also upon general "demurrer, *or the Court in general, upon application*, may quash the indictment."

The reasons stated in the motions to quash are ten in number, and are the same in each case. Passing over the 1st, 9th and 10th, in which everything in general, and nothing in particular is alleged, I take up the others in succession:

Second.—Because it is not alleged in the said indictment that the warehouse therein referred to, was a Customs warehouse or one duly appointed and established according to the provisions of law.

It was unnecessary to make any such statement. The meaning of the word

"warehouse" is clearly defined by the Customs Act, and it would be a matter of proof as to whether the building alluded to comes within that definition or not. The opinion pronounced in the case of Reg. and Pridham has been invoked in support of this reason. In vain, however; for in that case no fault was found with the indictment; but the jury were charged to acquit, because the legal establishment of the "*parcel post*" mentioned in the indictment, had not been proved.

Fourth.—Because it is not alleged that the goods therein referred to had been marked and stamped in accordance with the requirements of the Act for the security of the Revenue of Canada.

Fifth.—Because, although it is alleged that the goods referred to had been theretofore imported into Canada, it omits the averment of a material fact that the said goods had previously been duly entered for warehousing in accordance with the provisions of law.

Sixth.—Because the averment in the said indictment as to the goods being lodged and kept in the said warehouse omits to allege by whom the same were kept.

Not one of any such statements is required by the clause of the Statute under which the indictments are alleged to have been drawn. Moreover, in official matters, all things are presumed to have been properly done, *bene acta*, until the contrary has been proved.

Seventh.—Because it is not alleged that the goods referred to in the said indictment were taken out of, or removed from, the said warehouse without due entry and clearance having been previously made as required by law.

The allegation in the indictment that the goods were *fraudulently* removed, implies sufficiently that they were not legally cleared.

Eighth.—Because it is not alleged in the said indictment whether the tobacco therein referred to was manufactured or unmanufactured tobacco, and by reason of such omission, the indictment fails to show that the goods designated in the indictment were liable to the payment of duties under the provisions of the Act under which the indictment has been framed.

This objection, if tenable at all under the Act of 1867, is entirely overthrown by the Act of 1868 (31st Vic., c. 51), which renders all tobacco dutiable. Moreover, I am of opinion that even under the first Act, the general description of "tobacco" was sufficient, leaving it to be proved whether the articles removed were of that description of tobacco which was dutiable or not. So that in this view of the question it appears immaterial whether the indictment should have concluded by the assertion of a violation of one or more Statutes.

Having thus disposed of all the special objections made in writing, I come to one of a much more formidable character, which was ably urged in argument under the general heads by the learned and ingenious Counsel for the defence.

It is this: That the defendants, supposing them to have committed the acts charged against them, although liable to prosecution for the penalties awarded against smugglers, are not indictable for the misdemeanour created by the 75th section of the Act.

On this point I am with the defence. For the 80th section in enacting that

The Queen vs. Bathgate.

all those offending under it shall incur the penalties imposed on persons illegally importing or smuggling goods into Canada, does not declare that they shall be deemed guilty of the misdemeanour created by the 75th.

The learned Counsel for the Crown have invoked against this objection the last sentence of the interpretation clause of the Act, which is couched in the following terms: "And generally all the terms and provisions of the Act, or of "any such law as aforesaid" (meaning all other laws relating to the Customs, or to trade, or to navigation, as shown by the first sentence), "shall receive such fair "and liberal construction and interpretation as will best ensure the protection of "the Revenue and the attainment of the purpose for which such law was made, "according to its true intent, meaning and spirit."

I may be permitted to say, parenthetically, that I fully approve of the change made by this enactment in the manner of interpreting all laws relating to Customs and Excise. As I have already observed during the argument, the old mode of interpreting these laws, not in consonance with the spirit, which vivifies, but according to the letter, which kills, "*L'esprit vivifie, la lettre tue*," had led to a popular belief, fully borne out by judicial decisions, that it was allowable to cheat the Customs or the Excise, as under the feudal regime in France, and formerly in Lower Canada, it was permitted to defraud the Seignior, provided the strict letter of the law was not violated.

This stern mode of interpretation was adopted for the protection of the people, in times when Kings collected Revenue principally for their own purposes, or for foreign wars which were generally antagonistic to the interests of the people—just as the French Seigniors collected their dues for their own individual benefit. But now that we have a thoroughly constitutional form of Government under which the Revenue of the Crown is in reality the property of the people, to be appropriated and disposed of for their benefit pursuantly to their wishes, as constitutionally expressed by their representatives,—it is right that a wiser and more liberal interpretation of all the laws enacted for the perception and protection of the Revenue should be adopted. I am, therefore, fully prepared to give to all the terms and provisions of this Act, and of all others relating to Customs, Excise, trade and navigation, such fair and liberal interpretation and construction as will best ensure the protection of the Revenue. Yet I cannot admit that this system of liberal construction should be extended to the creation of a new crime, by implication; which would be the result under this interpretation clause, if Courts of Justice should so unfairly and illiberally construe the 80th clause of the Customs Act as to make it include the greater in the less, or in other terms, to stretch the meaning of the word "penalties" so far as to cover a misdemeanor punishable, not only by a penalty, but by imprisonment, (in addition to the penalty), of not more than one year in the discretion of the Court.

This Court is, therefore, of opinion that all these indictments are defective, and therefore, orders that they be quashed and set aside as illegal, null and void.

Indictments quashed.

T. W. Ritchie, Q.C., for the Crown.
F. P. Pominville, Q.C., for the Customs Department.
E. Carter, Q.C., and *B. Devlin*, for the defendants.

[J.K.]

(CROWN SIDE.)

MONTREAL, 22ND OCTOBER, 1869.

Coram DRUMMOND, J.

THE QUEEN vs. ROBERT D. BATHGATE, ET AL.

In an indictment under 31 Vict. cap. 8, sec. 143, for having opened the lock of a warehouse used for the security of the Revenue, without the knowledge and consent of the collector of Inland Revenue, a redundant statement was introduced, making the words which form the gist of the offence—"*without the knowledge and consent of the collector of Inland Revenue,*" apply, apparently, not to the opening of the lock, but to the keeping and securing of certain goods in the warehouse. HELD:—That the indictment was bad.

The indictments, for feloniously opening a lock attached to a warehouse used for the securing of the Revenue, were in the form following:—"** did feloniously open a certain lock, which was then and there attached to a certain warehouse, then and there used for the security of the Revenue under an Act of the Parliament of Canada passed in the Session held in the thirty-first year of the Reign of Our Lady the Queen, intituled, "An Act respecting the Inland Revenue," and situate in John street in the city of Montreal aforesaid, in the District aforesaid, and in which said warehouse certain goods for and in respect of which a certain duty of Excise was then and there by law imposed, were then and there kept and secured, without the knowledge and consent of the collector of Inland Revenue, to wit, of Philip Durnford," etc.

DRUMMOND, J. These indictments, four in number, (differing only as to the days on which the offences therein alleged are stated to have been committed) are framed upon the 143rd section of the Inland Revenue Act 31st Vict., cap. 8, which, in so far as it bears upon the offences charged, reads as follows:—"Every "person who opens or breaks any lock.....attached to any warehouse, or apart-"ment used for the security of the Revenue under this Act.....without the "knowledge and consent of the Collector of Inland Revenue, shall be guilty of "felony."

By a motion to quash, the Counsel for the defendants have impugned the indictments on grounds, twelve in number, three of which, the 1st, 2nd and 12th, are general.

I shall consider the special grounds *seriatim*, beginning with the reason which is numbered

Third.—Because it is not stated in the indictment that the lock alleged to have been opened was a Crown lock, or a lock of the Crown attached to a public or private warehouse, appointed or established in conformity with the provisions of the law relating to the bonding and warehousing of goods.

The clause of the Inland Revenue Act, cited by the Counsel for the defence (31st Vict., cap. 8, sec. 89,) shows clearly that there are not only Crown locks but private locks to be protected in warehouses. So that it is clearly felony to open without authority, a private, as well as a Crown lock.

Fourth.—Because it is not alleged in the said indictment, whether the warehouse to which the lock was attached was a public or private warehouse appointed and established according to the provisions of law.

Fifth.—Because it is not alleged that the warehouse was one used for the security of the Revenue of Canada.

The Queen vs. Bathgate.

Similar objections have been already disposed of by setting them aside in the misdemeanor cases.

Sixth.—Because the said indictment does not set forth the description of goods kept in the said warehouse, and fails to disclose that such goods were such as were liable to duty.

Seventh.—Because the material words of the Act referred to in the indictment have not been used, and it is not stated that the goods in the said warehouse were "subject to Excise."

Eight.—Because the allegation of the said indictment as to the goods being "kept and secured," omits to aver by whom the said goods were kept and secured.

Ninth.—Because it is not alleged in the said indictment that the said goods were retained in any warehouse under the supervision of any officer of Inland Revenue.

Tenth.—Because the said indictment does not allege that the defendants opened any lock attached to a warehouse in which goods were retained under the supervision of any officer of Inland Revenue.

Eleventh.—Because although it is alleged that the goods were goods for and in respect of which certain duty of Excise was then and there by law imposed, it omits to allege the material fact that the said duty was then and there unpaid.

All these objections relate to statements in the indictment which are mere surplusage.

Surplusage generally speaking is, however objectionable, not fatal to an indictment, provided it do not alter the sense of the words requisite to define the offence charged.

In these indictments, however, which should have been limited simply to an accusation against the defendant, of having opened the lock of a warehouse used for the security of the Revenue, under the Revenue Act, without the knowledge and consent of the Collector of Inland Revenue, the framer has unfortunately introduced a redundant statement making the words which form the very gist of the offence—"*without the knowledge and consent of the Collector of Inland Revenue*"—apply, not to the *opening of the lock*, but to the *keeping and securing of certain goods in the warehouse.*

The Counsel for the Crown have urged that if there be any ambiguity in the indictments, the same is to be found in the law. I cannot agree with this construction of the 143rd clause, for there the words implying absence of official knowledge and consent, although separated by several lines, are in sense, directly connected with the opening of the lock, as well as with other acts, while in the indictments these words cannot, under the most liberal grammatical interpretation, be made to apply to anything, but to the securing of the goods in the warehouse.

If these indictments were declared valid, any person opening a warehouse lock not only with the consent, but under the special order, of the Collector of Inland Revenue might be tried for felony. It appears clear to me that no crime known to the law is set forth in these indictments, and that they are deficient in that lucidity of expression which precludes all equivocal meaning, and in that certainty and precision which Courts of Justice should insist upon, even with more rigour,

now that the task of the criminal pleader has been rendered comparatively easy by recent enactments, which have removed from his path the manifold technicalities that surrounded it in former times.

The Court therefore orders that these indictments and each of them be quashed and set aside as illegal, null and void.

This judgment will, however, have no effect on the position of the defendants, because if they are guilty of the frauds charged against them, the ends of justice will not be defeated or even delayed. For the Counsel for the Crown will doubtless submit to the Grand Jury at the opening of the next term of this Court, bills of indictment in legal form which, if found, may be tried as soon as these could have been, had they not been cancelled.

Indictments quashed.

T. W. Ritchie, Q.C., for the Crown.
F. P. Pominville, Q.C., for the Inland Revenue Department.
E. Carter, Q.C., and *B. Devlin*, for the defendants.
(J.K.)

COUR SUPERIEURE.

En Revision.

MONTREAL, 30 OCTOBRE, 1869.

Coram Mondelet, J., Berthelot, J., Mackay, J.

No. 545.

Doutre vs. Gagnier.

Juge:—1. Qu'un régistrateur qui refuse de délivrer un acte enregistré à son bureau peut y être contraint par writ de *Mandamus*.

2. Qu'un tel officier public n'a aucun droit de rétention sur des papiers sous le prétexte que des honoraires réclamés n'ont pas été payés.

Sur un Bref de Mandamus émis de la Cour Supérieure à Beauharnois pour contraindre le Défendeur comme régistrateur du comté de Chateauguay de délivrer au requérant un acte enregistré à son bureau sur l'offre de paiement du coût d'enregistrement, le jugement suivant fut rendu, Johnson J., le 1er Septembre 1869, en Chambre.

The Court, etc., considering that on the 8th July, 1869, he, the petitioner, caused to be lodged at the office of the defendant, registrar for the County of Chateauguay, the deed of obligation and transfer in the said petition mentioned for the purpose of registration thereof, and that on the tenth of the same month the petitioner demanded and required from the defendant, as such registrar as aforesaid, the said deed of obligation and transfer, with a certificate of registration thereof; offering at the same time to pay to the said registrar the sum of twenty-three shillings, and that the said defendant, on the day and year last mentioned, refused to deliver the said deed of obligation and transfer, with certificate thereon, to said petitioner, but on the contrary retained the same in his possession, without any lawful or sufficient reason. Considering also that the said petitioner hath deposited before this Court a sum of twenty-

Doutre vs. Gagnier

three shillings, current money of Canada, to which the said defendant is entitled for the said registration and certificate thereof:

I do grant the said petition, and order that a peremptory writ do issue ordering the said defendant to deliver and file with the Prothonotary of this Court the said deed of obligation and transfer, with certificate thereon as aforesaid, whereupon payment shall be made to him of the said sum of twenty-three shillings, under pain of an attachment in case of his neglecting so to do, on the day fixed by said peremptory writ.

The whole with costs against the said defendant.

Ce jugement fut porté en révision par le défendeur, qui entr'autres motifs prétendait, que, par le chap. 37des Statuts Refondus pour le Bas-Canada, sec. 108 et 109, un droit spécial était indiqué contre le Régistrateur dans un semblable cas et que ce procédé aurait dû être adopté.

MONDELET, J. Le demandeur procédait contre le défendeur par un bref de *Mandamus* devant la Cour Supérieure du District de Beauharnois pour le contraindre, en sa qualité de Régistrateur du Comté de Chateauguay, à lui délivrer un acte enregistré à son bureau sur l'offre de paiement du coût d'enregistrement.

Le 8 juillet 1869, le demandeur fit déposer au bureau d'Enregistrement du Comté de Chateauguay, deux copies d'un transport fait par le demandeur devant Mtre. Jobin, notaire, le 25 juin 1869 au *Trust & Loan Co. of Upper Canada*, de la somme de $2050 à lui dûe comme bailleur de fonds par Stanislas Viau. Ce dépôt avait pour objet l'obtention d'un certificat d'enregistrement sur une des copies et l'enregistrement de l'autre, laquelle, pour cette fin, devait demeurer au bureau d'enregistrement:

Le Régistrateur reçut les actes en dépôt, sans exiger, d'avance, le paiement.

Deux jours plus tard, c'est-à-dire deux jours après le dépôt, le défendeur, requis de le faire, refusa de remettre au demandeur une des copies du transport avec certificat d'enregistrement. Cette demande fut accompagnée d'offres de payer au défendeur le coût de l'enregistrement, savoir $4.60.

Le défendeur a opposé à cette action deux réponses, l'une spéciale et l'autre générale.

Par sa réponse spéciale, le défendeur a plaidé que le demandeur a transmis au Régistrateur, en même temps que ces deux copies de transport, un blanc de certificat que lui demandeur a considéré comme demande de recherche (Exhb. No. 2, pièce du dossier) ; que le coût de l'enregistrement du transport et du certificat de recherches, était de $13.75, et non de $4.60, qui avaient été offertes, et que le défendeur a droit d'exiger le coût de ces deux actes en même temps et de refuser l'un, tant que l'autre n'est pas payé.

Le défendeur met en avant une autre prétention qui est, qu'en supposant que le demandeur aurait été en droit d'exiger, et d'obtenir l'acte de transport avec certificat de l'enregistrement seulement, la somme de $4.60 était insuffisante, car elle ne couvrait que le coût de l'acte, tandis que le demandeur poursuivi pour la dite somme de $4.60 antérieurement au *mandamus*, aurait dû aussi offrir les frais de cette action.

Il n'y a ici que deux questions à décider :

1° Le Régistrateur avait-il le droit de retenir le transport, quoique le coût de

l'enregistrement lui fût offert, sous le prétexte que le certificat de recherche n'était pas payé et qu'on refusait de le prendre ?

2° Le demandeur était-il tenu d'offrir les frais d'action avec le coût d'enregistrement du transport ?

Les parties ont procédé à l'Enquête dont les proportions me paraissent bien peu raisonnables.

Au reste, il en résulte d'abord un fait assez important, c'est que lors de l'action devant la Cour de Circuit, l'ouvrage pour lequel le demandeur était poursuivi, n'était pas encore fait. Le demandeur au surplus a prouvé les allégués de sa Requête libellée.

La preuve du défendeur, excessivement volumineuse, et hors d'œuvre sous plusieurs rapports, ne détruit pas ce qui me paraît être la prétention culminante du demandeur, et le blanc de certificat transmis au Régistrateur n'était aucunement de la part du demandeur, une demande ou requisition, et ce qu'en dit le témoin Lebrun, l'un des témoins du défendeur même, ne laisse rien à désirer là-dessus.

Le défendeur, dit il, m'a demandé si le demandeur avait demandé ce certificat. Je lui ai dit qu'il ne m'en avait rien dit, qu'il m'avait seulement dit de lui remettre les papiers pour qu'il les arrangeât, ajoutant que quand la copie serait prête, je devais la signifier à Viau.

Il n'appartenait pas au Régistrateur de faire d'autres ouvrages que ceux qu'on lui demandait.

Quant au droit de retention, comme l'a observé le conseil du demandeur, il ne peut exister qu'autant que la loi l'a établi. Ce serait un privilége, on ne le présume pas, et nulle Cour ne peut décrêter des priviléges. Il y a quelque chose de plus : nul officier public ne peut retenir des papiers (supposant les offres suffisantes) sous le prétexte que des honoraires réclamés, dûs même par rapport à d'autres vacations, n'ont pas été payés. Enfin si le Régistrateur a reçu les papiers, sans exiger d'avance son honoraire, il ne le peut ensuite que lorsque l'ouvrage est fait. De ce qui précéde, je conclus que le Régistrateur n'ayant droit qu'à $4.60 et non à $8.50 pour le certificat de recherches et l'offre de la somme de $4.60 lui ayant été régulièrement et suffisamment faite, n'avait aucun droit de refuser au demandeur, ce que ce dernier lui demandait, et dans la présente cause sur Bref de *mandamus* la Cour ordonne de lui délivrer : savoir l'une des deux copies laissées à son bureau, du transport à la compagnie du *Trust and Loan Company of Upper Canada, &c.*, avec certificat d'enregistrement sur la copie ainsi demandée. Les conclusions de la Requête doivent, à mon avis, être regardées comme bien accordées par le jugement du Juge Johnson, en chambre, le 1er septembre 1869, lequel à mon avis doit être confirmé.

Jugement confirmé.

Doutre, Doutre & Doutre, avocats du requérant.
A. & W. Robertson, avocats du défendeur.
(P.R.L.)

MONTREAL, 30TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 308.

Dubant vs. Lacombe, & Tranchemontagne, et ux, Opposants.

POWERS OF BAILIFF.

HELD:—That by C. C. P. 461, a bailiff of the Superior Court for the District of Montreal, has power to execute a writ of execution from the Court in an adjoining District.

TORRANCE, J. This case is before the Court on the merits of an opposition *à fin d'annuller*. A writ of execution issued from the Court at Montreal, addressed "to any of the bailiffs acting in and for the Districts of Montreal or Richelieu." It was executed in the District of Richelieu by Joseph Dorion a bailiff of the Superior Court for the District of Montreal. The opposition alleges that this bailiff had no power to make the seizure and that the proceedings are null. The Court is against the opposant, "considering that by the 461st "Article of the Code of Civil Procedure it was competent to a bailiff of the "Superior Court for the District of Montreal to execute the writ of execution "in this cause in the District of Richelieu."

Opposition dismissed.

Barnard & Pagnuelo, for opposants.
E. U. Piché, Q.C., for plaintiffs.
(J. K.)

MONREAL, 30TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 1356.

Saxton vs. *Sheppard & Peloquin* et al.

HELD:—That the Court will not, under C. C. P. 586, give an order that plaintiff and defendant be held to declare within a period to be fixed, whether they admit or contest the opposition of an opposant unless notice has been given to the parties of the application of the opposant.

TORRANCE, J. This case is before the Court on motions of the opposants that within 24 hours, or such other delay as it may please the Court to fix, the plaintiff and defendant be held to declare whether they admit or contest the opposition *à fin de distraire* by the opposants and that in default by them to make such declaration the oppositions be maintained with costs. Notice of these motions has been given to the plaintiff but not to the defendant, and therefore no order will be given at the present time. The application would appear to be based upon C. C. P. 586, but notice to both parties must be given.

Motion rejected.

James Armstrong, for plaintiff.
Loranger & Frères, for opposants.
(J. K.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9th SEPTEMBER, 1869.

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

No. 94.

ALEXANDER CAMPBELL, (*Plaintiff in Court below*),

AND

APPELLANT;

THE LIVERPOOL AND LONDON FIRE AND LIFE INSURANCE COMPANY, (*Defendants in Court below*),

RESPONDENTS.

HELD: — In the case of a fire policy of buildings described as dwellings, endorsed to the effect that any change of occupation, by which the risk is increased, must be notified in writing to the Insurance Company and endorsed on the policy, and that in default thereof the insurance shall be null and void; that the change of occupation to a tavern, without notice to or consent of the Company, does not render the policy void, when the Jury state in their special findings that an intermediate change of occupation into a vinegar factory had been sanctioned by the Company, and that the risk of the tavern was not greater than that of the vinegar factory.

This was an appeal from the judgment rendered in the Superior Court, at Montreal, on the 28th day of February, 1867, granting the defendants' motion for judgment *non obstante veredicto*, and dismissing plaintiff's motion for judgment in his favor, on the verdict and findings of the special jury before whom the case had been tried; a report of which judgment will be found in Vol. XI of the Jurist, pages 66 and *seq.*

Abbott, Q. C., for appellant, (after stating facts) argued, in effect, as follows:

From the statement of the facts already made, it will be obvious that there is in the first instance only one material and disputed question, namely, was the risk of fire, in the premises insured, rendered greater by this occupation as a tavern or saloon, than it was when they were occupied as a vinegar factory? It is only in the event of this question being answered in the affirmative, that it becomes necessary to enquire whether or no the defendants were notified of the change of occupation. For not only our law (Code Civil, Art 2574) but every known system of insurance, recognises the right of the insured to make what use of his property he pleases, without consulting or notifying the insurer, *provided he does not by such use, increase the risk.*

The jury, in this case, in two of their answers, distinctly found that the change of occupation did *not* increase the risk. The reversal of this part of the verdict is the first demand of the respondents; and the Court below has expressly declared that this finding, among others, be "set aside and held for naught;" and has rendered a judgment which only can be supported by holding that the change of occupation *did* increase the risk.

The Court, therefore, has not only set aside the verdict of the jury as to a *pure* question *of fact*, but has proceeded to adjudge *that question of fact*, in exactly the opposite sense, upon the evidence laid before the jury. And this upon a point on which it is not pretended by the respondents that there was *no* evidence against them, but merely that the *weight* of evidence was in their favor.

Now, assuming for the moment that "the weight of evidence" was against

Campbell and The Liverpool and London Fire and Life Insurance Co.

the verdict; that is to say, that there was such a preponderance of evidence the other way as to render the verdict manifestly unjust, the appellant submits that the respondents' remedy was an application for a new trial, *and not a motion for judgment*. And that even if the Court below considered that manifest injustice had been done, and that the verdict was so far unsupported that it should be set aside; yet, the only remedy it could afford to the respondents was a new trial; and that it could not grant that remedy without being asked for it. The question was plainly one in which no principle of law was involved. It is impossible to imagine one which was more exclusively a question of fact, or more completely within the province of the jury. There was evidence to support the finding; ample evidence, as the appellant will hereafter contend; and no question was or could be raised as to the legality of the evidence adduced. If, then, it be not left to be pronounced upon by the jury; or if being once pronounced upon, the judge may, according to *his* appreciation of the evidence, determine it in the opposite way, in what sense can the parties be said to have had a trial by jury? The appellant has availed himself of the right the law gives him, of having the issues of fact between him and the respondents tried by a jury; and they have been so tried; but of what avail is his privilege, if after the trial those same issues of fact are finally pronounced upon by a judge? He raised the issue that the change of occupation the respondents complained of, did not increase their risk. They insisted that it did; and he made his option to have that point determined by twelve merchants, instead of in the ordinary way by one judge. That privilege was granted him; the twelve merchants were summoned; the costly process of submitting the disputed point to them was gone through with; the witnesses were examined in their presence; they had the advantage which the judge had not, of judging of their evidence as well by their demeanor as by their words; and they decided the point in favor of the appellant. Yet after all, not they but the judge alone, decided it. The trial by jury was entirely passed over, and the point was decided by the judge as if no jury had ever been empanelled at all. The precise object of the jury trial is to withdraw the facts from the judge, and leave them to twelve men; but how can that object be said to be attained by converting the judge and jury substantially into an *Enquête* Court, and taking the verdict from the Judge afterwards? Such a proceeding would render the concession of jury trials perfectly illusory; and if such were the law, it would be absurd to resort to them.

But such is not the law, as the appellant respectfully submits. The substitution of a special for a general verdict did not alter the law of trial by jury, except in that particular. It did not withdraw the decision of the facts from the jury, but rather sought to give the jury more complete control over the issues of fact, by separating them from the issues of law. And this is effected by dissecting the various matters involved in the decision of a law-suit, and placing the appropriate portions of them before the judges of the law and the judges of the facts. Nor did the provision for securing full notes of the evidence tend in any way to restrict the province of the jury. It procured for the courts which might be called upon to pronounce upon the various points arising subsequent to the trial, the great advantage of access to the evidence; but there is nothing to

Campbell and The Liverpool and London Fire and Life Insurance Co.

indicate that it gave the judge final jurisdiction in matters of fact by constituting him a Court of Appeal from the verdict of the jury, with power to render the verdict which the jury ought to have rendered.

The Court undoubtedly has a certain power over the verdict. It may set the verdict aside, even when it decides pure matters of fact; but only that another trial may be had, and a better verdict rendered. Unless, indeed, the facts which it establishes are insufficient in law to sustain a judgment, in which case, it is not, strictly speaking, set aside, it is simply disregarded as useless.

The doctrine upon which the appellant relies cannot, perhaps, be more clearly or succinctly stated than it is by the Code of Procedure. "It is the province of "the judge to declare whether there is any evidence, and whether that evidence "is legal; and it is that of the jury to say whether that evidence is sufficient."

And the appellant submits, that it is equally beyond the power both of the judge and of the jury to step beyond the limits thus affixed to their functions, whether they attempt to do so at, or after, the trial.

It would seem to be plain, therefore, that if the Court below was justified at all in setting aside, as against the weight of evidence, the finding of the jury now under consideration, it could only do so upon a motion for a new trial; and that the only remedy it could afford to the respondents was a new trial, and not a substantive judgment upon the question of fact in dispute.

But the appellant contends that the verdict upon this point was not against the weight of evidence, but in conformity with it. And this view will be sustained by an examination of the notes of the judge as sent up to the court.

The vinegar manufactory appears to have required for its operation, alcohol, vitriol, shavings, and straw. And it required a constant heat of from 70° to 80° to be kept up continuously night and day. This is sworn to by Franck, who commenced the manufacture of vinegar on the premises and carried it on for six or eight months, and who leased the place to one Saladin, who carried it on for more than a year afterwards. Also by Dunham Ockerman, collector and inspector of licenses; and by Henry George Gillespie, merchant, both of whom were perfectly familiar with the place.

It is scarcely possible to enumerate four materials more combustible than these four, alcohol, vitriol, shavings, and straw; nor a more hazardous state of things attendant upon their use, than that they should be so used in a place kept heated night and day continuously, to a temperature of 70° to 80°.

On the other hand, though the same premises were nominally occupied as a tavern, in reality the business carried on in them by Crouch, was rather that of a provision store than a tavern. He kept no beds or rooms for strangers, nor stabling for their horses; there was no cooking for the public, and though he had a license to sell liquor, he also bought provisions in the market and retailed them. And he and his family lived in the room behind the shop.

This is all the direct evidence in the record as to the description of risk actually incurred during the occupancy of the premises as a vinegar factory and as a tavern; except that derived from the testimony of Chandler, the respondents' resident agent. This person swears that he examined the vinegar factory when commenced by Franck, and that he does not consider it so hazar-

Campbell and The Liverpool and London Fire and Life Insurance Co.

dous as a tavern. He states that vitriol is not used in the process, agreeing otherwise with the appellant's witnesses as to the materials required, but subsequently he admits that he himself *sold a pound of oil of vitriol* to Franck's servant for the declared purpose of being used in it; and finally he admits to the judge that vitriol would be requisite in the manufacture, under some circumstances.

It is true that he considers that Crouch's tavern was "a low tavern," and thinks it was much more hazardous than the vinegar factory; but unfortunately he was in the embarrassing position of being obliged, for one purpose, to prove that Crouch's tavern was a very dangerous place; and for another purpose to prove that he never heard of the existence, either of Crouch or of his place, till two days after the latter was burned to ashes. He swore stoutly to both facts; but the jury seemed to have been unable to decide which of his two assertions was worthy of belief, and they solved the difficulty by disbelieving both.

The testimony for the defence upon this point, except that of Chandler, which was utterly unworthy of credit, consisted chiefly of the opinions of Montreal Insurance agents as to the abstract difference in risk between vinegar factories and saloons generally. Not one of these men was aware that vitriol was used in the manufacture; none of them were in any respect acquainted with the materials used, none of them had ever seen either Franck's vinegar factory or Crouch's store; and so great was their desire to support their brethren, the respondents, that when his Honor the presiding judge asked one of them, if the use of vitriol, alcohol, shavings and straw, in a manufacture, accompanied by 70° to 80° degrees of continuous fire-heat, would not constitute a more hazardous risk than an ordinary dwelling, he replied "that would depend entirely "on circumstances!"

Again, it must be remarked that all these men spoke of taverns generally while it has been shewn that, although liquor was sold at Crouch's place, it was by no means subject to ordinary tavern risks. Franck describes his shop as having a counter on one side, where he sold provisions, and a small counter at the end, where he sold liquors under license. And as has been already stated, he kept no strangers in the house, neither by day nor night, and therefore was free from the ordinary contingencies to which taverns are subject, of having a number of persons constantly in different parts of the house, perhaps not always in a condition to be cautious as to fire.

The respondents say that the "weight" of evidence is against the verdict. The appellant submits that the foregoing analysis shews that the weight of the evidence is strongly in favor of the verdict. He contends that the question was, whether, under the actual state of facts at Belleville, in this very building, there had been any increase of risk, and that on that precise point the evidence of the three intelligent and disinterested men, who spoke from actual knowledge, and stated the facts as they were, is sufficient to outweigh the speculative opinions of all the Insurance agents examined, and thrice as many more, speaking in entire ignorance of the facts.

But it is not necessary that it should be so, to sustain the verdict. The ques-

tion whether the verdict shall stand or not, does not depend upon any nice balancing, by the Court or by the judge, of the evidence on both sides, to discover whether it may be a grain more weighty on the one side or on the other. The position of the appellant could not be disturbed even by a motion for a new trial, if there was legal evidence which went to the jury, in support of the view they took. It is purely and exclusively their function to say whether it is sufficient or not; and no case can be found where the opinion of the Court as to the mere preponderance of evidence against a verdict, upon a point like that under consideration, has been allowed to disturb it.

Precisely the same reasoning applies to the second finding of the jury, which the respondents sought to have reversed, namely, that as to the knowledge of the respondents' agent of the change of occupation complained of. The jury say "we think the agent was aware of it." Of course this can only prove to be of any importance in the event of its being held, contrary to the verdict of the jury, that the risk of fire was increased. In that event it would become important. As to the evidence upon this, it is not so direct as upon the other point, but it is such as satisfied the jury, and would probably satisfy any one. It is proved that the premises insured were in the same street as the respondents' office, and but a short distance from it; that it was on the route from that office to the railway station; that the agent constantly passed that way; that it was a corner building, and had Crouch's Hotel painted in large letters on the walls on both corners, and West End Hotel, on the window glass. The agent, it seems, did not actually receive the cash for the November premium till the day after the fire, when he told appellant's brother that "Crouch's place was burnt down," and that his policy would be void if he did not pay the premium, which Campbell then did. It seems strange that he should have been able to pronounce Crouch's store "a low tavern" and to speak so familiarly of "Crouch's place," as that which he held insured; if he did not know that there was such a "tavern" or such a "place;" and it also seems strange that he could have passed up and down the street where his office was, for a year, and have received premiums for insuring a conspicuous place in that street, without seeing there what every body else saw, and what he was more interested in seeing than any body else. Weighing the evidence as to his knowledge, against his own denial of it, the jury found the preponderance to be against his disclaimer of knowledge; and upon that point the appellant has no fear of a difference of opinion between this Court and the jury.

But he again urges, that in the most unfavorable view that can be taken, there undoubtedly appears of record legal evidence to go to the jury of the knowledge of Chandler; and he contends, that as the jury have deemed it sufficient, their finding cannot be disturbed.

1. If, then, there was no increase of risk of fire caused by the change of occupation from a vinegar factory to a tavern or saloon, such as was actually kept by Crouch, the condition of the policy was not forfeited, and the appellant must recover.

2. If the risk was increased, the respondents by their agent were aware of the change, and accepted the premium with a knowledge of it; and the appellant must recover.

Campbell and The Liverpool and London Fire and Life Insurance Co.

But the verdict of the jury conclusively establishes both these points in the appellant's favor; and it has been shown that the verdict cannot be disturbed by a motion for judgment.

The other points raised by the respondents' motion do not require discussion. They were understood to argue in the Court below, that they were entitled to notice of the change, *whether the risk was thereby increased or not*: and indeed the presiding judge appeared to favor that view. But a reference to the terms of the condition of the Policy, and to the authorities, will readily dispose of that pretension.

The effort to defeat the appellant, by asserting that the claim was vested in Franck's assignee, has already been referred to. In fact it is plain, that the respondents simply cast about in every direction to find means of resisting a claim on a policy for which they were always willing to receive, and had for several years received, the premiums. They first objected that the appellant had not the policy in his possession, insisting upon his finding it, that what they called "the essential fact" of its transfer to him could be established. Then they refused to pay on the ground that they had not been notified of the transfer of the property. When they found these two positions untenable, they abstained from any further definite answer, one way or the other, explaining to the appellant that "the delay which had occurred had been mainly to enable them to "elicit such facts as would establish his claim upon the Company, and that they "were still using efforts to that end." This was more than three months after the fire, and a similar time after, even according to Chandler's own statements, he had become fully aware of all the facts. Up to the end of June, the appellant was amused by a feigned consent to arbitrate, (the respondents naming their standing Counsel as their arbitrator in the first instance) but urged in vain that he might be informed if any other objection existed to his claim, than the two technical ones which had been stated to him, and which were obviously unfounded. His patience at length becoming exhausted he placed his claim in suit; and the plea informed him for the first time, of the defence which they had determined to fall back upon. Their pretension then was characterised by the same bad faith, as the other proceedings; for they claimed a forfeiture of the Policy on the ground that the occupation was changed from dwellings to a tavern. Fortunately the appellant was able to prove that the occupation as dwellings had long previously ceased with the knowledge and consent of the Company; and that the policy could, therefore, only properly be treated as if it had originally issued upon a vinegar factory. Had he failed in this proof, he would have stood in a very different position before the jury.

He now respectfully submits, that the judgment of the Court below is erroneous as to the procedure it has sanctioned; and erroneous, both in law and in fact upon its merits; that the verdict of the jury must be sustained; and that the judgment of the Court below, setting it aside and granting the respondents' motion, must be reversed; and finally that the motion of the appellant for judgment upon the verdict should be granted.

Bethune, Q. C., for respondent:—The circumstances under which the vinegar factory was established and the precise character of its risk were thus stated

by Edmond Chandler, (the respondents' agent at Belleville) at the trial:—"About two years and a half ago, (some time in the fall of 1863), Mr. Franck told me he was going to establish a vinegar factory, *on the German principle*, and asked me to go to the premises with him to see the preparations he had made for the making of vinegar on the German principle. I went with him and saw a preparation made for carrying it out, *on a very small scale*. He told me it was *merely an experiment*, that he had a man who professed to understand it, —that he should carry it on for a *few months to try if it was likely to succeed*, and if after that it did not appear profitable he was going to *abandon* the enterprise. *He gave me no intimation* that it was a *very dangerous experiment*. He told me it was to be on the German process *which I was well acquainted with*. I told him, if that was the case, and there were no larger preparations going on that I then saw ,that I did not see that it would increase the risk. When I went with Franck to examine the premises, at that time I saw three small vats and some empty barrels. From what I then *saw*, and from the *fact* that it was but temporary, I said I did not think it was necessary to make any change in th policy, or endorse anything to that effect, but that if anything further was made I would like to see it again. I was brought up as a chemist. Before I went to Belleville quite familiar with the German process of making vinegar, having carried it on with Mr. Birks, in Montreal, some years ago. This process consists in mixing alcohol and water, in the proportion of ten per cent of alcohol with water and a very little honey,—this is allowed to percolate through beech shavings placed in a vat over 18 feet high, with a false top and bottom. The water is at the temperature of about 70°. In Summer the water does not require heating. As far as I have seen or know, there is no extra risk in the manufacture of vinegar by that process, and I cannot see by what means it would increase the risk on the premises."

Mr. Chandler then explained that before giving his evidence he had examined the vinegar factories in Montreal of Williamson, Molson, and Lefebvre, and that these establishments were on a much larger scale than that shown by Franck.

Williamson then testified to there being *no risk whatever from fire*, in manufacturing vinegar as Franck had been doing. and that he never was charged any extra premium for the insurance of his establishment.

Perry proved that *Molson's, Lefebvre's & Fiss'* factories we insured at the office of The Royal, and that *no extra premium was charged.*

Bethune, a fire insurance agent, testified that he had examined *Allen's* vinegar factory, and that he saw nothing there to justify the charge of an extra premium.

Forbes (agent of the Queen Insurance Company), proved that he insured the *Molson's* factory and that *no extra* premium was charged.

Davidson (agent of the Phœnix Insurance Company) stated that he knew of no special risk in the manufacture of vinegar.

Spier (the inspector of the respondent) stated, that he had inspected *Lefebvre's, Molson's* and *Williamson's* factories, and failed to discover anything hazardous about them.

And *all* the respondent's witnesses who gave evidence on this subject testified

Campbell and The Liverpool and London Fire and Life Insurance Co.

that they knew of *no instance* where a *vinegar factory* had been charged *extra*, and that they never heard or knew of any such factory being burnt *from any inherent cause.*

On the part of the Appellant, Franck testified, that he considered a vinegar factory such as he had, more risky than a tavern, but in re-cross examination, he defined the risk to be the making of *shavings* on the premises, which he called a "*carpenter's risk*," and the using of *straw*, and the keeping of *men* about *night and day* on the premises, and keeping up a heavy fire night and day.

Now, as to the *shavings*, they were *hard* wood ones (*beech*),—and he himself testified that the making of shavings only took place "*once in six months*," and that *immediately* when the shavings are made *they are put into the vats, water poured over them*, and they are *completely saturated.* As to the *straw*, he explained that the *heads* are put *into the vats* and the rest *thrown away.* Then as to the *men* being about *night and day*,—their presence was plainly a *security* against fire, and not a cause of risk of fire. And the heavy fire he referred to was (according to his own evidence) 70 to 80 degrees, or not more than ordinary house heat. And this heat he himself explained was generated in *a stove* of the character used in an *ordinary dwelling house.* He also declared that he had been an insurance agent and admitted that he never knew of any extra risk for vinegar factories.

The appellant's next witness, Ockerman, gave it as his opinion the vinegar factory was more hazardous than the tavern, but he was obliged to admit that when he saw the factory in question he did not even see shavings about, *and that he knew nothing about how vinegar is made.*

Another witness, Gillespie, testified to seeing straw, chips, shavings and a number of casks and vats; and he and the last witness and Franck refer to *vitriol* being also on the premises, enclosed in a glass Demijohn, and Chandler also admitted that he also occasionally sold vitriol to the man who attended to the factory for Franck. From this it was argued by the appellant in the Court below, that the risk of fire was very hazardous, owing to the presence of vitriol on the premises. But it is to be noted, that the vitriol was in a glass jar, and that moreover *vitriol will not ignite* (as sworn to by Chandler, who is a professed chemist) unless it comes in contact with some *resinous substance*, such as *oil* or *hemp*; no such substance being used on the premises.

On the question of risk from the vinegar factory, therefore, it was abundantly established that it was not greater than that of a dwelling house.

Then as to the question of risk from a *tavern*, the respondent proved beyond all doubt, that it was one of the worst descriptions of risk, and that the *extra* premium charged by *all* insurance companies, for that description of risk, was 7s. 6d. to 10s.

It was contended at the trial that the particular description of tavern in use on the premises was not hazardous, because the house was not also occupied as a house of entertainment, such as an inn or boarding house. But, clearly, the risk from a tavern is not traceable to the occupancy of the house as one of entertainment, but to the fact, that spirituous liquors are retailed and drank in the establishment; entailing as a natural consequence intoxication, more or less

aggravated, on the part of those who keep the place, by the time they retire to sleep. And as illustrative of the risk, one may fairly point to the result which actually occurred in the present instance. So long as the premises were occupied as a dwelling or even as a vinegar factory, no fire occurs, but after the place has been used as a tavern, it is totally destroyed by a fire which *originated* in the portion of the premises *occupied as a tavern.*

The jury found that the fire had originated in the portion of the premises occupied as a tavern,—that they had been so occupied continuously from the 4th of January, 1864, to the date of the fire,—that there was "no evidence of the Company's having been notified of its "being occupied as a tavern, but (they added) we think the agent was aware of it,"—and they also found that the risk of fire in the factory was as great as it was in the tavern. And on the question of actual damage to the building they found it to be $3187.

The respondents moved afterwards in term, that judgment should not be pronounced on the verdict or findings of the jury in favor of the appellant, and on the contrary that notwithstanding such verdict and findings, judgment should be entered up and recorded in favor of the respondents, and the action of the appellant dismissed with costs.

The appellant at the same time moved,—"that the judgment of this Honorable Court, upon the verdict and findings of the jury impannelled to try the issues in this cause raised, be rendered and pronounced in favor of the said plaintiff, in conformity with the conclusions of his declaration, with costs."

Had the Court felt disposed to grant the appellant's motion, the judgment would have been obviously, not for £875 as claimed by the declaration, but for *two-thirds* of the $3187, found by the jury to be the total value of the premises destroyed, that is for $2124.67, and interest from service of process and costs; the insurable interest covered by the policy being limited to *two-thirds* of the value of the property.

The judgment of the Court below, however, was rendered in favor of the respondents, whose motion was granted, and the appellant's action consequently dismissed with costs.

That judgment, and reasoning in support thereof, as reported at pages 71, 72, 73, and 74, of the eleventh volume of the Lower Canada Jurist, are, it is respectfully submitted, consonant with law and justice, and ought to be confirmed by this Court.

1.—The finding of the jury, that the risk of the vinegar factory was as great as that of the tavern, was manifestly against the weight of evidence, as the respondents have already clearly demonstrated.

So also was the finding (if such a statement can be called a *finding*), that they *thought* the *agent* of the respondents *was aware*, that the premises were occupied as a tavern. On this point the agent Chandler *positively* swears, that when he renewed the insurance in November, 1864, he was under the impression that the premises were occupied *as dwellings*, and that it was not until *after the fire* that he *first heard* of the premises being occupied as a *tavern.*

The only question for consideration, as regards this first point, is, whether or not the Court could legally set aside these findings, as being contrary to the weight of evidence.

Campbell and The Liverpool and London Fire and Life Insurance Co.

The first reported case is that of Ferguson, appellant, and Gilmour, respondent, 1st. L. C. Jurist, pp. 131 and *seq*. The action was for verbal slander, and the jury had found that the words complained of had been spoken *maliciously*. The verdict had been set aside, on motion of the defendant, and the action dismissed. The appellant contended, that the evidence was enough to base a legal verdict upon, and that supposing the verdict to have been rendered *without sufficient evidence*, the Court below could do no more than *grant the respondent a new trial*." The appeal, however, was dismissed, and the judgment of the Court below confirmed.

Another case in point is that of Higginson vs. Lyman, 4 L. C. Jurist, pp. 329 and *seq*., where the Court held, that "The Superior Court has the power of appreciating for itself the evidence adduced before the jury, and if the verdict be not sustained by the evidence, will set it aside upon a motion to that effect, and render such judgment as shall be justified by the record." In the case referred to, the learned counsel of the defendant (who is the appellant's counsel in the present appeal) contended, that the jurisprudence of the Courts, as settled in the various cases cited by him (pages 345 and 346 of the report), establish that the Superior Court, both at Quebec and Montreal, and the Court of Queen's Bench, had set aside verdicts of juries and entered up judgment, notwithstanding such verdicts, and this "sometimes upon an appreciation of the evidence alone." And the honorable judge who pronounced the judgment of the Court stated (pages 347 and 348 of the report) "I am clearly of opinion, that under our system of jury trials the motion for judgment *non obstante veredicto*, for the reason that no evidence or no sufficient evidence has been adduced in support of the verdict, is a proceeding sanctioned by the practice of the Courts."

Another prominent case is that of Tilstone et al., appellants, and Gibb et al., respondents—4 L. C. Jur. pp. 361 and *seq*.—In that case the jury had found that the appellants had not paid the amount for which they had been sued. The Superior Court at Quebec refused to meddle with the finding of the jury, on the ground,—"*que les Jurés ont par leur dit verdict rapporté et prononcé sur la question de fait à eux soumise.*" Yet in appeal, that judgment was reversed, and the action of the respondents dismissed with costs.

Again, in the case Grant, appellant, and the Ætna Insurance Company, respondent, 5 L. C. Jur., pp. 285 and *seq*., the jury had found, that the appellant had not made a certain representation and that such representation was not material, even if it had been made. The respondent moved for judgment in his favor, *non obstante veredicto*. The Superior Court, presided over by the Hon. Mr. Justice Badgley, granted the respondent's motion and dismissed the appellant's action. In appeal, the appellant's counsel contended (amongst other things) that such a motion could not be granted, in the face of the verdict of the jury on the question of fact. The learned counsel argued also, that in the case of Ferguson & Gilmour the Court had rightly pronounced, even against the findings of the jury, because the plaintiff had also moved for judgment on the verdict, but that in this particular case the appellant had *never moved after the verdict*. The Court of Appeal confirmed the judgment of the Superior Court, and the Hon. Mr. Justice Aylwin observed, in doing so, (page 301 of the report,)—

"That the verdict was bad there can be no doubt. I now come to the *mode of getting rid of it*. The respondent simultaneously made three motions to effect his purpose and the Court gave him judgment, *non obstante veredicto*. This is at variance with the practice in England, where but one motion would be receivable, and where it is not competent for a defendant to move for judgment *non obstante veredicto*. With *us* the *mode* of proceedings adopted by the respondent *has been so long sanctioned by the Court below, that it would be dangerous to change it*, even supposing it to be wrong." And, in referring to the case of Casey & Goldsmid, he said, (page 302 of the report),—"since that case our Courts have *continually* given judgment *upon the record as it stood, and have never sent a case to be tried over again by a jury.*" It is to be noted, that the objection started by the appellant's Counsel in the case cited does not apply to the present one, as here the plaintiff moved for judgment on the verdict.

The case last cited was reversed in the Privy Council, but on a point wholly unconnected with the one under discussion, with reference to which, their Lordships said,—"the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a Colonial Court, on a question of its form and practice."

2.—Even on the findings of the jury, such as they were, the Court below, in view of all the facts and circumstances of the case, and dealing, as it had to do with the whole case, could not but adjudge as it did.

At this stage of the discussion, the respondent would respectfully refer the Court to the following authorities:—

POTHIER, *Assurance*, Nos. 196, 199.

EMERIGON par BOULAY-PATY, vol. 1, pp. 16, 18, 19.

BOUDOUSQUIE, *Assurance*, Nos. 109, 115, 117, 118, 119.

GRUN ET JOLIAT, *Assurance*,—Nos. 203, 210, 216.

QUENAULT, *Assurance*.—Nos. 174, 176, 373.

ALAUZET, *Assurance*, 2 vol., No. 493,—also, No. 494.

BOULAY-PATY, *Droit Commercial*, vol. 2, pages 87, 88.

LOCRE, *Code de Commerce*, 2nd vol. p. 457, No. 11.

Carter *vs.* Boehm, Smith's Leading Cases, page 270 Eng. ed., and 460 Amer. ed., and p. 274 Eng., 463 Amer. ed.

ELLIS, pages 30, 31, Eng. ed., 87, 88, 89, 90, Amer. ed., page 12, Eng. ed., and pages 47 and 48 Amer. ed.; and pages 39 and 40 Eng. ed., and 99 and 100 Amer. ed.

ANGELL, p. 235 § 175.

1 vol. Phillips on Ins., Nos. 524, 525, 531, 532, and 534; also in the notes to the American edition of Ellis on Insurance, pages 84, 85, and 86; and Hammond on Ins., page 66.

The contract here was an undertaking to insure a *dwelling house*, subject to the distinct agreement that should *any change* of occupation occur which would entitle the respondents to *charge a higher premum*, notice of such change should be given to the respondents *in writing*,—the *approval* by respondents *endorsed* on the policy,—and the *extra* premium *paid* to respondents,—otherwise, the policy to be *null and void*.

Campbell-and The Liverpool and London Fire and Life Insurance Co.

Whether the vinegar factory was or was not in reality as hazardous a risk as the tavern cannot in any degree legally affect the question at issue here.

The respondents according to the conditions of the policy were to be sole judge of the propriety of accepting or rejecting the risk, and of fixing the rate of premium in case of acceptance.

The tavern was clearly a greater risk than the dwelling house, and one for which an extra premium of 7s. 6d. to 10s. would undoubtedly have been charged, had it been accepted, and although the respondents, in the exercise of a discretion, of the soundness of which the respondents were the sole judge, thought fit to accept the risk of the vinegar factory, without extra premium, yet the respondents indubitably not only never agreed to insure the property in question as a tavern, but were wholly ignorant, until after the fire, that the premises had ever been applied to any such use.

Applying then the rule of law as set forth in the authorities cited, the insurance was clearly at an end, long previous to the actual destruction of the property consumed. And the respondents, therefore, confidently claim the confirmation in all respects of the judgment appealed from.

The following was the judgment, in appeal:—

"The Court * * * Considering that the said appellant hath established the material allegations in his declaration and pleadings in this cause fyled contained, and that the said allegations are sufficient in law to sustain his pretensions in this cause; Considering that the said jury empannelled to try the issues of fact in this cause did, upon the several articulations of fact submitted for their verdict thereon, find that insurance against fire was effected with the respondents by the said John C. Franck upon the building in the declaration mentioned as stated therein, for which the policy fyled in this cause was issued to him by the said respondents, and that the said building was afterwards totally destroyed by fire, as alleged by the said appellant, whilst the same or a part thereof was occupied as a tavern; considering that the said jury did also find that the occupation of the said building had been changed from that represented in the said policy at the execution and issue thereof, to the occupation of a vinegar factory, without objection by the respondents, who would not therefore endorse the said change upon the said policy in conformity with the conditions in that respect of the said policy, by reason that the said change did not increase the insurance risk upon the said building, and further that the said risk was not increased upon the said building by its subsequent change of occupation from a vinegar factory to that of a tavern, during which latter occupation the said building was totally destroyed by fire; Considering that by the said finding the insurable value of the said building at the destruction thereof was $3,187, and the said John C. Franck had not divested himself of his insurable interest in the said building, but had only conveyed an interest therein to the said appellant as collateral security to the said appellant to cover and protect the indebtedness of the said John C. Franck to the said appellant until the payment thereof; Considering that the said John C. Franck did, in conformity with his agreement with the appellant to that effect at the time of the execution of the said conveyance subsequently and before the institution of this action, duly assign the said policy to the said appellant by an endorse-

Campbell and The Liverpool and London Fire and Life Insurance Co.

ment thereon as required by the said policy, but notice of the said assignment was not given to the respondents until after the destruction by fire of the said building; Considering that the said verdict and the facts therein found were in favour of the said appellant and within the special province of the jury thereon, and sufficient in law to support the pretensions of the appellant; Considering that the said respondents did not move the Court below, to wit, the said Superior Court, to grant a new trial upon the said verdict and findings in the facts found by the said jury, and that the said Superior Court could not in law, upon the application of the respondents therefor, enter up a judgment in their favour, notwithstanding the verdict and findings aforesaid in favour of the appellant and against them, the said respondents; Considering, therefore, that the said judgment of the Superior Court rendered in this cause at Montreal on the 28th of February, 1867, was illegal and contrary to law and fact, doth reverse and set aside the said judgment, and proceeding to render such judgment as the Court below ought to have rendered; Considering that no increase of risk was incurred in the occupation of the said building as a tavern from its previous occupation as a vinegar factory, as found by the jury aforesaid, and considering, etc., doth, for the considerations hereinbefore mentioned, adjudge and condemn the respondents to pay to the said appellant *** with costs, as well of the Superior Court as of this Court."

Judgment of S. C. reversed.

Hon. J. J. C. Abbott, Q. C., for Appellant.
Strachan Bethune, Q. C., for Respondents.
(S. B.)

MONTREAL, 9TH SEPTEMBER, 1869.

No. 47.

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

JOHN HUBERT MACKAY,
(*Defendant in Court below,*)
APPELLANT;

AND

ALANSON COOK,
(*Plaintiff in Court below,*)
RESPONDENT.

HELD:—Confirming the judgment of the Court of Review, Judge DRUMMOND *dissentiente*, Judge BADGLEY *dubitante*.

1st.—That a petitory action may be instituted pending proceedings (by defendant) in a possessory action.

2nd.—That the Circuit Court has no jurisdiction over possessory actions.

The respondent on the 9th December, 1863, instituted before the Superior Court, Ottawa, a petitory action to obtain a certain lot of land. The appellant by his first plea, *exception temporaire en droit*, urged that on the 20th July, 1863, he instituted against the respondent, an action *en complainte* before the Circuit Court at Papineauville, in respect and with reference to the same

Mackay and Cook.

lot of land mentioned in plaintiff's declaration. That at the time of the institution of the respondent's petitory action the said appellant's action *en complainte* was still pending and undetermined before the said Circuit Court, and therefore that the said petitory action was premature and could not be instituted by the respondent so long as the said action *en complainte* was undecided, and concluded for the dismissal of the plaintiff's action.

By judgment of the Superior Court at Aylmer, the 17th December, 1866, it was declared: "The court having heard the parties by their respective counsel "on the merits, examined the proceedings and proof of record, and having "deliberated thereon: Considering that the said defendant has established by "evidence the material allegations of the first exception by him pleaded, to wit "that the *action pétitoire*, in this cause, has been instituted during the pendency "of an *action en complainte* between the said parties for the recovery of the "said property; and considering that by law the said *action pétitoire* cannot "be maintained, it is considered and adjudged that the said *action pétitoire* of "the said plaintiff be, and the same is hereby dismissed with costs.

The Court of Review at Montreal, the 28th October, 1867, (Judges Mondelet, Berthelot and Monk,) gave judgment as follows:

"The Court now here sitting as a Court of Review, having heard the par-"ties by their respective counsel, upon the judgment rendered in the Superior "Court in the District of Ottawa, on the 17th day of December, 1866, having "examined the record and proceedings had in this cause, and maturely deliber-"ated; Considering that the plaintiff could not, in law, be debarred from insti-"tuting and prosecuting the present *action pétitoire*, because he had been pre-"viously sued by the defendant *au Possessoire* in the Circuit Court, which "action is alleged to be still pending, relative to the land in question, and that "the Court below has made a wrong application of the maxim "*qu'on ne peut* "*cumuler le Pétitoire avec le Possessoire*:".

"Considering therefore, that in the judgment appealed from, to wit: the said "judgment of the 17th day of December, 1866, there is error, this Court doth "reverse, annul and set aside the said judgment, and proceeding to render the "judgment which the Court below should have rendered, it is ordered and "adjudged that the *Exception Péremptoire temporaire en droit*, be and the same "is dismissed with costs, and that the said parties do proceed in the said "cause before the said Superior Court, as they may advise, with costs of the "present judgment in Review against the said Defendant."

In appeal *L. Bélanger*, and *J. N. A. McKay*, for appellant:

C'est de ce dernier jugement dont est appel, le dit appelant prétendant que le dit dernier jugement est erroné, illégal, injuste et contraire à la preuve faite par l'appelant, tant au moyen des pièces par lui produites à l'appui de la dite première exception, qu'au moyen des admissions comprises dans la réponse spéciale de l'Intimé à la dite première exception.

Maintenant le dit appelant soumet que le dit jugement rendu par la dite Cour Supérieure siégeant comme Cour de Révision, à Montréal, doit être infirmé pour plusieurs raisons, et entre autres pour les suivantes:

1o Parceque le dit dernier jugement est irrégulier, illégal, injuste et contraire à la preuve.

2o Parceque le dit jugement ainsi rendu par la dite Cour de Révision déboute l'exception temporaire en droit du dit appelant, tandis qu'il aurait dû confirmer le dit jugement de la dite Cour Supérieure siégeant dans et pour le district d'Outaouais, et partant maintenir la dite Exception et renvoyer la dite action pétitoire du dit Alanson Cook, avec dépens.

3o Parce que la dite Cour de Révision a fait une fausse application de la loi en décidant par son dit jugement que le dit Alanson Cook avait droit en loi de poursuivre la dite action pétitoire en cette cause contre le dit appelant, pendant l'instance sur l'action possessoire en complainte mentionnée dans la dite Exception temporaire en droit.

4o Parce que le dit jugement de la dite Cour de Révision a été rendu contrairement à la loi.

5o. Parce que le dit jugement de la Cour de Révision est contraire à la preuve faite sur et à l'appui de la dite Exception temporaire.

6o Parce que le dit jugement de la Cour de Révision du 28 Octobre, 1867, au lieu d'infirmer le dit jugement de la dite Cour Supérieure siégeant dans et pour le district d'Outaouais et de débouter la dite Exception temporaire en droit de l'appelant, aurait dû confirmer le dit jugement de la dite Cour Supérieure siégeant dans et pour le district d'Outaouais, et maintenir la dite Exception temporaire en droit de l'appelant, et partant débouter la dite action du dit Intimé.

Le pétitoire ne peut être poursuivi pendant l'instance au possessoire et même avant que les choses ne soient rétablies dans le même état et avant que le jugement au possessoire n'ait été exécuté.

Poullain du Parc, vol. 10, p. 696, No. 13 and 14, p. 703 and 704, No. 25 and 26.
Pigeau, T. 1. p. 170 and 171, and Tome 2, p. 113.
Dictionnaire de Ferrière, T. 2, Verbo Pétitoire, p. 428.
Guyot, Rép. T. 13, Verbo Pétitoire, p. 117 and 118.
Pothier, Proc. Civile, p. 100.
Serpillon, sur l'Ordonnance de 1667, p. 282.
Carré, sur la proc. civile, vol. 1, Edition Belge, p. 105, Nos. 130, and 131.
Ravaut, Proc. Civile, p. 71 and 72.
Bioche, Dict. de procédure civile T. 1, p. 235, 387, 388 and 389.
Sirey, Code de Procédure Civile (Codes Annotés) p. 47, Art. 27, Note 27.
Aulanier, Traité des actions possessoires, p. 303 et suivants, Nos. 265, 267 et 270.
Code de Proc. Civile Canadien, Art 946.
L'Action possessoire peut être intentée devant la Cour de Circuit.
Statuts Refondus du Bas Canada, Chap. 79, Sect. 2 et chap, 78, Sec. 2.

John A. Perkins, Jr., for Respondent.—The respondent respectfully submits that the Circuit Court has no jurisdiction to try actions *en complainte*, that power being vested solely in the Superior Courts, *vide* Consolidated Statutes L.C., page 664: "The Circuit Court shall have cognizance of and shall hear and determine all civil suits or actions wherein the sum of money or the value of the thing demanded, does not exceed $200, and wherein no writ of *capias ad respondendum* issued out."

Same Statutes, pages 667, 668: The Superior Court shall take cognizance of all suits or actions, which are not cognizable in the Circuit Court.

The Superior Court has full power and jurisdiction and is competent to hear

Mackay and Cook.

and determine all plaints, suits and demands of what nature soever, which might have been heard and determined in the Courts of private justice, royal intendant or Superior Council under the Government of the Provinces, prior to the year 1759, touching rights, remedies and actions of a civil nature, and which are not specially provided for by the laws and ordinances of Lower Canada, made since the said year 1759.

Edits et ordonnances Royaux, vol. I, Cap. 38, Edits de création du conseil Supérieur de Québec, 1663.

"Avons en outre au dit conseil souverain donné et attribué, donnons et attribuons le pouvoir de connaître de toutes causes civiles et criminelles pour juger souverainement et en dernier ressort selon les lois et ordonnances de notre royaume."

Same vol. page 99, Edit pour l'établissement du Siége de la Prévoté de Québec 1667.

"A ces causes et autres bonnes considérations à ce nous mouvant de l'avis de notre conseil et de notre certaine science, pleine puissance et autorité royale nous avons par ce notre présent édit perpétuel et irrévocable rétabli et en tant que besoin crée et institué de nouveau, rétablissons créons et instituons le siége de la prévoté et justice ordinaire à Québec, pour connaître en première instance de toutes matières tant civiles que criminelles.

Same vol., page 152.

"Si aucun est troublé en la possession et jouissance d'un héritage ou droit "réel ou universel de meubles qu'il possédait publiquement sans violence à un "autre titre que de fermier ou possesseur precaire il peut dans l'année du trouble, "former complainte en cas de saisine et de nouvelleté contre celui qui lui a fait "le trouble."

From the above quotations it will be seen that actions *en complainte* previous to the year 1759 were instituted before the Courts from which our Superior Court derives its jurisdiction, and therefore it is the only Court, by virtue of the authority given to it by Statute, which has the power to try actions *en complainte*.

The respondent also submits, that the appellant seeks to recover before the Court by his action *en complainte* a property which exceeds much in value the sum of $200, which at once shows the Circuit Court to have no jurisdiction in the cause.

The respondent also submits that the institution by the appellant of his action *en complainte* before a tribunal of incompetent jurisdiction could not have the effect of debarring him of his right of instituting his said petitory action as he did.

Finally the respondent avers that the appellant hath totally failed in proving any of the exceptions fyled by him in this cause, and particularly with respect to the one of prescription the respondent saith that if the prescription of ten years *entre présents* is the one sought to be invoked, the appellant omitted to prove the presence of the parties during the above period of time; if on the contrary the prescription of twenty years is the one invoked the respondent avers that at the time of the institution of the present action the time allowed for such a prescription had not elapsed.

Mackay and Cook.

The respondent never had possession of the property in question, which has been held by the appellant for upwards of 18 or 20 years, and upon the merits therefore the action should be dismissed.

DRUMMOND, J., dissenting. I understand that my colleagues think that the Circuit Court has no jurisdiction over possessory actions. I am of a different opinion and hold that the Circuit Court has jurisdiction, and therefore it is plain to my mind that the plaintiff could not bring his petitory action before the possessory action had been disposed of.

PER CURIAM.—The entire case was submitted in the argument although the sole ground of appeal is the exception of the cumul of the possessoire and pétitoire. Upon that point the exception is unfounded because the Circuit Court has no jurisdiction in such case.

Judge Badgley was not so satisfied as the Chief Justice and Judge Caron upon the alleged want of jurisdiction in the Circuit Court, but being unwilling to allow his doubt to delay the judgment any longer he would not therefore dissent from his colleagues, the Chief Justice and Justice Caron.

Judgment confirmed.

Hon. Mr. Justice DRUMMOND, *dissentiente*, Hon. Mr. Justice BADGLEY, *dubitante*.

Bélanger & Desnoyers, for appellant.

John Delisle & J. A. Perkins, jr., for respondent.

(J. A. P. Jr.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 30 OCTOBRE, 1869.

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

No. 75.

Landry vs. Migneault, et al.

JUGE:—Qu'un bref de prohibition adressé à une Corporation, doit l'être à elle-même en son nom Corporatif et non pas aux officiers publics la composant ni à chacun d'eux.

Le 12 Août 1867, le requérant obtint un writ de prohibition adressé "aux membres" eo nomine "du et formant le Conseil Municipal du Comté d'Yamaska, dans le district de Richelieu."

Les répondants à ce bref s'y objectèrent par une exception et prétendirent que la requête libellée et le Bref de Prohibition sont mal dirigés, mal adressés et ont été mal signifiés, et conséquemment, illégaux et nuls. Les membres du Conseil du Comté d'Yamaska n'y sont pas même poursuivis en leur qualité officielle ni corporative.

En supposant que le requérant aurait eu droit à l'exercice d'un recours par Bref de Prérogative, il serait encore mal fondé et son Bref et sa requête libellée devraient également être mis de côté.

C'est à la Corporation du Comté d'Yamaska qu'il aurait dû s'attaquer et nullement aux Répondants.

Landry vs. Migneault.

Le jugement rendu par la Cour Inférieure à Sorel, Loranger, J., est comme suit :

La Cour considérant que les Défendeurs ont été bien assignés à répondre au bref de Prohibition émané en cette cause, tant en qualité d'appelants par requête contre l'homologation des listes d'électeurs pour la paroisse de St. David, mentionnée en la requête libellée, que comme membres du Conseil Municipal du Comté d'Yamaska, la forme et qualité dans lesquels les dits défendeurs ont été assignés étant les seuls qui peuvent être employées, pour obtenir le bénéfice du dit bref et forcer les défendeurs à y répondre, et que l'exception à la forme est mal fondée, a rejeté et rejette la dite exception avec dépens.

MACKAY, J. Migneault and others are prosecuting rights of importance. It is important that the electoral lists be accurately made up. This is an affair of electoral more than of common municipalities law. The Consolidated Statutes of Canada, ch. 6, it is true, refers us to the Municipalities Act for the proceedings to be upon appeals. Appeals in Lower Canada under ch. 6 of Consolidated Statutes of Canada are to be in like manner and form as on appeals from assessment rolls under Municipal Act of Lower Canada. The respondents (the private parties) are aggrieved, they say; and they appeal to the Corporation of the County. They may, or may not, have a right to succeed on their appeal; but they did in form, appeal. Then, a writ of prohibition is taken, and it ought to be addressed to the Corporation of the County; which was the body that was taking up, by the Municipal Council of the County, the appeal. The writ is said to be well addressed to those whose names are stated, as these are the persons acting; but there is nothing to show them acting. As to action, or activity, I see none, as yet, other than by the Corporation of the County acting, as the law says, it shall act, and represented as the law says it shall be. The affidavit of Landry shows a Corporation about to sit upon the appeal; and he says that this Corporation, about to sit, has no jurisdiction. If the Corporation could be seen to be *inactive*; but *persons*, (individuals,) *active* and assuming jurisdiction, these would be properly addressed as by this writ of prohibition. An address like the one that has been here is, in the circumstances of the case, improper, and leads to embarrassments. In this very case the persons summoned sever in pleading. Each one of them might have pleaded separately and created more confusion. Two of them do not plead at all. The only plea fyled is an *Exception à la forme*, and it has been dismissed. The Court here thinks that it ought to have been maintained. Supposing all true that Landry says, he had a plain, easy, remedy. He had just to go against the proper Corporation, in other words, the body that had taken up the appeal. We cannot agree with the judgment appealed from, particularly when we read the decisions in the first Lower Canada Jurist, page 289, Attorney-General vs. Yule et al.; and Corporation of St. Jerusalem vs. Quinn, 3 L. C. J., p. 234.

The same principle must be ruled here as in the Attorney-General vs. Yule. "The individual members of a Corporation cannot be impleaded in respect of the affairs of such Corporation."

Le jugement de la Cour de révision infirmant le jugement de première instance est motivé comme suit.

"The Court now here sitting as a Court of Review, having heard the parties by their counsel upon the judgment rendered in the Superior Court of the district of Richelieu, on the 23rd day of March, 1869, having examined the record and proceedings had in this cause, and maturely deliberated;

Considering that the matters complained of by the said petitioner Landry, and upon which the writ of prohibition issued in this cause are chargeable and charged against the Corporation referred to in his petition and the said writ;

Considering that the principal grievance of said Landry petitioning for said writ was and is that the Municipal Council of the County of Yamaska, to wit: representing the Corporation of the County of Yamaska, was, without right so to do, about to take cognizance of the *Requête d'Appel* in the petition of said Landry referred to, to wit, *Requête d'Appel* of said defendants Migneault, A. C. Wurtele, Sheppard, Champagne, V. C. Wurtele, Lambert, Pinard and Thérien;

Considering that under the facts of record and the allegations of petitioner himself, the writ of prohibition in this case issued is not, under the circumstances of this case, directed to the proper Corporation, but is improperly directed against the defendants Lemaître, Fortier, Beaupré, Boucher, Manseau, Arcand and Lahaie, as individuals *formant le Conseil Municipal du Comté d'Yamaska*, and that no proper service of proper writ has been made;

Considering that the *Exception à la forme* pleaded by the defendants, except Beaupré and Fortier, against the Requête of said Landry, and said writ of prohibition was and is well founded, and ought to have been maintained, and that the judgment complained of, to wit: the said judgment of the 23rd of March, 1869, dismissing said exception, was and is erroneous;

This Court, revising said judgment, reverses the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth maintain said *Exception à la forme*, for the first reason mentioned in it, and doth dismiss said *Requête* of said Landry, and declare null the process in this cause, in so far as regards said defendants who have pleaded in this cause, with costs against said Landry in the original Court, distraits to the attorney for said defendants, and also in this Court distraits to the defendants' attorneys in this Court in Revision, and it is ordered that the record be remitted to the said Superior Court of the District of Richelieu. (Mr. Justice MONDELET dissenting as to the *Exception à la forme*, which should have been rejected.)

Jugement renversé.

A. Germain, pour le Requérant.
A. L. Brassard, pour les Répondants en Cour Inférieure.
Mousseau & David, pour les Répondants en Cour de Révision.

(P. R. L.)

EN REVISION.

MONTREAL, 23 NOVEMBRE 1869.

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

No. 1011.

Forsyth & al. vs. *Charlebois.*

JUGE:—Que dans une action hypothécaire dont le montant n'excède pas $400, le dépôt requis sur l'inscription pour révision n'est que de $20.7 (*)

Le 22 Novembre 1866 les demandeurs firent la motion suivante devant la cour de révision :

Motion de la part des dits Demandeurs pour que l'inscription pour révision faite et produite par le Défendeur soit rayée, etc., etc.

1. Parce la présente action est une ACTION RÉELLE, savoir : en déclaration d'hypothèque ainsi que le jugement final rendu en cette cause et qu'à raison de cette action le Défendeur, pour obtenir la révision, était tenu de faire un dépôt de $40 tel que requis par la loi.

Per Curiam.—L'action hypothécaire est une action mixte; ce n'est pas une action réelle dans le sens des dispositions de l'article 497 du code de Procédure civile.

Motion rejetée.

Joseph, avocat des Demandeurs.
Barnard & Pagnuelo, avocats du Défendeur.
(P. R. L.)

EN REVISION.

MONTREAL, 23 NOVEMBRE 1869.

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

No. 295.

Lefebvre vs. Murdoch.

JUGE:—Que lorsque le montant du jugement n'excède pas $100, quoique le montant demandé excédât cette somme; il n'y a pas lieu à sa révision lorsque le créancier se contente du jugement rendu. (†)

Le 22 Novembre 1869, le Demandeur fit la motion suivante :

Motion de la part du dit Demandeur, (l'Intimé) dans cette cause, pour que l'inscription faite et produite par la Défenderesse, pour révision du jugement final rendu le 30 Octobre dernier, soit déchargée et renvoyée, en autant qu'icelle est illégale, nulle et de nul effet et qu'il n'y a pas droit d'appel du dit jugement et que copie soit remise à la Cour Inférieure (Court de Circuit) pour les raisons suivantes :

1. Parce que le dit jugement dont la Défenderesse demande la révision n'a été rendu que pour une somme de $90 en faveur du Demandeur, et que ce dernier a acquiescé au dit jugement et s'est désisté du surplus de sa demande par déclaration à cet effet signifiée à la Défenderesse et produite le 30 Octobre dernier,

(*) Code P. C. Art. 497.

(†) La Revue Légale, vol. 1. No. 3, p. 15. Bellerose & Hart, en appel à Montréal.

avant l'inscription de la Défenderesse pour Révision, et qu'en conséquence la Défenderesse n'a pas droit de demander la révision de tel jugement qui n'est pas susceptible d'appel; le tout avec dépens.*

Lefebvre vs. Murdoch.

Motion accordée.

Joseph, avocat du Demandeur.
Carter & Hatton, avocats du Défendeur.
(P. R. L.)

(IN REVIEW.)

MONTREAL, 30TH OCTOBER, 1869.

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

No. 343.

Currier vs. Lafrance.

HELD:—That when the defendant is served personally at a place other than his domicile, the delay is computed according to the distance from such place of service, (and not according to the distance from his domicile), to the place where the Court is held.

MONDELET, J., (dissentient).—The question here to be decided, is raised by an *Exception à la forme*, whereby it is demanded that the service of the summons upon defendant, is insufficient, the delay being too short. The distance of the domicile of the defendant from the Court House, at Aylmer, is upwards of one hundred miles. This is established by an admission given by the plaintiff. The bailiff, in his return of service, certifies, that he served the defendant, personally, in the township of Hull, on the 25th of April, 1868, and that the distance from the place of service, to the Court House, at Aylmer, is seventeen miles. The question is whether such service is sufficient. What does the Code of Civil Procedure say, with reference to such services? Art. 1066 says: "The delay upon summons is five intermediate days, when the distance from the defendant's *domicile* to the place where the Court is held, does not exceed five leagues, with the ordinary extension, when the distance is greater." Nothing can be more positive and clear. The delay, or time, is to be computed, not from the distance of the place where the service is made to the Court House, but from the domicile of the defendant to the place where the Court is held. An attempt is made to interpret the above article, which is as clear, positive and emphatic as it can be, by a reference to the 77th Article of the Code of Civil Procedure, with respect to what the bailiff must state in his return, wherein are found the following words: Subsection 5, "The distance from the Court House to the defendant's domicile, or the place of service." Now, in the first place, the Article 1066 being clear and positive, needs not to be explained or interpreted; it is not susceptible of two meanings: so much so, that an attempt is made to qualify it from the very fact of its being so clear and positive. I maintain that, in the face of such clear and positive law, no Court and no judge is at liberty to do anything else than carry it out.

No distinction, no interpretation, is to be set up against what, in itself, is not ambiguous. So much for what I believe to be what the judge is to do, in a case like the present.

Sed vide S. R. B. C. cap. 77, sec. 25; cap. 82, sec. 2; C. P. C. 1142.—(*Note du Rapporteur.*)

Carrier vs. Lafrance.

But even could it be that, when the law is positive and clear, as we find the 1066th Article to be, the judge could disregard it, and because it appears to him that some inconvenience may attend the carrying out of that positive and clear law, he were permitted to seek in other Articles of the Code, words which could assist him in assuming as doubtful, ambiguous, susceptible of more than one interpretation, an article which is anything but that, is it by a sub-section of an Article which merely directs what the bailiff shall insert in his return, that we are to be allowed to go counter to a law which is not directory, but which is a protection to parties who are summoned to appear before Courts of justice, and who, in case their domicile is more than five leagues from the Court House, have a right (Art. 75) to an increase of a day, for each additional five leagues? I am most decidedly of opinion we have no such right, no such power, and I certainly would much regret to discover and know, that such power does exist in any Court or judge. But those words, those mere directory words "the distance from the Court House to the defendant's domicile, or the place of service," do not, in the least, affect the question. They merely mean, that if the service has been made at the defendant's domicile, the bailiff shall certify that; and if, as in this case, it has been made elsewhere, the bailiff shall say so. But how can it be pretended for a moment, that it touches in any way so positive, so clear, so emphatic an Article as the 1066th C.C.P. is? How can such an Article, so unambiguous, be first declared to be ambiguous and doubtful, which it is not, and then be got rid of, by a pretended interpretation, so singularly, so gratuitously slipped in, because, forsooth, it may appear to some, that there might be some inconvenience in the carrying out of a law which we are bound to obey. I cannot give my concurrence to a course which I consider as a very arbitrary and dangerous one.

Another mode is used to defeat the law which is binding upon us. It is, as I have heard it said, to ascertain what the history of the enactment of the 1066th Article of the Code is, and for that purpose, a reference is made to the Consolidated Statutes of Lower Canada, c. 83, s. 42, 169 and 170.

By that Statute, sec. 170, sub. 2, "the writ shall be served at least five days (of which neither the day of service nor the day of return shall be reckoned as one) before the day fixed for the return thereof, if there be not more than five leagues from the place of service, and if there be more than five leagues, then there shall be an additional delay of one day for every additional five leagues."

What does the above prove? Nothing, and no more than what it decrees; but I beg leave to ask what has it to do with the 1066th Art. of the C. C. P.? What are we to say, when we confront that section of the ch. 83 of the Consolidated Statutes, with Article 1066? why this, and nothing else, that the latter establishes, in the most positive way, a new rule which we are bound to be governed by.

After all, it is so palpable, that were the Art. 1066 of the Code to be carried out with such unjustifiable modifications as it is attempted to subject it to, there might accrue great inconvenience, nay, great injustice to the defendant who lives at a distance of over 100 miles from the Court House, that were he to apply for delay to plead, he would obtain it. Why then, to no purpose, uselessly, unjustly, *a priori*, serve him by short service?

The answer is so plain that it requires not to be dilated upon.

Some people might, if not told to the contrary, suppose that there has been a jurisprudence on the point or question now debated. No such jurisprudence has ever existed. Under the old system, and under a different legislation, it was a practice to watch the presence of country merchants or others in the city, and to serve them personally, with summons under the old rule of forty-eight hours. That was done, and the circumstance of its never having been objected to, may be accounted for, by this, that it was a common interest that such a practice should be tolerated.

Carrier vs. Lafrance.

But even had there been a sanction, I mean a juridical sanction, given to such a course, on its being submitted to the Court for a decision, such jurisprudence would be of no avail, under the positive, clear, emphatic declaration of the 1066th Article of C. C. P., which has established a new rule.

Upon the whole, I am clearly of opinion, that the exception of the defendant should, on the point, be maintained, the service of the summons upon him declared null, and the action be dismissed with costs.

TORRANCE, J. The question is simply whether the C.C.P. 1066, has laid down a new rule for the delays between service upon a defendant and return of the action into Court. The majority of the Court think that no change has been intended. The 1066th Article, as we read it, lays down the rule where the service is made at the domicile, and is silent for the case in which the service is made personally upon the defendant elsewhere. This is a *casus omissus*, and the omission is supplied by C. S. L. C., cap. 83, s. 170, s. s. 2, which enacts that, when the place of service is more than five leagues from the Court House, an additional day must be allowed for every additional five leagues. The majority of the Court is, therefore, of opinion not to disturb a practice which has obtained for many years, of calculating the delays from the place of service. The Court below dismissed the exception *à la forme*, and the Court here maintains that judgment.

BERTHELOT, J., concurred.

Judgment confirmed.

Fleming, Church & Kenney, for plaintiff.
T. Colman, for defendant.
S. Bethune, Q. C., counsel.
(J. K.)

SUPERIOR COURT, 1869.

MONTREAL, 30TH OCTOBER, 1869.

Coram MACKAY, J.

No. 1142.

McDonald vs. *Lalonde.*

HELD:—That a plaintiff seizing *bonâ fide* property in possession of his debtor, is not liable in damages towards a third person, owner of the property. It is *damnum absque injuriâ*.

MACKAY, J. The defendant having a judgment for five pounds, at Soulanges, against Ronald McDonald, issued an execution against his goods and chattels, and seized in his possession two mares and a *voiture*. Ronald, just before the seizure, was asked as to whom these belonged, and replied: "it is mine." They

McDonald vs. Lalonde.

really belonged to the plaintiff in this action, Roderick McDonald, resident in Upper Canada. From the 23rd of January to the 23rd of April, 1868, Roderick had no use of his property. He opposed the seizure of it in the Circuit Court, at Soulanges, and *Lalonde* not contesting, his opposition was maintained in July, 1868, with costs against Ronald McDonald. (Art. 586, C. Proc.)

He now sues Lalonde for $250, as for illegal seizure of his property, stating damages nominal, and also particular, as for want of his animals, and *voiture*, costs of travelling, and law costs in and about the matter of his opposition.

The mares in question were not worth much; some of the witnesses only valuing them at twenty dollars each. As to my adopting some of the statements of witnesses, for instance, to the effect that plaintiff lost nothing by not having his mares, I cannot do *that*. But I deny action to the plaintiff altogether, under the circumstances of this case.

Lalonde is not proved to have acted maliciously; he was in his right seizing upon the possessor of the things; after enquiries, when called upon to admit or contest plaintiff's opposition, he does not contest. The two McDonalds are brothers-in-law, and Ronald (whom plaintiff had entrusted with the things) led to the seizure, by stating that they were his. True that, immediately after the seizure, he protested that they were *not* his. I consider this a case of *damnum absque injuriâ*. I believe such cases are generally considered so; else hundreds of condemnations would have been, before now, of persons in the situation of *Lalonde*; but we find none.

The judgment is as follows:—

The Court, etc.; considering that under the circumstances proved, plaintiff was, and is without right to have and maintain an action of damages such as the present; considering that no malice has been proved against defendant, and that defendant was in his right in doing all he did, and is not liable or guilty, as alleged, doth dismiss said plaintiff's action with costs.

Action dismissed.

De Lorimier, for Plaintiff.
Bondy, for Defendant.
(P. R. L.)

IN REVIEW.

MONTREAL, 30TH OCTOBER, 1869.

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

No. 1161.

Fournier vs. Ledoux.

HELD:—Overruling *Whalley* vs. *Kennedy*, 12 L. C. J., 225, that the delays fixed by C. C. P., 497-8, for inscribing in review are not suspended by the vacation.

MONDELET, J., dissentient.—Il est question d'une motion pour faire mettre de côté une inscription faite à St. Hyacinthe pour révision, attendu que le dépôt n'a pas précédé l'inscription, et à l'effet de faire remettre le dossier à la cour de première instance. Le dépôt parait avoir été fait, en vacance, le 19 Juillet dernier, et l'inscription pour révision aussi le 19. *Ergo*, dit-on, la loi est violée, votre inscription doit être renvoyée, et le dossier remis.

Fournier vs. Lodoux.

Je ne puis concourir dans le jugement qui va être rendu par la majorité de la Cour, accordant la motion. En vacance, on ne peut contraindre les parties de procéder. L'inscription étant faite le 19 Juillet, elle peut, elle doit être considérée comme faite le 1er Septembre. Alors le dépôt étant fait le 19 Juillet, il a précédé l'inscription, et tout est bien. Ceci n'est pas une subtilité, encore moins un sophisme. C'est tout au plus, une fiction légale, mais strictement correcte. Je suis donc d'avis, que la motion faite ici, devrait être renvoyée.

TORRANCE, J., giving the judgment of the Court. This case is in review of a judgment rendered at St. Hyacinthe on the 3rd of July last. The defendants inscribed in review on the 19th of July, having given notice of the inscription to the attorneys of the plaintiff on the 17th of July, and when the inscription was fyled on the 19th of July, a deposit of $23 was made at the office of the Circuit Court, at St. Hyacinthe. The plaintiff moves the Court to reject the inscription, on the ground that it was not made within eight days after the rendering of the judgment, and that it was not preceded by the *dépôt* required by law (C.C.P., 497, 498). The defendant replies that the delays did not run in vacation, and cites *Whalley* vs. *Kennedy*, 12 L.C.J., 225. The majority of the Court is of opinion to overrule this precedent, and grants the motion with costs. The inconvenience of a contrary practice would be too great, and the Court is satisfied that the vacation does not suspend the expiration of delays in a case like the present, any more than their expiration would be suspended in the case of an execution.

The judgment is *motivé* as follows:—

"La Cour etc.....

Considérant que la susdite inscription pour révision du jugement rendu par la Cour de Circuit du District de St. Hyacinthe le 3 de Juillet, 1869, est tardive et contrairement aux articles Nos. 497, 498 et 499 du Code de Procédure, et que l'article 463 du même Code ne s'applique pas à l'espèce: La Cour a renvoyé la dite inscription avec dépens, et ordonne que le dossier soit remis à la dite Cour de Circuit à St. Hyacinthe: L' Hon. Juge Mondelet différant."

Motion granted.

Dorion, Dorion & Geoffrion, for plaintiff.
Chapleau & Rainville, for defendant.
(J. K.)

SUPERIOR COURT, 1869.

MONTREAL, 20TH OCTOBER, 1869.

Coram TORRANCE, J.

No. 43.

Pollico ès qualité vs. *Elvidge*.

HELD:—1. That a donation by a father to a daughter and her husband is a *propre*, and does not fall into the community of property between husband and wife.

2. That the sale of a *bailleur de fonds* claim, by a tutor without authorization of a judge, is invalid.

TORRANCE, J. This is an action to set aside a deed of transfer made by John Green, the father and tutor of Maude Mary and Marl Maria, his minor children, issue of his marriage with Lucy Bissell, deceased. The declaration sets

Pollico vs. Elvidge.

up, that, on the 15th January, 1851, Randall M. Bissell made a donation of land to his daughter Lucy, wife of John Green; that on the 12th March, 1856, Lucy Bissell and John Green sold the land to Jacob Young the 3rd, and Lucy Adela Reynold, his wife, for the price of $1,700; that the land was a *propre* of Lucy Bissell; that she died on the 27th August, 1857, leaving two children mentioned above; that on the 20th January, 1858, John Green was appointed tutor to his said children, and the same day, as well individually as tutor, sold to the defendant the unpaid purchase money due by Jacob Young and Lucy Adela Reynold; that this transfer to defendant was null and void as made by Green without authorization of a judge; that defendant had received $1,504 on account of the transfer, and the conclusion of the declaration was that the transfer be rescinded and the defendant condemned to pay to plaintiff, in his capacity of tutor *ad hoc* to the minors, the sum of $1,504.

The defendant pleaded, 1st, that the donation to Lucy Bissell and her husband was, in fact, a sale to them, and fell into the community of property existing between them; 2nd, that the money transferred belonging to the community, the defendant had paid for the community three several sums of £290, £55, £25, and that the community owed him a further sum of £60, and that the claim of the tutor was thereby extinguished.

Upon a careful examination of the whole case, the Court is of opinion, 1st, That the pretension of the defendant that the pretended gift was in reality a sale is not made out. 2nd, That the gift from Randall M. Bissell to his daughter Lucy and her husband, by the terms of the 1276th article of the Civil Code did not fall into the community. 3rd, That the liability of the children for the debts of the community will only arise if they accept of the community which they have not yet done. 4th, That the transfer by John Green, the father and tutor to the defendant, is invalid by the 297th and 298th articles of the Civil Code as made without the authorization of the judge on the advice of a family council.

The judgment of the Court is *motivé*, as follows:

"The Court, etc., considering that by the 1276th Article of the Civil Code the donation of land, of date the 15th January, 1851, made by Randall M. Bissell to his daughter Lucy Bissell, was a *propre* of his said daughter, and did not fall into the *communauté* existing between her and her husband John Green;

Considering that the sums of money accruing from the sale of the said land by the said John Green and Lucy Bissell, by the two several deeds of sale, of date 12th March, 1856, (Tremblay, notary,) to Dame Lucy Adela Reynolds and Jacob Young, her husband, became by the death of the said Lucy Bissell, on the 27th [illegible] 1857, the property of her minor children, Maud Mary and Marl Maria, issue of her marriage with the said John Green;

Considering that by the 297th and 298th Articles of the Civil Code, the transfer by the tutor of the said minors of the said sums of money could not take place without the authorization of a judge, on the advice of relatives, and for an evident necessity;

Considering, therefore, that the deed of transfer and assignment, of date the 20th January, 1858, (J. Belle, N. P.,) made by the said John Green in his own

name and as tutor appointed to the said minor children, without such authorization and advice to the defendant, is invalid and null;

Considering that the defendant hath not established, by legal and sufficient evidence, the allegations of his affirmative pleas in this cause, and considering that the plaintiff, *ès qualité*, and the said minors cannot be charged with disbursements made by the defendant on behalf of the community of property alleged by him to have existed between the said John Green and the said late Lucy Bissell, until the said minors have accepted the said community, doth overrule the said pleas, leaving to the defendant such recourse as he may have in law for the recovery of moneys by him paid for said community, and the Court doth rescind the said deed of transfer, to wit, the transfer by the said John Green to the defendant, of date the 20th January, 1858, and declare the same to be henceforth null and void and of no effect.

And the Court doth adjudge and condemn the defendant to pay and satisfy to the plaintiff, *ès qualité*, &c., the sum of $1,200, being the two instalments of $100 each, due under the said deeds of sale, on the 1st April, 1858, and the like sum of $200, due under the said deeds, on the 1st April, 1859; and the like sum of $200, due under the said deeds, on the 1st April, 1860; and the like sum of $200, due under the said deeds, on the 1st April, 1861; and the like sum of $200, due under the said deeds, on the 1st April, 1862; and the like sum of $200, due under the said deeds, on the 1st April, 1863; together with interest on the said sum of $1,200 from the date of the signification of process upon the defendant, leaving the plaintiff, *ès qualité*, and the said minors their recourse for the other instalments not yet due at the date of the institution of this action and not claimed by this action from the defendant. The whole with costs against the defendant."

Judgment for plaintiff.

W. H. Kerr, for plaintiff.
M. Doherty, for defendant.
(J. K.)

CIRCUIT COURT, 1869.

MONTREAL, 11TH NOVEMBER, 1869.

Coram TORRANCE, J.

McFee vs. *Bowie, and T. S. Brown*, intervening party.

HELD:—That a party to a cause having, during its pendency, made an assignment under the Insolvent Act, can be examined as a witness by the assignee who intervenes and takes up the instance in his place.

The plaintiff, McFee, revendicated his horse in possession of Bowie, the latter having claimed a lien for keep, which plaintiff refused to admit, alleging an agreement that in consideration of his having partial use of the horse no charge was to be made by the defendant. The horse was delivered to plaintiff on giving security, and the case proceeded for costs. After *enquête* commenced and witnesses examined, McFee made an assignment under the Insolvent Act of 1869, to T. S. Brown, official assignee, who intervened and took up the case for the estate. At his *enquête* he called McFee, the Insolvent plaintiff, as a witness to

McFee vs. Bowie.

prove the agreement and other facts, and on argument on the defendant's objection thereto, examination was allowed under reserve by the Court till final hearing.

At the final hearing *Kelly*, for defendant, moved to reject McFee's deposition, and argued that the assignee represented the Insolvent, and was virtually the same party to the case, and that as the Insolvent could not have been examined in his own interest when the case began, his evidence could not, merely in consequence of his subsequent insolvency, be received.

R. A. Ramsay, for intervening party, argued that the case was entirely out of plaintiff's hands, he and intervening party were distinct persons. Intervening party represented plaintiff's estate and his creditors and not the plaintiff. As to interest of plaintiff, he could have none, and even if he had, he was a competent witness under Con. Stat. L. C., ch. 82, Sect. 14, 15, and Art. 1233 of Code Civil, by which interest is no objection to admissibility but only affects the credibility of witnesses. The Court adopted the latter view and allowed the evidence to stand.

Judgment for plaintiff.

Perkins & Ramsay, for plaintiff, and intervening party.
Kelly & Dorion, for defendant.

(R.A.R.)

MONTREAL, 11TH NOVEMBER, 1869.

Coram TORRANCE, J.

No. 957.

Harris vs. *Fontaine.*

HELD:—1st. That a lease by a lessor made to a lessee of premises to be used for purposes of prostitution to the knowledge of the lessor will not be upheld.

2nd. That the parties will be sent out of Court, each bearing his own costs.

TORRANCE, J. The plaintiff in this case, as the Court reads the evidence, leased certain premises, at the corner of Lagauchetière and St. Urbain Streets, to the defendant, knowing that she intended to use them for purposes of prostitution. The action is to recover $180, for rent due and to become due, and was begun with a *saisie arrêt* before judgment on the ground that the defendant was secreting her estate with intent to defraud the plaintiff and was also about to depart from the Province with similar intent. The defendant has pleaded the immoral cause of the contract. The action must be dismissed, and the Court says further that the turpitude of the contracting parties being the same, each should bear his own costs. *Garish* vs. *Duval*, 7 L. C. J. 127; *Gugy & Larkin*, 7 L. C. R, 11.

Action dismissed.

Loranger & Loranger, for plaintiff.
Kelly & Dorion, for defendant.

(J.K.)

INDEX

TO THE PRINCIPAL MATTERS IN THE THIRTEENTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q. C.

PAGE.

ACCOMMODATION :—*Vide* PROMISSORY NOTE.

ACTION HYPOTHECAIRE :—*Vide* PRACTICE.

ACTION PETITOIRE :—*Vide* PRACTICE.

ACTION POPULAIRE :—The, may be brought by two proprietors interested, jointly. (Bénard et al. vs. Bourdon, S. C.) 233

" POSSESSOIRE :—The Circuit Court has no jurisdiction in possessory actions. (Mackay, appellant, and Cook, respondent, Q. B.)..... 321

AGENCY :—Although in commercial matters agency is presumed to be onerous, a party may nevertheless be held to be not entitled to a commission, if he undertook to act by a synallagmatic contract which established a presumption that the commission was part of the consideration of the contract. (Renaud vs Walker, and E. Contra, S. C.)..... 180

APPEAL :—An, will not be allowed from an interlocutory judgment of the Superior Court, dismissing a demurrer to a declaration. (Benning, appellant, and Grange, respondent, Q. B.)..... 153

" :—*Vide* EXECUTION.

ARBITRATION :—*Vide* INSURANCE.

ATTACHMENT :—In an affidavit for, the assertion "that the deponent is credibly informed and hath every reason to believe, and doth verily and in his conscience believe that defendant is secreting, &c.," with the grounds of belief, is sufficient, and the omission of the word "verily" in the conclusion of the affidavit is not fatal. (Clement vs. Moore, S. C.)... 163

" " :—*Vide* WAR DEPARTMENT.

ATTORNEY :—Service on an, must be made at his elected domicile, but he is bound to have some one in charge of it. (Aimbault and vir vs. Bates et al., S. C.)..... 139

AVEU JUDICIAIRE :—The, may be divided, when one part of the answer is combatted by indications of fraud and simulation or does not agree with the pleadings of the party interrogated. (Goudreault, appellant, and Poisson et al., Respondents, Q. B.)..... 235

PAGE.

BANK :—A special deposit receipt granted by a bank is not negotiable, and cannot, therefore, be transferred by a simple endorsement. (Voyer vs. Richer, C. of R.) 213

BOARD OF TRADE :—The members of the Council of The Montreal, are not exempt from serving as jurors in civil and criminal cases. (Matthewson vs. The Royal Insurance Company, S. C.) 239

CADASTRE :—A, duly deposited and closed, and as to which no appeal was taken before the Seigniorial Court of Revision, is final, and a defendant cannot ask its reformation upon the alleged ground that the Commissioner was led into error owing to the non-production of deeds. (Ellice vs. Renaud, S. C.) 164

CAPIAS AD RESPONDENDUM :—A security, under a Bond to the Sheriff, is liable to *contrainte par corps*. (Belle vs. Côté, C. C.) 26

" " :—In the case of a, on the ground of fraudulent secretion, it is not sufficient to swear that deponent "is credibly informed, hath every reason to believe, and doth verily and in his conscience believe," and the secretion must be affirmed of the property and effects generally of the debtor, and not merely of his "moveable property or effects." (Hurtubise et al. vs. Leriche, S. C.) 83

" " :—The holder of negotiable paper, endorsed to him merely to adopt any course he may think proper against the maker, and without his becoming owner thereof, may legally arrest the maker as his *personal debtor*, and an application to reduce the bail in such a case will not be allowed. (Winning et al. vs. Fraser, S. C.) 167

" " :—*Vide* INSOLVENT ACT OF 1864.

CERTIORARI :—Proceedings had under section 18 of Act 31st Vic. ch. 42, are of such a character as to be susceptible of being removed by *certiorari*; and a writ of *certiorari* will be granted, notwithstanding the same is expressly taken away by the Statute (Sec. 21), provided there be ground for the belief that the conviction was had without proof, where the Act provides that it shall be on proof to the satisfaction of the magistrate. (Ex parte Morrison, for *certiorari*, and DeLorimier, magistrate, *ad hoc*, S. C.) 295

" :—Full faith and credit will be given to a Magistrate or Officer's return to a writ of *certiorari*, and if the return show that the conviction was had upon the confession of the defendant, the defendant will not be permitted to go behind the return and show by affidavits of parties present, that he made no confession and that the return is false, and that the conviction was really had without any proof of confession whatever. (Do.) 295

CHALLENGE :—*Vide* PRACTICE.

COMMUNITY OF PROPERTY :—So long as there is no *partage* of the, and of its continuation, the surviving husband can validly hypothecate an immoveable which he made moveable for the purposes of the community. (Lalonde dit Latrelile vs. Parent, and Bourbonnais, opposant, and Parent *ès qualité* et al, Contesting, C. of R.) 231

COMPENSATION :—Plea of, *Vide* PRACTICE.

CONTRAINTE PAR CORPS :—*Vide* CAPIAS AD RESPONDENDUM.

" " :— " PRACTICE.

" " :— " PROTHONOTARY.

CORPORATION :—A, cannot acquire lands without permission of the Crown or the Legislature. (The Chaudière Gold Mining Company of Boston vs. Desbarats et al, S. C.) 182

PAGE.

COSTS :—In the absence of a judgment awarding distraction of, the parties to the suit can make what settlement they please, even as to the costs, notwithstanding that distraction of costs is demanded by the defendant's attorney by his plea. (The Quebec Bank vs. Paquet, C. of R.)... 122

" :—A motion for security of, must be made, or the notice thereof served (when the motion cannot then be made) within four days after the return day of the writ. (Rousseau vs. Trudeau et al., S. C.)..... 138

" :—A defendant, who succeeds in Review in obtaining a reversal, in considerable part, of the judgment complained of, may, nevertheless, be condemned to pay the costs in Review. (Lynch vs. Bertrand, C. of R.).. 189

" :—However unjust a condemnation for costs in the Court below may seem to be, the Court of Review cannot afford relief to [illegible] aggrieved. And although the judgment of the Court below [illegible] respects confirmed, the Court of Review may nevertheless [illegible] costs to the party succeeding. (MacDonald et al. vs. [illegible] 189

" :—When several debtors are condemned individually to pay [illegible] damages they will be jointly and severally condemned to pay the costs of suit. (Génier vs. Woodman et al., S. C.)..... 201

" :—Security for.—*Vide* OPPOSITION *afin de distraire*.

CURÉ :—A, cannot be sued in damages, for anything done in the discharge of his duty, unless notice of action be served on him at least one month before the issue of the writ of summons. (Robert et al., appellants, and Beau, respondent, Q. B)..... 225

DAMAGES :—A City Corporation may be sued in, for assaults committed by its servants, such as policemen, when such assaults are approved and attempted to be justified by the Corporation. (Doolan vs. The Corporation of Montreal, C. of R.)..... 71

" :—An action lies for, for breach of promise of marriage. (Grange vs. Benning, C. of R.)..... 126-290

" :—In an action for, (under Con. S. of C. ch. 78), for the death of a relative killed by accident, the relationship must be established by legal proof, and special damages must be alleged. (Provost et ux., appellants, and Jackson et al., respondents., Q. B.)..... 17

" :—A party cannot claim, for breach of contract, when the other party could not reasonably foresee that his neglect or default would cause such damage. To give rise to an action of damages in such a case it would be necessary to put the defendant in *mord*, and notify him that damage would be the result of his neglect. (Renaud vs. Walker & B. contra, S. C.)..... 180

" :—An action of, brought by a female of the age of majority, for alleged seduction, without any allegation of a promise of marriage, is unfounded in law. (Desormeaux vs. Caillotte, S. C.)..... 211

" :—*Vide* CURÉ.

" :—Two proprietors cannot legally join in an action for the recovery of their respective damages. (Bénard et al. vs. Bourdon, S. C.)..... 233

" :—An action to recover, arising from the construction of a mill-dam and thereby causing the water of the stream to flow over the neighbouring lands, cannot be brought except on an *expertise* under ch. 51 of the Con. Stat. of L. C. (Blais vs. Blais, and Blais, pltf. *en gar*, vs. Larochelle, S. C.)..... 277

" *Vide* EXECUTION.

DEPOSIT RECEIPT :—*Vide* BANK.

DOWER :—A general renunciation, for consideration, by a wife *separée de biens*, in

PAGE.

1828, of all rights she might have in a property sold by her husband, and which at the time was hypothecated for the payment to her of a *douaire préfix*, did not operate as a bar to her children's claim to be paid such dower, when the same became open. (Morley vs. Massue, C. of R.) 85

DOWER:—A sale of property affected by, under the bankruptcy laws in force in 1845, did not purge the property from the dower not then open. (Do.).... 85

DRUNKENNESS:—*Vide* RESCISION.

ENQUETE:—*Vide* PRACTICE.

EVIDENCE:—*Vide* MINOR.

" :—" EXCEPTION DÉCLINATOIRE.

:—A deposition sworn to, *by consent*, before a commissioner of the S. C., is *null and void*. (Pinsonneault, appellant, and Valade et al., respondents, Q. B.)..... 160

" :—Adduced by plaintiffs in rebuttal, tending merely to confirm and strengthen their original case, is inadmissible and will be rejected. Morland et al. vs. Torrance, S. C.)..... 197

:—*Vide* AVEU JUDICIAIRE.

EXCEPTION DÉCLINATOIRE:—In the case of an, based on the pretention that the note sued on, although dated in Montreal, was really signed in Quebec, evidence of the fact may be legally made by the oath of the plaintiff. (Gault et al. vs. Wright et al., S. C.)..... 60

" :—In the foregoing case, if the maker of the note reside in Quebec and be served with process there, he cannot be legally summoned to answer a suit so served and instituted in Montreal. (Do.)..... 60

EXECUTION:—The, of a judgment in appeal reducing in amount the judgment of the S. C., cannot legally issue until after the expiration of 15 days from the date of such judgment in appeal. (Duhaut vs. Lacombe et al., and Morrison, opposant, S. C.)..... 230

" :—A writ of, in the S. C., may be addressed to a Bailiff of the Court for execution even in an adjoining district. (Duhaut vs. Lacombe, and Tranchemontagne *et ux.*, opposants, S. C.)..... 308

" :—A plaintiff seizing, *bonâ fide*, the property of another in the possession of his debtor, is not liable in damages to the proprietor. (McDonald vs. Lalonde, S. C.)..... 331

EXHIBITS:—*Vide* PRACTICE.

FIRE MARSHAL:—The Chief Engineer of the Fire Department, Montreal, was not legally put *in mora*, to grant to the Fire Marshal the certificate required by the Quebec Act, 31st Vic. ch. 32, by making a simple demand therefor, without making due proof to the engineer that the fire occurred and that the Fire Marshal had made investigation into its cause, within the period prescribed by the Act. (Austin et al. vs. Bertram, C. C.)..... 157

" :—The Chief Engineer is not liable to be sued personally for the recovery (by way of damages) of the fees intended to be covered by the certificate demanded of and withheld by the Engineer, and the only legal remedy in the premises is the writ of *mandamus*. (Do.)..... 157

FOREIGN JUDGMENT:—In an action on a, the plaintiff is bound, when called on to do so, to produce the bill of particulars on which the judgment was rendered, and, in default of doing so within a fixed delay, his action will be dismissed with costs. (Hoppock et al. vs. Demers, S. C.)..... 224

FORGERY:—*Vide* PROMISSORY NOTE.

FRAUDULENT SECRETION:—Where a trading partnership obtains advances from a bank, under an agreement that the moneys derived from the sale of

PAGE.

hemlock bark extract manufactured by the partnership should go in liquidation of the debt to the bank, and the partnership, while in a state of insolvency and largely indebted to the bank, sells a quantity of bark extract and applies the proceeds to the payment of other debts, such an act does not amount to secretion. (The Quebec Bank vs. Steers et al., and Seymour, et al., T. S., and defendants petrs., S. C.... 75

HABEAS CORPUS :—*Vide* MINOR.

HYPOTHEQUE :—*Vide* COMMUNITY OF PROPERTY.

INDICTMENT :—In an, for obstructing an officer of excise under 27 & 28 Vic., ch. 3, the omission of the averment that at the time of the obstruction the officer was acting in the discharge of his duty under said Act, is not a defect of substance but of form, which is cured by the verdict. (Spelman, plaintiff in error, and the Queen, defendant in error, Q. B)..... 154

" :—An, signed by an advocate prosecuting for the Crown and as representing the Attorney General for the Province of Quebec, and not as representing the Minister of Justice, is valid. (Regina vs. Downey, Q B).....

" :—An, under 31 Vic. ch. 8, s. 143, for having opened the lock of a warehouse used for the security of the Revenue, without the knowledge and consent of the Collector of Inland Revenue, is bad, if a redundant statement be introduced, making the words which form the gist of the offence, "*without the knowledge and consent of the Collector of Inland Revenue,*"—apply apparently not to the opening of the lock, but to the keeping and securing of certain goods in the warehouse. (Regina vs Bathgate et al., Q. B.)..... 303

INSOLVENT ACT OF 1864 :—In the case of a joint demand by two creditors for an assignment, the one creditor cannot make proof for the other, and the claim of one of such creditors based on a transfer, unsignified at the time of the demand (although signified subsequently) cannot avail in support of the demand. (Turgeon et al. vs. Taillon and Taillon, Petr., S C.) 19

" :—An insolvent, under the, may validly make a voluntary assignment of his estate and effects to any official assignee, whether resident within the district or county wherein such insolvent has his place of business or not. (Brown, appellant, and Douglas, respondent, Q. B.)..... 2

" :—Under the, a creditor whose debt has not matured may commence proceedings against his debtor, who is insolvent. (Moore vs. Luce, C. P.)..... 113

" :—If it appear that the debtor does not owe more than $100 beyond the creditor's debt, (none of which was due at the time, and a portion not due for several years to come,) he will be allowed further time to shew that he was not in fact insolvent. (Do.)..... 113

" :—The nullity declared by paragraph 3 of sec. 8, is an absolute nullity, and, therefore, a promissory note given in violation of the provisions of said paragraph is absolutely null and void, *ab initio*, even in the hands of a third party innocent holder before maturity. (In the matter of Davis et al., Insolvents, and E. Muir, claimants, and Chamberlin et al., creditors contesting, S. C.)..... 184

" :—A creditor is not debarred from his right to examine the insolvent under oath, before a judge, by the mere fact that a composition deed (purporting to be duly executed) has been deposited with the Prothonotary, and that a notice has been given by the insolvent of his intention to seek its confirmation. (In the matter of Bowie, insolvent, and Rooney, respondent, S.C)..... 191

PAGE.

INSOLVENT ACT OF 1864 :—A sum of money paid by a debtor to obtain his discharge under a *Capias ad Respondendum*, may be recovered back by the assignee of the debtor, under deed of assignment made immediately after the arrest, on the principle that the payment had been made by the insolvent within 30 days before the execution of the assignment. (Sauvageau vs. Larivière, C. of R.) 210

" :—An action lies by the assignee to recover damages caused to an insolvent estate by an opposition founded on a simulated sale from the insolvent to opposant, defendant, without being specially authorized to bring such action by the creditors holding hypothecary claims on the real estate. (Brown, *es qualité*, vs. Smith, S. C.) 288

" :—*Vide* WITNESS.

" :—*Vide* LESSON.

INSURANCE :—The sale of property insured does not convey to the purchaser the policy of insurance, without a transfer of the policy and by mere operation of law. (Forgie et al. vs. The Royal Insurance Company, S. C.).... 9

" :—Where a reference to arbitrators allowed the parties *two* days to produce papers, &c., and the award was made by the arbitrators on the day following the reference, without their having had any communication with the defendants, such award will be held premature and null. (Chapman et al. vs. The Lancashire Insurance Company, and Fraser et al., plaintiffs, *par reprise d'Instance*, S. C.) 36

" :—Where the plaintiffs effected insurance on premises described as being occupied by them as a bonded warehouse, and by other tenants as offices, and subsequently sublet part of the premises to a common warehouseman, to be used for storage of goods, and also effected additional insurance upon the property insured, without giving notice of either fact to the insurers as required by the conditions endorsed on the back of the policy, it will be held that there was breach of warranty on the part of the insured, and that the policy is null and void. (Do.) 36

" :—*Vide* JURY TRIAL.

" :—The implied warranty of seaworthiness applies to the state of the vessel at the commencement of the voyage, and if seaworthy then, the insurer is responsible for all the ordinary incidents arising in the course of the voyage ; and it is no breach of this warranty, (1) that defects existed in the boiler at the time of sailing, rendering repairs to it after sailing necessary, where, in the opinion of the Court, it is not proved that the loss was occasioned by the originally defective boiler, or by the repaired boiler ; (2) that the chief engineer had never before been to sea and was ignorant of the management of boilers in salt water, where, in the opinion of the Court, it is not proved that the loss was occasioned or influenced thereby. (The Quebec Marine Insurance Company, appellant, and the Commercial Bank of Canada, respondent, Q. B.)..... ... 267

" :—In the case of a fire policy of buildings described as dwellings, endorsed to the effect that any change of occupation, by which the risk is increased, must be notified in writing to the Insurance Company and notified on the policy, and that in default thereof the insurance shall be null and void ; that the change of occupation to a tavern, without notice to or consent of the Company, does not render the policy void, when the Jury state in their special findings that an intermediate stage of occupation into a vinegar factory had been sanctioned by the Company, and that the risk of the tavern was not greater than that of the

PAGE.

vinegar factory. (Campbell, appellant, and the Liverpool and London Fire and Life Insurance Company, respondent, Q. B.)..... 309

INTEREST:—*Vide* USURY.

JUDGES:—*Vide* BOARD OF TRADE.

" :—CHALLENGE OF, *Vide* PRACTICE.

JURY TRIAL:—A suit, wherein the plaintiff avers that he has been injured in his credit, name and reputation, and brought into disgrace, by reason of an attachment sued out by defendant illegally and maliciously, is susceptible of trial by Jury. (Fulton vs. Stevenson et al., S. C.) 112

" :—When, in answer to a question, whether the assured (in a case of fire insurance) had given notice and delivered in an account giving particulars of his loss, under oath, and offered all information to the Insurance Company, and made claim to the payment of a specified sum, the Jury reply "we consider the claim made, *but not in due form*," these words "but not in due form" will be held as mere surplusage and of no legal force or effect whatever. (Wiggins, appellant, and the Queen Insurance Company of Liverpool and London, respondent, Q. B.)..... 141

JURISDICTION:—*Vide* ACTION POSSESSOIRE.

LEASE:—A, of premises to be used for purposes of prostitution, to the knowledge of the lessor, will not be upheld, and the parties will be sent out of Court each bearing his own costs. (Harris vs. Fontaine, C. C.)..... 336

LÉSION:—The action for cause of, does not lie in favour of the purchaser. (Chapleau, appellant, and Deblen, respondent, Q. B.)..... 194

LESSOR:—The privilege of the, on the proceeds of the effects found on the premises leased is not affected by the Insolvent Act of 1864, and has precedence over the privilege of the assignee and insolvent for costs of their respective discharges under the Act. (In the matter of Morgan, insolvent, and Whyte, assignee, and Biron contesting dividend sheet, S. C.) ... 187

MANDAMUS:—A writ of, will be refused to a party claiming admission to a society for aiding members during sickness from which he was justly expelled, on the ground that he had falsely represented himself to be in good health and had refused to submit to a medical examination. (Morel de la Durantaye, petitioner, vs. La Société St. Ignace de Montreal, S. C.) 1

MARRIAGE:—Breach of promise of, *vide* DAMAGES.

MINOR:—A, cannot sue for wages in his own name, when his engagement has been made by his father. (Allard vs. Wilcot, C. C.)..... 28

" :—A contract to permit a, to be received, fed, clothed, educated and brought up by another, may be made by a father, a widower, and such contract being proved, must be enforced, and the father making the same is not at liberty to repudiate such contract and demand the restoration of the child to him, after he has allowed the past execution of the contract by permitting the child to remain with the person taking it four years and more. (Ex parte Kennedy for *habeas corpus*, and Barlow, respondent, S. C.)..... 57

" :—The admission of the father that he was ready to put out his child, and that the other party was ready to receive it, but not on the terms exacted by the father, is sufficient *commencement de preuve par écrit* to allow the admission of parol evidence to prove the contract, if *commencement de preuve par écrit* be necessary in such a case. (Do.).... 57

" :—The interests of the minor and the habits of the father and his domestic relations are to be considered, and particularly when the minor is a

PAGE.

femaje, when the father demands the custody of the minor, after having left her to the care of another for a length of time. (Do.)..... 57

MINOR :—The fact of the party taking the child being of a different religious faith from the father is no ground of itself for declaring the contract void. (Do.) 57

:—*Vide* TUTOR.

MITOYENNETÉ :—Before the code, a proprietor, who wished to build on the line separating his property from that of his neighbour, could build the half of his wall on his neighbor's land, provided the total thickness of the wall did not exceed eighteen inches, and this even when the respective properties were divided by a wooden fence. (Prevost, appellant, and Perrault et al., respondents, Q. B.)..... 106

MUNICIPAL CORPORATION :—*Vide* DAMAGES.

MUNICIPAL TAX TITLE :—In an action to rescind a deed of sale, for municipal taxes, it is not necessary to make the corporation of the county a party to the action, if the defects of title invoked are exclusively attributed to the local corporation, or its secretary. (Patton vs. Corporation of St. André d'Acton et al., S. C.),..... 21

" :—An evaluation rôle is null, if the valuators do not possess the required real estate qualification or if they have not signed the rôle. (Do.)... 21

" :—The requisition to pay, required by the 13th Par. of Sec. 59 of the Municipal Act, is necessary to render the assessment legal. (Do.)... 21

" :—The notice required as to the completion of the rôle is indispensable. (Do.)..... 21

" :—The municipal regulation, fixing the amount of impost, ought to specify in an exact and precise manner the object and end of the tax. (Do.) 21

" :—The tax ought to be based on the exact value of the properties assessed. (Do.)..... 21

" :—In an action of recision the *onus probandi* is on the municipality to establish that all the formalities of the law have been observed. (Do.) 21

NEW TRIAL :—When the verdict and findings of the jury are, in the opinion of the Court, contrary to the evidence adduced at the trial, the Court will set aside the verdict and findings and grant a new trial. (Mathewson vs. the Royal Insurance Company, S. C.)..... 6

NOVATION :—A settlement of accounts between the creditors and the principal debtor, and the taking by the creditor of a note payable on demand for the balance due by the debtor, does not operate a novation of the debt, so as to discharge a surety to the original obligation. (Rogers et al. vs. Morris et al., S. C.)..... 20

OPPOSITION :—To entitle the opposant to an order on plaintiff and defendant to declare whether they will admit or deny, notice of application must be served on both parties. (Saxton vs. Sheppard, and Peloquin et al., opposants, S. C.)..... 308

OPPOSITION, *à fin d'annuller* :—*vide* SUBSTITUTION.

" :—*A fin de distraire* :—A foreign plaintiff contesting an, is bound to give security for costs and fyle his power of attorney. (Baltzar et al. vs. Grewing et al., and Hutchison *et vir*, opposants, S. C.)..... 297

PARISH :—The Côte de Notre Dame de Liesse forms part of the Parish of St. Laurent. (Les Syndics de la Paroisse des Saints Anges de Lachine vs. Lefebvre, C.,C.)..... 185

PAYMENT, will be presumed by lapse of time or other circumstance which renders it probable. (Allard vs. Legault et al., & E. contra, C. C.)..... 80

PAGE.

PÉREMPTION D'INSTANCE:—A motion for a rule nisi for, made by a defendant in person, who has ceased to be represented by his attorney *ad litem*, and who has not subsequently appeared by a new attorney or in person, is irregular, null and void. (Johnson vs. Rimmer and Lockwood et al., Int. party, C. of R.)..... 131

" :—The service of a notice of motion to be made by plaintiff is a valid interruption of *péremption d'Instance*. (The Mayor, &c., of Montreal vs. Ranson, C. C.)..... 234

PRACTICE:—*Vide* NEW TRIAL.

" :—A plaintiff cannot increase the amount of his demand by a motion to amend his declaration to that effect. (Sénécal vs. Lemoine, S. C.).. 56

" :—Where a defendant, after a judgment by default has been entered against him, has been allowed to appear by opposition and plead to the action (Arts. 484, 485 C. C. P.) he cannot afterwards make a motion for security for costs, on the ground of the plaintiff being an absentee, unless in his opposition he has reserved his right to make such motion. (Booth vs. Lawton, and Lawton, opposant, S. C.)..... 59

" :—*Vide* EXCEPTION DECLINATOIRE.

" :— " JURY TRIAL.

" :— " COSTS.

" :— " PÉREMPTION D'INSTANCE.

" :—The omission to state certain costs in a writ of *contrainte par corps* does not absolve the defendant from paying them subsequently. (Beauchêne vs. Pacaud, C. C.)..... 135

" :—*Vide* ATTORNEY.

" :—Exhibits fyled in one cause cannot be transferred *pendente lite*, to another cause. (Aimbault et vir vs. Dunlop, S. C.)..... 140

" :—*Vide* APPEAL.

" :— " INDICTMENT.

" :—Each distinct pleading must be followed by a conclusion. (Johnson vs. Gauthier, S. C.)..... 163

" :—A party may file at *Enquête*, and without notice, papers and documents on which his action or plea is not based, leaving the question as to their material character to be decided at the final hearing on the merits. (Mills vs. The Granby Red Slate Company, S. C.)..... 166

" :—The issue is completed by the declaration, exception and answer, if the answer be general. (Cochrane et al. vs. Bourne et al. S. C.)..... 168

" :—It is not necessary for the plaintiff to notify the defendant that he has put in security for costs; notice that security will be put in on a day specified being sufficient. And the delays, therefore, run from the date of putting in such security. (Graves vs. Dennison et al., C. of R.).... 178

" :—Do. (Tuckett et al. vs. Forrester et al. S. C.)..... 179

" :—The service of a writ of summons on the Clerk of the Recorder's Court, in his office attached to the Court, during office hours, and while he is engaged in his official duties, but not *à l'audience*, is a valid service. (Wilson vs. Ibbotson, S. C.)..... 186

" :—*Vide* FOREIGN JUDGMENT.

" :— " CURE.

" :— " EXECUTION.

" :— " ACTION POPULAIRE.

" :— " AVEU JUDICIAIRE.

" :— " RECUSATION.

" :— " SAISIE GAGERIE, *par droit de suite*.

" :—In an action, demanding a sum of money due on a promissory note and

PAGE.

for money lent, the defendant cannot plead compensation by unliquidated damages claimed to be due by the plaintiff to a partnership of which the defendant is a partner. (The Quebec Bank vs. Cook, S. C.) 253

PRACTICE :—A pleading is bad which sets up in compensation unliquidated damages alleged to be due as well to the defendant personally as to the partnership of which he is a member, without stating how much of the damages has been sustained by himself personally and how much by the Company. (Do.) 253

" :—*Vide* WITNESS.

" :— " WRIT OF CAPIAS.

" :—On a trial for felony, the Crown may, without showing cause, direct a juror, by the same thing called by the Clerk of the Court, to " stand aside," and on the panel being gone over a second time, may, without shewing cause for challenge, require such juror to stand aside a second time, and so on, till the panel is exhausted, i. e., till it appears that a jury cannot be had without such juror. (Regina vs. Lacombe, Q. B.) 259

" :—*Vide* OPPOSITION *à fin de distraire*.

" :—An indictment will not lie, under a section of a Statute, which provides that persons committing certain offences with regard to warehoused goods shall incur the *penalties* imposed on persons for *smuggling*, for the misdemeanor of *smuggling* created by another section of the same statute. (Regina vs. Battiste et al., Q. B.) 299

" :—A defective indictment may be quashed on motion, as well as on demurrer. (Do.) 299

" :—A petitory action may be instituted pending proceedings (by the defendant) in a possessory action. (Mackay, appellant, and Cook, respondent, S. C. R. 321

" :—*Vide* PROHIBITION.

" :—In an hypothecary action, of which the amount does not exceed $400, the deposit required on an inscription in review is only $20. (Forsyth et al. vs. Charlebois, C. of R.) 328

" :—When the amount of the judgment complained of does not exceed $100, and the plaintiff acquiesces in the judgment, the defendant cannot bring the case before the Court of Review, although the amount demanded by the action exceeds $100. (Lefebvre vs. Murdoch, C. of R.) 328

" :—When the defendant is served personally at a place other than his domicile, the delay is computed according to the distance from the place of such service, (and not according to the distance from his domicile), to the place where the Court is held. (Currier vs. Lafrance, C. of R.) 329

" :—The delays for inscribing in Review are not suspended in vacation. (Fournier vs. Ledoux, C. of R.) 332

PRESCRIPTION :—The prescription of a promissory note made in a foreign country and payable there, is not governed by the *lex loci contractus*, but by the *lex fori*. (Wilson vs. Demers, S. C.) 24

PROHIBITION :—A writ of, to a corporation, cannot be addressed to the individual members composing such corporation. (Landry vs. Migneault et al., C. of R.) 325

PROMISSORY NOTE :—*Vide* PRESCRIPTION.

" :—A holder of an accommodation, even with knowledge of the fact,

PAGE.

... recover thereon from the maker, and may rank on the estate of ... discharge the endorser, without losing his recourse against the ... the imputation made by the holder of payments made by ... order and not declared to be incorrect upon an account furnish... will operate as a valid imputation even against the accommoda... tion maker. (Lyman et al. vs. Dyon et al., S. C.)..... 160

PROMISSORY NOTE:—If an endorser sign his name on the back of a, having spaces to the left of the amount sufficient to permit of alteration by the maker, and deliver the note in that condition to the maker, and the maker afterwards increase the amount of the note, by filling in the blank spaces with an additional word and figure, and pass the note in its altered state to a *bonâ fide* holder for value, and if the said note so altered appear, on the face thereof, to be genuine, the endorser is liable to pay the full amount of the note as altered to such *bonâ fide* holder for value. (Dorwin et al., appellants, and Thomson, respondent, Q.B.) 262

PROPRE:—A donation by a father to a daughter and her husband is a *propre* and does not fall into the community. (Pollico *ès qualité* and Elvidge, S. C.)..... 333

PROSTITUTION:—House of, *Vide* LEASE.

PROTHONOTARY:—An order or judgment of the Superior Court, enjoining "the *late* Prothonotary of this Court, Messrs. Monk, Coffin and Papineau, to wit, Samuel Wentworth Monk, William C. H. Coffin and Louis J. A. Papineau, *or their representatives*," to pay a certain sum of money deposited with "Monk, Coffin and Papineau, Prothonotary," Mr. Papineau being still Prothonotary with other associates, is valid, and this, notwithstanding that both Monk and Coffin were dead when such judgment or order was pronounced, and that the same was pronounced without any one of the three individuals, or their representatives, being in any way parties to the case. (In the matter of the Mayor, &c., of Montreal, and Bonaventure Street and Guy et al., proprietors, and Papineau *mis en cause*, S. C.)..... 281

:—Under the circumstances above related, the same Papineau is still an officer of the court, and, as such, liable to be summarily impleaded, by rule for *contrainte par corps*, for non-compliance with said order or judgment. (Do.)..... 281

:—Notwithstanding the fact that said Papineau, by the terms of his appointment by the government and the consequent notarial agreement between himself and his colleagues, had no control over the business of the said Superior Court, or the monies received by said Prothonotary, and abstained from exercising any such control, and did not participate in the emoluments ... and bench (his powers and remuneration being limited to the business and emoluments of the Circuit Court), he nevertheless is liable and responsible for all monies which may at any time have been deposited with the said Prothonotary. (Do.)..... 281

QUANTO MINORIS:—*Vide* SALE.

RAILROAD:—*Vide* STOCK.

RAILWAY ACCIDENT:—*Vide* DAMAGES.

RECUSATION:—A Judge who has already expressed his opinion, in a similar suit, between the same parties, should refrain from sitting. (Hall, appel., and Brigham, respondent, Q. B.)..... 252

REGISTRAR:—A, who refuses to deliver an act registered in his office, on the ground that his fees as claimed by him (in excess of those admitted and tendered to him,) have not been paid, may be compelled, by writ of *mandamus*, to deliver the act... (Dame ... vs. Gagnier, C. of R.)..... 305

PAGE.

REGISTRATION :—The costs of, are always at the cost of the debtor. (Beauchêne vs. Pacaud, C. C.) 135

" :—The, of an obligation granted by one Antoine *Declos alias Decleau*, inscribed in the Register as the obligation of Antoine *Dechêne*, will be of no avail against a *tiers détenteur* who purchased from the mortgagor in good faith, on a certificate attesting that no mortgage was registered against the property belonging to said Antoine *Declos alias Decleau*. (Beland vs. Dionne et al., C. of R.)..... 204

REQUETE LIBELLÉE :—A petitioner complaining of the election to the Mayoralty of Montreal cannot by the same petition allege that the election was null and pray that it be declared so, and allege that the sitting Mayor was disqualified and pray that the petitioner be declared duly elected ; such allegations and conclusions being incompatible. (Beaudry vs. Workman, S. C.)..... 15

RESCISION :—A notarial act, consented to by a person in a state of intoxication brought about fraudulently by the person in whose favour the act was made, is subject to rescision. (Verdon vs. Verdon, S. C.)..... 223

REVIEW :—Court of, *Vide* PRACTICE.

SAISIE GAGERIE, *par droit de suite*, may be exercised (as between landlord and tenant) after the expiration of eight days from the date of the removal of the goods from the premises leased. (Serrurier vs. Lagarde et al., C. C.)..... 252

SALE :—In the case of a, of a steamboat, by way of mortgage, or of mortgage by way of sale, without registration as required by Art. 2360 of the Civil Code of L. C., the sale is null and void. (Vautier vs. La Compagnie de Navigation de Beauharnois, &c., and Lynch, opposant, C. C.)..... 52

" :—When a lot is sold, as containing 40 arpents in superficies, more or less, without guarantee of precise measurement, but within certain defined boundaries, and it turn out that the lot contains in reality only 30 arpents in superficies, it will be held to be a sale according to boundaries and not *ad mensuram*. (Munro vs. Lalonde, S. C.)..... 128

SECURITY FOR COSTS :—*Vide* PRACTICE.

SEDUCTION :—*Vide* DAMAGES.

SMUGGLING :—*Vide* PRACTICE

STOCK :—Subscription for, in a railway company, may be conditional, and in such case the non-fulfillment of the condition will operate as a bar to any right of action for calls on the stock. (Rodgers et al., appellants, and Laurin, respondent, Q. B.)..... 175

SUBSTITUTION :—In the case of a, not open, the curator to the substitution has no right or interest to oppose the sale of a property affected by the substitution. (Wilson vs. Leblanc & Leblanc, *es qualité*, opposant, S. C.. 201

SUMMONS, service of :—*Vide* PRACTICE.

SURETY :—*Vide* CAPIAS AD RESPONDENDUM.

" :—The allowing by a bank manager of over-drafts, without security, but (in the opinion of the Court) under a discretionary power possessed by him, and without fraudulent intent, is not an irregularity within the meaning of a policy guaranteeing the bank against such loss as might be occasioned to the bank by the want of integrity, honesty, fidelity, or by the negligence, defaults or irregularities of the manager. (The Bank of Toronto vs. the European Assurance Society, S. C.).... 63

" :—A, cannot withdraw from his liability under a bond for security for costs, by simple notice that he does not desire to remain surety any longer. (Ex parte Stephen, petitioner, and Stephen, defendant, S. C.)..... 140

PAGE.

SURETY:—A, will be condemned equally with the principal for whom he is surety, unless he plead the benefit of discussion in due form. (Sargent vs. Johnson et al., C. of R.) 298

TUTOR:—The sale by a, of a *bailleur de fonds* claim belonging to his ward, without authorization of a Judge, is invalid. (Pollico, *es qualité* vs. Elvidge, S. C.) 333

USURY:—The discounting of a promissory note by a bank, in the year 1862, by paying the face of the note (less the discount) in American greenbacks, taken at par and deducting, in addition, a commission of $10 to cover alleged trouble connected with previous renewals was not usurious. (Eastern Townships Bank, appellant, and Humphrey et al., respondents, Q. B.) 156

VESSEL:—*Vide* SALE.

WAGER:—In the case of a, where the money is deposited before the event in the hands of a stakeholder, such deposit is equivalent to a payment, within the meaning of Art. 1927 of the Code, and therefore the losing party has no right of action to recover back the amount so deposited, in the absence of fraud. (McShane vs. Jordan, S. C.) 61

WAGES:—*Vide* MINOR.

WAREHOUSE RECEIPT:—A, in favor of A., cannot be legally transferred to B, without an endorsement thereon by A. (Baile vs. Whyte, C. of R.) 130

WAR DEPARTMENT:—Moneys payable on account of a pending contract with the, for the erection of fortifications in this Province, are not liable to attachment. (Fitts vs. Piton et al., and H. M. Principal Secretary of State for the War Department et al., T. S., S. C.) 165

WATER POWER:—*Vide* DAMAGES.

WIFE:—A, *séparée de biens*, is not liable for butcher's meat purchased by her and consumed by herself and family. (Rousson vs. Gauvin et *vir*, C. C.) 82

:—*Vide* DOWER.

WILL:—In the case of a, executed in solemn form, it is necessary that the notary and the witnesses understand the language of the testator and that in which the will is drawn up. (McLennan, appellant, and Dewar, respondent, Q. B.) 102

WITNESS:—When an affidavit establishes that a, will leave the next evening for the Moisie, distant from Montreal about 500 miles, and with which there is no regular communication, that he will be there at least a month, and that on his return he proposed to set off for the United States, to remain there an indefinite time, an order will be granted for the immediate examination of the witness, under Art. 240 of the Code of Civil Procedure. (Molson vs. The Moisie Company, and Dufresne, opposant, and the plaintiffs, contesting, S. C.) 255

:—A party to a cause having made, during its pendency, an assignment under the Insolvent Act, can be examined as a witness by the assignee who intervenes and takes up the *instance* in his place. (McFee vs. Bowie, and Brown, intervening party, C. C.) 335

WRIT OF ERROR:—A, cannot be granted in a criminal case, by the Court of Queen's Bench sitting in Appeal, without the *fiat* of the Attorney General. (Regina vs. Notman, Q. B.) 255