THE

# LEGAL NEWS.

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## *CURRENT TOPICS AND CASES.*

In *Illinois Central R. Co.* v. *City of Chicago*, Jan. 30, 1892, the principal question was as to the power of the city to extend its streets across a railroad. The Court (Circuit Court, Cook Co.) held that the railroad company took its charter and acquired its right of way subject to the right of the State, by itself or its accredited representatives, the municipalities, to exercise the right of eminent domain, and to extend public highways and streets across the railroad whenever the public exigency demands it. The railroad must, in this, yield to the municipality, a governmental agency representing the public at large. Railroads take their charter subject to the exercise of the police power by the State, or by its agencies, the municipalities, in which is the power to compel railroad companies, at their own expense, to provide and maintain crossings for the safety of the public and the prevention of accidents. The *Chicago Legal News* of Feb. 13, in which the case is reported, says: "The decision of the Court in this case has been watched with much interest by those operating railroads, or administering municipal government. It follows in line with the opinion delivered by Chief Justice Magruder, published in this issue, and would, therefore, seem to be next thing to a Supreme Court opinion."

In *Banque Jacques Cartier & Leblanc*, Court of Queen's Bench, Montreal, Jan. 18, the Court held that a party who, before maturity, has become the holder of a promissory note in good faith and without notice of any objection, for valuable consideration, is entitled to recover the amount thereof from the person whose signature appears on the note as maker, even where it is proved that the signature was obtained by artifice and fraud, and without any consideration being received by the promissor. The conclusion arrived at in this case varies from that stated by the Court of Appeal in *Exchange Bank of Canada & Carle*, M. L. R., 3 Q. B. 61, in which an appeal by a bank, in another case connected with the Mahan frauds, was dismissed. It will be observed, however, that in *Exchange Bank & Carle*, the Court of Queen's Bench was of opinion that Baxter, for whom the bank was merely a *prête-nom*, had reason to be aware of the fraud by which the note had been obtained from the maker; and moreover, that it was not proved that Baxter had given consideration for the note.

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In *Lavoie* v. *Lacroix*, Superior Court, district of Bedford, Lynch, J., Jan. 14, 1892, the Court held that where the sale of movables under writ of execution has been retarded by an opposition filed by the defendant, and the day fixed for the return of the writ has passed without an order having been obtained from the Court or Judge extending the return day, the seizure lapses. The same thing was held by the Court of Review, Montreal, in *Fletcher* v. *Smith*, 2 Leg. News, 117.

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In *Beaulne* v. *Fortier*, noted in the present issue, Mr. Justice Taschereau made an announcement which requires the attention of the bar. The plaintiff asked for leave to sue *in formâ pauperis*, in an action for alimentary allowance. His Honor remarked that formerly these actions were always brought in the Circuit Court, which had the effect of preventing large costs, which the parties could ill afford to pay. He added that after consultation

with his colleagues the bench had determined to refuse leave to sue *in formâ pauperis* in such cases unless the actions were brought in the Circuit Court. This decision will prevent useless costs to a class of litigants to whom a heavy bill of costs is an intolerable evil.

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## *THE ACTION UNDER ART.* 1056, *C.C.*

Few cases have attracted more attention from the bar than *C.P.R. Co. & Robinson*; it might probably be added with truth that few judgments pronounced by the Supreme Court have caused so much surprise. The majority and dissentient opinions will be found in the present issue.

It will be observed that the action is brought under Art. 1056 of the Civil Code, by the widow of a man who was fatally injured while in the service of the Company, and died somewhat more than a year afterwards. The case has a peculiar history. It was twice tried before special juries. After each trial it was carried through all the courts. On the first occasion, after judgment had been rendered in favour of the plaintiff by the Court of Queen's Bench, the Supreme Court ordered a new trial. The defendants before proceeding to the second trial obtained leave to amend their pleas. A second trial took place, the verdict being again in favor of the plaintiff Robinson. It was only after all this litigation, which had extended over six or seven years, that a construction of Art. 1056 which had not occurred to the learned counsel for the defence in all this time, and which apparently had never occurred to any member of the courts through which the case had passed, was suggested at the argument before the Court of Review, after the second jury trial. The suggestion was this: That a year had elapsed before the death of the injured person; that the action for bodily injuries is prescribed by one year; that at the date of death the injured person had therefore no right of action if death had not ensued; that Art. 1056 assumes

there is a subsisting right of action at the date of death, which the injured person might have exercised if death had not ensued; and therefore on the face of the declaration no right was shown to the remedy under Art. 1056. One judge of the three who sat in Review sustained this pretention, but the Court of Queen's Bench unanimously pronounced against it. The late Sir A. A. Dorion, who delivered the judgment of the Court, stated his conviction very strongly that the question of prescription of the husband's claim could not affect the right of the wife, provided she sued within a year after his death; that the action of the widow under Art. 1056 is a new and distinct action, given to her whenever the husband dies without having obtained indemnity. The case went to the Supreme Court for the second time, and there Mr. Justice Fournier was equally positive that the widow's right was not affected by prescription against the husband; but Mr. Justice Taschereau, whose opinion was concurred in by the other members of the Court, held the contrary.

We find, therefore, that eight judges in all support the widow's claim, (the eight being all from the bar of this province), while six judges (two only from this province), hold that it does not exist.

That the terms of Art. 1056 are tolerably clear in themselves is abundantly evident from the fact that during half a dozen years of litigation everybody interpreted them in the same way. No question was raised as to their meaning. The article reads: "In all cases where "the person injured by the commission of an offence or "a quasi offence dies in consequence, *without having* "*obtained indemnity or satisfaction*, his consort and his as- "cendant and descendant relations have a right, *but only* "*within a year after his death*, to recover from the person "who committed the offence or quasi offence, or his re- "presentatives, all damages occasioned by such death." The majority of the Supreme Court, apparently, would add to the words "without having obtained indemnity or satisfaction," the words "or without a sufficient time

" to prescribe the action of the injured person having " elapsed before the death."

As the case has been removed to a higher Court we have no disposition to discuss the question here. Mr. Justice Taschereau has, in the opinion which will be found in the present issue, urged with considerable force and ingenuity the view that there must be a claim subsisting at the time of death. It seems to us that there is a reason why prescription of the husband's claim should have nothing to do with the action under Art. 1056. The effect of this article is to relieve a person fatally injured from the burden of suing for damages during the fragment of life left to him. He may accept indemnity, but if indemnity be withheld he knows that his widow and children will have a valid claim after his death. A man fatally injured cannot easily foresee how long he may survive. It is of course a very unusual thing for death to be deferred for a year. Would it not be a hardship as well as an absurdity that a dying man who sees the year drawing to an end, should in his last days be under an obligation to institute a suit? And to what end? Not with the expectation of arriving at a judgment, for he may not have a week of life; but he is told that he must do this solely to interrupt prescription and prevent his wife's claim from being lost.

There must be a claim, it is said, subsisting at the moment of death. But in the next clause of the article the action is given to the widow of a person dying from wounds received in a duel, even against the seconds and witnesses. A person mortally wounded would have no claim which he could urge, against his antagonist or those present. So there is no subsisting claim in that case.

The Judicial Committee has granted special leave to appeal. We had an opportunity, in July last, of hearing the argument before their lordships. The history of the case and the grounds of the judgment of the Supreme Court were very fully entered into, Mr. Digby of the

English bar representing the petitioner, and Mr. H. Abbott the respondents. Their lordships, after a few minutes, private deliberation, delivered the judgment which will be found on another page, granting special leave to appeal.

In these remarks we have not referred to the question whether the action for bodily injuries is prescribed by one or two years in a case like the present. The Code is not free from difficulty, and whatever may be the construction put upon it, it must be conceded that one year is a very inadequate time. Injuries may be received which do not develop themselves, and the extent of which cannot be accurately estimated, within a twelve month from the time of the accident. In England the prescription is six years, so that a point like that raised in the *Robinson* case is never likely to arise there.

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## SUPREME COURT OF CANADA.

OTTAWA, June 22, 1891.

*Coram* RITCHIE, C.J., STRONG, FOURNIER, TASCHEREAU, GWYNNE and PATTERSON, JJ.

CANADIAN PACIFIC R. Co. (defendants), appellants, and ROBINSON (plaintiff), respondent.

*Art.* 1056, *C. C.—Action under—Action for bodily injuries—Prescription—Art.* 2262, *C. C.—Art.* 433, *C. C. P.*

HELD:—1. *Art.* 1056, *C. C., gives the widow, or other relatives therein mentioned, a right of action only when at the death of the injured person there was a subsisting right of action which, had death not ensued, he might have exercised. Therefore if the injured person's claim was prescribed before his death the widow has no action under Art.* 1056.

2. *That actions for quasi offences causing bodily injuries are prescribed by one year.*

3. *That where the allegations of the plaintiff are not sufficient in law to sustain his pretensions, the Court may render judgment in favor of the defendant, notwithstanding that the verdict of the jury is upon matters of fact in favor of the plaintiff.*

APPEAL from a judgment of the Court of Queen's Bench, Montreal, reported in M. L. R., 6 Q. B. 118.

TASCHEREAU, J.:—

By Sec. 1 of ch. 78, C.S.C.. it is enacted that "Whenever the "death of a person has been caused by such wrongful act, "neglect or default, as would (if death had not ensued) have en- "titled the party injured to maintain an action and recover "damages in respect thereof, in such case the person who "would have been liable if death had not ensued, shall be liable "to an action for damages, notwithstanding the death of the "person injured, and although the death has been caused under "such circumstances as amount in law to felony." Since this case was before this Court in 1887, as reported in 14 Supr. C. 105, that Statute has been expressly repealed by the Revised Statutes of Quebec, Appendix A; but under 50 Vic. ch. 5, Secs. 5, 6, 7, such repeal, could it otherwise do so, does not affect the present case. Then I do not see that it adds anything to the repeal enacted by Art. 2613, C.C., of all previous laws on matters upon which express provision is made in the Code. So that, for our determination of the case as now presented to us, the law is precisely the same as it was upon the former appeal.

Now, I take it to be concluded by the judgment of this Court upon that appeal that this action, avowedly brought under Art. 1056 of the Code, is nothing else but the statutory action given in England by Lord Campbell's Act, and consequently, that, in expounding the law as to its nature and the principles upon which it rests, we must be guided by the same considerations, and governed by the same rules, that have been authoritatively adopted and recognized in the construction of that Act. And one of these rules, I would say to-day an uncontroverted one, is that, under the Act, the widow or other relatives therein mentioned have no action. if at the time of his death, the deceased had none.

The leading case on the question is *Read* v. *Great Eastern*, L.R., 3 Q.B. 555, where it was determined, upon that principle, that if the deceased had accepted any compensation in satisfaction of his claim against the defendant, the personal representatives are debarred from bringing any action under the Statute. The Statute does not give any new right of action or a fresh cause of action, said the Court, and if the deceased has received compensation he could "not have maintained an action and recovered "damages in respect thereof in the very words of the Statute, so "this plaintiff has herself no action." And as Lush, J., said in the same case, as reported in 9 B. & S: "The Statute gives a

" right of action when there *was at the time* of the death a *sub-*
" *sisting* cause of action."

In *Haigh* v. *Royal Mail Steam Packet Co.*, 52 L.J.Q.B. 640, Brett, M.R., speaking of the same Statute said, " under which, it is " clear, the executors can only recover if the deceased man " could have recovered, supposing that everything did happen to " him which, had he not been killed, would have entitled him to " bring an action."

I refer also to *Armsworth* v. *South Eastern*, 11 Jur. 758; *Tucker* v. *Chaplin*, 2 C. & R. 730; *Boulter* v. *Webster*, 11 L. J. N. S. 598. In *Griffiths* v. *The Earl of Dudley*, 9 Q. B. D. 357, on the same principle, again, it was held that if the deceased, being a workman, had contracted for himself or his representatives with his employer not to claim compensation for personal injury, whether resulting in death or not, his widow had no action under Lord Campbell's Act for the damages resulting to her from his death. The plaintiff had argued that the Act gives a separate and independent right to the widow and children of a person killed, a right wholly separate from any right existing in the decedent's legal representatives, to recover for injuries to his personal estate. But, said Field, J., " *Read* v. *Great Eastern* is a " clear decision that Lord Campbell's Act did not give any new " cause of action, but only substituted the right of the represen- " tative to sue in the place of the right which the deceased him- " self would have had if he had survived." And Cave, J., added, " " It was argued that whether or not the deceased could have " bargained away his own right to recover damages, he could not " bargain away the right of his family under Lord Campbell's " Act. That Act was passed because it was thought a hardship " that, where a man sustained personal injuries, and died with- " out having himself recovered compensation, leaving behind him " persons in certain degrees of relationship, those persons should " not be entitled to bring an action. *Read* v. *Great Eastern* has " decided that the Act gives no new cause of action to the " relatives, but only a right in substitution for the right of action " which the deceased would have had if he had survived."

And in *Senior* v. *Ward*, 1 Ell. & Ell. 385, Lord Campbell, C. J., said, " We conceive that the legislature in passing the statute " upon which the action is brought, intended to give an action to " the representatives of a person killed by negligence only where, " had he survived, he himself, at the common law, could have " maintained an action against the person guilty of the alleged

" negligence." It is true that, in *Pym* v. *Great Northern*, 4 B. & S. 396, in the Exchequer Chamber, Erle, C.J., said:—"The " statute as appears to me, gives to the personal representative a " cause of action beyond that which the deceased would have had " if he had survived; and based on different principles." But that sentence is used merely in reference to the extent of the damages that can be recovered in an action under the Act; and the words "cause of action," as the context of the judgment clearly shows, simply refer to those damages. The same remark applies to *Blake* v. *Midland*, 18 Q. B., where it was said that—"The Statute does not transfer this right of action to the repre-" sentative, but gives him a totally new right of action." In that case also the only question under consideration was the nature and extent of the damages recoverable in an action under the Act.

In *Seward* v. *The Vera Cruz*, 10 App. Cas. 59, in the House of Lords, where the point under consideration was, whether the Admiralty Court had jurisdiction in an action under the Act, though Lord Selborne said that the Act gives a new cause of action, and Lord Blackburn (who, in *Read* v. *Great Eastern*, had said, "The Statute does not give a new right of action") added, "An action new in its species, new in its quality, new in its " principle, and in every way new," there was not a single expression thrown out that could be interpreted as questioning the decision in *Read* v. *Great Eastern*, or as casting the least doubt on the doctrine that, to maintain an action under the Act, there must have been, at the time of the death for which damages are claimed, a subsisting cause of action, and that, when the deceased, either voluntarily or involuntarily, had placed himself in a position that, had he survived, he could not at the time of death, have brought an action for his personal injury, no new right of action had been conferred to replace that which, through his own conduct, had never arisen or had been extinguished. *Beven, on Negligence*, 185.

In the United States, a similar statute has received the same construction in the following cases. In *Dibble* v. *New York*, 25 Barb. 183, the defendants had settled with the deceased his claim for his injuries. The Judge at the trial had charged the jury that this settlement could not affect the widow's action, which was given to her by the Statute for the damages she had sustained by reason of her husband's death. But the Court held that such was not the law, and that "The right to such an action " depends not only upon the character of the act from which

"death ensued, but upon the condition of the decedent's claim at "the time of his death, and if the claim was in such a shape that "he could not then have enforced it, had death not ensued, the "statute gives the executors no right of action, and creates no "liability whatever on the part of the person inflicting the in-"jury." Johnson, J., for the Court, said, "When death ensued, "therefore, the deceased had no subsisting cause of action, nor "could he have maintained any action and recovered any dama-"ges, in respect of the act or the injury, if death had not ensued. "The right of action which he might have enforced had he sur-"vived the injury, upon his death accrues to the personal repre-"sentative. And it is given for the same wrongful act or neglect. "That is the essential foundation of the action in either case. The "wrong to be redressed is the same in both cases, but the injury "flowing from the wrong to be compensated is different. The "person injured is compensated for the injury to his person, the "others for the injury they sustain from the death of the injured "person. If the person injured obtains satisfaction by action or "by voluntary settlement and payment before death ensues, the "wrongful act which caused the injury and all its consequences "past and future, are included, and the whole cancelled together, "and the liability of the person inflicting the injury ended..... "The object of the statute was to continue the cause of action "for the benefit of the widow and next of kin to enable "them to obtain their damages resulting from the same primary "cause, and not to create an entirely new additional right of "action."

And Comstock, C. J., in the same case, in appeal, reported in *Whitford* v. *The Panama*, 23 N.Y. 484, said: "No new cause of "action is created by the legislature, but the cause which, by the "rules of the common law, has become lapsed or lost by the "death of the person to whom it belonged, is continued and "devolved upon his administrator. The opposing argument is "founded wholly on the idea that the cause of suit by the admin-"istrator is the death of the party, and not the wrongful assault "or negligent conduct by which it is occasioned.....In "the view of the Statute, therefore, the right to be enforced is "not an original one, springing into existence from the death of "the intestate, but is one having a previous existence, with the "incident or survivorship derived from the statute itself. The "true point of inquiry is whether a wrong of this nature, result-

"ing in death, affords more than a single cause of action. Now "to affirm that, in cases of this nature, two causes of suit arise, "one in favor of the decedent in his lifetime, the other founded "on his death, is to depart from the plainest legal analogies."

In *Littlewood* v. *The Mayor*, 89 N.Y. 24, also, where the deceased had recovered before his death for his damages, an action by his widow was held not to be maintainable.

Rappallo, J., for the Court, said:—"It seems to me very evi- "dent that the only defence of which the wrongdoer was in- "tended to be deprived was that afforded him by the death of "the party injured, and that it is to say the least, assumed "throughout the Act that, at the time of such death, the defend- "ant was liable. The Statute may well be construed as meaning "that the party who, at the time of the bringing of the action, "would have been liable if death had not ensued, shall be liable "to an action notwithstanding the death."

In *Fowlkes* v. *The N. & D. R. R. Co.*, 5 Baxter, 663, the statute governing the case decreed, in one of its sections, that the right of action which a person who dies from injuries received from another, or where death is caused by the wrongful act or omission of another, would have had against a wrongdoer, in case death had not ensued, would not abate or be extinguished by his death, but was to pass to his personal representative for the benefit of his widow and next of kin. There was no statute of limitation expressly applicable to that class of cases. But, by another section of the statute, it was provided that actions for personal injuries should be commenced within one year after the cause of action accrued. The Court held that, under this last section, the cause of the survivors' action accrued when the injury was received, or at the time of the wrongful act or omission, and that consequently, as to their action, the statutory limitation of one year began to run from that time, as it would have for the decedent's action itself had he survived his injuries. "Their "action," says the Court, "is brought for the same cause as if "the injured party had himself brought the action, and it is not "the death of the injured party that is the cause of the sur- "vivors' action. The argument that the action allowed by the "statute is a new action given to the personal representative, an "action that the injured party could not have maintained, and "that the action is given on account of the death, though plaus- "ible, is not sound."

Now, applying these considerations to the present case, I am

of opinion that the respondent's argument here in answer to the appellant's motion, that her action is not an action transmitted to her by the deceased, but that it is a new action, entirely different from that which the deceased had in his lifetime for his injuries, is, as against the motion, unfounded in law and cannot support her claim. Of course, her action was not transmitted to her by the deceased. He never had an action for damages resulting from his own death. And her action is different in this, that she claims the damages resulting from his death, whilst he would have claimed the damages resulting from the injury to himself; in other words, he would have claimed *his* damages, whilst she claims *her own* damages. (*Pym* v. *Great Northern*. 2 B. & S. 759.) But what is the cause of action in both cases? Where did it originate? What gave birth to any right of action at all against the appellants? Is it not their negligent act from which the deceased suffered an injury? Is not the respondent's action for her damages based, as it could not but be, on that negligent act, as an action by the deceased for his own damages must itself have been? There is unquestionably only one article of the Code under which the appellants' liability attaches, as tort feasors; that is, Art. 1053, which enacts that every person is responsible for the damage caused by his fault to another. On that article only did an action by the deceased lie, and on that article only does the basis of the respondent's action rest. The action is a new action, as to her, in one sense. It is the creature of the Statute or of Art. 1056, and is new, entirely new, in that respect. It originated for her at her husband's death, and is for damages that, for him, did not exist. But the measure of her right to have the appellants declared responsible towards her is to be ascertained by the rights the deceased himself had against them; and there is attached to her right of action the implied statutory condition that at the time of his death her husband himself had a right of action. If his right was then gone, if the appellants were freed from any liability towards him, she has no claim. The statute and the article of the Code extend the remedy to her, but do not revive the appellants' liability, if it had been extinguished. They simply give her the right to avail herself of the right to the action the deceased had at his death, enlarging its scope so as to embrace the actual pecuniary damages resulting to her from the death.

The article of the Code may not be so clear on this as the statute was. But in construing it, as it is not given as new law,

it has to be taken as a purely declaratory enactment (*Wardle* v. *Bethune*, in the Privy Council, 8 Moo., P. C. C. 223), and as such conferring no new or additional rights, apart from the damages, upon the widow and other surviving relatives therein mentioned. And the fact that it was not in the Code as presented to the Legislature, but was subsequently inserted by the commissioners as an omission in their report of a subsisting law, is confirmatory of that view. They cannot be presumed to have intended to make in that law a change they had no power to make; and before coming to the conclusion that they have inadvertently done so, we must carefully ascertain that there is no room whatever for a different construction. Moreover, when, by an express enactment, given as pre-existing law, two years before the decision in *Read* v. *Great Eastern*, the Code decreed that payment and satisfaction to the deceased for his damages bars the survivors' action for their damages, it clearly recognized that their action is not the so totally separate and independent one that the respondent would have us declare it to be.

Now, in the present case, could Flynn, the respondent's husband, at the time he died, but for his death have maintained an action against the appellants for the damages resulting to him from the accident in question, under Art. 1053 C. C.; that is to say, after the expiration of one year from the time of the accident? I am of opinion that he could not.

By art. 1138, C. C., "All obligations become extinct by prescription;" and by art. 2183, "Prescription is a means of being "discharged by lapse of time. Extinctive prescription is a bar to, "and in some cases *precludes*, any action for the fulfilment of an "obligation or the acknowledgment of a right when the creditor "has not preferred his claim within the time fixed by law." By art. 2262, actions for bodily injuries are prescribed by one year after the right of action accrued, and by art. 2267, after the lapse of one year the liability of the wrongdoer is absolutely extinguished, and no action lies for the damages resulting from his offence or quasi-offence; or, in other words, no action lies for bodily injuries, but during one year after the act of commission oromission by which they were caused, except in cases of continuous torts, *délits* or *quasi délits successifs*, the doctrine as to which has no application in the present case. By art. 2188 the courts are bound of their own motion to dismiss any action brought after the expiration of one year, if the limitation is not specially pleaded.

The respondent's contention that the only prescription that could have been opposed to an action by her husband at the time he died would have been that of two years, under art. 2261, is unfounded. That article, in express terms, covers only offences and quasi-offences where other provisions of the Code do not apply. Now, when art. 2262 decrees that actions for bodily injuries are prescribed by one year, it means *all* actions for bodily injuries under art. 1053, with, of course, the limitative words of the article itself, "saving the special provisions contained in art. 1056 and cases regulated by special laws." The respondent, to support this contention that the prescription of two years under art. 2261 would have been the only one applicable to an action by Flynn, has based an argument on the French version of art. 2262. The words "*injures corporelles*" therein, she said, do not apply to a quasi-offence, but merely to an *offence*. There is no doubt that the word "injures" in this connection is generally taken to mean an "injure par voie de fait" or an offence, *délit;* yet Dareau, "Des Injures," 55, under the title "Injures par action." treats of the damages caused by negligence of a carriage driver, or by an unskillful surgical operation, and a case in our own Courts, *Wood* v. *McCallum*, 3 Rev. de Lég. 360, used the term "an action d'injures" for malicious arrest of a person. Another case of *Smith* v. *Binet*, Rev. de Lég., 504, says the contents of a confidential letter are not the subject of an *action d'injures*. Even in the Roman law, "Quelquefois le mot injure signifie 'dommage,'" says Thevenot Dessaules, "Dict. du Digeste," vo. "Injures."

But however this may be, I do not attach any importance to it, because the Code itself gives an unmistakeable clue to the interpretation of the words as used in this article. When the English version says "bodily injuries," there is no room left for controversy. I take it that whether the article was first written in French or in English is immaterial, if there is no absolute contradiction between the two versions. In the case of ambiguity, where there is no possibility to reconcile the two, one must be interpreted by the other. The English version cannot be read out of the law; art. 2615, C. C. It was submitted to the Legislature, enacted and sanctioned simultaneously with the French one, and is law just as much as the French one is. Here the words "bodily injuries" leave no room for doubt, and we must conclude that "injures corporelles" mean bodily injuries, and that bodily injuries mean "injures corporelles." In fact, that

is what the two versions of the Code, read together or by the light of one another, say in express terms.

Moreover, in this article 2262 itself there is, intrinsically and without reference to the English version, a clear interpretation of the term "injures corporelles" adverse to the respondent's contention on this point. The words therein, saving the special provisions contained in art. 1056, evidently and necessarily imply that the offences and quasi-offences mentioned in that art. 1056 are both such as can be the cause of bodily injuries or "injures corporelles," for which art. 1053 gives an action, and which that article itself (2262) decrees shall be prescribed by one year. Were the respondent's views to prevail, it would follow that, as to offences, *délits*, causing death, under art. 1056, the prescription of one year of art. 2262 would be the one to apply, but that as to quasi-offences, *quasi-délits*, causing death under the same article 1056, the only prescription applicable would be that of two years under art. 2261. I do not see anything in these articles that would justify such a distinction. I hold, then, that the minority of the Court of Review rightly came to the conclusion that at the time of his death Flynn's right of action was gone. Now, it must be conceded that, had he lived and instituted an action against the Company at any time after the expiration of a year, his action must have been dismissed, even if the Company had not contested it at all, or if they had pleaded to the merits without invoking the prescription, by the Court itself of its own motion, as I remarked before (arts. 2188, 2267, C. C.), and this even in a court of appeal if it had escaped notice in the court of first instance. Such is the established jurisprudence of the province, and one which has received the direct sanction of this Court in the two cases of *Breakey* v. *Carter* and *Dorion* v. *Crowley*, Cass. Dig. 256, 420. In the recent case of *Corporation of Sherbrooke* v. *Dufort*, M. L. R., 5 Q. B. 266, the Court of Queen's Bench has anew given full application to this doctrine.

Now, as to that saving clause itself of art. 2262, "saving the special provisions contained in art. 1056," it is susceptible of only one construction—that is, that as to offences and quasi-offences followed by the death of the person injured thereby, the widow and other relatives herein named are given a year after the death to bring their action, though at the time of the bringing of their action more than a year had elapsed since the offence or quasi-offence which caused the death, *provided the deceased had not allowed his own action, given to him by art.* 1053, *to be extin-*

*guished by prescription.* This construction is the only possible one if, as I take it to be concluded by authority, it is an essential condition of the survivor's right of action that the deceased, at his death, himself had a right of action. In the present case, when Flynn died, the Company were freed from any liability for the consequences of their quasi-offence. It had been absolutely extinguished, and I do not see on what principle it could be contended that it was revived by his death in favour of his widow and child. That would be extending the right of the survivors under the Act to an unlimited number of years, and as long as the injured party survived his injury, with one year additional, provided doctors could be found to swear, and a jury to find, that the quasi-offence was the immediate cause of the death. Now, is that not against the very terms of art. 2267, which decrees that the liability of the wrongdoer is absolutely extinguished by effluxion of time, and of art. 2183, under which extinctive prescription precludes the action when it is not brought within the year? This saving clause of art. 2262 was undoubtedly inserted to obviate what would otherwise have evidently been a contradiction between the article itself and article 1056. Without it the widow would have had one year after the death to bring her action, only when the husband would have died on the very day of the accident. and if he died, say, ten months after the accident, she would have had only two months. With it she has one year after his death, if he dies at any time within the twelve months, and, perhaps, though unnecessary to decide here, if he dies after the twelve months, but the prescription as against him has been interrupted by an action or otherwise. It was not in the article as passed by the Legislature, and was inserted therein subsequently, as pre-existing law, by the Commissioners, as was art. 1056 itself. The Commissioners had not the power to make any amendments to the Code as passed by the Legislature, and therefore, in the construction of the two articles read together, as I previously remarked as to art. 1056, we are bound to declare, as nothing directly to the contrary appears therein, that the law is precisely the same as it was before the Code (except as for the time required for the prescription of actions for bodily injuries, which was specially enacted as new law), and consequently that under the Code, as it was previously under the Statute, any objection which would have been fatal to an action by the decedent, at the time when he died, must be fatal to an action by the survivors.

Now, as to the contention that the prescription should have been pleaded by the company. On this point also I think the respondent fails. The argument that her action is based on art. 1056 and that, consequently, prescription should have been plended as art. 2262 and art. 2267 do not apply to the said art. 1056, is based on the confusion of the matters in controversy. The basis of her action is art. 1053, not art. 1056, and the appellants do not at all contend that her action is prescribed. But they say that as Flynn's action, given to him by art. 1053, was, by art. 2262 prescribed when he died, and as by art. 2267 coupled with art. 2183 their liability was absolutely extinguished and he had then in law no right of action, consequently as art. 1056 only extends to her the right of the action he had when he died, she, in law, has no action. The maxim *contra non valentem agere nulla currit prescriptio* cited by the respondent has no application whatever. It is not a new fact, but one resulting from the respondent's own declaration upon which the appellants rely in support of their motion; and they simply contend that, upon the findings of the jury, assuming their absolute correctness, she has no claim against them. Troplong, Prescript. No. 87. They have pleaded a general denegation, besides a plea, in an exception, that they were not indebted towards the respondent in any sum of money whatever. That was, as unequivocally as could be, putting the respondent's right of action in issue. It has been argued that had the appellants specially pleaded that the action had been prescribed before Flynn's death, the respondents might in reply have alleged facts to show that the prescription had been interrupted or renounced to. But that is precisely the ground of one of the allegations of her declaration as follows:

"That since the occurrence of the said accident and since the "death of the said Patrick Flynn, the said plaintiff acting for "herself and her child had been in continuous communication "with the said defendants, who have from time to time promised "and agreed to compensate her for her great loss and damage, "by reason of which the present action has been delayed, the "said plaintiff believing in the good faith of the said defendants, "but they have failed and neglected, notwithstanding, to comply "with their undertaking, all of which the said plaintiff is ready "and willing to establish."

Now, of that allegation not only has the respondent made no proof whatever and is there no finding by the jury, but she obviously abandoned it altogether by assenting to an assignment

of facts, in which there is not a word of it. Then apart from this, such a contention, assuming *Walker* v. *Sweet* (21 L. C. J. 29) to be correctly decided, if it were to prevail here, would put an end to the so-well established right of invoking these short prescriptions in *ex parte* actions, or without a special plea at any stage of the proceedings, and this even in appeal, for the first time. In every such case the plaintiff might also urge that, had the prescription been pleaded he would have been able to reply and prove that it had been interrupted. And is it quite sure that a plaintiff would be allowed by a replication, such a departure from his original demand? Would not this be a new ground of action? If the plaintiff declares upon facts which in law do not show a right of action, he has no *locus standi;* and if he bases his demand on a right *primâ facie* absolutely prescribed, and on which the law says he cannot maintain an action, but relies upon other facts to rebut the prescription, he must allege these other facts in his declaration, and if he alleges them but does not prove them, he must also fail, whether the prescription was pleaded or not. It seems to me here, upon this motion, that if by the respondent's declaration aside from the allegation of promise to pay which she has abandoned as I said, it appears that at his death her husband had no action, as I think it clear it does, the question is at an end. It was not necessary for the appellants to plead by *exception péremptoire* a point of law which arises from the respondent's own allegation of facts. Or to put the question in another shape, would not this action but for that allegation of promise to pay have been demurrable? Compare *Lavoie* v. *Grégoire*, 9 L. C. R. 255; *Filiatrault* v. *Grand Trunk*, 2 L. C. J. 97. If a debt extinguished by a peremptory prescription be transferred, could it be contended on an action by the transferee that prescription must be specially pleaded by the debtor? Unquestionably not, and the transferee plaintiff could not ask the court not to give effect to the prescription on the ground that had it been pleaded he might in reply have alleged interruption by the defendant in his dealings with the transferor. Now I think I am justified by the cases I have cited at the opening of my remarks to assimilate in this respect the action conferred on the survivors, by the statute, to an action by a transferee. By the statute construed as I think it must be, the wrongdoer has the same right to oppose to an action by the survivors, the grounds of defence that he would have had against an action by the deceased, that a debtor has to oppose to a transferee all the grounds of defence

he would have had against the transferor. That must be so, if it is law, as *Read* v. *Great Eastern* and *Griffiths* v. *The Earl of Dudley* held it to be, that no action lies under the statute if at the death there was not a subsisting cause of action.

By art. 431, C. P. C., the defendant has the right to move in arrest of judgment upon the verdict wherever it appears on the face of the record that, notwithstanding the verdict, the plaintiff has no right to recover any sum.

And by art. 433 the Court may, *non obstante veredicto*, render judgment in favour of the other party, if the allegations of the party to get the verdict are not sufficient in law to sustain his pretensions. These enactments, it seems to me, expressly recognise that it is not necessary for a defendant to plead questions of law which appear on the face of the record. There is no ambiguity in their terms, that I can see, and if they do not entitle the appellants here to the right to these motions, I am at a loss to understand what they mean.

As to the contention of the respondent that she is entitled to invoke the appellants' pleading and subsequent proceedings in the case as a waiver of their right in these motions, there is nothing in it. It is also evidently based on a misconception of the ground taken by the appellants, as if they were relying on prescription of the present action. Now I repeat it, that is not at all the ground they take. They simply deny that, upon the findings of the jury, she ever had a right of action. And I cannot conceive that their plea or other proceedings could give her a right to an action, which it appears on the face of the record they, *ab initio*, put in issue, and which she never had and never can have.

There is one point on which it is unnecessary to pass; yet which I must mention lest my silence might be construed as an acquiescence in the propositions of law that were enunciated thereon in the course of the argument. Both parties seem to have taken it for granted that the prescription of art. 2262 was not based on a presumption of payment, but only on grounds of public policy. I would have thought it based on both. However, as the question was not argued, I refer to it merely to remark, without coming to any determination whatever on the point, that all that the commissioners say about it in their report, could it affect the law, is, that it is grounded upon the higher region of public policy rather than on the presumption of payment. And it would seem to me that, in any liberating or extinctive

prescription, even those falling under art. 2267. the element of presumption of payment is not to be considered as entirely eliminated. Domat says, "Toutes ces sortes de prescriptions qui " font perdre des droits sont fondées sur cette presomption que " celui qui demeure si longtemps sans exiger sa dette en a été " payé ou a reconnu qu'il ne lui était rien dû." I refer also to Pothier, Oblig., 677, 718, 723, 727; Marcadé, Prescr., page 233; Boileux, page 871; Troplong, Prescript. Nos. 943. 987, 994, 1003. 1035 and authorities in Sirey, codes annotés, under art. 2277 of the French Code. which is held by the commentators, and the jurisprudence, to be grounded, as our art. 2262 is. less on a presumption of payment than on reasons of public policy. Compare also *Fuchs* v. *Legaré, Caron* v. *Cloutier*. 3 Q. L. R. 11,230, and *Giard* v. *Giard*. 15 L. C. R. 494.

In the view I take of the case, it would be also unnecessary for me to refer to the evidence given at the trial. I will say a word however as to the contention argued at some length before us, on the part of the respondent, that the company had, by its conduct acknowledged its liability for this accident, and had thereby interrupted the prescription of Flynn's action, though in law it has no bearing on the case, as it is presented to us, and is even not now open to the respondent, as by the assignment of facts, no issue on this fact, by consent, was submitted to the jury. It is in evidence, it is true, that Dr. Girdwood did make some offers to the deceased on the part of the company, but he distinctly swears that these offers were merely made as a gratuity and to relieve his immediate wants, without acknowledging any obligation whatever. Mr. Armine Nicolls likewise testifies that offers made to him as acting for Flynn, by Mr. Drinkwater for the company, were made without any acknowledgment of liability. Under these circumstances the following cases are entirely applicable here :

" L'ouvrier opposerait vainement comme ayant eu pour effet " d'interrompre la prescription, le fait de la réception de secours " donnés par le patron, ces secours n'impliquant pas nécessaire- " ment que le patron ait entendu reconnaître la responsabilité " qu'on prétend faire déclarer à sa charge.

" Qu'à supposer même que la compagnie ait donné quelques " secours à Billebault, on ne saurait y voir une reconnaissance du " droit de cet ouvrier, mais un acte de bienfaisance fort naturel, " et que ce serait arrêter les louables élans de la charité que leur " donner une portée qu'ils n'ont pas par eux-mêmes.

" Action en responsabilité dirigée devant un tribunal civil

"contre un patron, à raison d'un accident survenu à l'un de ses "ouvriers dans le cours de son travail.

"En pareil cas la prescription n'est ni suspendue par la mino-"rité de l'ouvrier, ni interrompue par un secours donné par le "patron, accordé à titre de commisération et ne pouvant impli-"quer la reconnaissance d'une dette." (Dalloz, 1888-1-411).

I refer also to Dalloz, 69-2-217, and 82-1, p. 254.

The formal judgment of the Court of Review, Wurtele, J., dissenting, is based upon the ground that the prescription of Flynn's right of action should have been pleaded, and that by their pleas, and subsequent proceedings in the cause, the appellants had waived their right to now invoke such prescription. By the formal judgment of the Court of Appeal, it does not appear that this judgment was confirmed upon other grounds; and I would have assumed that, when that Court merely says, "Considering there is no error, doth affirm," they had come to the same conclusion as the Court below upon the same grounds. In the printed case submitted to us there are unfortunately no notes from any of the learned Judges in the Court of Appeal. We have been referred, however, to what purports to be the opinion of the learned Chief Justice Dorion, speaking for the Court, in M. L. R., 6 Q. B. 118, by which it would appear that their *ratio decidendi*, taking a different ground from that of the first Court, was that the prescription against Flynn's action did not at all apply to the action of his wife and children, the Court thereby holding, if I do not misunderstand them, that assuming that the appellants were freed from all liability towards Flynn before his death, and even if they had specially pleaded the prescription of Flynn's action, yet that the respondent was entitled to her action.

I have come to the conclusion, after the best consideration I have been able to give to the case, for the reasons I have above given, that this judgment cannot be supported, and that the motion of the respondent for judgment on the verdict should be dismissed, and the motion of the appellants for judgment, in arrest of judgment, or *non obstante veredicto*, should be allowed.

At the settling of the minutes it will be determined after having heard the parties, if necessary, upon which of these motions judgment should be entered.

Appeal allowed with costs.

The Chief Justice, Sir W. J. Ritchie, and Gwynne and Patterson, JJ., concurred with Taschereau, J.

Strong, J., was also of opinion that the appeal should be allowed.

FOURNIER, J. (diss.)

Le présent appel est d'un jugement rendu à l'unanimité par la Cour du Banc de la Reine le 19 juin 1890, confirmant le jugement de la Cour de Révision siégeant à Montréal, lequel avait renvoyé les trois motions de l'appelante. 1o. pour jugement *non obstante veredicto*: 2o. en arrêt de jugement; et 3o. pour un nouveau procès, et avait accordé la motion de l'intimeé pour jugement conformément au verdict rendu par le jury sur un second procès de cette cause.

L'action a été instituée le 17 mai 1884 par l'intimée, tant pour elle-même qu'en sa qualité de tutrice à son enfant mineur, pour recouvrer les dommages leur résultant de la mort de Patrick Flynn, mari de l'intimée et père de son enfant mineur. Cette mort avait été la suite d'un accident arrivé à Flynn par la faute et négligence de l'appelante. L'intimée concluait à $10,000 de dommages et intérêts. L'appelante a plaidé que l'accident en question n'avait été causé par la faute et négligence de sa part, ni de la part d'aucun de ses employés, mais qu'au contraire il n'avait été causé que par la faute et négligence du dit Patrick Flynn. Sur la contestation ainsi liée, le procès eut lieu sous la présidence de l'Hon. Juge Doherty, et un verdict fut rendu en faveur de l'intimée pour $2000, et $1000 en faveur de son enfant mineur.

Jugement fut rendu par la majorité de la Cour de Révision, renvoyant la motion de l'intimée pour jugement et accordant la motion de l'appelante pour un nouveau procès. Sur appel à la Cour du Banc de la Reine, ce jugement fut renversé à l'unanimité des juges de cette cour par un jugement accordant à l'intimée le montant de son verdict.

Le jugement de la Cour du Banc de la Reine ayant été soumis à la révision de cette cour, il intervint le 20 juin 1887 en faveur de l'appelante un jugement lui accordant un nouveau procès, sur le principe que le juge avait erré en disant aux jurés: "qu'ils avaient le droit et pouvaient prendre en considération dans l'évaluation des dommages les angoisses et les peines d'esprit de la mère et de l'orpheline."

La cause étant revenue devant la Cour Supérieure pour faire fixer un jour pour le procès, l'appelante après plus de trois ans de contestation, fit motion pour amender son plaidoyer et obtint la permission de plaider de nouveau. Une nouvelle énonciation de faits fut préparée pour être soumise au jury. Le procès eut lieu le 28 et 29 novembre, et le jury rendit un verdict de $4,500

en faveur de l'intimée et de $2000 en faveur de son enfant mineur.

L'appelante fit alors à l'encontre de ce verdict les trois motions mentionnées plus haut. L'intimée de son côté fit motion pour jugement en sa faveur conformément au verdict.

Les deux premières motions, celle pour jugement *non obstante veredicto* et celle en arrêt de jugement, sont en réalité fondées sur les mêmes raisons, savoir que le droit d'l'intimée était éteint et prescrit dès avant l'institution de son action, parceque Patrick Flynn son mari ayant été victime de l'accident le 22 avril 1882,n' était mort que le 13 novembre 1883, plus d'un an et trois mois après, c'est-a-dire à une époque où l'action de Flynn, s'il eût vécu, eût été prescrite.

Cette prétention de l'appelante est toute nouvelle et est formulée pour la première fois sur le débat de ces motions. Il n'en a été fait aucune mention dans les défenses à l'action ni dans les plaidoiries orales. Les défenses ont été même amendées sans qu'on ait soulevé cette prétention. Les raisons invoquées au soutien de la motion pour un nouveau procès, étaient que la prépondérance de la preuve est en faveur de l'appelante, que Flynn ne fut pas blessé pendant qu'il était au service et sous les ordres de l'appelante. mais par sa propre faute et négligence ; que le verdict est irrégulier et défectueux parceque les réponses sont vagues, incertaines et contradictoires, et que le montant accordé est excessif.

Devant la Cour de Révision on a fort savamment débattu la question de savoir laquelle des deux prescriptions, de celle d'un an en vertu de l'article 2262 ou de celle de deux ans en vertu de l'article 2261, doit s'appliquer au cas de quasi délit dont le mari de la demanderesse a été victime. Mais avant de rechercher la solution de cette question, il faudrait d'abord établir qu'il s'agit dans cette cause du droit d'action du mari. Tel n'est pas le cas, il n'est nullement question de la réclamation que le mari aurait eu s'il eut vecu, il s'agit uniquement de l'action donnée à l'intimée par l'article 1056, action qui ne peut exister qu'après la mort du mari, sans avoir reçu de compensation pour ses dommages.

L'action donnée à l'intimée dans les circonstances de cette cause est de date assez récente. Elle a d'abord été introduite par le Statut 10 & 11 Vic. Cap. 6, qui lui-même n'était pour ainsi dire que la copie du Statut impérial 9 & 10 Vic. Chap. 93, communément appelé le "Lord Campbell's Act." Ces dispositions législatives font maintenant partie du code civil dans lequel elles sont résumées sous l'article 1056. C'est dans cet article que l'on

doit trouver la source du droit d'action de l'intimée. Il lui est accordé de la manière suivante:—" 1056. " Dans tous les cas où " la partie contre qui le délit ou quasi-délit a été commis, décède " en conséquence sans avoir obtenu indemnité ou satisfaction, " son conjoint, ses père et mère et enfants, ont pendant l'année " seulement à compter du décès, droit de poursuivre celui qui en " est l'auteur ou ses représentants pour les dommages et intérêts " résultant de tel décès," etc.

L'action dont il s'agit n'est pas celle qu'aurait eue Flynn pour dommages lui résultant de ses blessures et des souffrances qu'il avait eues à supporter, c'est l'action spéciale accordée à sa veuve pour les dommages et intérêts lui résultant de la mort de son mari. Elle lui est accordée personnellement et non en aucune qualité de représentante de son mari. Elle ne réclame pas du chef de son mari, comme étant à ses droits, soit comme légataire ou autrement, l'indemnité qu'il aurait eu droit d'avoir. Non, elle exerce l'action qui lui est donnée par l'art. 1056, indépendamment de tous droits pouvant appartenir à son mari, elle ne derive son droit d'action que du Statut, c-a-d. du code, et nullement de son mari. Son action n'existe même pas du vivant de son mari, comment peut-on dire qu'elle dépend de l'existence du droit d'action de son mari et que s'il a laissé éteindre ou prescrire son droit autrement que par l'acceptation d'une indemnité, la perte de son droit entraine aussi celui de sa femme, qui n'est pas son heritière ou représentante légale et qui ne réclame pas de son chef, mais qu'elle possède en vertu d'une disposition spéciale et personnelle en sa faveur? Une telle prétention est si évidemment fausse qu'elle se refute d'elle-même. Ce droit d'action reconnu à la femme est un droit additionnel. Pourqu'il existe il faut d'abord que son mari n'ait pas accepté de compensation pour les conséquences du délit ou quasi-délit dont il a été victime. Ce n'est qu'après le décès de son mari que le droit de poursuivre celui qui en est l'auteur, pour les dommages-intérêts résultant de tel décès prend naissance par l'existence de la condition.

Son mari étant décédé le 13 novembre 1883 sans avoir accepté ni reçu aucune compensation pour ses dommages, ce n'est qu'à compter du moment de son décès, que le droit d'action de l'intimée a commencé à exister. Mais d'après l'étrange proposition de l'appelante, que le droit d'action du mari étant prescrit, celui de la femme doit également l'être et même avant d'avoir existé parce qu'au moment du décès de son mari, le droit de ce dernier

était déjà prescrit. que fait-on de la disposition qui accorde à la femme son droit d'action pendant *l'année seulement* à compter du décès? On l'ignore tout simplement, ou mieux encore on a recours à une subtilité aussi ingénieuse que peu honnête, pour déterminer son droit d'action en prétendant qu'il n'était que le même droit que celui de son mari, ayant pour origine le même quasi-délit, et que le mari ayant laissé prescrire son action, celle de la femme l'a été également.

D'abord, il n'est pas vrai que l'action du mari soit la même que celle de la femme. Elles ne naissent pas en même temps et la nature en est différente. Celle du mari prend naissance immédiatement après l'accident, et tant qu'elle existe, la femme n'a elle-même aucun droit d'action. L'action du mari a pour objet de réclamer ses dommages lui résultant de ses blessures, perte de temps, et celle de la femme est limitée aux dommages-intérêts résultant du décès du mari.

Comment peut-on appliquer la même prescription, que ce soit celle d'un an ou de deux ans, et les faire courir de la date de l'accident contre les actions respectives du mari et de la femme? Si c'est celle d'un an, dans le cas actuel le mari étant mort plus de 15 mois après l'accident l'action de la femme était prescrite avant la naissance de son droit d'action que la loi ne lui accorde qu'à compter du décès. C'est détruire en entier l'effet de l'article. La vraie date de la prescription de l'action de la femme est si clairement et si positivement déterminée par le Code qu'il parait absurde de chercher à en établir une autre. C'est, dit l'article 1056, *pendant l'année seulement à compter du décès* que la femme aura droit de poursuivre l'auteur du délit ou quasi-délit pour les dommages-intérêts résultant de tel décès. Tant qu'il n'est pas écoulé un an depuis le décès du mari, la femme a droit d'exercer son action comme dans le cas actuel, et il est tout-à-fait indifférent pour ce qui la regarde, que la prescription soit d'un an ou de deux ans, quant à l'action qu'aurait eu son mari. Son action à elle qui naît au décès de son mari ne peut pas durer plus d'un an et n'est nullement liée au sort du droit d'action de son mari. Les tribunaux n'ont pas le droit d'étendre ni de diminuer la durée de son action, elle a droit de l'exercer pendant toute l'année après le décès de son mari.

Puisque tant que son mari n'est pas mort, la femme ne peut exercer aucun droit d'action, son action ne peut donc être prescrite, conformément à la maxime *contra non valentem agere nulla currit prescriptio.* Cette action de la femme me paraît assez solidement

appuyée sur l'article 1056 pour qu'il ne soit pas nécessaire de discuter la question de savoir si ce n'est pas plutôt la prescription de deux ans de l'art. 2261 que l'on doit appliquer au cas actuel. En effet l'accident dont il s'agit n'est qu'un pur quasi-délit dans lequel l'élément de la malice n'entre nullement.

L'hon. juge en chef, Sir A. A. Dorion, après avoir exprimé que la prescription de l'action du mari dans le cas actuel ne devrait courir qu'après l'expiration des quinze mois pendant lesquels il a survécu à l'accident, s'exprime ainsi dans son jugement sur cette cause au sujet de la prescription de l'action de la femme: "This is not an action by the injured person, but a different ac- "tion. The Civil Code, Art. 1056, gives to the widow and child- " ren of one who dies from injuries received from the negligence " of another an action against the guilty party. This action is " not given to them in any representative quality, and the article " expressly provides that it may be brought within a year from " the decease of the injured party. The prescription against the " action of the deceased did not therefore apply to the action of " the wife and children. This was the opinion of the majority of " the Court of Review, and it will be unanimously affirmed by " this Court." M. L. R., 6 Q. B. 124.

Pour ces raisons je suis d'avis que le jugement de la Cour du Banc de la Reine devrait être affirmé avec dépens.

Judgment reversed, Fournier, J., dissenting.

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An application was made on the 25th July, 1891, to the Judicial Committee of the Privy Council, for special leave to appeal from the above judgment.

After a full statement by counsel, the Committee granted the application.

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Petition of Robinson for special leave to appeal in the matter of a cause intituled Robinson* v. *the Canadian Pacific Railway, from the Supreme Court of Canada; delivered July 25th,* 1891.

Present:

LORD WATSON.
LORD HANNEN.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Having regard to the general importance of the question raised in this Petition upon sections 1056 and 2262 of the Civil Code of Lower Canada, and also to the difference of judicial opinion in the Courts below, their Lordships think it right to advise Her Majesty to admit the Appeal. But they desire to intimate that in order that the only point which they think of sufficient importance to warrant an Appeal may be fully discussed, they will not expect the Appellant to raise any question as to the propriety of the plea being added to the record. They also desire to intimate that in the event of the Board coming to a different conclusion from the Supreme Court on the construction of the Code, they will not be disposed to entertain any question as to the propriety of granting a new trial, a point which might, in that case, be open to the respondent. That is a matter which, should it arise, must be remitted to the Court below. These hints may enable the parties to diminish the bulk of the record.

Petition granted.

*Kenelm E. Digby* for petitioner.
*H. Abbott, Q.C.*, contra.

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## COUR SUPERIEURE.

(En Chambre.)

*Coram* Taschereau, J.

Montréal, 15 février 1892.

Emilie Beaulne v. Victor Fortier et al.

*Action pour pension alimentaire—Demande à ester en justice in formâ pauperis.*

Taschereau, J.:—Il s'agit d'une requête de la dite Emilie Beaulne demandant à ester en justice *in formâ pauperis* dans une action qu'elle veut intenter en Cour Supérieure pour pension alimentaire.

Il parait s'être glissé dans ce district une pratique tout-à-fait vicieuse sous ce rapport. Elle consiste à instituer invariablement ces sortes d'actions devant la Cour Supérieure, lorsqu'il est si facile, en réclamant seulement trois mois ou six mois d'une pension alimentaire, de les intenter en Cour de Circuit, et par là d'éviter aux parties, le plus souvent très-pauvres, des frais considérables. Un défendeur condamné en Cour de Circuit à payer une pension alimentaire à ses parents âgés et infirmes, n'est généralement pas disposé à recommencer un nouveau procès. Il règle

finalement cette question, et le premier jugement aura toujours, sinon l'effet légal, du moins l'effet pratique de la chose jugée. Cela d'ailleurs n'empêche pas l'évocation, par l'une ou l'autre des parties, dans les causes qui en vaudraient la peine.

Autrefois, ces sortes d'actions se portaient toujours à la Cour de Circuit. Il est à désirer qu'on en revienne à cette sage coutume.

J'ai consulté mes collègues à cet égard et nous nous sommes entendus pour refuser dorénavant la permission d'ester en justice *in forma pauperis* à la Cour Supérieure dans ces causes.

(La requérante retire sa requête et en présente une autre pour ester en justice *in forma pauperis* à la Cour de Circuit, laquelle est accordée.)

*J. A. Lefebvre*, pour la requérante.

*J. A. David*, pour les défendeurs.

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## *COURT OF QUEEN'S BENCH—MONTREAL.*

*Pleading—Demurrer—Sufficiency of allegations—Compound interest.*

*Held*:—Where the plaintiff claimed a certain capital sum, and also computed compound interest as well as interest thereon, and alleged as to the total amount, "which said last mentioned sum "the said defendant hath often admitted to owe and promised to "pay to the said plaintiff, but has always neglected to do so,"—that the allegations of the declaration justified a conclusion for the whole amount; and that it was not necessary to allege specially that the defendant had promised to pay compound interest.—*Mc Vey & Mc Vey*, Lacoste, C.J., Bossé, Blanchet, Wurtele, Tait, JJ., Nov. 27, 1891.

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*Insurance, Guarantee—Conditions of Policy—Interpretation.*

By a condition of the policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employee "committed and discovered during the continuance of this agreement, and within three months from the death, dismissal, or retirement of the employee." The policy lapsed, and a defalcation was discovered four months afterwards.

*Held*:—(By the Superior Court,) That the company was not liable in respect of such defalcation, inasmuch as it was not *discovered* as well as *committed* during the continuance of the agreement.

The policy also contained a clause that on the discovery of any fraud or dishonesty on the part of the employee, the employer should immediately give notice to the company. A defalcation was discovered April 6, and the company was not notified until April 17, when the employee had left the country.

*Held*:—(By the Court of Queen's Bench), That the employer was not entitled to recover under the policy.—*Commercial Mutual Building Society & London Guarantee & Accident Co.*, Baby, Bossé, Doherty, Cimon, JJ., June 25, 1891.

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## *SUPERIOR COURT—MONTREAL.*

*Promissory note—Illegal consideration—Speculative transactions—Gaming Contract—Art.* 1927, *C. C.*

*Held*:—That there is no right of action for the recovery of the amount of a promissory note given by the proprietor of what is commonly termed a "bucket-shop," to a customer, in settlement of speculative transactions between them, *i.e.*, speculations on the rise and fall of prices of goods and stocks, without delivery of the things bought and sold.—*Dalglish* v. *Bond*, Loranger, J., Feb. 19, 1889.

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## *PROCEEDINGS IN APPEAL—MONTREAL.*

*Wednesday, February* 17.

*Cadieux & Taché.*—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., April 26, 1890.—C.A.V.

*C. P. R. Co. & Collins; C. P. R. Co. & Larmonth.*—Heard on appeal from judgments of Superior Court, Montreal, Wurtele, J., March 13, 1890.—C.A.V.

*Thursday, February* 18.

*Lamarche & Brunelle.*—Leave to appeal from interlocutory judgment granted.

*Desrcy & Morin; Corporation of Parish of St. Ours & Morin.*—Heard on appeal from judgments of Superior Court, district of Richelieu, Ouimet, J., June 13, 1887.—C.A.V.

*Carter & McCaffrey.*—Heard on appeal from judgment of Superior Court, district of Bedford, Lynch, J., May 19, 1890.—C.A.V.

*Friday, February* 19.

*Fortier & Tellier, & Dorion.*—Petition for *habeas corpus.*—C.A.V.

*Stewart & St. Ann's Mutual Building Society.*—Heard on appeal from judgment of Superior Court, Montreal, Jetté, J., Sept. 18, 1888.—C.A.V.

*Ex parte Litzenberg alias Morgan.*—Writ of *habeas corpus* ordered to issue.

*Lefebvre & Magnan, & Marsan dit Lapierre.*—Part heard on appeal from judgment of Superior Court, Montreal, Taschereau, J., Sept. 14, 1889.

*Saturday, February 20.*

*Bernier & Tremblay.*—Quebec case. Judgment reversed, and writ of prohibition quashed.

*Lambe & Muth.*—Motion for leave to appeal rejected.

*Lefebvre & Magnan.*—Hearing concluded.—C.A.V.

*Monday, February 22.*

*Ex parte Litzenberg alias Morgan.*—*Habeas corpus* under Extradition Act. Heard.—C.A.V.

*Canadian Bank of Commerce & Stevenson.*—Third hearing.—C.A.V.

*Tuesday, February 23.*

*Delvecchio & Lapierre.*—Motion to unite four appeals granted.

*Vipond & Tiffin.*—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., March 31, 1890.—C.A.V.

*Ex parte Litzenberg alias Morgan.*—Petition for *habeas corpus* under Extradition Act rejected.

*Shaw & Norman.*—Heard on appeal from interlocutory judgment of Superior Court, Montreal, Oct. 8, 1890.—C.A.V.

*Tellier & Fortier.*—Petition for *habeas corpus* rejected.

*Brown & Leclerc.*—Heard on appeal from judgment of Superior Court, Montreal, Loranger, J., March 11, 1890.—C.A.V.

*Wednesday, February 24.*

*Lapierre & Rodier.*—Reversed, Wurtele, J., dissenting.

*Powers & Martindale.*—Reversed.

*Canada Atlantic Railway Co. & Poirier.*—Confirmed.

*Cité de Sorel & Provost.*—Reversed, and action dismissed.

*Gillard & Moore.*—Motion for leave to appeal rejected.

*Ville de Longueuil & Prefontaine.*—Heard on appeal from judgment of Superior Court, Montreal, Davidson, J., March 5, 1890.—C.A.V.

*Prieur & Aubert de Gaspé.*—Heard on appeal from judgment of Superior Court, Montreal, Tait, J., September 18, 1890.—C.A.V.

The Court adjourned to March 15.

## *INSOLVENT NOTICES.*

*Quebec Official Gazette, Feb. 6, 13, 20.*

*Judicial Abandonments.*

ARMSTRONG, Archibald, Melbourne, Jan. 30.

BESSETTE, Jérémie (Mad. A. Bessette), Montreal, Feb. 13.

BILODEAU, Jean, St. Elzéar, and J. Bilodeau & fils, Ste. Marie, Feb. 3.

BISSON, H. & J., Lévis, Feb. 6.

BROUSSEAU, Miles, R., St. Paul d'Abbotsford, Feb. 8.

DESPAROIS, Paul Ephrem, Salaberry de Valleyfield, Feb. 6.

GAUDETTE & Co. (Dame Marie Gladu *et vir*), Farnham, Jan. 25.

GODBOUT, Frs. Xavier, St. Joseph de Lévis, Feb. 3.

HUA, Richardson & Co., tanners and leather merchants, Montreal, Jan. 30.

MERCIER, Joseph, Montreal, Feb. 4.

MORIN & Cie., Dr. Ed., Quebec, Feb. 16.

NAULT, François Xavier, St. Casimir, Feb. 18.

PROVOST, Hubert, contractor, Maisonneuve, Feb. 12.

POUPART & De Rouselle, Montreal, Feb. 6.

ST. LAURENT, Alfred, auctioneer, Quebec, Feb. 4.

TROTTIER, Felix, trader and manufacturer, St. Casimir, Jan. 28.

TRUDEAU, Aimé, Windsor Mills, Feb. 8.

*Curators appointed.*

ARMSTRONG, Archibald.—Millier & Griffith, Sherbrooke, joint curator, Feb. 16.

BECK, Martin, Montreal. — D. Williamson, Montreal, curator, Feb. 8.

BUSH & Co., Chas. F., Montreal.—D. Seath, Montreal, curator, Feb. 8.

CARDINAL, Félix, St. Stanislas.—Kent & Turcotte, Montreal, joint curator, Feb. 2.

CARDINAL & Co.—Bilodeau & Renaud, Montreal, joint curator, Feb. 6.

CARROLL & Co., Montreal.—J. McD. Hains, Montreal, curator, Feb. 17.

CHOINIÈRE, Louis, Ste. Pie.—J. Morin, St. Hyacinthe, curator, Feb. 6.

DAOUST, F. X., furrier, Montreal.—C. Desmarteau, Montreal, curator, Feb. 4.

DEMERS, J. B., tanner, Ste. Julie.—N. Matte, Quebec, curator, Feb. 6.

DESPAROIS, Paul E., Valleyfield.—Kent & Turcotte, Montreal, joint curator, Feb. 15.

DUBOIS, Louis, St. John's.—D. Seath, Montreal, curator, Feb. 1.

FALARDEAU & Paquet, tanners, Quebec.—N. Matte, Quebec, curator, Feb. 1.

GALIBOIS, F. X.—L. A. Bergevin, Quebec, curator, Feb. 12.

GAUDETTE & Co.—E. Donahue, Farnham, curator, Feb. 2.

GODBOUT, Frs. X.—P. J. G. Labbé, Quebec, curator, Feb. 16.

GOURDEAU, Félix.—D. Arcand, Quebec, curator, Feb. 9.

GREYNALD, R. B., distiller, Berthierville.—C. Desmarteau, Montreal, curator, Jan. 30.

HOOD, Mann & Co., Montreal.—W. A. Caldwell, Montreal, curator, Feb. 6.

HUA, Richardson & Co., Montreal.—W. A. Caldwell, Montreal, curator, Feb. 20.

LANGIE, Philomène, widow of late Auray Laferrière.—J. O. Dion, St. Hyacinthe, curator, Feb. 2.

LESSARD, F. X., Montreal.—D. Seath, Montreal, curator, Jan. 23.

LOUGHMAN & O'Flaherty, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 8.

MALBOEUF, C. A. L., Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 3.

MARROTTE, Samuel, Montreal.—Kent & Turcotte, Montreal, joint curator, Feb. 16.

MERCIER, Joseph.—J. M. Marcotte, Montreal, curator, Feb. 10.

PRICE, John, Montreal.—J. McD. Hains, Montreal, curator, Jan. 29.

RENÉ, J. H., Nicolet.—F. Valentine, Three Rivers, curator, Feb. 13.

ROBERGE, Edouard.—Millier & Griffith, Sherbrooke, joint curator, Feb. 10.

ROLLAND, P. L.—Bilodeau & Renaud, Montreal, joint curator, Jan. 30.

SENNEVILLE, Hylas, Nicolet.—F. Valentine, Three Rivers, curator, Feb. 13.

ST. LAURENT, F. A.—G. H. Burroughs, Quebec, curator.

THIBAUDEAU, Honoré, Stanfold.—H. A. Bedard, Quebec, curator, Feb. 8.

TROTTIER, Félix.—G. H. Burroughs, Quebec, curator, Feb. 9.

WILKINS, Charles, Barnston.—G. B. Hall, Barnston, curator, Feb. 3.