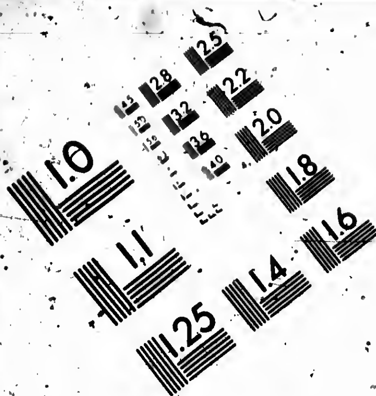
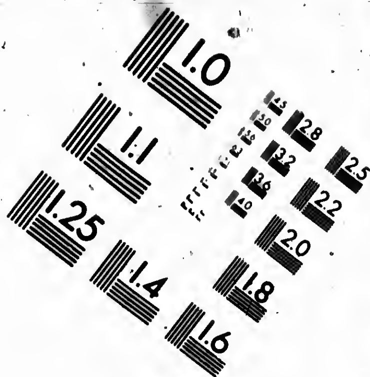

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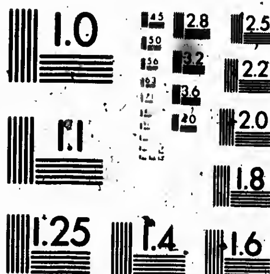
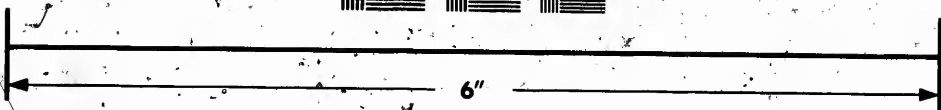

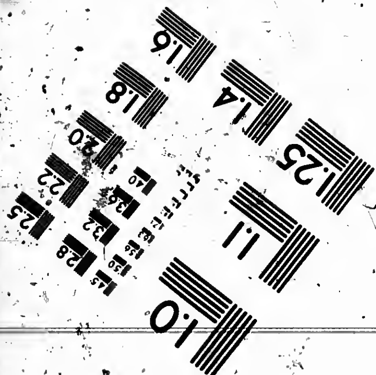
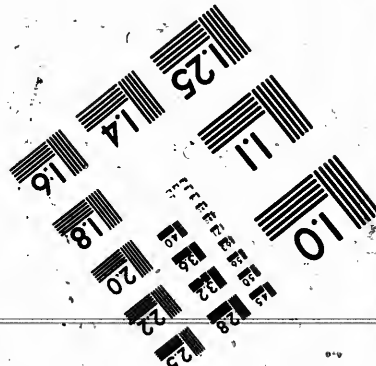

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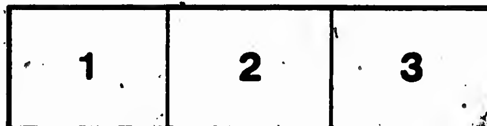

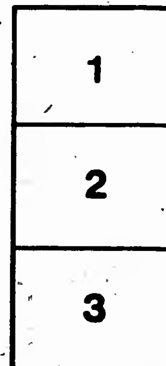

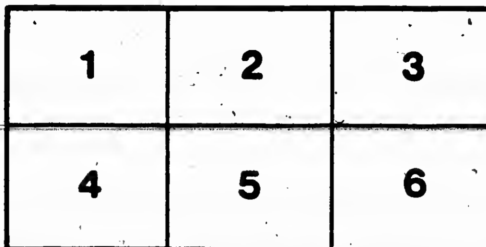

THE

LOWER CANADA
Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. X.

Editorial Committee:

S. BETHUNE, Q.C.; P. R. LAFRENAYE; F. W. TORRANCE; J. L. MORRIS.

THE INDICES.

BY S. BETHUNE, Q.C.

Montreal:
PRINTED AND PUBLISHED BY JOHN LOVELL.
1867.

DEC 12 1961

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Contributors.

J. J. DAY, Q. C.
R. ROY, Q. C.
S. BETHUNE, Q. C.
P. R. LAFRENAYE.
J. DOUTRE, Q. C.
F. W. TORRANCE.
V. P. W. DORION.
J. POPHAM.
L. RICARD.
A. H. LUNN.

J. M. LORANGER.
H. L. SNOWDON.
J. L. MORRIS.
E. L. PACAUD.
J. A. PERKINS, Jun.
F. X. A. TRUDEL.
J. T. WOTHERSPOON.
D. S. LEACH.
G. DOUTRE.
J. O. JOSEPH.

W. E. BULLOCK.

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Coram

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COURT OF QUEEN'S BENCH.

MONTREAL, 6TH JUNE, 1865.

Coram DUVAL, CH. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

No. 54.

ALEXANDER BUNTIN,

(Defdt. in Court below,)
APPELLANT;

AND

WILLIAM R. HIBBARD,

(Plff. in Court below,)
RESPONDENT.

HELD :—1. That in the case of a sale of rags by sample, the purchaser may claim the resiliation of the sale, on the ground that the rags delivered were not according to sample, within a reasonable delay after delivery.

2. That the mere reception of the rags at the railway depot where they were delivered, without special examination and comparison with the samples, and the payment of a sum to account on the supposition that all was right, will not operate as a bar to the vendee's repudiating the sale after discovery that the rags were not according to sample.

This was an appeal from a judgment rendered in the Superior Court, at Montreal, by the Honorable Mr. Justice Smith, on the 1st day of April, 1864.

The action in the Court below was brought for the recovery of $1,637.17, as a balance due on the sale of rags by the respondent to the appellant.

The appellant pleaded, in effect, that the sale had been by sample, and that after delivery of the rags the appellant discovered they were not in accordance with the sample, and, on the contrary, were inferior in quality to such sample to the extent of at least one cent per pound, and that appellant had duly tendered them back to the respondent, and prayed for the resiliation of the sale.

The respondent replied specially, to the effect, that the appellant had taken delivery of and accepted the rags and adopted the contract, and that he had not "used diligence in tendering back the rags."

Buntin and Hibbard.

The following was the judgment of the Superior Court:

"The Court having heard the parties by their counsel upon the merits of this cause, and also upon the motion of the plaintiff to correct an error in his answer to defendant's plea, and upon the motion of the plaintiff that the ruling at Enquête in this cause maintaining the objections made to the question of plaintiff to the witness, William Lawes, in rebuttal, be revised, and said ruling reversed, having examined the proceedings, proof of record, and deliberated, doth grant the first motion, and doth reject the second, and in consequence doth permit the said plaintiff to correct his said answer to defendant's plea by striking out the figures "15th" in the last line of the first page of said answer, and inserting in lieu thereof the words "twenty-first;" and the Court, considering that the said plaintiff hath fully proved the sale and delivery of the eighty-six bales of rags, at and for the price of five and a half cents per pound, and that the whole amounts to the sum of two thousand eight hundred and thirty-seven dollars seventeen cents, current money of this Proince of Canada, which sum, after deducting a sum of twelve hundred dollars, leaves a balance due and unpaid by reason of the said sale of sixteen hundred and thirty-seven dollars seventeen cents, said current money, which the said plaintiff is entitled to recover from the said defendant; and further, considering that although the said sale was so made by sample as admitted by the said plaintiff on *faits et articles*, and that the said eighty-six bales of rags so delivered by the said plaintiff to the defendant were in some respects inferior to the sample on which the said sale was made, yet it is sufficiently established in evidence that the said rags were received and accepted by the said defendant by and through the agency of James W. Bury, the clerk of the defendant in that respect appointed to receive and take delivery of the said rags, after due and ample notice had been given to the said defendant of the arrival in Montreal of the said rags, Montreal being the port of delivery under the contract of sale of the said rags, and ample time given for the examination of the said rags if the said defendant had been so disposed; and further, considering that the said rags were so received, and were accepted by the said defendant as a due and complete delivery of the said rags, and as equivalent to the sample left with the defendant for that purpose, and as a fulfilment of the said contract; and considering that ample time was given by the plaintiff to the said defendant, to wit, from the eighteenth day of April to the twenty-first day of April, to examine the said rags, and to ascertain whether the said rags were in all respects equal to the said sample, and that they were so received and taken possession by the said defendant, and by him carried away and sent to his mills, with the exception of fourteen bales, which were set aside as not being merchantable and in good order, and which said fourteen bales were afterward received and taken by the defendant under special authority of David McFarlane, the clerk and agent of the said defendant, and with the understanding and agreement with the plaintiff that the said fourteen bales should be valued, and an allowance on the price thereof made by the said plaintiff, by reason of which, and by law, the delivery of the said rags was completed, and the rags accepted as sufficient under the said sale; and further, considering that the said defendant hath failed to shew any reason in law or in fact by which the defendant could

Buntin and Hibbard.

be relieved from the necessity of examining the said rags, to ascertain if the same was according to sample after notice of the arrival; and further considering that the said defendant afterwards, to wit, on the seventeenth day of June, one thousand eight hundred and sixty-three, and the twentieth day of June, one thousand eight hundred and sixty-three, by two several protests against the said plaintiff, did accept the sale and delivery thereof, and did merely claim damages by way of diminution in value of the said rags, and did not even then repudiate the sale as not being according to sample which he was bound to do by law, if he did so intend to invalidate the sale; and further, considering that it is now too late to claim any resiliation of the said sale as the said defendant hath done in and by his said plea to this action; and further, considering that the said defendant hath failed to show or establish anything by reason of which or by law the said sale should be annulled or set aside, or to prevent the conclusions of the said action from being granted; and further, seeing that the said defendant hath not claimed any reduction in the price of the fourteen bales of rags, the Court doth overrule and set aside the said ple[illegible]d doth condemn the said defendant to pay to the said plaintiff the sum of one thousand six hundred and thirty-seven dollars seventeen cents, said current money of Canada, with interest thereon, from the twenty-second day of June, one thousand eight hundred and sixty-three, date of the service of process in this cause, until actual payment and costs of suit, *distraits* in favor of Messrs. A. & W. Robertson, the attorneys of the said plaintiff, leaving the said defendant to such recourse as he may be entitled to in respect of the said fourteen bales of rags aforesaid.

Bethune, Q. C., for appellant:

The facts which have given rise to the present appeal are as follows:

On the 16th of May, 1863, at Montreal, the appellant purchased from the respondent forty-six bales of white cotton rags, at five cents per pound, and eighty-six bales of cotton and linen rags at five and a half cents per pound, deliverable in Montreal, and payable $1,200 in cash when part of the bales were delivered, and the balance at a subsequent date.

The sale was by sample, according to two samples of rags deposited with the defendant, and marked $\frac{\text{B}}{\text{AA}}$ and $\frac{\text{M}}{\text{W.}}$

The eighty-six bales, composed of fifty-nine bales of the mark $\frac{\text{B}}{\text{AA}}$, and twenty seven bales of the mark $\frac{\text{M}}{\text{W}}$, were delivered at the Grand Trunk Depot, on the Lachine Canal, on the 21st of May, 1863.

At the time of the delivery the respondent was at his paper-mills, at Valleyfield in the county of Beauharnois, where he had gone on the 19th of May, 1863.

The reception of the goods at the Railroad Depot was conducted by one of respondent's clerks, James W. Bury, who says, "I had nothing to do with "reference to the quality of the rags; my duty was confined to weighing them, "receiving delivery of them, and shipping them to Valleyfield."

At the time of the delivery, fourteen of the bales were found to be damaged by salt water, the rest being apparently in shipping order, and an understanding

Buntin and Hibbard

was come to between the appellant's book-keeper and the respondent that these fourteen bales should be shipped to Valleyfield with the rest, and the damage by water be subsequently adjusted by the clerks who had seen them.

The rags arrived at the mills on the evening of the 22nd, and were landed on the 23rd of May, 1863, and on some of the bales being opened, the appellant immediately pronounced them inferior to the samples, and ordered his foreman (John Creighton) by no means to use any of them, and to keep them carefully, so that the appellant might bring up the samples and compare them with the contents of the bales.

In the meantime, on the 23rd of May, 1863, (whilst the appellant was so absent) his book keeper, at the request of the respondent, paid over the $1200, —as he says,—" presuming that the bales which were not objected to were according to quality indicated by sample, and that the damage would be adjusted as " to the wet bales."

The appellant returned to Montreal on the evening of the 23rd May, 1863. The 24th was a Sunday. The 25th was observed as a general holiday in honor of the Queen's birth-day which had fallen on the Sunday. On the 26th or 27th, the appellant complained verbally to the respondent, who called at the appellant's store on the following day or the day after. In the words of one of the witnesses (William C. Cowan),—Mr. Buntin "objected to Mr. Hibbard, " that the quality of the rags was not according to sample: they spoke of an " arbitration to determine both the quality of the rags and the amount of " the damage." And they accordingly arranged in the language of another witness (James W. Bury),—" that sample bales, two wet ones and two dry ones " one of each mark, should be brought down from the mill for the purpose of " being examined."

The sample bales were accordingly brought to Montreal from the mills early in June. In the meantime the forty-six bales had arrived in a very damaged condition and were deposited in appellant's store. After the arrival of the sample bales the respondent called at the appellant's store, and on the bales being pointed out to him, he said (as testified by Bury),—"*it is not them I have come to see, it is the forty-six bales.*"

Although the sample bales which had been thus brought down to Montreal were so brought, at the respondent's request, and in order to their being compared with the original samples by proper surveyors, the respondent failed to attend to their examination. The appellant, in consequence, on the 17th June, 1863, protested notarially against the respondent, and demanded of him forthwith to aid in the survey. (Paper 8 of the record).

To the appellant's surprise, he received a letter from the respondent on the 18th of June (paper 37 of Record), to the effect that he was still prepared to fulfil his proposal regarding the *fourteen* bales; thus attempting to ignore the agreement to examine and ascertain whether or not the whole eighty-six bales were according to sample, and to limit the survey to the damage by wet of the fourteen bales.

The appellant immediately replied (paper 23 of the record) that he had been "ready and willing *for more than ten days*, to hold a *survey on the eighty-six*

Buntin and Hibbard.

"*bales in dispute,*" and that he was still prepared to do so "*at an hour's* "*notice,*"—adding, "the writer fully expected you this morning *as agreed*, with "your arbitrator, to estimate the damage *and quality*: the rags are very much "*in our way* where they are, and unless some move is made *during the course* "*of to-morrow*, the 19th instant, we must adopt *other measures* to protect our "interests." To this letter the respondent *never replied.*

The appellant, having waited, as he promised, the whole of the 19th of June, or the carrying out of the agreed on survey, and not receiving any reply to his etter, formally tendered back the whole of the eighty-six bales of rags, as not eing in accordance with the samples, and demanded to be refunded the $1,200 aid by his book-keeper on the 23rd of May previously, without waiting for the esult of the promised survey, which the respondent was evidently avoiding.

On the 22nd of June, 1863, the respondent caused the appellant to be served with an action for the price of the eighty-six bales, less the $1,200, having can-elled in the meantime the sale of the forty-six bales originally sold with the ighty-six bales, but delivered in a damaged condition.

In order to avoid question, under the circumstances, as to the actual con-ition and quality of the rags, the appellant notified the respondent notarially (paper No. 10 of the record) on the first of July, 1863, that he would hold a urvey on the following day at eleven o'clock, naming as his surveyor, William Darling, of Montreal, merchant, and calling on the respondent to name a sur-veyor on his part.

The respondent failed to name a surveyor, or to attend, and Mr. Darling con-ducted the survey in consequence *ex parte*.

The result of the survey was to the effect, that the fifty-nine bales contained ttle or no linen rags (*scarcely an eighth part being linen*), and their contents ere extremely dirty and absolutely matted together in many cases with dirt, hereas the sample of these bales was comparatively free from dirt, and con-ained a considerable portion of linen rags (*say about half the weight*). And at the twenty-seven bales, although nearer the sample than the fifty-nine bales as gards the assortment of rags, were nevertheless very dirty and matted with dirt, hereas the sample by which they were sold was comparatively clean. The sur-eyor, apart from any question of damage by wet, estimated the difference in uality between the eighty-six bales and the samples by which they were sold at fully a cent per pound."

The appellant in view of the foregoing facts, pleaded that he was not bound y the sale, and prayed that it be "rescinded, annulled, and set aside, and the id plaintiff ordered to take back the said eighty-six bales of rags."

To this plea the respondent replied specially to the effect, that the bales ought have been examined at the time of their delivery at the Grand Trunk Depot, at least "forthwith and without any delay, on their arrival at Valleyfield." hat appellant ought then to have conveyed them at once to Montreal, and ndered them back; that appellant has paid part of the price and "adopted the said contract," and "by his own acts has put it out of his power to demand the resiliation of the said contract," and "that in fact the price of

Bantin and Hibbard.

"rags has fallen since the sale, and fell shortly before the delivery of said bales "to the defendant."

In the course of the *Enquête* the opinion expressed by Mr. Darling, the surveyor, was fully sustained by a number of competent witnesses.

On the question of the price of rags having fallen, the respondent examined two witnesses, Wood and Angus. The former, a *watchmaker*, stated that "*about* the date of the sale" the price of rags in Montreal "fell *at least* twenty-"five per cent." The latter limited the fall to a half a cent per pound (or ten per cent.) from 15th May to 15th June, 1863, and to a quarter of a cent per pound or five per cent. from 15th June to 15th July, 1863. Against this we have the evidence of Viau dit Laliberté, (whose experience in the purchase of rags covers the past twenty-three years), who says:—"*Le prix de chiffons a con-*"*tinué à peu près le même depuis le milieu de mai au milieu de juin dernier.*" Also the testimony of Creighton, (whose experience of the Montreal rag market covers the past ten years), as follows:—"I do not hesitate to state that there "was little or no variation in the market price of rags in Montreal since the "month of April last; the market has in fact been remarkably steady ever since "month of April last; the only fall that has occurred is a quarter of a cent a "pound, which took place in July last, and has continued ever since." Then as to the advance of $1,200, it was made, as a matter of fact, on the forty-six bales and the eighty-six bales together; *the latter being a part delivery of the whole purchase*, which entitled the respondent, in terms of the sale, to the advance. This advance, moreover, was made by the book-keeper under the circumstances sworn to by him, and cannot legally be construed into an adoption of the contract such as contended for by the respondent.

The judgment appealed from was made to turn, in its first branch, on the legal proposition that the failure of the appellant to examine the rags when delivered at the Grand Trunk Depôt, was fatal. On this point the counsel for the respondent in the Court below relied on the general doctrine laid down by Pardessus (2d vol., No. 282),—"lorsque les marchandises ont été transportées dans ses magasins, où il les a reçues sans réclamation, il est *présumé* satisfait de leur qualité,"— * * * "c'est *au moment de l'arrivée* des marchandises, que celui à "qui elles sont adressées doit exprimer son refus, et les motifs sur lesquels il le "fonde,"—* * * "s'il ne s'élève de difficultés que sur la qualité, qu'il prétend "n'être pas celle dont il est convenu, il doit faire constater l'état des choses en-"voyées, *au moment de l'arrivée, ou dans le plus bref délai.*"

The appellant respectfully submits that the legal effect of taking delivery, without objection, is merely to establish a *presumption* that the purchaser is satisfied, and that all is right, and that such presumption may be destroyed by proof to the contrary and by a subsequent examination and comparison, if there be no reason to suspect fraud, and that the merchandize is still in a condition to admit of a fair examination and comparison. At all events, according to this very authority, the purchaser is not strictly limited to the actual time of delivery to ascertain the condition of the thing bought, but is bound to do so "*dans le plus bref délai.*" Now, the appellant here is clearly within this latter rule, as he not only ascertained the state

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of the rags, but objected to their reception as not being according to sample, within the shortest reasonable delay, under the circumstances, after the delivery. Should any doubt, however, exist as to the diligence of the appellant in this respect, *the respondent clearly waived all objection on that head*, by assenting to a survey of the rags, by means of the sample bales which he agreed should be brought from the mills at Valleyfield for that purpose. And all the subsequent delays are clearly attributable to the acts of the respondent who, after seeing the sample bales, and no doubt fearing the result of a survey, postponed their examination under one excuse or another, until the appellant, in self-defence, was compelled to tender back the whole purchase. Apart from these special observations, it is further submitted, that in law neither the actual time of delivery nor the shortest reasonable delay after are fatal periods, within which the examination and rejection must take place. And on this point the appellant would respectfully refer to the last part of the No. 282 of the 2nd Pardessus, on which the respondent relied in the Court below for the success of his case —" Ce n'est " pas que le fait de la réception, *sans ces précautions* fût *par lui-même* une fin " de non recevoir contre la réclamation de l'acheteur." * * * " Si une partie de " la marchandise étant encore dans les magasins du vendeur, *une comparaison " était possible.* Alors, *le silence gardé par l'acheteur, sur les premières livrai- " sons*, ne serait, *ni une approbation* pour le passé, *ni une renonciation* à ses droits " pour l'avenir."

The second branch of the judgment under consideration reposes on the idea, that the appellant had " ample time" to examine and ascertain whether or not the rags were according to sample,—" to wit, from the eighteenth day of *April* to the twenty-first day of *April*," and the third branch on the alleged fact, that the appellant by the two protests of the 17th and 20th June, 1863, " *did accept the " sale and delivery* * * and did merely claim damages by way of diminution in " value of the said rags, and did not even then repudiate the sale as not being " according to sample.*"

Both these branches of the judgment are singularly based in error. The sale itself only took place in May, and it was therefore impossible for the appellant to verify the correctness of the article he purchased, one month before he bought it. Then the protest of the 17th of June distinctly affirms, that the rags " *turned " out on examination to be far inferior to sample, and a portion of them to be " damaged by water;*" and the demand of the protest is *not for* damages, by " way of diminution in value," but " *that he* (the respondent) *do forthwith give " his aid and assistance in having a survey held on the said rags, and in having " the matter settled in a satisfactory and business-like manner.*" And the protest of the 20th of June, after reciting the contents of the former protest, and pointing out the non-compliance with its demand, *distinctly repudiates the purchase, and formally tenders back the rags.* And in neither protest is there the *slightest* allusion to " damages by way of diminution in value."

With these remarks, the appellant confidently claims at the hands of this Court a reversal of the judgment appealed from.

Robertson, Q. C., on behalf of the respondent, submitted :—

1.—That the defendant had ample time to examine the rags, and did examine,

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weigh, and receive, by his clerk and agent, Bury, at Point St. Charles, the whole of them on the 21st, after three days notice to weigh and receive them. Only fourteen bales were found fault with as being wet, and an arrangement was made as to settlement of the amount of damage, on these fourteen bales, which the defendant has not done, notwithstanding the plaintiff's offer, but wishes to rescind the whole contract.

"If a portion were not merchantable, or were damaged, the defendant might claim a deduction in proportion to the amount of damage, but cannot repudiate the whole contract."—Starkie Evidence, p. 878, 879.

"Where a commodity is delivered to any one entitled to represent the buyer, and give it a new direction in which the seller is not participant; or to one who as his clerk, servant, custodian, &c., is to hold the goods, till by a separate and uncontrolled act of the buyer, a new destination is impressed on them, the delivery is effectual to all intents and purposes." 1 Bell's Com., page 173.

"So where the buyer sends his own ship, or a ship chartered by him, delivery into such ship is effectual to all intents and purposes." *Ib.*, p. 174.

So delivery to a clerk—p. 200.

Lord Abinger in Chapman vs. Morton, 11 Mee. & Welsby, p. 539: "If the defendant intended to renounce the contract, he ought to have given the plaintiff distinct notice *at once* that he repudiated the goods, and that on such a day he would sell them for the benefit of plaintiff."

Party who wishes to rescind, "must act decidedly and promptly on the *first discovery* of the breach." Note, p. 541.

2.—Even if the rags had been deliverable at Valleyfield, it was defendant's duty to have had them examined and compared with the sample, instead of waiting more then a fortnight before sending up the samples from Montreal to Valleyfield.

Gonget and Merger, Dictionnaire, *verbo Vente*, No. 123 to 126. No. 195. "C'est au moment de l'arrivée des marchandises que celui à qui elles sont addressées doit exprimer son refus."

So in Joseph *vs.* Morrow, *et al.* (4 L. C. Jurist 389)—Smith, Justice, says: —"The defendant should have tendered back the brandy *immediately* so as to afford the plaintiff the opportunity of verifying the alleged variance."

In Clement *vs.* Page *et al.* (1 L. C. Jurist p. 79)—"No damage can be recovered by a vendor who has neglected to tender back the article bought *so soon as* he has discovered the defects thereof."

There was no sale by sample, and no implied warranty that all the bales should exactly correspond with the sample. "The mere exhibiting of a sample will not "of itself constitute a sale by sample, so as to subject the seller to liability on his "implied warranty, because it may be exhibited merely to enable the buyer to "form a judgment on its probable quality." Story Sales (sect. 838).

But even if there had been a sale by sample, and therefore an implied warranty as to the quality of the goods, yet "if they prove to be of inferior quality or "fitness, the goods cannot be returned; the remedy is by action of damages "the measure of which is the difference between the value of the article as it is, "and as it was reported to be." (Ib., sect. 830.)

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The pretended examination of only from one to four bales, and the attempt to shew the whole 86 bales were defective, cannot succeed. The comparison with the sample, and the *exparte* examination of the witnesses were made too late, and the offer contained in the protest of 20th June was also too late, and was insufficient.

MEREDITH, J.—(*dissentiens*): "It is proved that the rags sold by the respondent to the appellant were not of as good a quality as the sample according to which they were sold. But it appears to me that the appellant did not use such diligence as was necessary to enable him to make, with effect, the complaint which he now urges.

The goods were deliverable at Montreal, and were delivered at the depôt of the Grand Trunk Railway at Point St. Charles, on the 21st May. The bales on that occasion were counted and weighed, and fourteen of them were found to be wet, but no examination was made of the quality of the rags. There was nothing however to prevent the appellant from examining them there. And there was the less reason for his omitting to do so, as, according to his own showing, an examination of three or four bales would have sufficed to enable him to judge of the whole of the lot.

The rags arrived at the mill at Valleyfield on the 22nd of May, and were discharged from the barge on the 23rd. The appellant at once said that the quality of the rags was not such as he had a right to expect; but he had left the samples in Montreal, so that the rags could not, at the mill, be compared with the samples. The appellant returned to Montreal on the 23rd, but nothing could be done on the 24th or 25th, as the first was a Sunday and the second a holiday. The appellant, upon his arrival at Montreal, ought at once, and in a formal manner, to have notified the respondent that the rags were not according to the sample.

This was the more necessary, because, firstly—the defendant (now the appellant) had removed the rags to his own place after having had full opportunity of examining them at Point St Charles; and, secondly, because a sum of £300 had been paid on account.

The appellant in his factum says, *on the 26th or 27th the appellant complained verbally to the respondent, who called at the appellant's store on the following day or the day after.* In the words of one of the witnesses (William C. Cowan) Mr. Buntin "objected to Mr. Hibbard that the quality of the rags was not according to sample; they spoke of an arbitration to determine both the quality "of the rags and the amount of the damage." And they accordingly arranged in the language of another witness (James W. Bury), "that sample bales, two "wet ones and two dry ones, one of each mark, should be brought down from "the mill for the purpose of being examined."

On reference to the depositions of Bury and Cowan, we find that Bury says: "On some day during the said week, the plaintiff called at the office of the defendant, when the plaintiff and the defendant had a conversation about the rags, and Cowan says, "On some day during the week, and I should say not later "than Friday, Mr. Hibbard called at the defendant's office." It therefore seems that the conversation of which the appellant speaks of as having taken place on the 26th or 27th May, could not have taken place even according to his own witnesses, until the 29th or 30th. Mr. McFarlane says that on Tuesday or

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Wednesday Mr. Buntin left his office saying he was going over to Mr. Hibbard's to complain of the rags not being according to sample; but we have no proof that he did go there on either of those days—and under the circumstances the appellant would have acted in a more prudent and business-like way if he had made this complaint in writing, instead of by a mere verbal communication, as he alleges it was made.

We find also that a delay took place about bringing down the sample bales; two of those that were wet came down on the 2nd June; but the two dry bales did not come down till the 9th of June, and it does not appear that the respondent was notified of their arrival until some days afterwards.

Such are the facts respecting the diligence or want of diligence on the part of the appellant.

As to the law of the case it is clear that if the appellant wished to return the rags, he was bound to do so without any unreasonable delay, "*dans le plus bref délai*," as some of the French writers say.* The English rule on this subject, which agrees with the French rule, is well laid down in a leading American case cited by the respondent, in which it was held that "one who wants to abandon "or rescind a contract for non-performance of its terms by the other must act "promptly and decidedly on the first discovery of the breach."†

It appears to me that the appellant cannot be said to have used due diligence in the case before us. He did not examine the rags as he might have done and indeed ought to have done when they were delivered at Point St Charles, and before he conveyed them to the country. When the rags were sent to the country, the samples were left in town. The appellant on his return to town ought to have notified the respondent in writing that he objected to the quality of the rags—this he did not do, and a delay of some days took place before he had any verbal conversation with the respondent on the subject; then, although the rags appear to have been within a day's journey of Montreal, the sample bales of the dry rags were not brought back until the 9th of June. And even then the respondent was not notified for some days of the arrival of the sample bales.

The result was that the appellant, instead of rejecting the rags, as he probably might have done, at Point St. Charles, on the 21st May, was not prepared to have a survey held even on the sample bales until the middle of June; and in the meantime the price of rags seems to have gone down to the extent of about ten per cent.

It may be said that if the respondent had sold goods not agreeing with the sample, he has only himself to blame for the loss to which he is exposed. But merchants frequently sell goods according to the invoices which they themselves receive, and without any opportunity of examining them; and therefore bad faith is not to be presumed merely in consequence of goods sold not being strictly in accordance with the sample furnished; and for the same reason it appears to me necessary to enforce strictly the rule that where a party intends to rescind or abandon a contract, "he must act promptly and decidedly on the first discovery of the breach."

* Pardessus, 2 vol., No. 282.

† Lawrence *vs.* Dale, 3 Johnson Ch. cases, pp. 23, 42, cited 11 M. and W., p. 541.

The following was the judgment of the Court of Appeals:—

"The Court * * * * considering that the rags, for the recovery of a balance of the value of which this action was brought, were inferior in quality and value to the samples upon which they were sold; considering that the appellant, purchaser of the said rags, did, within a reasonable delay, protest, verbally and in writing, against the validity of the sale, and did call upon the respondent, the vendor, to aid and assist him in making a survey of the rags, in order that the matter in dispute might be settled "in a satisfactory and business-like manner;" considering that the respondent neglected to join in such survey, and that the appellant duly notified him, that he, the appellant, repudiated the contract, and required him to take back the said rags; considering that the payment of twelve hundred dollars in account of the said purchase was made by a clerk in the employ of the appellant, without his knowledge, and in ignorance of the fact that the rags delivered were inferior to the samples.

Considering, therefore, that in the judgment rendered by the Superior Court sitting at Montreal, on the first day of April, one thousand eight hundred and sixty-four, there is error, the Court here doth reverse, annul and set aside the same; and proceeding to announce the judgment which the Court below ought to have rendered, this Court doth declare the sale of the said rags to be null and void, and doth order the said respondent to take back the said rags, reserving to the appellant his recourse to recover the said sum of twelve hundred dollars paid through error, on account of the purchase hereby declared null and void,—and for damages, if any he be entitled to; the whole with costs against the respondent as well in this Court as in the Court below.

(The Honorable Justices Meredith and Mondelet dissenting.)‡

Judgment of Court below reversed.

Strachan Bethune, *Q. C.*, for appellant.

A. & W. Robertson, for respondent.

(S. B.)

‡ An appeal has been since instituted to Her Majesty in Her Privy Council.

MONTREAL, SEPTEMBER 8TH, 1865.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., AND MONDELET, J.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

(*Opposants in Court below*,)

APPELLANTS;

AND

THE EASTERN TOWNSHIPS BANK,

(*Plaintiffs in Court below*,)

RESPONDENTS.

HELD:—That the rolling stock of a railway in Lower Canada is a part of its realty, being *immeuble par destination*, and as such is not liable to seizure under a writ of execution *de bonis*.

In the Superior Court, Montreal, in July, 1862, the Eastern Townships Bank sued the Grand Trunk Railway Company of Canada upon a promissory note,

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made by it and then past due, and, on the first of December, 1862, the Bank recovered judgment in its said suit for the sum of $2,568 and ninety cents, amount of said promissory note, including interest and costs of protest, with interest further on $2,500, from tenth of July, 1862, and on three dollars and fifteen cents, (costs of protest), from 15th July, 1862, till perfect payment, the whole with costs.

Previously to that suit and judgment, the Legislature of Canada had passed the Act 25 Vic., cap. 56.

In January, 1863, towards satisfaction of its said Judgment claim, the Eastern Townships Bank (now respondents) issued execution *de bonis* against the Grand Trunk Railway Company, and seized, of its property, "one locomotive, number eighteen."

Against that seizure, and to prevent sale of that locomotive, the now appellants fyled an opposition *afin d'annuler*, reciting the said Act of Parliament, 25 Vic., cap. 56, and claiming the benefit of it.

For other reasons in support of their opposition, Opposants said that their railway and rolling stock necessary for working their railway were and are not liable to be seized or sold under execution; that the locomotive seized in this cause forms part of opposants' railway, and is necessary to its efficient working, and that the seizure of it by plaintiffs was and is illegal and null; that, besides, the opposants' railway and the rolling stock necessary for the working of it, and among that stock the locomotive seized, was and is mortgaged and pledged in favor of the first and second preferential bond-holders, to an amount exceeding three milions sterling, and also in favor of the province, &c.; that the seizure made in this cause was by reason of the premises, and by law, null and void, &c.; conclusions accordingly repeating the offers mentioned in the opposition.

On the 31st December, 1862, the Superior Court (The Honorable Mr. Justice Smith,) rendered the following judgment:

The Court having heard the opposants and their said contesting party by their respective counsel, upon the merits of the opposition *afin d'annuler*, made and fyled in this cause by the said opposants to the writ of *Fieri Facias de Bonis* issued in this cause, on the fifteenth day of January, one thousand eight hundred and sixty-three, and upon the contestation of the said plaintiffs to the said opposition, having examined the proceedings, evidence and documents of record, and deliberated, considering that the said opposants have altogether failed to shew any right in law, or to establish the existence of any facts, by reason of which or by law, the said opposition can be maintained, or the conclusions of the said opposition granted. The Court doth dismiss the same with costs *distraits* in favor of Messieurs A. & W. Robertson, the attornies of the said contesting party.

In appeal from this Judgment the case was taken to the Court of Queen's Bench.

Drummond, J., said:—By the judgment appealed from, an opposition *afin d'annuler*, fyled by the appellant, (defendant, and opposant below,) was dismissed with costs.

The action was brought upon a promissory note, dated at Montreal, the 1st

February, 1862, made by the appellant for $2,500, payable to the order of one J. Woodward, and by him endorsed to James A. Gordon, who endorsed it to the Bank, respondent in the cause.

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Judgment was rendered on the 31st December, 1862, for the amount of the note with interest and costs. On the issuing of an execution, 15th January, 1863, a locomotive engine was seized, and the appellant fyled an opposition founded on the first, second, twenty-second, twenty-third, twenty-fourth, and twenty-fifth sections of the Grand Trunk Arrangements Act of 1862 (25 Vic. c. 56) which sections are set forth in the opposition, as follows:

Section 1.—" All moneys to be received by the said Company from the Pro-" vince and from Her Majesty's Imperial Government for postal services, and " for the conveyance of troops or military stores and munitions of war, shall be " appropriated solely to the payment of the present debts of the Company, owing " either in Canada or in England to others than bondholders of the Company or " holders of notarial mortgages, registered in Lower Canada, in the manner and " subject to the provisions hereinafter mentioned."

Section 2.—" The said Company may issue bonds to be secured on the moneys " mentioned in the next preceding section, and the principal and interest whereof " shall be a first charge on such moneys, and may issue such bonds in favor of " the creditors in the said section mentioned, or may dispose of such bonds and " apply the proceeds to the payment of the present debts due to such creditors."

Section 22.—" Moneys received in respect of postal services to be applied in " payment of dividend to certain creditors."

Section 23.—" For the balance which will remain due to the several creditors " after payment of so much as shall be paid in money, or received in bonds " under section 2, they shall respectively be entitled, on delivering up any secu-" rities which they may hold, after such realisation as mentioned in the last " preceding section, to receive stock equal in nominal amount to the difference " between the sum paid in money or bonds and stock as aforesaid, and twenty " shillings in the pound, such payment to be made in perpetual stock to be created " as next hereinafter mentioned, and such payment and delivery of stock shall " be accepted by them respectively, in full satisfaction and discharge of their " respective debts, and on the payment or tender of such dividend, and the " delivery, or readiness to deliver, such stock, every such debt shall be absolutely " barred and extinguished. Provided always, that this and the next preceding " section shall be subject to the consent of three-fourths in amount of such " creditors of the Company resident in America, and three-fourths of the credit-" ors resident in England, respectively, to be given, in writing, on or before the " first day of November, one thousand eight hundred and sixty-two; but should " such consent be withheld for a period of three months beyond such date, then " the appropriation of the moneys receiveable by the Company for postal services, " and for the conveyance of troops and military stores and munitions of war, as " set forth in section one, shall cease and determine, and all parties shall be " remitted to the position occupied by them respectively prior to the passing of " this Act."

Section 24. — Directors to create stock accordingly.

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Section 25.—" Subject also to the proviso to section 23, no execution shall at " any time issue against the Company, on any judgment recovered or to be " recovered, for any now existing debt, such as are mentioned in sections one " and two."

Section 39.—" This Act shall not take effect unless accepted by a majority " consisting of two-thirds in number and amount of the bond and shareholders " of the Company, present in person or by proxy, at a meeting of such bond " and shareholders, to be held on or before the 1st of September, 1862, &c., &c."

The opposition alleged :

That the consents referred to in the 23d section of the Act " have been or " must have been given on or before the 1st November last past, or during the " period of three months beyond the first day of November last past in writing " by three-fourths," &c.

That on the 8th August, 1862, at a meeting duly held in the London Tavern, the Act was accepted by a majority of two-thirds, referred to in the 39th section of the Act.

That the Company have not recovered from the Government the moneys they are entitled to under the Act; that the amount is still in dispute.

That the plaintiff's debt is one which fell under the provisions of the Act, and that plaintiff and all other creditors entitled to postal moneys " had no other " right, by virtue of the said Grand Trunk Arrangements Act of 1862, against " the opposants, than their share, proportion, or dividend of the moneys or bonds " authorised to be issued, appropriated and set apart, by the 1st, 2nd, and 22nd " sections of the said Act," and to the balance in fourth preference stock, under the 24th section of the Act.

That the Company had taken " all necessary measures for carrying out " the 1st, 2nd, and 22nd sections of the Act, and had large claims against the Government for postal services, and that " so soon as the amount of the said pecuniary " remuneration due to the said opposants by the Province is fixed and paid by " the opposants, the said opposants will pay to the said plaintiffs their share or " dividend in money or bonds, as provided by the 1st, 2nd, and 22nd sections " of the Act, and as to the balance that will remain due to them, the said " plaintiffs, the opposants will pay it by the delivery of stock, as directed by " the 23rd and 24th sections of the said Act," reserving their right [illegible] a deposit *en justice* of such dividend fourth preference stock.

That the rolling stock forms part of the road, and is not lia[illegible] that the earnings of the Company " are the only assets available to the creditors " of the Company, first deducting working expenses, as defined by the 20th " section of said Act, but that the plaintiffs and other creditors are excluded " from s[illegible]ing in such balance of earnings by the Act."

That th[illegible] stock is necessary for the working of the road " and is mort- " gaged [illegible] in favour of the first and second preference bondholders to " an amou[illegible] three millions sterling, and also in favor of the Province," and that [illegible] rolling stock were liable to seizure, it could not be sold unless by " the consent of the said parties ;" and if sold the proceeds of the sale must go to the said privileged creditors.

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Conclusion.—That the opposition be declared valid, and the execution void; that *main levée* of the seizure be granted to the opposant, with costs; the opposant praying *acte* of his offer to pay in money, bonds, and fourth preference stock, and that such offer be declared good and valid, with reserve to take other conclusions so soon as the amount due by the Province to the Company "is finally adjusted and paid to them," and to deposit *en justice* the amount found to be due to plaintiffs.

The plaintiff's contestation set up in effect, that true the Arrangement Act was passed, but that its provisions had not been carried into effect; that from the opposition itself it sufficiently appeared that the postal moneys had not been paid nor bonds issued as mentioned in the Act; that therefore no tender could be made, nor had any tender been set up by the opposition which could operate as an extinguishment of the judgment, or as a bar to the usual legal process to enforce it.

That the diligence alleged to have been used by the Company to obtain the postal moneys, and their alleged readiness to tender the dividend in cash or in bonds and preference stock for the balance could not be held or declared to be equivalent to the actual payment and tender required by the Act, and that without actual payment and tender, and without the allegation and proof of the acceptance of the Act by the creditors, the plaintiff's rights were in full force.

That the allegations as to the rolling stock not being liable to seizure, and as to the division of the earnings of the road, and the matters tending to show that first or second bondholders might have a privilege on the rolling stock, or upon the proceeds of such stock when sold, could not control the plaintiff's right to execute, in a legal manner, a judgment legally obtained; nor could the question as to the proper distribution of the moneys, the proceeds of such sale, nor the rank of the various creditors of the Company, as between themselves, be tried on allegations such as these made in the opposition; that the rights of creditors *inter se* must be raised by the creditors themselves, and on a contestation raised to the distribution of the proceeds in the usual way by oppositions *à fin de conserver*, and not by oppositions to the seizure of the stock.

A general denegation was also fyled.

It appears to me that the evidence adduced by the appellants in support of the opposition fyled by them in the Court below is sufficient to show that they have complied with the requirements of the Grand Trunk Arrangements Act of 1862, as completely as they could, and that they are therefore entitled to the protection offered thereby.

Moreover, I am decidedly of opinion that the judgment appealed from should be reversed, because the locomotive engine seized as a moveable is in fact an integral part of the immovable property constituting the Grand Trunk Railway. It is to all intents and purposes part of the realty, *un immeuble par destination*, and is no more liable to seizure, apart from the immoveable property to which it belongs, than the detached burrstones in a mill, the vats in a brewery, or the boilers in a sugar factory.

The Honorable Mr. Justice Meredith, being absent when the judgment of

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the Court of Appeals was rendered, his opinion was not expressed; but his notes of Judgment were as follows, concurring with the judgment:-

The ground upon which I deem it my duty to concur in the judgment, now about to be rendered, is, that I think the appellants are entitled to the benefit of the statutory arrrangement which they have alleged. Under the statute it was necessary in order that the arrangement thereby proposed should become effectual, that the Grand Trunk Company should obtain the consent of "three-fourths "*in amount* of the creditors of the Company resident in America, and of three-"fourths of the creditors resident in England." The word "amount" is used with reference to the creditors resident in America, and is omitted with respect to the creditors in England. I therefore think that, with respect to the English creditors, the statute must be understood as requiring the assent of three-fourths of those creditors, not in *amount*, but in *number*. The respondents, *without admitting this*, contend that if the statute ought to be interpreted as meaning three-fourths of the English creditors *in number*, even in that case, the consent of the proportion required of the English creditors has not been obtained. According to the paper C, it seems that the English creditors are nine in number: and the copies of assent produced purport to be signed by six only.

Glyn, Mills & Co. are among the six consenting creditors; and Glyn & Co. are among the three creditors who have not consented.

With reference to this point, Mr. Hickson, the accountant of the Company, says:—

"I have means, and have had, of seeing who the creditors of the Company, defendants, were and are. Having seen all the books of the Company, and having them in my charge, I can speak on the subject.

"Having examined the Exhibits B and C, fyled by the opposants in this cause, I say that said exhibits truly show who were the creditors of the defendant's Company, at the dates mentioned at head of said exhibit, in Canada and America, and in England, respectively.

"There were no other creditors in Canada or America, or in England to be dealt with under the 'Grand Trunk Arrangements Act, one thousand eight hundred and sixty two,' or the 25th Victoria, Chap. 56."

And in another part of his deposition the same witness:—

"In the exhibit C, 'Glyn & Co.' figure as creditors of defendant's Company 'and Glyn, Mills & Co.' also, but both are one and the same creditor, and the assent written by 'Glyn, Mills & Co.' covers the item opposite 'Glyn & Co.,' in said exhibit C."

This, certainly, seems very slender evidence to allow so important a case to rest on; but the evidence of Hickson is distinct and positive; no attempt has been made to weaken it, by cross-examination, or to contradict it by evidence for the respondents; and, such being the case, it may, I think, be reasonably inferred that the statement of Hickson was deemed by both parties incontrovertible; which would, in some degree, account for no attempt having been made to support it, by the appellants, or to impugn it, by the respondents.

The main point, however, relied on by the appellants was that their right to enforce their judgment against the Railway Company could not be defeated or

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postponed, without an actual payment to them of their share of the postal and military service monies, and a tender of the stock to which they were entitled; and they say (the statement in the abstract being quite correct) "that a promise to pay and to tender, when the defendant gets the means to do so, cannot "extinguish the debt or postpone the execution of the judgment."

On the other hand, the Railway Company contended:

"That when the Act came into full force, and the consents in sec. 23 referred "to were given, from that moment the 25th section came into effect, and no execu-"tion could be issued against the Company by a creditor entitled to any of the "postal monies, and that although the debts were not barred or extinguished, un-"less on the payment and tender referred to in the 23rd sec., yet that the remedy "by execution was taken away without any necessity of a payment or tender by "the Company."

This view seems to be well founded. The Grand Trunk Company being in embarrassed circumstances, and it being highly important to the public, to the stockholders, and to the creditors, and more particularly to the non-privileged creditors, of whom the respondents were one, that the road should be kept open, and that the keeping of it open, as the Legislature have said, should not be "imperilled," the Legislature made a settlement between the appellants and their creditors, subject to its being ratified by the consent of a large majority of all the creditors, and of the different classes of those creditors.

The required consent, as I view the case, was afterwards given. By the settlement thus made a certain portion of the assets of the Company was set apart, exclusively for the benefit of the non-privileged creditors, who thus became privileged creditors to the extent of the assets assigned, as it were, to them. It seems to me plain that as soon as the consent of the required proportions of the creditors was given, within the period allowed by the statute, the settlement became binding upon the mortgagees and bond-holders, so as to prevent them from attempting to divert the postal and military service monies from the non-privileged creditors. And I think it equally plain that the agreement must have become binding upon both sides, and upon all parties at the same moment of time. And, therefore, that from the moment the postal and military service monies became secured to the non-privileged creditors, they became incapable of interfering, either by execution or otherwise, with the assets left for the satisfaction of the claims of the bond-holders and mortgagees.

The Legislature have declared that the Company may issue bonds, to be secured on the postal and military service money; and that such bonds may be issued in favor of the non-privileged creditors, or that the Company may dispose of such bonds, and apply the proceeds to the payment of the non-privileged creditors. For the exercise of the powers thus vested in the Company, in the interest, it may be observed, of the non-privileged creditors, a considerable period of time was required; and it cannot be supposed that during the time so required the Legislature intended that the non-privileged creditors should have the right to enforce their claims against the whole of the property of the Company, for the tendency of the statute, under that supposition, would be to invite the non-privileged creditors to attempt at once to enforce their claims by executions, and in that way

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imperil the keeping open of the road—which it was the avowed object of the Legislature to secure. The proceeding on the part of the respondents is also open to this objection, that if it were sanctioned the non-privileged creditors would have all the advantages of the statutory settlement, and yet deprive the mortagees and bondholders of the consideration for which those advantages were given.

It does not appear that there has been any want of diligence on the part of the Company in endeavoring to make the postal monies and military service monies available to the creditors; but even if there had been, the right of the Bank in that case, would be to enforce the statutory arrangement and not to defeat it. Upon the whole, therefore, I am of opinion that the required proportions of the creditors gave their assent, in due time, to the Grand Trunk Arrangements Act of 1862; that from the time that assent was given, the postal monies and military service monies have been set apart for the benefit of the non-privileged creditors—the balance of whose claims are to be satisfied by an appropriation of stock in their favor—and that the non-privileged creditors, whose claims have been thus provided for, cannot, in the meantime, enforce those claims against the other assets of the company; which, under the arrangement, are left for the satisfaction of the claims of the bond-holders and mortgagees.

The right of the Company to file an opposition, under the circumstances just mentioned, cannot, I think, be questioned.

For these reasons, I am of opinion, that the execution sued out by the respondents ought to be set aside.

The following was the judgment of the Court of Appeals, rendered the 8th September, 1865:

"The Court * * * Considering that the locomotive engine seized in this cause forms part of the rolling stock of the Grand Trunk Railway Company; considering that the said locomotive engine is an indispensable portion of the realty forming the said road and is in law an immovable (*immeuble par destination*), the Court here doth reverse and set aside the judgment rendered in the Court below; and, proceeding to pronounce the judgment the Court below ought to have rendered, doth maintain the opposition of the said Grand Trunk Railway Company, and doth order that *main levée* be granted to them of the said seizure, the whole with costs in both courts."

Judgment reversed.

Cartier & Pominville, for appellants.
A. & W. Robertson, for respondents.
(W.E.B.)

CIRCUIT COURT.

MONTREAL, 30TH SEPTEMBER, 1865.

Coram BADGLEY, J.

Brahadi vs. *Bergeron et al.*

HELD.—That the usual delays between service of declaration and return of an action must be allowed between service of a copy of declaration at the prothonotary's office and return of writ in cases of attachment under C. S. L. C. Cap. 83, Sect. 57.

In this case *saisie gagerie* was issued on 2nd May. On 4th May three copies of the declaration were filed at the office of the prothonotary for the three

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defendants. The writ was returnable on the 8th so that there were only four days between the service of the declarations and the return. The defendants objected to the service, on the ground that they were entitled to five clear days between it and the return. Ward vs. Cousine, 9 L. C. Jurist, 28; Godfrey vs. Kitchener. The plaintiff replied, that service of the copies of the declaration could be made at the office of the prothonotary at any time within three days after the service of the writ, in term, and eight days in vacation.

Per Curiam. The law termed the deposit of a copy of the declaration in the prothonotary's office a service, and being a service there must be the same delay allowed as prescribed by the 107th clause of the Statute for services generally. The time of service in this case must therefore be held short, and the exception maintained.*

Exception à la forme maintained.

Day & Day, for plaintiffs.
De Lorimier, for defendants.
(J P.)

SUPERIOR COURT.

MONTREAL, 30TH SEPTEMBER, 1865.

Coram MONK, J.

No. 1119.

Raphael vs. *McDonald.*

HELD:—That in an action commenced by *capias*, served on the 31st May, and returnable on 12th June (vacation) a service of the declaration by depositing it in the prothonotary's office on the 7th June, is a legal service of the declaration on defendant; and that a delay of ten days between the service and return of declaration is not required.

The plaintiff issued a capias, which was served on defendant on 31st May, and returnable on 12th June (vacation); on the 7th June he served a copy of the declaration on defendant, by depositing it in the prothonotary's office.

Robertson A. & W., for the defendant, fyled an *Exception à la forme*, maintaining, that by law every declaration as well as a writ, in the Superior Court, required a delay of ten clear days between the service and the return; and that while the statute (Cons. Stat. L. C. Cap. 83, Sect. 57) permitted the service of the declaration after the service of the writ, in a case where a capias has been obtained, there was no abrogation of the requirement that it should be served ten clear days previous to the return. Therefore there had been no legal service of the declaration on the defendant in the present action, inasmuch as the day on which it was deposited in the prothonotary's office was on the 7th, five days only previous to the return day. *Ward* vs. *Cousine*, 9 L. C. Jurist, 28. Even if the delay between the service and the return of the declaration were sufficient, the service was nevertheless bad, because it was made by depositing the document in the prothonotary's office; while the writ was directed to the sheriff, therefore the sheriff alone could make a sufficient service of the declaration on defendant.

* This decision is now in appeal.

Raphad vs. McDonald.

Popham, for plaintiff. The permission granted by the 57th sect. of the 83 cap. of Con. Stat., was a privilege granted to the plaintiff, not to the defendant. All a defendant could require in an ordinary case, is, that the service of the declaration be made at least ten clear days previous to the return day of the action; there is no requirement, that the declaration shall be served along with the writ. If the defendant's pretension is correct, that where a capias has issued, there must still be an interval of ten days between the service of the declaration and the return, there would cease to be any advantage to the plaintiff. The section can only be interpreted to mean, that where a capias, &c., has issued, not more than ten clear days need elapse between the service and the return, and that where that delay has been given on the writ, the service of the declaration may be made at any time within three days after such service of the writ, if made in term, and eight days after, if made in vacation. The case of Ward and Cousine was inapplicable to the present case, because there, the declaration had been *personally* served on the defendant after the service of the writ, and after the expiration of the ordinary required delay. Had the decaration in this case been deposited in the office of the clerk of the Circuit Court, in which the action emanated, according to the terms of the statute, instead of having been personally served, would have been sufficient.

Per Curiam. The service of declaration in this case is sufficient.

Exception à la forme dismissed.

Popham J., for plaintiff.
Robertson A. & W., for defendant.
(J.P.)

MONTREAL, 29 AVRIL 1865.

Coram BERTHELOT, J.

No. 2541.

P. E. LECLERE ET AL.,

DEMAS.

vs.

J. L. BEAUDRY ET AL.,

DEFRS.

JUGE:—1°. Que l'action en *retrait successoral* n'a point lieu quand la cession a eu pour objet une part fixe et déterminée dans un immeuble certain.
2°. Qu'un droit ne peut être considéré comme litigieux que quand il y a procès mu.

Les demandeurs ont instituée une action contre les défendeurs, en février 1858, exposant que par *acte de donation* du 14 mai 1827, Marie Josephte St. Germain, veuve J.-Bte. Castonguay, donna à son fils Frs. Xr. Castonguay, la jouissance et usufruit de trois immeubles, pour la propriété en passer à ses enfants; dans le cas de mort du donataire sans enfants, la jouissance et usufruit de ces immeubles devaient échoir à ses frères et sœurs; et, avenant le décès de ces derniers avant le donataire, la propriété des dits biens retournait à leurs enfants nés et à naître, pour être partagée entr'eux par souches.

Que par une autre *donation* du 15 mai 1827, la même donatrice céda à Julie Castonguay, sa fille, la jouissance et usufruit d'un autre immeuble, aux mêmes clauses et conditions que celles renfermées en la donation du 14 mai 1827.

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Que Julie Castonguay est décédée sans enfants.

Que Frs. Xavier Castonguay est vivant, mais n'a jamais eu d'enfants.

Qu'à l'époque des dites donations, la donatrice avait quatre enfants vivants; Julie, Francois-Xavier, Josephte (Dame Leclere, Demanderesse) et Jean-Baptiste, et plusieurs petits enfants, savoir: les enfants de son fils Benjamin, décédé.

Que par *actes* des 24 et 28 juillet 1857, les dits enfants de feu Benjamin Castonguay, ont cédé et vendu aux défendeurs, les droits et prétentions qu'ils pourraient avoir dans les dits immeubles, en vertu des dits *actes* de donation; lesquels droits, ont prétendu les cédants, consistaient dans *un tiers indivis* du *tiers indivis* de chacun des dits immeubles, et à n'en prendre possession, les cessionnaires, qu'au décès de Francois-Xavier Castonguay, Pierre E. Leclere et Josephte Castonguay.

Que par *acte* de cession du 28 juillet 1857, Edouard Castonguay stipula, que si, interprétant les *actes* de donations en vertu desquels il vendait, il se trouvait n'avoir aucun droit, les cessionnaires n'auraient pas de recours contre lui.

Que les demandeurs représentent la succession de la dite dame Marie Josephte St. Germain, et sont appelés aux substitutions créées et établies par les dits *actes* de donations.

Que les défendeurs sont étrangers à la succession Castongnay, qu'ils sont devenus cessionnaires, à vil prix, dans le but de s'immiscer dans la dite succession, et de vexer et tracasser les demandeurs.

Les demandeurs nient ensuite les droits des dits cédants dans les dits immeubles, mais, pour éviter contestation et procès au sujet des prétentions des défendeurs, qui constituent des *droits litigieux*, et pour empêcher les dits défendeurs de s'immiscer dans les affaires de la succession Castonguay, les dits demandeurs ont offert, par *acte* d'offres du 24 février 1858, de les rembourser du prix des dites cessions, et *ils concluent* à ce qu'*acte* leur soit donné de la déclaration qu'ils font qu'ils entendent retraire et se faire subroger dans les dits droits successifs que les défendeurs ont acquis, en vertu des dits *actes* de cession, que les offres des demandeurs soient déclarées bonnes et valables, et les défendeurs condamnés, sous tel délai qu'il plaira à la Cour fixer, à faire et consentir cession ou transport des dits droits et prétentions et y subroger les demandeurs, sinon, et le dit délai passé, que le jugement à intervenir tienne lieu de telle cession ou transport.

Les défendeurs ont opposé une *défense au fonds en droit* à cette action, et les moyens invoqués à l'appui de cette *défense* sont les suivants:

1°. Le *retrait successoral* n'est pas en force dans ce pays.

2°. En supposant que tel droit existât ici, il ne peut y avoir lieu au *retrait successoral* ou de *subrogation*, que lorsque la cession comprend tous les droits que peut avoir une partie dans une succession.

3°. Les droits dont la subrogation est demandée, ne sont pas des droits successifs, mais résultent d'un don particulier; ils ont été donnés à titre particulier, tandis que le *retrait* ne peut être exercé que sur des biens donnés à titre universel.

4°. Que les biens cédés sont certains, fixes et déterminés, et les défendeurs n'auront jamais occasion de s'immiscer dans les affaires de la succession Castonguay.

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A l'audition, sur la *défense en droit*, les points suivants furent discutés par les parties.

Roy, de la part des défendeurs ; l'action était appelée dans l'ancien droit, *Retrait* de *subrogation*, *Retrait* de *cohéritier*, *Retrait* de *bienséance*, *Retrait* d'*indivision*, et se nomme dans le droit moderne *Retrait successoral*.

Voir Pothier, vente, p. 583, 657, nos. 524 et seq, p. 682, 684.
" Propriété, T. 4, p. 488 et seq.
" Donations testamentaires, ch. 5, sec. 2 § 2, sec. 3 § 8.
Proudhon, usufruit, no. 985.
Lebrun, successions, liv. 4, ch. 2, sec. 3, no. 66, p. 323.
Servin, plaidoyer, 104.
Guyot, Rép. vo. Droits successifs, p. 553, c. 2, art. 2.
" " vo. Retrait de cohéritier, p. 414.
" " vo. Retrait de communion ou d'indivision, p. 415.
Louet, T. 1, Let. c. p. 154, no. 13.
Mornac, sur la loi *ab anastasio*.
De Salviat, T. 1, p. 194 et seq.
Duparc Poullain, T. 4, p. 65, nos. 84 et 86.
Toullier, T. 4, nos. 433 et seq.
Troplong, vente, nos. 226, 983, 985 et seq.
" société, T. 2, no. 1059.
Delvincourt, T. 2, p. 45 et notes sur p. 45, p. 136.
Chabot, successions, T. 2, p. 319.
Bosquet, T. 2, 181.
Marcadé, T. 3, p. 212 sur art. 841.

1°. Ce droit fondé sur deux lois romaines, *per diversas* et *ab anastasio*, n'a jamais existé ici; on ne le trouve dans aucune loi en force au parlement de Paris ; deux ou trois arrêts admettant ce droit au parlement de Paris ne peuvent constituer une jurisprudence ; d'autres arrêts sur la matière sont postérieurs à la date de l'établissement du Conseil Supérieur de Québec (1663) et c'est en vain que les demandeurs les invoquent comme formant une jurisprudence que doivent suivre nos tribunaux.

Guyot, *Ret. de cohéritier*, p. 414. " Ce retrait n'est pas admis partout ; il y a " bien des provinces où il n'est pas reconnu, etc." Benoît, Retrait successoral, préface, p. III. " La législation ancienne n'avait point de dispositions formelles qui " constituassent ce droit, etc.," et p. 10, etc. ; " cette faculté n'est pas moins " fondée en droit commun *dans les pays de droit écrit*."

En instituant cette demande, les demandeurs tentent d'introduire en ce pays un droit qui n'a jamais été exercé devant nos tribunaux, qui tend à restreindre et limiter la liberté des conventions, et qui, en cela, est contraire à notre droit public.

2°. En France, le contrat intervenu entre les défendeurs et leurs cédants n'aurait pas donné lieu à l'exercice du *retrait*.

Ils ont cédé, non pas des droits *en général* dans une succession, mais *une part certaine, fixe et déterminée* dans trois immeubles désignés spécialement, savoir: pour chaque cédant, *un tiers* indivis dans un ⅓ indivis de chacun de ces immeubles; les cessionnaires ne pourront, à l'aide de cette cession, s'immiscer dans les affaires de la famille Castonguay, ni dans la succession, pour savoir de quoi elle se

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compose, ni pénétrer les secrets de cette famille; ils n'auront jamais à réclamer qu'une part *certaine*, *fixe et déterminée* dans les immeubles en question: et la présente actionn'est accordée que pour éloigner un étranger du partage d'une succession, et l'empêcher de péaétrer les secrets d'une famille; ainsi le cessionnaire d'un *quart*, d'un *tiers*, d'une *moitié*, de biens successifs aurait droit de prendre connaissance de *toutes* les affaires de la succession, et d'en examiner tous les papiers, pour constater le *quantum* de la parte qu'il a acquise; tandis qu'ici les cessionnaires ont acquis une *quotité fixe* qui n'est pas susceptible d'augmentation ou de diminution, selon que le partage sera bien ou mal fait, ou selon que la succession sera plus ou moins considérable.

Guyot, vo. *droits successifs*, p. 554, c. 1. "2° que lorsque les droits successifs "se bornent à des héritages connus, le cessionnaire peut jouir de tout l'avantage "de la cession, parcequ'alors il ne s'agit plus de pénétrer les secrets d'une "famille, etc."

Toullier, T. 4, p. 448, no. 447 et p. 570, no, 576.
Benoit, p. 223 et seq., no. 63, 64, p. 248 et seq.
Duport-Lavillette, Quest. de D. T. 5, p. 486, no. 766.
Malleville, T. 2, p. 271.
Duvergier, vente, T. 2, p. 369, 436.
Marcadé. sur art. 841, no. 309.
Merlin, Quest. de D. vo. Retrait successoral p. 269.

3°. Les droits cédés ne sont pas litigieux; ne sont réputés tels que ceux au sujet desquels il y a *litige*, *procès pendant*.

Les auteurs de l'ancien droit étaient partagés sur cette question; les uns voulaient qu'un droit fut réputé *litigieux* lorsqu'il n'était susceptible de contestation, les autres, prétendant qu'une pareille doctrine était incertaine, ne produirait que de la confusion et aurait de graves conséquences, tout droit pouvant éventuellement être contesté, ne connaissaient comme litigieux que les droits actuellement contestés devant les tribunaux.

Les rédacteurs du Code Napoléon ont adopté cette dernière règle, et l'article 1700, en statuant que la chose est censée *litigieuse* quand il y a procès, ne fait que revivre les dispositions du droit romain.

Authentiq, ad leg. 1, C. *De litigiosis*.
Louet, T. 2, p. 84 et 85.
Leprêtre, centurie 100ème, p. 297.
Loisel, Instit. Cout. art 768., p. 116. "Exception de vice de litige n'a lieu."
Lacombe, vo. transport, nos. 12, 13.
Troplong, vente, T. 2, p. 588 et seq., 591 et seq., no 986. Cite Lamoignon, Lacombe, Soefve et autres.
Marcadé, T. 5, p. 349, art. 1700.
Malleville, sur le même art. 1700.

L'opinion de Pothier cité par les demrs. perd de son autorité en ce pays si l'on observe qu'il n'écrivait pas dans le ressort du Parlement de Paris.

4°. Enfin la part indivise cédée aux défendeurs n'était pas échue aux cédants en qualité d'héritiers, mais comme donataires en vertu de l'acte de donation du 14 Mai 1827, et ne formait pas partie d'une succession.

Sous ces circonstances, la vente et cession attaquée par les demandeurs n'est pas sujtte à la subrogation qu'ils réclament.

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A. A. Dorion de la part des demandeurs : les défendeurs, étrangers à la famille Castonguay, ont acheté, des héritiers Benjamin Castonguay, leurs prétentions dans les biens donnés à charge de substitution par Mme Castonguay, leur grande-mère ; ces prétentions ne sont autre chose que des *droits successifs*, de plus ils sont contestés et par conséquent *litigieux ;* les demandeurs, qui sont appelés à la substitution, ont droit de se faire subroger aux défendeurs, en leur remboursant le prix qu'ils ont payé.

1°. Le retrait successoral a lieu en ce pays, lors même que les droits cédés ne sont pas litigieux.

Lebrun, des succes. liv. 4, chap. 2, sect. 3, no. 66, p. 323.
Merlin Rép. vo. droits successifs, no. 8, p. 339, no. 9, p. 340.
Nouveau Denizart, vo. Cession de droits successifs. s. IV. p. 397.
Locré, T. 10, p. 267, No. 59. Exposé des motifs de l'art. 841, par Chabot.
Bourjon T. 1, no. 41, p. 755.

2°. Ce retrait peut s'exercer lors même qu'il ne s'agit que d'un immeuble spécialement désigné, et même après partage de la succession, surtout si biens vendus, quoique spécialement désignés, embrassent tous les droits successifs des cédants.

Lebrun des suc. liv. 4, chap. 2, sect. 3, no. 67, p. 323-4.
Chabot com. des suc., T. 2, p. 324, no. 9.
Delvincourt, T. 2, p. 136, No. 5, 2me partie, notes.
Dalloz Rec. pér. 1836, 1, 170, 1, 2me aliéna.
" " " 1830, 2, 65.
" " " 1833, 1, 212.
Denevers. J. de cassation, 1809, 2, 9.
Sirey, 1831, 2, 284.
Même pour les biens communs.
Duparc Poullain, T. 5, p. 383, no. 8.
Nouv. Denizart, cession de droits suc. s. 4, p. 399.
Guyot, Rép. vo. droits suc., p. 355.

3°. Ceux sur qui des *droits litigieux* ont été cédés peuvent se faire subroger à l'acquéreur, en lui remboursant le prix qu'il a payé lors même que ces droits ne seraient pas *successifs*.

Pothier, vente, nos, 583, 4, 590, 1, 3, 597 et 996.
Duparc Poullain, T. 5, p. 379 et seq.
Pocquet de Livonière, liv 5, Reg 8, p. 562.
Chardon, Dol. T. 2, p. 602, 3.

4°. Cela s'applique aux cessions de droits immobiliers, comme aux cessions de créances et de droits mobiliers.

Pothier, vente, no. 593.
Troplong, " no. 1001.
Brodeau, Let. C. chap. 13, p. 183.
Chenu, 2me partie, Ques. 99, p. 389, 390.
Lamoignon, T. 2, p. 159.
Pocquet de Livonière, p. 562.

5°. L'on reconnaît ordinairement, par *l'acte* même, si les droits cédés sont *litigieux*.

Merlin, Rép. vo. droits litigieux, no. 1, p. 330. Ed. Belge.
Troplong, vente, T. 2, No. 996.
Duvergier, vente, T. 2, No. 379.
Dalloz Rec. pér. 1836, 1, 170.

Guyot, Rép. vo. droits litigieux, p. 523.
Anc. Denisart, vo. droits litigieux, No. 1, 2, 3, 4 et 5.

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6°. Il n'était pas nécessaire, dans l'ancien droit, qu'il y eut procès pour que le droit fût litigieux. Sous ce rapport l'art. 1700 du code civil a introduit une disposition nouvelle.

Pothier, vente, no. 583, 4.
Merlin, Rép. vo. droits litigieux, no. 1, p. 330, Ed. Belge.
Locré, T. 14, p. 75, observations du conseiller Lacuée.

Les demandeurs ont allégué que les défendeurs ont acheté des droits successifs; que ces droits sont litigieux; que la cession a été faite à vil prix et sans garantie, en sorte qu'elle a tous les caractères d'une cession de droits litigieux; l'action contient donc tout ce qui est essentiel, et la *défense en droit* doit être déboutée.

JUGEMENT:—La Cour, après avoir entendu les parties, par leurs avocats, sur *défense en droit*, plaidée par les dits défendeurs à l'encontre de l'action des demandeurs, examiné la procédure et pièces produites et avoir sur le tout mûrement délibéré;

Considérant que lors de la passation des trois actes de cession du 24 juillet et du 28 juillet 1856, reçus devant Maître J. Belle et son confrère, notaires, et consentis par les nommés Antoine Benjamin Castonguay, François-Xavier Castonguay et Joseph Edouard Castonguay, aux dits défendeurs en cette cause, il n'est pas allégué ou prétendu, par les dits demandeurs, en leur déclaration, qu'il y eût alors *aucun litige existant* à l'égard des choses et droits qui en font l'objet;

Considérant que ce qui a fait l'objet des dits actes de cession n'est pas un droit indéterminé dans une succession, mais bien seulement une quotité fixe et certaine dans les trois immeubles y désignés ainsi que dans la déclaration des demandeurs;

Considérant que, par la loi du pays, il n'y a pas lieu, dans l'espèce actuelle, à l'exercice par les demandeurs de l'action qu'ils ont intentée contre les dits défendeurs, a maintenu la dite *défense en droit*, et déboute l'action des demandeurs avec dépens.*

MM. Cherrier, Dorion et Dorion, pour les demandeurs.
M. Rouer Roy, C. R., pour les défendeurs.
(R. R.)

* Le projet de code du Bas-Canada, au titre de la vente, ch. 10, sec. 3, contient les deux articles suivants:

Art. 99.—"Lorsqu'une vente de droits litigieux a lieu, celui de qui ils sont réclamés "en est entièrement déchargé en remboursant à l'acheteur le prix de vente avec "les frais et loyaux coûts et les intérêts sur le prix à compter du jour que le paiement en a été fait."

Art. 100.—Un droit est réputé litigieux lorsqu'il est incertain, disputé ou disputable par "le débiteur, soit que la demande en soit intentée en justice, ou qu'il y ait lieu de "présumer qu'elle sera nécessaire."

Mais le jugement ne pouvait reposer sur ces dispositions qui ne sont pas encore en force; le juge a, comme les rédacteurs du code Napoléon, embrassé l'opinion des auteurs qui, comme Lamoignon, Lacombe et autres, voulaient qu'il y eût procès mu.

MONTREAL, 31st OCTOBER, 1865.

Coram BADGLEY, J.

No. 1208.

Macfarlane vs. *Lynch.*

HELD:—That where the bail of a party originally arrested under a *Capias ad respondendum* have caused him to be imprisoned under a writ of *contrainte par corps* issued at their instance, in order that he should undergo the imprisonment imposed as a punishment under sub-section 2 of Sec. 12 of ch. 87 of the Con. Stat. of L. C.; the bail cannot, for that reason alone, claim that their bail bond should be cancelled and discharged.

This was a petition by the bail of the defendant who was originally arrested under a writ of *capias ad respondendum*, claiming that their bail bond should be cancelled and discharged.

The defendant had neglected to fyle the statement required by section 12 of ch. 87 of the Con. Stat. of L. C., in consequence whereof he had been condemned to a certain term of imprisonment, under sub-section 2 of said Sec. 12.

The plaintiff not having succeeded in finding the defendant, the bail caused a writ of *contrainte par corps* to be issued, at their own instance, under which the defendant was arrested and imprisoned in the common gaol of the district.

The bail now claimed to be released from further responsibility under the *capias.*

Per Curiam:—It is quite impossible to grant the present application. The defendant is undergoing imprisonment as a punishment, and is in no sense in custody under the writ of *Capias ad respondendum.* Whether he has been placed in confinement, at the special instance of the bail or not, does not affect the question. To get rid of their responsibility the bail must surrender the defendant in the usual way, and I cannot hold what has been done as a surrender in discharge of the bail. The petition is therefore rejected.

Petition rejected.

Strachan Bethune, Q. C., for plaintiffs.
Doutre & Doutre, for the petitioners.
(S. B.)

MONTREAL, 31st OCTOBER, 1865.

Coram BADGLEY, J.

No. 554.

Macfarlane et al. vs. *Bell, and Dougall et al., T. S. and Burns, Tiers Opposant.*

HELD:—1°. That an official assignee, under the Insolvent Act of 1864, has a right to claim and be paid as a *tiers* opposant, a sum of money deposited in the hands of the prothonotary by a *tiers saisi*, after judgment, in a case of *saisie arrêt avant jugement.*

2°. That the plaintiffs in such a case have a lien for their costs of attachment up to the time of the publication of the attachment under which the official assignee was appointed; the right to be paid which will be reserved to the plaintiffs in the judgment awarding the moneys to the official assignee.

This was a petition, in the nature of a *tierce opposition*, in a case commenced by *saisie-arrêt, en main tierce*, fyled by an official assignee, under the Insolvent Act of 1864, claiming to be paid a sum of $149.84, which had been deposited in the hands of the prothonotary, after the judgment maintaining the *saisie arrêt.*

Macfarlane et al vs. Bell.

The attachment under which the assignee was appointed issued on the 6th of February, 1865, and was first published in the *Canada Gazette* on the 11th of February, 1865, and the attachment in the present case was issued on the 8th of February, 1865.

The petition was not contested, but at the final hearing, *Cross, Q. C.*, for the plaintiffs argued, that they were entitled to be paid their full costs in the cause by privilege, and that the order, for the payment of the moneys to the assignee, should be subject to such costs.

Bethune, Q. C.,—for the *tiers* opposant, replied, that the effect of the appointment of the assignee was to vest the money attached in this cause in him, as of the date of the attachment under which he was appointed; that the effect of the publication in the *Canada Gazette* was to limit the plaintiff's claim to costs to those accrued up to that time; and that under any circumstances the monies deposited must be paid to the assignee, in order that he might distribute them according to law.

Per Curiam.—There can be no doubt, that the prayer of the petition must be granted, but, as the plaintiffs are entitled to rank by privilege in the insolvent Court for their costs of attachment, up to the date of the first publication of the attachment issued under the Act, I shall reserve the plaintiff's privilege accordingly.

Cross & Lunn, for plaintiffs. Petition granted.

Strachan Bethune, Q. C., for *tiers* opposant.

(S. B.)

MONTREAL, 30TH JUNE, 1865.

Coram MONK, A. J.

No. 646.

Tarratt et al. vs. *Barber et al.*

HELD :—That the *mere order* for the issuing by the defendants of a *commission rogatoire*, is sufficient to prevent the plaintiffs from inscribing their cause for judgment, although the plaintiffs formally notify the defendants in writing to use due diligence, and although an interval of fifteen days has elapsed between the date of the order and the day named in the inscription for hearing *without any attempt being made by the defendants to sue out the commission so allowed to issue.*

This was a motion to reject the inscription of the cause for final hearing, on the ground that the cause was "not ripe for hearing;" the *commission rogatoire* allowed to issue in the case not having been executed and returned, and no sufficient time having elapsed for such execution and return.

Bethune, Q. C., showing cause, drew the attention of the Court to the fact, that the order for the commission had been granted on the 5th instant, that on the 8th instant, the plaintiffs formally notified the defendants in writing to use due diligence in issuing the writ, and that in default of their so doing, the plaintiffs would inscribe the cause for final hearing on the merits,—that nothing having been done towards issuing the commission, the cause was inscribed on the 16th for hearing on the 21st,—and that *even up to the very moment fixed for the final*

Terratt et al. vs. Berber et al.

hearing no steps whatever had been adopted by the defendants to avail themselves of the benefit of the order. And he further called the attention of the Court to the fact, that the granting of the motion would have the effect of giving the defendants the benefit of the delay which must naturally accrue, by means of the long vacation, until September term, without any legal assurance that the commission would ever issue at all.

Robertson (William), contended, on behalf of the defendants, that as the *commission rogatoire* could not possibly have been returned from England by the 21st instant, the fact of no step having been taken towards issuing it was not of itself sufficient to entitle the plaintiffs to proceed, as if no order had been granted. He moreover assured the Court, that he seriously intended to take out and would take out the commission and prosecute it with effect, and that the failure to do so so far was solely attributable to his having been prevented, by professional occupation, from attending to the matter.

Per Curiam.—Under the circumstances, and in view of the personal assurance of the defendant's counsel that the commission is seriously intended to be executed, the motion to discharge the inscription for hearing on the merits is granted, and the inscription is accordingly discharged.*

Motion to discharge inscription granted.

Strachan Bethune, Q. C., for plaintiffs.

A. & W. Robertson, for defendants.

(S. B.)

MONTREAL, APRIL 2ND, 1864.

Coram BERTHELOT, J.

No. 925.

Ireland vs. Maume and Duchesnay et vir, T. S.

HELD:—Where a wife *separée de biens* from her husband, carries on trade and commerce through her husband, authorized as her agent to that effect, under power of Attorney, the said husband may be examined as a witness against his wife.

Here the declaration of the *Tiers saisi* was contested. She carried on trade under the style of Cuvilier & Co. Her husband being examined by the plaintiff stated that he was acting under a power of Attorney from the garnishee to manage her business, and that he conducted her business for her. Objection was made to the examination of the garnishee's husband as witness against her.

BERTHELOT, J., overruled the objection, remarking that, in this case, the husband was the duly appointed agent of the wife, and alone aware of the matters in contest.

John L. Morris, attorney for plaintiff.

Cartier, Pominville, and Betournay, for garnishees.

(J. L. M.)

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* The commission was never sued out nor any step to that end ever adopted. [Reporter's note].

COURT OF QUEEN'S BENCH.

CROWN SIDE.

MONTREAL, 30th OCTOBER, 1865.

Coram MONDELET, J.

Regina vs. Wayne W. Blossom, et al.

Persons accused of a misdemeanour are not entitled to be bailed, if in the opinion of the Judge presiding, the evidence adduced be positive against them, though two Juries have been discharged because they could not agree upon a verdict; and in such case the Court will order that the prisoners stand committed to gaol without bail or mainprise, to be tried again at the next term, and not to be discharged without further orders from the Court.

On the 25th of September, 1865, Charles Hogan Adams, William Amos Blossom, Walter Clayton, and Wayne William Blossom, were indicted before the said Court for wickedly devising and intending to kidnap one George Nicholas Saunders, and to remove him from within the protection of the laws of Canada on the 7th of August, 1865, with force and arms, at the city of Montreal, and with unlawfully conspiring, combining, confederating and agreeing, together, forcibly to steal and carry away the said G. N. Saunders, against his will and consent, from out of the City of Montreal, and the Province of Canada, into a Foreign State, to wit, the United States of America.

The grand jury found a true bill. The prisoners pleaded not guilty, and were arraigned for trial on the 29th of September, 1865.

The Honorable Judge presiding at the trial charged the jury for a conviction, but the jury after three days' deliberation were discharged, because unable to agree upon a verdict.

On the 17th of October following, the said prisoners were again put upon their trial, on the same indictment, before another jury. This jury also disagreed, and after nine days' deliberation, were also discharged. The Hon. Judge remanded the prisoners to stand their trial at the next term of the Court of Queen's Bench, in March next, and gave the following order of date 30th October, 1865.

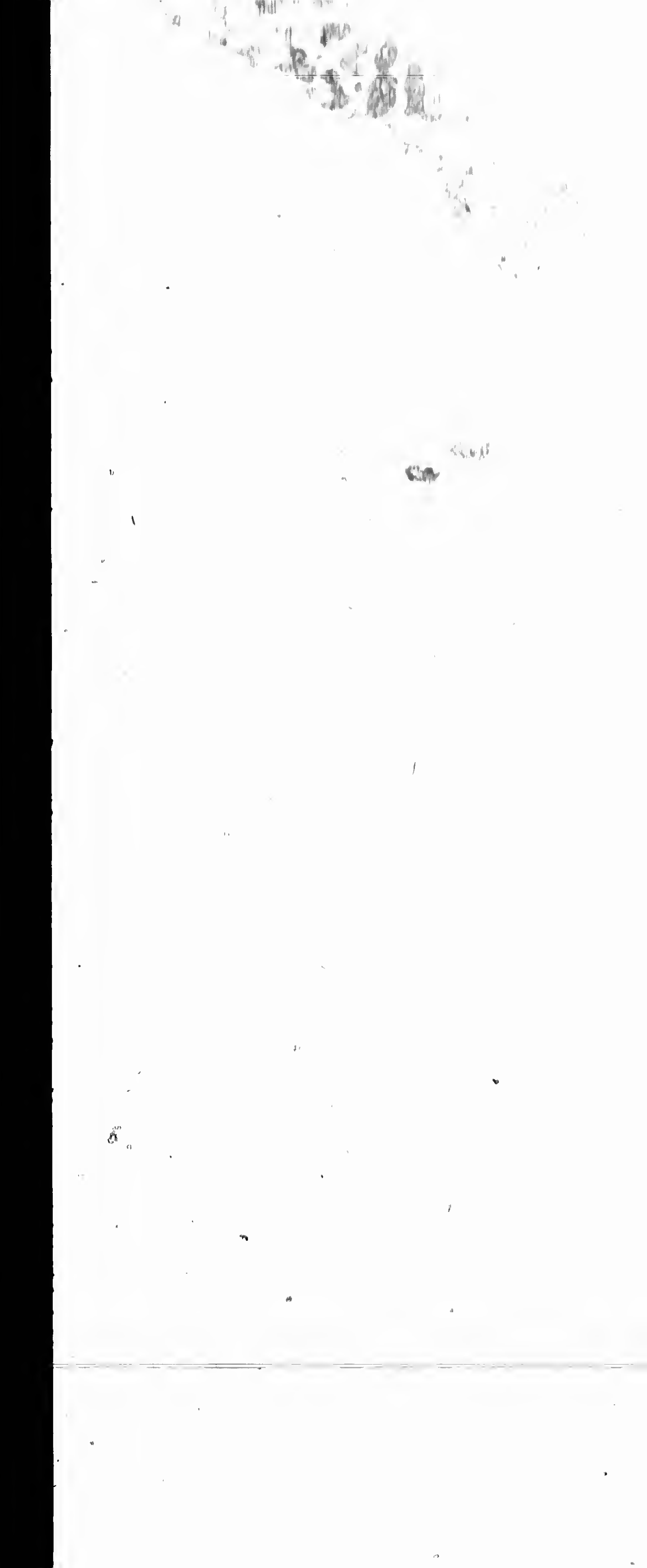
"The Court, in consequence of the non-agreement of the jury to a verdict, "discharges them, and it is hereby adjudged and ordered that the four prisoners "be remanded to the common gaol of this district.

"And whereas, from the positive evidence adduced in this trial, the said pri-"soners are not entitled to be bailed, it is adjudged and ordered that they do "stand committed to the gaol of this district without bail or mainprise, to "stand their trial at the next term of this Court, and not to be discharged "without further orders from this Court."

T. K. Ramsay, for the crown.

B. Devlin, for defendants.

(W.E.B.)



SUPERIOR COURT.

MONTREAL, 9TH NOVEMBER, 1865.

Coram MONK, J.,

IN CHAMBERS.

Ex Parte WAYNE W. BLOSSOM, *et al.*,

Petitioners for writ of Habeas Corpus.

HELD:—1st. That under the circumstances of this case, as stated above, the prisoners were entitled to bail.

24 G. 3, c. 1, s. 3, is as follows: "And thereupon within two days after the party shall be brought before him, the Judge, before whom the prisoner is brought as aforesaid, shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more surety or sureties * * * * * unless it appears unto the said Judge that the party so committed is detained upon a legal process, order or warrant out of some Court that hath jurisdiction of criminal matters, &c. Held:—That by virtue of this section an order by the Court of Queen's Bench, Crown side, such as recited in the preceding case, is a legal bar to the granting of bail, by another Judge, to persons entitled to the same, without regard to the legality or illegality of such order."

On the 7th November, 1865, on behalf of Wayne W. Blossom and Walter Clayton, two of the prisoners mentioned in the preceding case, *Mr. Devlin* applied to *Mr. Justice* MONK for bail.

After a long argument between *Mr. Devlin* and *Mr. Ramsay*, *contra*, which was subsequently repeated in an abridged form before Mr. Justice BADGLEY, Mr. Justice MONK took the application *en délibéré*.

In giving judgment on the above application, on the 9th November, Mr. Justice MONK said:

This is an application on behalf of Wayne W. Blossom and Walter Clayton to be discharged from custody, or to be admitted to bail in their own recognizances.

It is one of very grave importance, and as submitted to me involves a variety of legal and merely technical difficulties meriting serious consideration. The record of the Court of Queen's Bench discloses the following facts:

On the 25th of September last the petitioners were indicted for conspiracy to kidnap George N. Saunders, for whose capture a high reward had been offered by the Government of the United States, and the Grand Jury found a true bill. The prisoners pleaded severally not guilty, and on the 29th September and on the following days they were tried. The honorable and learned Judge presiding having charged for a conviction, the case was submitted to the petit jury, and after three days' deliberation they were finally discharged by the Court. On the 17th day of October the prisoners were again put upon their trial, on the same indictment. The jury again disagreed, and after nine days' deliberation were discharged by the Court. The Judge on remanding the prisoners to stand their trial at the next term of the Court of Queen's Bench, in March next, gave the following order, dated the 30th October, 1865:

"The Court in consequence of the non-agreement of the jury to a verdict, discharges them, and it it is hereby adjudged and ordered that the four prisoners be remanded to the common goal of this district.

"And whereas, from the positive evidence adduced in this trial the said pri-

Wayne W Blossom.

soners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the jail of this district, without bail or mainprize, to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court."

Upon the application of the prisoners to me the writ of *habeas corpus* was ordered, and by the return it would appear that the petitioners are now detained under this remand, being equivalent to a commitment from the Court of Queen's Bench. It may be proper to remark that the offence charged is a misdemeanour, and is bailable under our statute. It is made so in express terms, and it may be, moreover, considered and held, that by the words of the statute it is obligatory on the Judge to admit to bail on such a charge. After indictment found, and two trials had, neither resulting in a verdict, owing to the disagreement of the jury, these men are detained in prison in virtue of the foregoing order of the Judge, and it is under the following clauses of the Act, chap. 95 of the Consolidated Statutes that I am called upon to liberate them :

"All persons committed or detained in any prison within Lower Canada for any criminal or supposed criminal offence shall of right be entitled to demand and obtain from the Court of Queen's Bench, or from the Superior Court, or any one of the Judges of either of the said Courts, the writ of *habeas corpus* with all benefits and relief resulting therefrom, at all such times, and in as full, ample, perfect and beneficial a manner, and to all intents, uses, ends and purposes, as Her Majesty's subjects within the realm of England, committed or detained in any prison within that realm, are there entitled by that writ, and to the benefit arising therefrom, by the common and statute laws thereof.—24 G. 3, c. 1, s. 1; 1 G. 4, c. 8.—7 V. c. 17, s. 15.—12 V. c. 37, s. 41.—12 V. c. 38, s. 98—12 V. c. 40, s. 3.—20 V. c. 44, s. 13, 35.

"2. And upon service of the writ as aforesaid, the officer, or his under-officer, or deputy, in whose custody the party is so committed or detained, shall within the times respectively before limited, bring such prisoner before the Judge, and in case of his absence, before any other Judge of the same Court, with the return of such writ and the true causes of the commitment and detainer.

"3. And thereupon, within two days after the party shall be brought before him, the Judge before whom the prisoner is brought as aforesaid shall discharge the said prisoner from his imprisonment, taking his recognizance, with one or more surety or sureties, in any sum which shall not be excessive, according to his discretion, having regard to the quality of the prisoner and nature of the offence, for his appearance in the Court of Queen's Bench, at the next term, or general gaol delivery, in and for the District where the commitment was, or where the offence was committed, or in such other Court where the offence is properly cognizable, as the case requires, and then shall certify the said writ with the return thereof, and the said recognizance into the Court where such appearance is to be made,—*unless it appears, unto the said Judge, that the party so committed is detained upon a legal process, order or warrant out of some Court that hath jurisdiction of criminal matters*, or by some warrant signed and sealed with the hand and seal either of one of the Judges of the said Court of Queen's Bench, or of the Superior Court, or of some Justice of the Peace,

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for such matters or offences for which by law the prisoner is not liable.—24 G. 3, c. 1. s. 3."

From these citations it is obvious that I am bound by law to discharge the prisoners upon bail unless the circumstances of the case, and Mr. Justice Mondelet's order, enforce upon me a contrary duty. This application has been strenuously resisted by the Crown Prosecutor, Mr. Ramsay, and he has done so mainly on the following grounds:

1st, Because I cannot sit in appeal or review upon a judgment of the Court of Queen's Bench.

2nd. Because, in addition to the general principle thus involved, our Provincial Statute excepts the case of any legal process, order or warrant of a Court having jurisdiction of criminal matters; and

3rd. Because, even if those difficulties were surmounted, the circumstances of the case and the evidence adduced are such that the parties should not be bailed.

I have had the advantage of hearing both parties at length, and it now becomes my duty to dispose of this case as thus presented to me. And first, as to whether this is a judgment of the Court or not. After the discharge of the jury upon the last trial, the case for the time being was disposed of, and there was no application, either on the part of the Crown, to fix a day for another trial, nor on the part of the prisoners for their discharge or for bail. There was absolutely nothing before the Court to adjudicate upon. But upon the discharge of the jury, the Court had the power, and indeed it was the duty of the Judge to remand the prisoners to jail until delivered in due course of law, or to the next session of the Court, fixing or not fixing the day for trial as the case might be. In remanding the prisoners the Judge added the following important declaration: "And whereas, from the positive evidence adduced in this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district, *without bail or mainprize, to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court.*" The first question which arises on the objection of the Crown is, whether this order is or is not a judgment of the Court, and if it be a judgment whether I can review, revise, or disregard it, emanating as it does from another Court, and of the highest jurisdiction in criminal matters? This is the first difficulty in the way of admitting the petitioners to bail. Before proceeding, however, to dispose of this branch of the subject, it becomes expedient to advert to a circumstance which should be steadily borne in mind in examining the proposition of the Counsel for the Crown. As a matter of law and of uniform practice, the prisoners were bailable for the offence charged, not only before but after indictment found against them: and the important fact that two successive juries empannelled to try the case disagreed, and after prolonged deliberation, and under great pressure and stern remonstrance from the Court, were discharged without verdicts, if it did not entitle them to an acquittal, rendered their right to be admittted to bail less doubtful; in truth, rendered it unquestionable in a case of misdemeanour. I have not the least hesitation in stating it as my belief that the refusal to admit

these men to bail under such circumstances, and for such an offence, would be without example or precedent in the annals of criminal justice.

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But that question did not regularly arise in this instance. There was no refusal to admit to bail, because no application to that effect was made to the Court by the prisoners. The honourable and learned Judge, without any motion on the part of the Crown, without any demand by the prisoners to be liberated on bail, without anything submitted upon which to rest a judgment of the Court, ordered the accused to "stand commited to jail without bail or mainprize till the next term of the Court, and not to be discharged without further orders of that Court."

The Judge expressed a very decided opinion upon the evidence adduced; and I must assume from that expression of opinion that the testimony was very strong against the accused: but he went further, and denied the prisoners the right to be bailed under any circumstances, with an implied order to all Judges of concurrent jurisdiction carefully to abstain from the exercise of that authority, and those powers which the law has expressly conferred upon them in matters of bail in criminal cases. It is worthy of remark that this order was given in remanding the prisoners for future trial on a charge of misdemeanour, and not upon a commitment in execution of a judgment by the Court. Upon the legality or illegality of this proceeding I am not called upon to pass any judgment: but I must state my opinion to be that, as this order was given without any application whatever having been made to the presiding Judge, it is not, and cannot be considered a judgment of the Court. It adjudicates upon nothing—it decides nothing—it disposes of nothing judicially. It was correctly argued by the Crown Prosecutor that no judgment of the Court of Queen's Bench could be brought before me by way of appeal under a writ of *habeas corpus*. If this be a judgment of the Court, I am bound by it; but, as I have just stated, it does not appear to me to bear that character; and, therefore, as I view the order, the first objection of the Crown to my entertaining this application is unfounded. I need scarcely add that this was not the chief objection urged by the Crown; for it was contended, in the second place, that even if not a judgment, it is an order of the Court, and as such is a legal bar under the statute to my proceeding to admit the prisoners to bail—that I can no more question the legality of an order than I can a judgment of the Court of Queen's Bench. In order fully to understand *in limine* the force of this objection, it is proper to refer to the statute itself.

The Judge before whom the prisoners are brought, as aforesaid, shall discharge the said prisoners from imprisonment, "unless it appears unto the said Judge, "that the party so committed, is detained upon legal process, *order*, or warrant "out of one Court that hath jurisdiction of Criminal matters." This is the language of the law. It is precise, peremptory, and free from ambiguity, and it is contended by the Crown Prosecutor that I am bound by this exception to the general rule—that I can neither pass judgment on the legality of this order, nor disregard it. On the other hand, it was argued by Mr. Devlin that this order is wholly illegal—that it renders an offence which was bailable—not bailable—that it assumes to abrogate by the exercise of a dangerous and arbitrary

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power the writ of *habeas corpus*, and the right to bail conferred expressly by the statute. That if such an authority can be exercised by the Court of Queen's Bench without any check or control, and plainly against law, it is manifest that the rights and liberty of the subjects must be seriously jeopardised; that if this order can be sustained, any order, however oppressive and outrageous, may be; and that there would be an end to some of the most important guarantees established for the protection of the accused parties before our tribunals of Criminal Justice—in short, that it was a violent, illegal, and perilous innovation upon the law and practice of the Court. Again, I must remark that it is no part of my duty to enunciate any opinion on the legality or illegality of that order, the honourable Judge presiding on the occasion constituted the Court—his order is the order of the Court, and I have no more right to offer any criticism of that order than I would have to review a judgment of that Court. And if in this case I should entertain an opinion entirely at variance with that honorable and learned Judge—it is quite beyond the scope of my duty to express that opinion. But the prisoner's Counsel goes further and contends with much plausibility, if not with much cogency of argument, that I am not called upon to adjudicate upon this order at all; that I should utterly disregard it; that on the one hand I have the law, and on the other an illegal order of a Court, and that in such a case my duty is to obey the law, and entirely to ignore an order which is manifestly contrary to law; that in fact this cannot be regarded as an order at all, but simply as something *obiter dictum* by the Judge, and an absolute nullity, in so far as my duty is concerned on this occasion. Numerous cases were cited, showing that some of the most eminent Judges of England have enunciated and enforced doctrines which directly sustain this view of the law in the case before me. I have considered these authorities carefully, and, were it not for the precise language of our statute, they would receive their application in the present instance; for I feel satisfied that were it not for the exception made in the law, excluding cases where parties are detained by an order of a Court of Criminal jurisdiction, my duty would be at once to liberate the prisoners on bail, irrespective of this order. They are, in my opinion, plainly entitled, under all the circumstance of this case, to be liberated, but I am bound to a contrary course by the order of the Court; and therefore, Mr. Devlin, it is with extreme regret that I am compelled to refuse your application. I would merely add, in conclusion, that in a case of this kind, when I have before me the order of a competent Court, and the prospect of a serious conflict of jurisdiction, and in a case of doubt as to whether I am to disregard that order or to admit the prisoners to bail, my plain duty is not to interfere, and such is the case in the present instance. This, no doubt, is a case of great hardship, and the precedent established, if it should not hereafter become one of an alarming character, it will be, because it is one which, in my humble opinion, it will not be judicious for Courts to follow.

Application for bail rejected.

B. Devlin, for Petitioners.

(W. E. B.)

MONTREAL, NOVEMBER 22ND, 1865.

In Chambers.

Coram BADGLEY, J.

Ex parte WAYNE W. BLOSSOM, *et al.*,

C. S. C., cap. 102, sec. 57. *Petitioners for writ of Habeas Corpus.*

HELD :—1st. That "*shall*" in this section is obligatory.

2nd. That in case of prisoners having been twice tried for misdemeanour and the juries in both trials discharged, because of disagreement, an order of the Court of Queen's Bench that the prisoner *be committed to gaol, without bail or mainprize, to stand his trial at the next term and not to be discharged without further orders from the said Court*, is void, and as such will be no bar to the granting of bail by any competent Court or Judge.

SEMBLE : That in such a case as the one above stated, the evidence of guilt of the prisoner is to be gathered by the Judge, to whom application for bail is made, from the conclusions of the jury, and not from the opinion of the judge presiding at the trial.

The application for bail on behalf of the said Wayne W. Blossom and Walter Clayton being rejected by Mr. Justice MONK, on the 9th November, the application was renewed to Mr. Justice BADGLEY, on the 18th of the same month, and the said Blossom and Clayton were brought before His Honour, on the writ of *habeas corpus* granted in their behalf.

Mr. Ramsay, who appeared for the Crown, addressed His Honor, substantially, as follows :—Can a Judge hear a petition on a *habeas corpus*, similiar to one already disposed of by another Judge ? Section 28 of the Statute (C. S. L. C. cap. 95) was enacted to relieve Judges of the responsibility of refusing writs of *habeas corpus* in cases already disposed of by their brother Judges on the pretext of judicial comity. As it was not possible to establish the rule that no party could in any case be liberated on *habeas corpus*, after his first petition had been refused, the section in question established a test; namely, " unless any new facts are stated." It is in vain to pretend that it is within the power of the applicant to avoid the operation of this enactment by simply changing the form of his petition. There must be really and truly a new fact or facts. In the present case it is not pretended that a single new fact has arisen since the application to Mr. Justice MONK. The first petition was by Wayne W. Blossom and Walter Clayton, accused of a misdemeanour, to be admitted to bail, and the present petition is by the same parties and for the same purpose. But it is said that section 28 only forbids the intervention of a second Judge if the writ has been "refused" by any one Judge, and that in this case the writ was not refused ; that it was granted, and that on the writ the petition was refused. This is verbal quibbling run mad. Can it be pretended, with the object of the law clear, that refusing a writ by a Judge does not mean refusing the application? Will it be maintained that if the first Judge refuse the petition without issuing the writ, he precludes a second Judge from taking another petition, setting forth the same grounds as the first, into consideration ; but that if the first Judge goes a step further and issues the writ, in fact, adjudicates more fully on the question, that the second Judge thereby becomes competent to hear a similiar petition ? If it be so, the law of common sense and the law for the interpretation of statutes must be at variance, which I do not believe. It is pre-

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tended, however, that the same extraordinary and exceptional mode of interpretation should be applied to this section, other than the well known maxim *Ubi eadem ratio ibi idem jus*, in favour, it is said, of the liberty of the subject. This is a double error, and one so common as to deserve a check. In the first place, even if the matter in question were the interpretation of a statute interfering with the beneficial and constitutional writ of *habeas corpus*, the rule quoted would apply. In the second place, there is no particular sanctity or veneration attaching to the writ of *habeas corpus* to admit to bail; the writ derived from *Magna Charta*, preserved by the Bill of Rights, and so on, is the writ of *habeas corpus ad subjiciendum*, and the two are no more akin to one another than a writ of summons and a writ of execution. In England there were at one time several—no fewer than four sorts of writ in force, by which a prisoner might be brought up to give bail. It is, therefore, sovereignly ridiculous to indulge in mock heroics whenever an application is made to admit a prisoner to bail. *De jure* a person committed on suspicion, and especially one against whom a bill has been found, has no absolute right to bail; and consequently no sentimental question as to the liberty of the subject is involved in such an application. As to Mr. Justice Mondelet's order—section 4, ss. 3 (C. Sts. L. C., cap. 95) has been subjected to some criticism. On one hand it is pretended that the words at the end—" for which by law the prisoner is not bailable," control the whole section, and that the object of the section is simply to exclude any interference with a prisoner undergoing sentence. The answer to this is two-fold. First. In the early part of the section the cases of execution of a sentence are expressly reserved from the application of the section (" not being convicted or in execution by legal process") ; so it does not apply to them. Second. There is no such thing as an offence " not bailable " by a Judge of the Queen's Bench, or of the Superior Court; that is before sentence. It would therefore seem that Judge Mondelet's order, whether good, bad or indifferent, for about that we are not called upon to agree, was within the scope of his functions. In fact, to set aside his order you have to interpret a statute and set yourself up, sitting in Chambers, as a Court of Appeal from the judgment or order of the Court of Queen's Bench. Would it be discreet to bail the prisoners even if you had jurisdiction ? But, even supposing Mr. Justice Mondelet's orders were, as the petition says, " extra judicial," would such an opinion as it expresses as to the evidence, coming from the Judge who heard the case twice, not preclude any other Judge from assuming the responsibility of admitting the prisoners to bail ? Your power is only discretionary, and how could you pretend to have exercised it discreetly if, in face of such an opinion, you admitted the prisoners to bail ? On what could you pretend you based this discretion ? You know nothing of the evidence. Mr. Justice Mondelet heard it all from the mouths of the witnesses, and heard it sifted and examined by counsel on both sides. But the affidavits ? but what are they to the whole evidence ? But the affidavits are conclusive of the prisoner's guilt. They were taken in the actual perpetration of an overt act; nay, more, the act to do which they conspired—of their conspiracy. In answer to this, we are told that this is only a misdemeanour, and that all persons accused of misdemeanour must, necessarily, be admitted to bail; that these men have been twice tried, and consequently, that

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they are entitled to an acquittal, or, at all events, to stand out on bail; and even, their counsel says, on their own recognizances. To this I reply that the admission to bail in misdemeanours, as in felonies, is purely discretionary with the Judge. He admits to bail if he thinks, from the quality of the prisoners, from the nature of the crime and the doubtfulness of the evidence, there is a reasonable probability that the prisoners will reappear to take their trial. Upon these questions there can be no doubt—(2 Hale, 127.) But it is pretended that our statute says that in misdemeanours the prisoner "shall" be admitted to bail. I maintain that "shall" there is not imperative (sec. 57, Con. Stat. Can. cap. 102); for we find in sec. 53 the word "may," which with the general principle cited above in the reference to Hale will settle this question. With regard to the right of prisoners who have been tried twice, the jury in neither case agreeing to an acquittal, I have yet to learn on what that proposition is founded. In the United States, whence these men come, it has been held that the disagreement of a jury is no reason for admitting prisoners to bail. ["Hurd" on Habeas Corpus, p. 446.] I must admit, when I heard Judge Monk weighing the presumption arising from the disagreement of the jury, against the strongly expressed opinion, if nothing more, of Mr. Mondelet's order, the idea came upon me with all the freshness of novelty. I have sought in vain for any such principle in the books, and I find it not; nor does it seem to me to be supported on abstract argument. Does not the argument work both ways? Are not the jurors who refuse to acquit as much to be considered as those who refuse to convict? Now to come to the facts,—if my view of the law is correct—on what do the prisoners base their claim to have this favour extended to them? Everything that is commonly taken into consideration in questions of the expediency of admitting prisoners to bail is against them. 1st. Their crime, though called a misdemeanour, is highly penal. 2nd. The object of the crime, the procuring a large sum of money, makes it important that care should be taken that the punishment should not resolve itself into a pecuniary penalty only. 3rd. The evidence of their guilt is positive, nay, more, the facts are not questioned; the defence consisting of the pretence that Mr. Sanders consented to the kidnapping, and consequently that there was no conspiracy, backed with this other consideration, that O'Leary was a Roman Catholic and a Free Mason; *ergo*—that the prisoners did not conspire to kidnap Sanders. 4th. The fact that these men were foreigners, in fact vagrants, who have no need to return here, and who certainly will not return for the luxury of standing a trial.

Mr. Devlin proceeded to reply at considerable length; his address being for the most part a repetition of the arguments advanced when the case was brought before Judge Monk. He contended, in brief, that Judge Mondelet had no power to suspend the privilege of *habeas corpus* or bail in this case, and that his order doing so was so unprecedented, arbitrary and illegal; and that two juries having failed to agree upon a verdict on the trial of these men, the offence being but a misdemeanour, they were entitled to enlargement on the tender of proper security, which they could readily give. That further, this was a new petition, and that, should the opinion of His Honor coincide with that of prisoners' counsel, is would in no way conflict with the grounds upon which the last petition was

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rejected. Mr Devlin argued also to this effect: my position is founded expressly upon the illegality of Judge Mondelet's order; therefore, it is new in every respect from that presented to Judge Monk. Taking all the facts together, it is as clear as the sun that these men are entitled to bail unless there is something in the way to prevent your Honour from conceding that right to them—unless you consider this order binding. If you are of opinion that a judge of Queen's Bench, because he is sitting there, can do a thing entirely opposed to law—if you think he can suspend a writ of *habeas corpus* in a particular case, for a period of six months and say—I command all other Judges to abstain from inquiring into the legality of my conduct—it is for your Honor to state so. It is for you to say whether Judge Mondelet has that power or not. Because if he has, I should not be at all surprised if some individuals happening to sympathize with my clients were sentenced to undergo six months imprisonment on a similar order. If these men instead of being foreigners, were our citizens, you would have had Montreal in arms against this order. But because they are foreigners, and the public mind has been prejudiced to a certain extent against them, they are allowed to lie in jail. This order has been universally approved of with the exception of one of two journals in this city which have uttered a feeble protest of the milk-and-water kind against it. I submit my clients are clearly and unmistakeably entitled to bail.

Mr. Ramsay wished to correct the error of the learned gentleman's. He did not wish it to go abroad for a moment that there was any difference in the administration of the law as between foreigners and persons here. The only reason why he mentioned the word "foreigners" was that the prisoners, being so, were assimilated to vagrants as regards the matter of granting bail. It was not because they were Americans, or of any other nationality, for he did not believe that that made any difference to us.

Badgley, *J.*—It makes no difference at all.

Mr. Ramsay.—Certainly not, your Honor.

Mr. Devlin said it was the first time he had heard foreigners assimilated to vagrants. If that was to be the doctrine, he thought that we would have few foreigners coming among us.

Mr. Ramsay replied that the learned gentleman misunderstood his remarks. A vagrant was a man who had no position or status in the country, which was true in the eye of the law, as regards foreigners also; and the men who went by five or six names as some of the prisoners had done, were very much in the position of vagrants in the broadest sense.

On the 22nd of November, 1865, Mr. Justice Badgley, in giving judgment on the above application, said:

The petitioners applied to me for a writ of *habeas corpus*, for the ultimate purpose of standing out upon bail, but ascertaining at the preliminary hearing before me that technical objections of a serious character existed, in consequence of their unsuccessful application upon a previous writ to Mr. Justice Monk, the present writ was ordered to issue that I might, from the return made to it, be informed of the circumstances of the case, and of the previous proceedings had thereon. This was the more necessary from the statutory objection strongly

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urged against a second writ when the first has been refused, as well as from the ruling of my judicial colleague for whose opinion I entertain the most respectful consideration, not only from his judicial position in connection with myself, but from his known intelligence and experience in matters connected with criminal jurisprudence.

The writ issued in consequence, and its return has been accompanied with all the particulars connected with the previous proceedings, thereby obviating the necessity of affidavits to establish the circumstances. The circumstances of the case, and the legal proceedings upon them, obviously present themselves for primary consideration.

On the 7th of August last, the accused were arrested in an attempt to kidnap Mr. Sanders, with the object of transmitting his person within the territories of the United States, where his apprehension would secure to them a very large reward, said to be offered by the United States Government.

He was not charged with any offence under the Extradition Treaty, and these persons were actuated solely by considerations of the money to be made by the operation.

They were arrested on the 7th of August, regularly committed on the 16th, and at the ensuing Sessions of the Court of Queen's Bench, in this city, an indictment for conspiracy to kidnap Mr. Sanders, with the usual averments of assault, &c., was found against them, to which they pleaded not guilty, and on the following 4th of October they were put upon their trial. This trial lasted from the 4th to the 9th of October, when the jury were discharged, having been unable to agree, after a deliberation of three days.

The prisoners were, of course, remanded for a second trial, with a new panel of jurors; and this trial commenced on the 17th of October and continued until the 30th of October, the last day and close of the Criminal Sessions, when this second jury were also discharged—also having been unable to agree upon a verdict, after a deliberation of nine days.

Upon both trials the presiding Judge charged strongly, for a conviction, and after the discharge of the second jury, on the 30th, he made the following order:

"The Court, in consequence of the non-agreement of the jury to a verdict, discharges them, and it is hereby adjudged and ordered that the four prisoners be remanded to the common gaol of this district.

"And whereas, from the positive evidence adduced in this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district without bail, or mainprize, to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court."

The original commitments, with this order, have been returned with the writ, together with the original affidavits, the subsequent indictment with the proceedings thereon, and also the previous writ of *habeas corpus*, and the proceedings upon it before Mr. Justice Monk, with his refusal and rejection of the writ. Complicated and important as the matter submitted doubtless was upon the first writ, the difficulty, in a technical point of view, has been much increased by this second application; which, it is urged by the Attorney-General, is obnoxious to

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the statutory objections contained in the 28th sec. of our Provincial *habeas corpus* Act.

The section is as follows: "Whenever a writ of *habeas corpus* has been once refused by any one Judge, it shall not be lawful to renew the application before him, unless any new facts are stated, or before any other Judge; but application may, in any such case, be made anew to the Court of Queen's Bench," &c.

It is only necessary to observe upon this enactment that it is peculiar to the *habeas corpus* law of Lower Canada, and it is by no means creditable to our jurisprudence or judiciary; it is of recent legislation—an unfortunate addition to our local, excellent, and time-honoured original statute. It has no parallel in the *habeas corpus* law of England or Ireland, or of our sister province of Upper Canada, or of any of the United States. It was intended to preserve the equanimity of certain of our Judges some time ago, whose opinions upon applications for *habeas corpus* had been overruled by others; but it is at variance with the whole purview and intent of the Act, and with the first section of the statute, which gives to all persons in Lower Canada the full benefit and relief of the writ in as full, ample and beneficial a manner as Her Majesty's subjects in England (I give the words of the Act), who, we know, may take their applications to all the Judges in Westminster Hall in succession. However that may be, the objection from the section of statute is preliminary and important in character, and must be settled before proceeding further.

The section necessarily refers in the first instance to the application for the issue of the writ, which, if insufficient in itself, cannot of course be renewed, without new facts; but the section also obviously involves the judicial refusal to act upon the writ when issued. If from the circumstances or proceedings submitted, refusal is decided upon—as in this case, the refusal to act upon the first writ would necessarily be final unless new facts were stated as required by this statute. To ascertain the possible existence of these new facts, it is necessary to compare the applications.

The first contains simply the statement of the committal of the accused, the finding of the indictment against them, their arraignments and their two trials, with the discharge of the two juries, and thereupon declaring themselves not guilty, they claim their discharge, or bail upon their own recognizance.

The second application contains the same detailed statements, but it also sets out, in addition, at length, the above recited order, made after the discharge of the second jury on the 30th Oct., the detention of the accused under that order, and their claim to stand out on bail. 1st. Because the offence charged being a misdemeanour only, is bailable by law. 2nd. Because their two trials without a verdict, by reason of the discharge of the two juries for non-agreement, is evidence of grave doubt of their guilt; and 3rd. Because the order itself cannot legally exclude the operative effect of co-ordinate judicial power to admit to bail in legally bailable cases, such as theirs.

The new facts stated in this second application, it is enough to say without commenting upon other dissimilarity between the two averments, are clearly sufficient to take this application out of the statutory objection. The preliminary objection therefore cannot sustain itself, and must be necessarily overruled.

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Proceeding onwards to the writ itself, very important objections against it have been advanced, and a similar result is required upon this writ as upon the previous one; and here *in limine* it will be proper to observe that by the effect of their remand, after the discharge of the second jury, the prisoners have necessarily been thrown back for detention, not upon the indictment, which is only the accusation and charge formed for their trial, but upon the original commitment for the originally charged offence, namely "the conspiracy to kidnap." It must be stated that this offence is unquestionably a misdemeanour only, and that according to law, common and statute, to all intents and purposes, it is undoubtedly a bailable offence, that the statute in express terms making it obligatory to admit to bail on such charges; and here it is proper to advert briefly to a verbal objection set up by the Attorney General, as to the obligatory term used in this statute. The objection is plainly founded upon a misapprehension by the Crown prosecutor as to his construction of the word *shall* used in the 57th section of the statute, which provides that "if the offence is a misdemeanour, then the "Justices shall admit the party to bail." He says that this word is not *obligatory*, but that the admission to bail is protestative only, because the 53rd section is the operative law, and in that section the word *may* is used in connection with bail for a misdemeanour. This is not so, however; the 52nd section and 53rd section do both refer to bailing for offences, and point out by whom that power shall be exercised. The 52nd section provides for and requires the presence and action of two Justices to bail for felony, whilst the 53rd section provides that one Justice may bail for misdemeanour. There is manifestly no question in them as to the principle of admitting to bail, which is positively fixed by the words of the 57th section, whilst those two sections only point out the persons who shall have power to act. Clearly there is nothing in this verbal objection, and *shall* remains obligatory still, notwithstanding.

Now, after the discharge of the jury, the prisoners remaining in effect untried, nothing remained but to remand them to prison to await another trial or until their discharge, according to law. There was nothing to adjudicate upon, no special order was required, and the prisoners had made no application for their admission to bail, upon which the Court could affix an order or make a decision. However the above order was made, the remand was of course, unobjectionable; but the following was gratuitously added to it:—

"And whereas, from the evidence adduced in this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district, *without bail or mainprize; to stand their trial at the next term of this Court, and not be discharged without further order from this Court.*"

The terms of this order are very extraordinary: their legal effect is to exclude the petitioners for the pale of the law—plainly to tell them that there is no beneficial law of liberty for them; and to use the forcible language of the petitioners' counsel, to suspend the *habeas corpus* Act as regards them. It is not easy to discover whence such judicial authority has been drawn; it does not belong to English law, it is not within the attributes of English Judges. If

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remands, which are mere commitments in effect, may be coupled with such orders of exclusion, why should not all commitments have similar additions? It is true that the Court of Queen's Bench has, by common law, the power to exercise extraordinary discretions, but no instance in the books can be discovered where its discretion has been exhibited in such a manner, bearing in mind, at the same time, *that this order is entirely and absolutely exparte, and without any application by the parties to the Court, and that the parties interested in it were absolutely not heard nor allowed to be heard upon it before being sent back to prison.* But the order is simply an order; it is not a judgment—it has none of the attributes of a judgment—it could not be got rid of by Writ of Error: because the Writ of Error only acts upon final judgments. If it is an order, it is not exclusive, unless it is declared so by the law; and if so, it must, of course, be submitted to, however extraordinary it may be. Without hearing the accused it goes to the extent of ordering all Judges of concurrent jurisdiction to abstain from interference with it, and from exercising those powers which the law compels them to exercise under the infliction of heavy penalties. Being, therefore, clearly no *final* judgment, which it would be impossible for me to touch if it were, it is urged that even as an order it excludes all concurrent judicial action, and that its power is to be found in the provisions of the 3rd subsection of the 4th section of our *habeas corpus* Act. This difficulty is purely technical, involving the construction of the latter part of the sub-section. After the statute has provided, viz: "*that all persons committed or detained in any prison in Lower Canada shall of right be entitled to demand and obtain from the Court of Queen's Bench, or Superior Court, or any one of the Judges of either, the Writ of Habeas Corpus, with all the benefit and relief therefrom, &c.,*" and has also provided, 2nd, for preventing delays to returns of writs, it directs that the writ shall be granted by one of the Judges on view of the copy of the warrant of commitment and detainer, and shall be returned *immediate* before such Judge; 3rd, that the person in custody shall be brought before the Judge by the detaining officer, who *shall return the writ with the true causes of the commitment and detainer.* It, thereupon, 4th, provides that the Judge shall, within two days after the party is brought before him, discharge the prisoner from his imprisonment, taking his recognizance, &c., &c., according to his discretion, &c., &c., for his appearance at the court of Queen's Bench at its next term, &c., &c.,—*unless it appears unto the said Judge that the party so committed is detained upon a legal process, order or warrant out of some Court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal either of one of the Judges of the said Court of Queen's Bench, or of the Superior Court, or of some Justice of the Peace, for such matters or offences for which by law the prisoner is not bailable,*—24 G. 4, c. 1, s. 3.

In the construction of statutes it is necessary for good interpretation that the words used should be read as following those with which they are connected or to which they really apply. Now this clause is the concluding portion of the 3rd sub-section which I have given summarily immediately preceding it, and is restrictive of the power to bail whenever the party so committed is detained upon some legal order out of some Court that hath jurisdiction, and "*is for such matter*

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of offence for which by law the prisoner is not bailable." It is manifest that the detention must be for some offence—without it there could be no detention; the offence therefore is the correlative of detention, and the order therefore of detenton must be for an offence. But the restriction or limitation of the statute applies only to offences not bailable; therefore all bailable offences are beyond the effect of the order, which therefore cannot apply to them, and therefore is contrary to law. Mr. Justice MONK rested at the *order* only, without taking into consideration that the order of detention must have been for some act or offence, and could not have stood alone without the concluding words of the section—"*for such matters of offence for which by law the prisoner is not bailable.*"

I have no hesitation in stating my clear conviction that the latter words of the secton are its important portion, and that they do not and cannot be made to give any effect or validity to the order in question.

But it is urged that the limitation is useless because there is no crime or offence which is not bailable. The answer is to be found in the statute itself, which excepts persons committed for treason or felony, plainly expressed in the warrant as well as persons convicted or in execution by legal process, who are, consequently, not entitled to this writ either in term or in vacation. I ch. Cr. L. 126, Com. Dig. Hab. Corp. 3. And in this is the answer to the argument respecting commitments for contempts, which, being executions, of course cannot be touched by *habeas corpus*. It is true that although *de jure* these exceptions exclude, yet *pro favore*, the power may be exercised. Whether it be so or no, the argument does not take away the right by a Judge, under the statute, to issue the writ if there is probable cause shewn to relieve the applicant. "The Crown, "in all cases of illegal or wrongful detention is in legal presumption concerned "in having justice done, and therefore must be a party to the proceeding to "remove it. It is a prerogative writ which the Sovereign may send to any place, "having a right to be informed of the state and condition of every prisoner, and "for what reason he is confined."—1 Ch., C. L. 119, Bac. Abr., tit. Hab. Corp. 2. In other words, the proceeding in *habeas corpus* is an inquisition by the Government, at the suggestion and instance of an individual, but still in the name and capacity of the Sovereign.

Now, to justify the detention, the return must shew it to be founded on legal authority. There can be no doubt as to the commitment, and as to the remand here which is in the nature of a recommitment; further than this we cannot legally go upon this order. Hawk, p. 186, says: "The conclusion should be according to the purpose of the commitment. At common law the conclusion usually was *there to remain until he shall be discharged by due course of law.*" And Hale, p. 6, 584, says: "If the conclusion be irregular, the warrant will not for that reason be void, but the law will reject that which is surplusage and the rest shall stand." Is this order to stand as part of the commitment? Clearly not; it is the surplusage of Hale. Can it be allowed to stand as a barrier against co-ordinate jurisdiction? Clearly not; because it is not supported by the *Habeas Corpus* Act, which orders the direct reverse. It is a rule essential to the efficient administration of justice, that where a Court has jurisdiction over the subject matter, and regularly obtains jurisdiction over the person, its right

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and duty is to determine any question which may arise in the cause without the interference of any other tribunal; even so, but then it must rest upon its legal authority. This rule is not without exception, because though it is objected herein that the Judge has no jurisdiction, it must be observed that the provisions of the *Habeas Corpus* Act are very general and comprehensive: in every case in which there is a detention without lawful authority the party may be released. Why? Because when a Court acts without authority its orders are nullities; they are not voidable but simply void, and form no bar to a recovery sought, even prior to reversal; they constitute no justification; still, even in such case as this the action of the bailing Judge is not revisory of the order; it is simply the exercise of the power under the law to arrest the execution of a void order; it acts directly on the effect of the order, namely, the imprisonment, but only collaterally on the order itself. Assuming, then, the authority to act, notwithstanding the order—assuming that this order itself cannot control the statute or the action of co-ordinate judicial authority—assuming that it can have no objective effect, as to the application for bail, that as to the prisoners it was obstructive, and made for the purpose of putting them beyond the pale of the law, and as to the co-ordinate Judges, it was preventive of their action under the statute, it is clear that both as an obstruction and a preventive it was decidedly void; it carried its own contradiction in its own terms; it impliedly admitted the right of these persons to be admitted to bail, by anticipating their application for the advantages of the statute, and obstructing and preventing the right. Why should such an order have been made at all if the offence were not bailable? The order itself admits and confesses the privilege of the prisoners to be admitted to bail.

Not considering the order any longer, this return shews the commitment for a bailable offence, and their detention under that commitment. I am free to confess that however much I may desire that the prisoners should be punished for their outrageous breach of our laws, I still more desire to act within the law, and under that impression I find it beyond my power to refuse their application. Now Hawkins says, "Bail is only proper when it stands indifferent whether the party is guilty or innocent of the accusation against him, as it often does before his trial." But he adds: "Where that indifference is removed, it would, generally speaking, be absurd to bail him." But how stands this case? Two trials, with two different sets of juries, two discharges of the jury after prolonged consideration—all this is indicative of doubt, and the following case, which goes far to exemplify my position, shews that the presumption of guilt, by the effect of the two discharged juries without verdict, is absolutely set aside.

In Wheeler's Criminal Cases, p. 404, is a case for manslaughter, from which the following extract is taken from the remarks of the Judge:—

"In some late cases bail has been refused when the offence was a felony punishable with transportation; as, in 2 D. and E. 77 and 3 East, 157; and there is therefore no fixed or certain rule in cases of felony, each particular case depending upon its peculiar circumstances. The object and end of imprisonment before trial and conviction is to secure the forthcoming of a person charged with the commission of a crime, and it is never intended as any part of the punishment; for until the guilt of the party be legally ascertained there is no ground

for punishment, and it would be cruel and unjust to inflict it. The laws of every free government estimate personal liberty as of the most sacred character, and it ought not to be violated or abridged before trial; but in cases where there are strong presumptions of guilt, and although the nature and kind of punishment which await those whose guilt is legally established, does not alter the turpitude of the offence, it must enter into the consideration of the question of bail; for if the punishment would be a pecuniary infliction, then bail, if more than the amount of the probable fine, answers every purpose: if the punishment be death or corporal punishment consciousness of guilt would probably induce to flight, and an evasion of the punishment; and in admitting to bail, therefore, regard must be had to the probable guilt of the party, and the nature of the crime, and the nature of the punishment demanded.

"It appears to me, from the facts before me, the conclusion is inevitable, that it is quite doubtful whether the prisoner is guilty; and I think it stands indifferent whether he is so or not. After a long and laborious trial, the jury have not been able to agree, and what proportion of them were for convicting, and what for acquitting has not been shown. No inference can be drawn from the fact that the foreman pronounced a verdict which was dissented from by the third juror, that all the other jurors were for convicting the prisoner: and it may well be that a bare majority of the jury agreed to the verdict as assumed by the foreman. I perceive that all the jurors viewed the case as of a mitigated character, by their recommendation of the prisoner to mercy. I must presume that the jurors were impartial, and that their final disagreement proceeded from a conscientious difference in opinion as to the prisoner's guilt; and I am therefore bound to conclude that the prisoner may be innocent of the offence. In such a case, as I understand the law, he is entitled to be bailed, if he can give it in amount, and by persons of sufficient ability, affording a reasonable expectation, from the impending forfeiture of the recognizance that he will appear and stand trial."

I perfectly concur with the foregoing, and will only add, that if doubt of guilt was the legal result of the disagreement of one jury, how much more strongly should the presumption of innocence, in so far as it affects the application to be admitted to bail, follow the discharge of two juries.

It only remains to advert to the bail to be given, and although Mr. Justice Monk construed the law as to the order differently from me, and that such technical differences must be naturally expected, that learned Judge and myself have no difference of opinion as to the effect of the two discharges upon the presumption of guilt in this case: without the order in his way to act, he was strongly of opinion to admit the application to bail, as I now do. Hence, following Hale, pp. 101 and 2, Inst. 189, I hold that the discretionary power has arisen, which is only designed to release the accused, whilst his culpability is uncertain, and his consequent punishment undecided. I cannot, therefore, take the opinion of Mr. Justice Mondelet upon the facts of this case. I can know nothing of the evidence adduced, except from those whose province it is to pronounce their verdict upon it; and as they have disagreed, the law necessarily gives the advantage of the presumption of innocence to the prisoners to the extent, not that they shall be discharged absolutely, but that they may stand out upon bail to take

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their trial hereafter in concurrence with their remand. They will, therefore, be admitted to bail, themselves in $1200 each, and two sureties for each of $600 each—the sureties to justify.

Application granted.

T. K. Ramsay, for the crown.
B. Devlin, for petitioners.

COURT OF QUEEN'S BENCH.

QUEBEC, DECEMBER, 1865.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., and MONDELET, J.

Ex Parte WAYNE W. BLOSSOM,

Petitioner for Writ of Habeas Corpus.

HELD:—That a person charged with misdemeanour is, after two trials for the same and disagreement of the jury in both trials, entitled to bail, and such bail will be granted.

On the 29th of November, 1865, Mr. Justice BADGLEY issued an order to the keeper of the Common Gaol for the district of Montreal, to bring before him Wayne W. Blossom, that he might be admitted to bail.

Mr. Payette, the gaoler, in answer to the said order, begged respectfully to bring under the notice of the said honorable Justice that he was not in possession of the writ of *habeas corpus* issued by his Honor, and that therefore he had no right to bring up before his Honor the said Wayne W. Blossom.

A copy of the said order was served on the sheriff of the district of Montreal by the high constable, who returned as follows: No writ of habeas corpus having been served upon me in this case, I am not authorized to bring up the body of the said prisoner, Wayne W. Blossom, or to allow him to go at large out of the precincts of the said gaol.

(Signed,) T. BOUTHILLIER.

Montreal, 29th Nov., 1865.

On the 6th of December, *Mr. Devlin* applied to the Court of Queen's Bench, for a writ of habeas corpus to bring the said Wayne W. Blossom before the said Court, which was granted, and the said prisoner being produced, an application was made for bail; but owing to the absence of the honorable Chief Justice and the equal division of the Court, no judgment was given, and the application was renewed before a full Court in the ensuing session at Quebec when the application was granted.

Mr. Ramsay, contra. This case is now so well known that I shall endeavor to confine the argument as much as possible; nevertheless, it is necessary to state that this application is rendered more complex than it would otherwise be by the order given on the last day of the term of the Court of Queen's Bench, Crown side, commonly called, Mr. Justice *Mondelet's* order. It has been broadly stated that all misdemeanours are necessarily bailable, by all magistrates, Judges or Courts authorized to admit to bail, and that they have no discretion to exercise. If this be so, then the order affecting the applicant is clearly bad; but it may be

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well to reflect before coming to that conclusion, on the effects of such a decision. It is in fact to say that in every offence styled a misdemeanour, no matter how heinous it may be, the punishment can be commuted for a fine. But need such a declaration be made? I propose to show, by the old law, the decisions in England, and by our statutes that it need not. Our act touching *habeas corpus* and bail is drawn first from the Statute of Westminster 1st. Before that statute it would seem that all offences were bailable, save perhaps treason and the death of a man, and by that statute a list is carefully given of those cases that are replevisable and those which are not. That classification is not the one now laid down of misdemeanour and felony. Among those excluded from bail are persons taken "for manifest offences;" and this distinction is based on the general principles of bail. See Hawkins, Bk 2, ch. 15, sect. 45—"*Nor persons accused of open offences*, for the reason of bail is, that it is dubious whether the party be guilty; but where he is notoriously guilty, he shall not be bailed." 1 Comyn's Dig., vo. Bail (F 1.) And North, C. J., said in *Hall* vs. *Booth*, 1 Mod. Rep., 236—"The reason of bail is upon a supposition of law, that the defendant flies the judgment of the law." Nothing can be better established in principle than this, that bail is not to be taken at all except when there is a reasonable probability that the prisoner will abide his trial, either because the evidence is slight or the penalty trifling. And it is for this reason that persons of ill-fame are not bailable. Anon. 12 Mod., p. 431. And this *dictum* of Holt, C. J., applies to misdemeanours as well as felonies. Petersdorff's Abridg. vo. Bail. But, again, the St. of Westminster 1st never applied to the Court of Queen's Bench, which always had the discretion to accept or refuse bail. See 2 *Hale*, p. 129, 2 Inst. 188-9. Rudd's case 1 Leach 130. Exp. Baronet 72 Com. Law. Rep. Petersdorff on Bail 483 and 486. We next come to the St. of Chas. II, the *Habeas Corpus* Act, which is almost totally incorporated in chap. 95 C. S. L. C. Section 1 of our act gives the general right to the writ of *habeas corpus*. Section 2, at least the first part of it, gives the mode in which it shall issue; but it does not oblige the Court of Queen's Bench to issue the writ, or if issued to do anything under it, so that there can be no doubt that its discretionary power is left unembarrassed even by that act. And here I should observe that the words "one of" in the second last line of page 874 of the C. S. L. C. must be struck out, as an interpolation which makes nonsense of the section. Having shown that the Court of Queen's Bench, and probably the Superior Court, have complete discretion in this matter, I shall now proceed to show that so has a Judge in vacation; and this brings us to sec. 4 C. S. L. C. In sub-section 3, I find a "shall" which is against me. It has been argued that that word obliges even a Judge in vacation to admit to bail in all cases of misdemeanour. That this is not the case I think appears plainly from the context; but I propose to show that the legislature elsewhere recognizes his discretion.

DUVAL, C. J.—The "shall" there refers to the two days.

Mr. Ramsay.—I am glad to hear the Chief Justice give so strong an opinion in favor of my pretension: but I still may be permitted to cite section 55, C. S. C., cap. 102, as it seemed to be the opinion, when the case was argued in Montreal, that this "shall" was against me. If it be not, then my second point

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is gained, and I may say that a Judge in vacation has an unlimited discretion to admit or to refuse bail in all cases whatsoever. Before leaving this section, I would, however, remark that the distinction of the Statute of Charles II. is not that now made, but between suspicion of felony and whether the treason or felony is plainly expressed in the warrant of commitment. Yet in R. *vs.* Mark *et al.*, 3 East, 157, this distinction was not attended to, and the court re-committed, although it was dubious by the warrant whether the statutory felony had been committed. I next come to magistrates. It has been said that they, at all events, are bound to take bail in all cases of misdemeanour, and that the obligation on them is directory to Courts and Judges in the exercise of their discretion. I contend that the statute upon which this pretension is based (secs. 53 and 57. C. S. C., cap. 102), should not be so interpreted. In the first place, section 53 says one Justice *may* bail. At first sight this appears discretionary, and is consequently in my favour. But this is denied, and it is urged that *may* is used to distinguish the case of misdemeanours from felonies, where it requires two Justices to bail. This seems to me to be an error; *may* is not required for this purpose. If the Legislature had desired to take away all discretion from a Justice, it was perfectly easy to use the imperative "shall." In the next place, in section 57, there is the word "shall" bail in misdemeanours, and it is contended that this is imperative and against me. I admit this to be so at first sight; but if the sentence be examined it will be found that *shall* applies to two classes—1st, where the magistrate thinks there is only a suspicion of felony, so strong as not to permit him to let the accused go, but too slight to refuse bail, and for this *shall* is absolutely required, because it is *shall if he thinks fit*, therefore shall is discretionary; 2nd, where it is only a misdemeanour. I therefore propose to read shall or may, and this is, I believe, a perfectly legitimate mode of dealing with the difficulty; for a difficulty there is, because *may*, of section 53, must be read *shall*, or the *shall*, of section 57, must be read *shall* or *may*. I think I have established, therefore, that neither in the old nor the recent statute law is there anything to support this iron rule, monstrous and absurd in itself, and contrary to every principle, which it is now attempted to lay down for the first time in this country, namely, that all persons accused of misdemeanour are entitled to bail. Since I argued this case before, I enquired in the Police Court, in Montreal, if such a rule had ever prevailed there; and I was told that it had not, that bail had frequently been refused in cases of misdemeanour by the Judge of Sessions, whose experience ought to have some weight although the Judge of an inferior tribunal. But it has been said, where is there an English case of refusal to bail a misdemeanour? I answer where is there a case of conspiracy to kidnap of this sort? Kidnapping in England is a felony by the 43 Eliz., and if that statute had been in force here this question would not have arisen; but heinous as these people's offence is, I was fully aware, before drawing the bill of indictment, that I could only get at the whole four prisoners by means of an indictment for conspiracy. If, however, I cannot get a direct case of a person accused of misdemeanour being refused bail, I propose to show that the discretion to bail or to refuse bail always existed even with Justices of the Peace. In the case of *Reg.* vs. *Tracy*, 6 Mod., the distinction was made of its being a *common*

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misdemeanour; but on the other hand, it is said that in *Marriot's* case, Salkeld, 104, bail was taken because it was only a great misdemeanour. One of these cases is therefore for, the other against me. But there are a number of cases from which the discretion of the magistrate may be inferred. Thus in *Muriel* vs. *Tracy*, 6 Mod. 169, an action against a magistrate for refusing to take bail in a misdemeanour, the magistrate was held not liable, as there was no evidence of malice on his part. The same holding was maintained in *Linford* vs. *Fitzroy*, 66 Common Law Rep. 240, and this case was distinguished from Badger's case, 45 Com. Law Rep. 468, where the magistrates were compelled to pay the costs of the rule because they had acted improperly; but the Court refused to order an indictment. These three cases therefore support each other, as does also the case of *Prickett* vs. *Gratrex*, 55 Com. Law Rep. 1029, where it was held that *bona fides* wont justify a magistrate; *i. e.*, where the act is purely ministerial, his good faith is no excuse for a wrongful act.

The next point in the argument is the order. This has been called a most arbitrary and unheard of order. I shall make it my duty to show that it is quite the reverse.

DUVAL, C. J.—The order may have been wrong; but it certainly was neither unusual nor arbitrary.

MEREDITH, J.—No sensible man can blame Mr. Justice MONDELET for the order, since it appears that even now the Court is divided as to whether he was right or wrong in making it.

Mr. Ramsay.—In *Reg.* vs. *McAttavy*, 4 Cox, p. 444, and *Reg.* vs. *Maginnis*, 5 Cox, p. 511, orders similar to the one complained of were given, and the Court of Queen's Bench in Ireland would not interfere at all. They did not say they had not the power, but they would not. And in another case, *Reg.* vs. *Harris*, 4 Cox, p. 21, Mr. Justice *Earle* refused bail because the Judge of Assize had a bad opinion of the case, and the Crown would not consent. From these three cases I draw two conclusions. 1st. That orders such as that made by Mr. Justice MONDELET are not unheard of. 2nd. That even an opinion less firmly expressed by one Judge in England is looked upon as sacred by his brother Judges. See also *Rex* vs. *Mark* already cited. But as to the first point I can also draw authority from the Statute of Westminster 1st, which evidently points to such orders, and declares they cannot be touched by any inferior Court or by a Judge in vacation. This enactment is also to be found reproduced in our statute. It has been the subject of much discussion, and the pretension I now put forward was in this very case supported by Mr. Justice MONK, at Montreal. I have not dwelt on the enormity of this offence, for I feel that if the Court has a discretion at all it will refuse bail, apart from any consideration of the order. East (vol. 1, page 430) says that the crime of kidnapping might well have been made capital from its enormity. These people too were vagrants, men who had been haunting Canada for months under false names. This was another reason for refusing them bail. It would be an illogical position for this Court to assume, to say it had a discretion which it could not exercise, for that would be to have no discretion at all. And why should they not exercise their discretion? Because in England, where the law is essentially different, the recent practice is to bail in certain

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misdemeanours. With all respect for English precedent we certainly cannot be hampered to that extent, and be forced to accept as law the decisions of tribunals given in a different country, and under a statute materially differing from ours. But if we are to follow slavishly even English errors, let us hedge them round with similar protections, and let us ask the bail they ask in England. In Judd's case, 2 Leach 547, £3,000 of bail was exacted; this would balance considerably the $25,000 speculations of kidnappers.

Mr. Stuart, Q. C., followed on the same side, ably contending that this court had no jurisdiction to review the order except on writ of error.

Mr. Ramsay handed up to the court a case reported in the *Times* of the 21st of last November, a case of misdemeanor in which bail had been refused, and which had just been communicated to him by Mr. Pemberton.

MONDELET, J., speaking first, and *dissentiens*, said:—I shall premise, by observing that I hail with pleasure the test which the order given at Montreal, by the Criminal Court, in this case, is now put to. It is important that a decision should be given by the highest Judicial Court, on a point which appears to have caused some excitement. As far as I am concerned, I am free to admit, that I rejoice at it, so far as a legal discussion goes; but when I find that an attempt is made to question my motives, and that what was, in my opinion, legal and called for, has, in more than questionable taste, been held out as arbitrary, tyrannical, and a deliberate violation of the law, and an act of partisanship. I cannot but regret that any one should have so far forgotten himself, and the most common rules of propriety, as to make such insinuations, knowing, as all know, that I have never, during my long judicial career, been guilty of an act of partiality. I shall always feel happy at seeing, properly discussed, my rulings; but, as to my character, I shall never, with impunity, allow it to be assailed.

Now to the point before the Court.

My brother Aylwin and I differ from the decision which the majority of the Court will render. I am not perfectly correct, I fear, when I use the word decision, since there is not a majority of this Court to declare that the order (not of Judge Mondelet, but of the Montreal Criminal Court) is illegal—all that is about being done will reduce itself to admitting the prisoners to bail.

The first branch of the subject I shall adress myself to, is the question of the jurisdiction of this Court. Is the case one which, in its present stage, this Court is empowered to take cognizance of? I think not. The Court of Queen's Bench, in Lower Canada, is a Court of Appellate Jurisdiction in civil matters—such is its primary and essential constitution. Then, additionally, it is invested with original criminal jurisdiction; and, besides, in certain cases, it may, *in error*, take cognizance of certain matters originating in the course of trial in the Criminal Court. It requires only to refer to Cons. Stat. L. C., c. 77, sec. 4, as to the appellate jurisdiction, and to sec. 67 and 62, with respect to the criminal jurisdiction, to apprehend, at once, the correctness of the preceding observations.

An application for a writ of *habeas corpus* may be made to this Court, in the way directed by law; but it is evident, that the case now before the Court is one

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which presents itself in a very different aspect from others. Here we have the judgment or order of the Court of Queen's Bench, sitting on the Crown side, that the prisoner, together with three others, shall stand committed and not be discharged, but by the order of the said Court, sitting on the Crown side. Is this order not an estoppel? Is there any power in this Court, sitting in appeal, in civil matters, without a *writ of error*, to interfere with such an order? Is it not as certain as elementary, that "a man may not be delivered from the commitment of a Court of Oyer and Terminer by *habeas corpus*, without a writ of error?" (1 Salt., 348.) Is it not glaringly manifest that the often-times repetition that the order is the order of Judge Mondelet, is a gratuitous assertion—untrue in law, and in fact—since, by law, one Judge holding the Criminal Court, has as much power as if the five Judges of the Court were on the Bench? He is the whole Court. It clearly follows, that the order in question cannot be touched by this present Court, full as it is, and much less, by any member thereof: and of course, much less again, by any member of a Court inferior in jurisdiction to the Court of Queen's Bench.

A great cry has been raised against the order, on the score that it is one to all the Judges, not to interfere with it, and that it is *a piece of blank paper*, inasmuch as the Judges of the Superior Court have in matters of *habeas corpus*, concurrent jurisdiction with the Judges of this Court.

A moment's reflection will enable any one, to see how much such an objection is wanting in soundness. First of all, the judges of the Superior Court have concurrent jurisdiction in matters of *habeas corpus*, where and when judges of this Court have, but no farther; and since it is plain that no *individual* judge in this Court has a right to interfere with this order of the Court of Queen's Bench, sitting on the Crown side, it is more than plain, that no judge of the Superior Court had a right to meddle with this case.

Judge Mondelet had no right to seal the lips of all his brother judges. How often has this trite observation not been made? Well the answer is at hand. The Court of Queen's Bench, sitting on the Crown side, has, in the plenitude of its power, in the exercise of its discretion, being in possession of all the facts, considered right and safe, in the interest of the community at large, and for its protection, to order the prisoners to be sent back to prison, and there to remain, *without bail or mainprize*, until discharged by that Court. That decides the point. And well is it that it was so ordered. The sequel shows it. A judge of another Court has, in his wisdom, looked upon the order of the Court of Queen's Bench, as a nullity, and has thought proper to treat it as such. He granted the *habeas corpus*, and would have admitted Blossom to bail, had not the Sheriff and the gaoler very properly resisted the order of Mr. Justice Badgley. Had the learned judge persisted, I would, on application being made to me, have, at once, set the sheriff and gaoler at liberty had they been committed for (*pretended*) contempt, in not obeying Mr. Justice Badgley's order, which was a perfect nullity. I may be permitted to say, that there was more discretion exhibited in abandoning this unwise proceeding than in initiating it before a judge in chambers.

Is it not, moreover, evident, that if *one* judge may assume to declare *null and*

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void an *illegal* order of the Court of Queen's Bench, he may as well treat, in the same way, a perfectly *legal* order of that Court?

Anarchy must inevitably be the result! The proceedings of the highest Court in the country would then be stopped and controlled by the *order* of a single judge of a Court of an inferior jurisdiction, or even by the order of a *single* judge of that Court!

Mr. Justice Monk took that view of the case, and refused to act, the judgment of the Court being, as he correctly said, law for him.

Besides, who ever heard of a *writ of habeas corpus* to set aside or come counter to a judgment or an order of the Court of Queen's Bench? Where is that to be found? Truly no one in England or any where else, ever, before this day, dreamt of such a thing! The judgment or order of the whole Court of Queen's Bench, sitting on the Crown side, set aside in chambers, by a single judge, either of that Court, or by a single judge of an inferior Court! The mere mention of such a pretension is sufficient to characterise it.

Well might the Chief Justice (Duval) of this Court *in re* Donaghue (L. C. Reports, Vol. 9, p. 286 and seq.), say that—

"The writ of *habeas corpus* is not granted for the purpose of reviewing the judgment of a Court, and questioning the regularity of the proceedings before that Court. The object of the writ is to keep Courts within their jurisdiction, not to correct their errors. This must be done by appeal or by writ of error."

True, the case of Donaghue was a different one from the present, but, as far as the nature and effect of the *habeas corpus* are concerned, the principle which the learned Chief Justice acted upon and enunciated, is unquestionable.

Now comes the question whether bailing for misdemeanours is obligatory. It is not at common law. It is not by our own statute law.

L. C. Cons. Statutes, c. 95, sec. 3, subs. 3.

Canada Cons. Statutes, c. 102, sec. 55 and 57.

It is discretionary, and here, as in England, (1st Chitty, p. 97) the Court of Queen's Bench, in the plentitude of its power, may and should exercise its discretion.

The *dicta* of Lord Chief Justice Denman, have been made much of, but that learned judge has, after all, merely spoken of *practice and received opinions*. Suppose had he gone further, are we Judges, in Canada, come down to such a state of abnegation as to give up our opinion, and bow down humbly to the *dicta* of Judges in England, however eminent they are? Are they infallible more than we are? Do they not differ as much, if not more, than we do here? Have their judgments never been set aside by the House of Lords? I have great respect for the eminent judiciary in England; but I must be permitted to say, that I have greater respect for what I consider to be law, and for what I take to be reason and justice, rather than mere *dictà* or *precedents*.

Besides, if Lord Denman, or any other judge in England, had ever been placed as we are here in Canada, close to the frontier, where there are for *kidnapping* facilities which do not and cannot exist in England, is it to be supposed that they would be more disposed than I have been, to admit to bail, the prisoner Blossom, giving him, thereby, a *passport* to his home over the line 45°? I am

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confident they would look to it, as it should be done. What is the object of bail? Is it not to secure the appearance of the accused? Oh, but it is a misdemeanor! Which means: for a felony, i. e., stealing to the amount of fifteen shillings, if evidence is strong, you will not bail, but if it be an *enormous misdemeanour*, perilling the peace of the country, as well as the personal liberty of the subject, you are bound to bail. And this is called law; this is held out as right and just, and commended by what, *ad captandum*, is so often termed the liberty of the subject!

The liberty of the subject! Give the subject the liberty of doing all he may desire, and extend no protection to the subjects, that is, the community at large. A very sound and protecting doctrine!

The order was not only perfectly legal, but imperiously called for, by the circumstances. Never was evidence more conclusive. Every one is familiar with all the facts of the case—of this outrage and conspiracy, and violation of our soil by desperadoes, whom the fear of murder, and the consequences of their nefarious doings, did not deter from their criminal purposes. The scandalous dereliction of duty in some of the jurors, in refusing to convict men whose guilt was made out beyond the possibility of doubt, &c., was not, as many pretended, a reason to give the prisoners the *benefit of the doubt*. There was no doubt. Both sections of the jury were, or appeared, equally determined to convict or acquit—all, all gave the case a character which was *sui generis*. The Court would have been wanting in its duty to the country, had it not peremptorily ordered these men to be detained as it has done. The *Trent* affair was a less heinous one. Commodore Wilkes had some plausible motives, right or wrong; here we have a deep laid and continued conspiracy, with murder as a means, and kidnapping as the end, and all that, to secure a reward for six desperadoes who seem to have obtained the sympathies of the apostles of *the liberty of the subject*. The Chief Justice (Duval) of this Court very properly said, during the argument, that the order was neither *unusual* nor *arbitrary*. And another member of the Court (Judge Meredith) has observed that "no reasonable man can blame Judge Mondelet for giving the order, since judges were divided in opinion with regard to it."

I now close by remarking that after all that has been said, written, and argued, there is not a majority of the Court to declare the order illegal. The Chief Justice abstains from expressing any opinion. Judge Meredith says it is open to grave objections. Judge Aylwin and myself are of opinion that it is legal, and was called for, by the circumstances of the case. Judge Drummond stands alone in the expression of his opinion, "that the order was illegal, and a piece of blank paper, in that part which went further than remanding the prisoners to gaol."

The prisoner will, in consequence of the order of the majority of this Court, be admitted to bail, and will be allowed to return to his country, impressed, as I trust, that in Canada, foreigners obtain what they consider protection, as well as Her Majesty's subjects.

AYLWIN, J., also dissentient said:

This case has been ably argued, and it is therefore unnecessary for me to say

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much upon the present occasion. By the Consolidated Statutes L. C., Cap. 77, Sec. 67:—it is enacted that—

"The said Court of Queen's Bench and the Judges thereof, shall have criminal jurisdiction throughout Lower Canada, and in the several districts thereof, "with full power and authority to take cognisance of, hear, try, and determine, "in due course of law, all pleas of the Crown, treasons, murders, felonies and "misdemeanors, crimes and criminal offences whatsoever, had, done, or committed, or whereof cognizance may lawfully be taken within Lower Canada, "save and except such as are cognizable only by the jurisdiction of the Admiralty."

68. The Judges of this court are to be Justices of the Peace and Coroners.

69. "No cause, matter or thing shall be removed into the said Court from any "other Court or jurisdiction, except cases pending before any Court of General or "Quarter Sessions of the Peace, in which a trial by Jury is by law allowed, which "cases may be removed into the Court hereby established, by *certiorari.*

71. "Subject to the next following section, the terms or sittings of the Court "of Queen's Bench, in the exercise of its criminal jurisdiction, shall respectively "be held by any one or more Judges of the said Court; and any one or more of "them shall, at such terms or sittings, form a quorum, and may exercise all the "powers and jurisdiction of the Court.

72. "Any one of the Judges of the Superior Court may hold any term or "sitting of the Court of Queen's Bench for the exercise of the original criminal "jurisdiction of that Court, and shall have all the powers of a Judge thereof, and "of the Court in the exercise of said jurisdiction; but it shall not be incumbent "upon any Judge of the Superior Court to hold any such powers at either of "the cities of Quebec or Montreal, if there is a Judge of the Court of Queen's "Bench present at such city, and able to act.

73. "All writs and processes of said Court, issued in the exercise of its jurisdiction in criminal matters, shall be distinguished as being so issued, and shall "be signed by the clerk of the Crown in and for the district in which they "issue, and shall run and be sealed and attested in the manner hereinbefore "provided with regard to the writs and process of the Court issued in the exercise of its jurisdiction as a Court of Appeal and Error."

[The Honourable Justice here referred to Con. Stats. L. C., Chap. 77, Sec. 56 to 63 creating a Court of Error.]

56. 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. 20 V., c. 44, s. 21.

"And in order to provide means of deciding any difficult question of law arising at criminal trials."

"57. When any person has been convicted of any treason, felony or misdemeanor at any criminal term of the said Court of Queen's Bench or before any Court of Oyer and Terminer, gaol delivery, or quarter sessions, the Court before which

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the case has been tried, may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the said Court of Queen's Bench on the appeal side thereof, and may thereupon respite execution of the judgment on such conviction, or postpone the judgment, until such question has been considered and decided by the said Court of Queen's Bench; and in either case the Court before which the case trial was had, in its discretion, shall commit the person convicted to prison, or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the Court thinks fit, conditioned to appear at such time or times as the Court shall direct, and receive judgment or render himself in execution, as the case may be. 20 V., c. 44, s. 22.

"58. The said Court shall thereupon state, in a case to be signed by the judge or judges, recorder, inspector and superintendent of police, or chairman holding or presiding such Court, the question or questions of law which have been so reserved, with the special circumstances upon which the same have arisen; and shall forthwith transmit the same to the clerk of appeals, at the place where appeals from the district in which the conviction was had, are to be heard:

"2. The said Court of Queen's Bench shall have full power and authority, at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine every question therein, and thereupon to reverse, amend or affirm any judgment which has been given on the indictment or inquisition on the trial whereof such question arose, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench, the party convicted ought not to have been convicted, or to arrest the judgment, or to order judgment to be given thereon at some other criminal term of the said Court, or session of Oyer and Terminer, or Quarter Sessions if no judgment has before that time been given, as the said Court of Queen's Bench is advised, or to make such other orders as justice requires. 20 V., c. 44, s. 23.

"59. The judgment or order, if any, of the Court of Queen's Bench in such case as aforesaid, shall be certified under the hand of the chief-justice or one of the judges concurring therein to the Clerk of the Court from which the same was sent, who shall enter it on the original record in proper form, and a certificate of such entry under the hand of such clerk, in the form or as near as may be to the effect of the Schedule A, to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by such clerk to the sheriff or gaoler in whose custody the person convicted is, and such certificate shall be a sufficient warrant to such sheriff or gaoler and all other persons, for the execution of the judgment as the same is so certified to him to have been affirmed or amended, (and execution shall thereupon be done upon such judgment,) or for the discharge of the person convicted from further imprisonment if the judgment be reversed, avoided or arrested; and in that case such sheriff or gaoler shall forthwith discharge him, and at the next sitting of the Court from which the case was sent, the recognizance of bail, if any, shall be vacated, and if the Court from which the case was sent is directed by the Court of Queen's Bench to give judgment, it shall give judgment at the next sessions thereof. 20 V., c. 44, s. 24.

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"60. The judgment of the Court of Queen's Bench in any such case as aforesaid, shall be delivered in open Court, after hearing counsel or the parties in case the prosecutor or the party convicted thinks it fit that the case be argued; and in like manner as other judgments of the said Court on the appeal side; but no notice, appearance or other form of procedure, except such only, if any, as the Court in such cases sees fit to direct, shall be requisite. 20 V., c. 44, s. 25.

"61. The Court of Queen's Bench, when a case has been so reserved for its opinion, may, if it sees fit, cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly and judgment shall be delivered after it has been amended. 20 V., c. 44, s. 26.

"62. Whenever any writ of error is brought upon any judgment on any indictment, information, presentment or information in any criminal case, and the Court of Queen's Bench reverses the judgment, the said Court may either pronounce the proper judgment, which shall be executed as the judgment of the Court below, or may remit the record to the Court below, in order that such Court may pronounce the proper judgment. 20 V., c. 44, s. 27.

"63. If in any criminal case either reserved as aforesaid or brought before it by writ of error, the Court of Queen's Bench is of opinion that the conviction was had 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. 20 V., c. 44, s. 28."

A writ of *habeas corpus* on the behalf of Wayne W. Blossom issued out of this Court on the Appeal side of the Court of Queen's Bench sitting in appeal and Error, as a Court of Error as well in criminal as in civil causes, and the return to that writ is as follows:

Province of Canada,
District of Montreal. } COURT OF QUEEN'S BENCH—CROWN SIDE.

29 *Vic. September Term, A.D.* 1865.

Monday the thirtieth day of October, one thousand eight hundred and sixty-five.

Present:

The Honorable CHARLES MONDELET, assistant Judge of the said Court.

No. 18. *The Queen vs. Charles Hogan Adams, William Ames Blossom, Walter Clayton, and Wayne W. Blossom.*

ON INDICTMENT FOR CONSPIRACY.

The Court, in consequence of the non-agreement of the jury to a verdict, discharges them; and it is hereby adjudged and ordered that the four prisoners be remanded to the common gaol of this district. And whereas from the positive evidence adduced on this trial, the said prisoners are not entitled to be bailed, it is adjudged and ordered that they do stand committed to the gaol of this district without bail or mainprize to stand their trial at the next term of this Court, and not to be discharged without further orders from this Court.

Certified to be a true extract from the Register of the said Court.

Montreal, 2nd November, 1865.

(Signed) A. DEBEAUMONT,

Deputy Clerk of the Crown.

Wayne W. Blossom.

Province of Canada, } I, LOUIS PAYETTE, keeper of Her Majesty's common
District of Montreal. } jail, in and for the city and district of Montreal, in the Province of Canada aforesaid, do hereby certify and return to our Sovereign Lady the Queen, that before the coming of the annexed writs to me directed, to wit, on the sixteenth day of August, the body of Wayne W. Blossom therein named, was committed into the said jail of our said Lady the Queen, under my custody, by virtue of two warrants under the hand and seal of William Ermatinger, Esquire, Police Magistrate, in and for the district of Montreal, which said warrants are in the words following, to wit:

Province of Canada, }
District of Montreal. } POLICE COURT.

To all or any of the constables or other peace officers in the said district of Montreal, and to the keeper of the common jail at the said city of Montreal, in the said district of Montreal.

Whereas, Walter Clayton, William Am[illegible] Wayne W. Blossom, and Charles Hogan Adams, all of the city of [illegible] the district of Montreal, laborers, were this day charged before me, [illegible]atinger, Esquire, police magistrate in and for the district of Montreal, [illegible] oath of George N. Sanders and others, for that the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams, did on the seventh day of August instant, at the city of Montreal, unlawfully commit an assault on the person of George N. Sanders of the said city of Montreal, and then and there did forcibly and unlawfully steal and carry away and secrete the said George N. Sanders, against the peace of our Lady the Queen, her crown and dignity.

These are therefore to command you, the said constables or peace officers, or any of you, to take the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams, and them safely convey to the common jail, at the City of Montreal aforesaid, and there deliver them to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said common jail, to receive the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams into your custody in the said common jail, and there safely to keep them until they shall be [illegible] delivered by due course of law.

Given under my hand and seal, this sixteenth day of August in the year of our Lord one thousand eight hundred and sixty-five, at the said city of Montreal, in the district aforesaid.

(Signed,)

W. ERMATINGER, P. M.

Province of Canada, }
District of Montreal. } POLICE OFFICE.

To all or any of the constables or other peace officers in the said district of Montreal, and to the keeper of the common jail at the said city of Montreal, in the said district of Montreal.

Whereas, Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams, all of the City of Montreal, in the District of Montreal, laborers, were this day charged before me, William Ermatinger, Esquire, police

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magistrate in and for the district of Montreal, on the oath of George N. Sanders and others, for that the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams did, on the seventh day of August instant, at the city of Montreal, unlawfully conspire, combine, confederate and agree, together with divers other persons, forcibly and unlawfully to steal and carry away George N. Sanders from the Province of Canada, where he was then living, into the United States of America, against the peace of our Sovereign Lady the Queen, her crown and dignity.

These are therefore to command you, the said constables or peace officers, or any of you, to take the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams, and them safely convey to the common jail, at the city of Montreal aforesaid, and there deliver them to the keeper thereof, together with this precept; and I do hereby command you, the said keeper of the said common jail, to receive the said Walter Clayton, William Ames Blossom, Wayne W. Blossom, and Charles Hogan Adams into your custody in the said common jail, and there safely to keep them until they shall be thence delivered by due course of law.

Given under my hand and seal, this sixteenth day of August, in the year of our Lord one thousand eight hundred and sixty-five, at the said city of Montreal, in the district aforesaid.

(Signed,)

W. Ermatinger, P. M.

And that these are the causes and the only causes of the caption, commitment and detention of the said Wayne W. Blossom in Her Majesty's jail aforesaid; the body of which said Wayne W. Blossom I have now, as by the said writ it is commanded me. *Attested* at the city of Montreal, in the said district of Montreal, in the said Province of Canada, this sixth day of December, in the *twenty-ninth* year of Her Majesty's reign, and in the year of our Lord Christ one thousand eight hundred and sixty-five.

(Signed,)

Louis Payette,

Jailer.

It is to be noticed that in the making of this return the jailer has made no mention of the fact that upon a writ of *habeas corpus* before that now submitted, a previous writ was given by his Honour Mr. Justice Monk, being a Judge of the Superior Court, who rejected the application, and necessarily must have ordered a remand.

Shortly after this a similar application for *habeas corpus* being submitted to Mr. Justice Badgley, an order was made to admit the prisoner to bail. In the making of his return I have to express my opinion that the answer to the return was defective, and that all the facts in relation to the two preceding writs of *habeas corpus* should have been disclosed.

In expressing my opinion I have to say that the writ of *habeas corpus* now under consideration should be struck from the record of this present Court as *quia improvide emanavit:*

1st. In consequence of the form as issuing out of the Appeal side instead of

the Crown side; and secondly, in consequence of there being no portion of the law which authorized us to undertake any exercise in this cause as in a criminal case.

The Court of Queen's Bench, to be a Court of Error in criminal cases, requires a writ of error which can only operate a stay of the execution of the judgment of the Court below, and it is clear that no questions were reserved by the Criminal Courts, or submitted to the Court on its Appeal side.

The whole proceeding then is *coram non judice*, and with that I should be inclined to stop at this point.

But it would be unjust on my part not to express the sound and legal view of what I hold with reference to the order made by Mr. Justice Mondelet, that is to say more clearly by the whole Court of Queen's Bench, Crown side. If ever a cause, after two attempts to obtain trial by Jury, became abortive, it was high time for the Honorable Judge to make the order which he made. The learned Judge, having exercised his discretion, has done it well, and for the peace, welfare and good government of the people of this province.

Were the matter to be debated, that thing could only be done by means of a motion in the shape of our own Court on the Crown side, for a revision of the order, and that even I doubt.

In the Queen's Bench in England or Ireland no case has ever occurred, or will occur, to set aside a judgment of the Court once made in Bank, and still less will it ever be treated as a nullity and a piece of blank paper. The power of the Court of Queen's Bench is unlimited, and is the arbiter of every matter in relation to bail, and is higher than the writ of *habeas corpus*, which is only intended as a means to an end, but which never was intended to destroy the authority of justice. Again, if nothing else than the Comity of Courts be considered, that would be sufficient to restrain me from undertaking to alter the judgment of any Court, certainly much less that of my own Court the Queen's Bench, by a side wind.

At the time of the second trial at Bank it was impossible that a third trial could occur at the same term of the Court; the sitting was also as a Court of General Jail Delivery, and the term was to last until such time as it was to be deemed by the Judge to be closed. The order of the Judge, therefore, that the prisoner should be held to remain in jail, without bail or mainprize, until the Court should again meet, was absolutely necessary.

A great deal has been said of the distinction between felonies and misdemeanors. I hold that in the Court of Queen's Bench, the instant that a prisoner stands in the dock for his trial, and that the Jury has been empanelled and the trial has commenced, no man be discharged unless it be by verdict, or order of the Court. I shall not undertake to enter into the speculative opinions of one side or the other, nor shall I enter into the discussion respecting the powers of Justices of the Peace, or of the necessity of granting trial under the *habeas corpus* provisions of the law of Canada. It is unnecessary to mention anything upon these points with the view which I have taken of the matter. But of this I am sure that a Justice of the Peace, acting judicially, and not acting with malice, will always be certain in a British Court to obtain full protection against

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a party who shall bring an action, and this is established by Lord Denman in the case of Lisford and Fitzroy in 13 Queen's Bench, 240. With these remarks I have to conclude that it is absolutely necessary at this time to legislate upon the conflicting powers between the Court of Queen's Bench and what is improperly called the *Superior* Court; and in any case so as to prevent a conflicting jurisdiction, I do not believe that Judges in England will ever undertake after indictment, and most certainly not after trial, will ever attempt any jurisdiction whatsoever.

MEREDITH, J., said: This case has been argued with very great care and ability, and I feel it due to the learned counsel engaged to say that the reasoning and authorities which they submitted to us have afforded me much assistance in forming my opinion upon the important questions now to be determined.

The offence with which the prisoner stands charged is, it is admitted, a misdemeanor, and by the indictment found against him he is accused of having conspired with certain other persons "to steal and carry away one George N. "Saunders out of the City of Montreal, and from out of this Province, where "he, the said Saunders, was then and there living and residing, into a foreign "state, to wit, the United States of America, against the will and consent of "him the said George N. Saunders."

Upon this indictment the prisoner has been twice tried without the Jury being able to agree; and the first question to be considered by us is this: Under the circumstances already mentioned, ought the prisoner to be admitted to bail?

For the present I shall leave out of sight the order made by the learned judge before whom the prisoner was tried, and I shall consider the question, firstly, with reference to the jurisprudence of the Courts in England, before the passing of the English Statute 11th and 12th Victoria, cap. 42; and at the same time I shall take occasion to notice the authorities placed before us by the learned Crown prosecutor. I shall then consider the question, 2ndly, with reference to the Statute law of England from which our own statute on the subject has been taken; and 3rdly, with reference to our own statute on the subject.

Before, however, adverting to the decisions of the English Courts, I desire to quote a provision of our own law securing to us the benefit of the writ of *habeas corpus*, which makes it our duty to consider with even more than ordinary care the judgments of the English Courts on this subject. I advert to the first section of that law, which is as follows: "All persons committed or de- "tained in any prison in Lower Canada, for any criminal, or supposed criminal "offence shall *of right* be entitled to demand and obtain from the Court of "Queen's Bench, or from the Superior Court, or any one of the Judges of "either of the said Courts, the writ of *habeas corpus* with all the benefit and "relief resulting therefrom, at all such times, and in as *full, ample, perfect* and "*beneficial* a manner, and to all *intents, uses, ends* and *purposes*, as Her Majesty's "subjects within the realm of England, committed or detained in any prison "within that realm, are there entitled to that writ, and to the benefit arising "therefrom by the common and statute laws thereof."

The foregoing emphatic declaration of the Legislature makes it our duty to nquire whether, at the time of the passing of our Habeas Corpus Act, a subject

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of Her Majesty, within the realm of England, if detained in prison there, under circumstances similar to those under which the prisoner is now detained here, would have been entitled to give bail.

Sir Matthew Hale, than whom a higher authority cannot be cited, laying down the law upon the subject of bail, says: "*regularly* in all offences, either "against the common law or acts of parliament, that are *below felony*, the offen-"der is *bailable*, unless, first, he hath had judgment; 2nd, or that by some "particular or special act of parliament bail is ousted."

Here it is to be observed that the word "*bailable*," in the foregoing passage is construed by "Blackstone," vol. 4, page 298, as signifying that the party *ought to be admitted to bail.**

And it is in that sense that it is generally used by the writers on this subject.

The rule laid by Chief Justice Hale was acted upon by the Court of Queen's Bench in the time of Chief Justice Holt, as will be seen on reference to "1st Salkeld, p. 104," where Marriott's case is reported as follows:

"Marriott was committed for forging endorsements upon Exchequer bills, and upon a *habeas corpus* was bailed, because the crime was *only a great misdemeanor;* for though the *forging* the bills be *felony*, yet forging the endorsement is not."†

This case, decided in 1698, is of itself sufficient to show that the distinction between felonies and misdemeanors, with respect to the right to be admitted to bail, is not, as has been contended, an invention of modern times; the truth being that that distinction is to be found in our earliest statutes on the subject.

I shall next allude to the case of the *Queen* vs. *Tracy*, decided in 1705, and to which our attention was particularly drawn by the learned Crown prosecutor. It appears that one Ashley caused a person named Muriel to be arrested for assault and battery, and that Tracy, being himself a Justice of the Peace, caused another Justice of the Peace to refuse bail from Muriel, who thereupon was imprisoned, and, at the instance of Tracy, used severely by the jailer. According to the report the Court appears to have held, among other "things, that it is an offence in a Justice of the Peace to refuse bail in case of "a *common misdemeanor.*

It may be observed that the report in addition to what is said to have been held "per curiam" gives us the observations made by Chief Justice Holt, and by another of the Judges; and that we do not find, in those observations, any distinction made between common misdemeanors and misdemeanors of any other kind.

I notice, however, an observation of Chief Justice Holt, in the same case, which tends to establish, that in former times, the distinction between misdemeanors and felonies was even greater than at present. The observation to which I refer is as follows:

"Formerly indeed none could be *taken up for a misdemeanor* till indictment found." The learned Chief Justice adds, however, "but now the practice over

* Vide observations of Mr. Justice Coleridge—13th Ad. & El. N. S. page 242, vol. 66, E. C. L. R.

† 1st Salkeld, page 104, Marriott's case.

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all England is otherwise."* There is also a passage in the report of the proceedings upon a previous indictment respecting the same offence, which shows that the difference between misdemeanors and felonies with respect to the right to be admitted to bail was then fully understood. It is this: "That Tracy, when Muriel was before a Justice of the Peace, persuaded him to refuse to bail him though the *fault being a misdemeanor, was in its nature bailable.*"

The observation upon which the Crown Prosecutor relies, even if made by the Court, does not seem of much importance. Muriel had been indicted for assault and battery, that being a common misdemeanor, and the Court, having that case in view, is reported to have held that "to refuse bail in a case of common misdemeanor (such being the case in which bail had been refused) is an offence in the Justice of the Peace." But it cannot be thence inferred that the Court held that bail may be refused in cases of misdemeanor of an uncommon or enormous character.

I propose to allude next to the celebrated case of John Wilkes, decided in 1768, that being 16 years before the passing of our Habeas Corpus Act. Wilkes having been convicted upon two informations for libel, the offences being misdemeanors, appeared personally in Court, surrendered himself to the sheriff, and moved to be admitted to bail. But Lord Mansfield said that he knew of no case where a person, "*convicted of a misdemeanor*, had been admitted to bail without the consent of the prosecutor." Mr. Justice Willes said "*after actual conviction* of a misdemeanor the defendant is not *entitled* to bail," Judge Aston concurred in that opinion, and bail accordingly was refused, the ground being that *after conviction* of a misdemeanor the defendant is not *entitled* to bail.

The next case, in the order of date, to which I propose to refer, is the case of the *King* vs. *Judd*,† decided by the Court of King's Bench in England in the year 1788. The prisoner was committed to Hertford jail, by a warrant under the hands and seal of eleven justices of that county, for certain *grave misdemeanors*, and having been brought up from jail to the Court of King's Bench, by *habeas corpus* to be bailed—his counsel submitted that the warrant *contained no charge of felony*, and therefore he was *entitled* to be bailed, or discharged by virtue of the statute 31st Charles, II. c. 2. The counsel for the crown were Erskine (one of the greatest English criminal lawyers), Mingay and Garret; who did not question the doctrine, that the prisoner was entitled to bail if the offence was misdemeanor only, but attempted to show that the commitment contained *a felony*; and Mr. Justice Ashurt, with the concurrence of the other Judge, Mr. Justice Grose, delivered the judgment of the Court as follows:

"However improper the defendant's conduct appears to have been upon the "proceedings, before the Justices, yet unless it appears upon the face of the com-"mitment itself that the defendant is charged with *felony, we are bound* by the "Habeas Corpus Act to discharge him, taking such bail for his appearance to

* 6 Modern Report, page 179 and 180, *Queen* vs. *Tracy*.
† 6 Modern Report, page 31, Queen vs. Tracy.

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"take his trial as we in our discretion shall think fit according to the circum-"stances of the case. The question therefore is (said the learned president of "the Court) whether there is specified in this commitment, such an offence as "amounts to *felony*." It is of importance to bear in mind that the observations of Mr. Justice Ashurt do not refer to the duties of Justice of the Peace, or to the duties of a Judge in Chambers, but are declaratory of the duties of the Court of Queen's Bench in England; and his words are "unless it appears upon the face of the commitment, that the defendant is charged *with felony, we are bound* to discharge him by the Habeas Corpus Act."

This case, although decided mainly with reference to the provisions of the Habeas Corpus Act, is in accordance with the rule laid down by Sir Matthew Hale, more than a century previously, and also with the judgment in Marriott's case; and, so far as I know, it has never before been questioned; and having been decided, as it was, just four years ago, after the passing of our Habeas Corpus Act, may well be referred to as showing the extent of the "*benefit and relief*" which Her Majesty's subjects within the realm of England then had under the writ of *habeas corpus;* that being, as our own Legislature have expressly declared, the measure of "*the benefit and relief*" intended to be afforded to prisoners in Canada by the same writ.

I now come to the case of the *King* vs. *Marks*,* to which also our attention was drawn by the learned crown prosecutor. In that case, which was decided in 1802, I find Lord Ellenborough observed, "As it appears then from the deposi-"tions that there is a *corpus delicti*, within the meaning of the Act of Parliament, "*which constitutes its felony*, it is our duty to remand the prisoners," and in the same case Leblanc, J., said, "And it is equally clear that though the warrant be "informal, yet if, upon the depositions returned, the Court see that a *felony* has "been committed, and that there is reasonable ground of charge against the "prisoner, they will not bail but remand them." This case, therefore, does not make against the rule contended for by the learned counsel for the prisoner.

The next case to be referred to is the case of the *Queen* vs. *Badger et al.*, to which, also, our attention was drawn by the learned counsel for the prisoner.

In that case a motion was made for a criminal information against two Justices of the Peace for illegally refusing bail; and Lord Denman, as the organ of the Court, (the other judges present being Patteson and Wightman,) speaking of the prisoner, and of his offer to give bail, observed:

"Standing charged *with a misdemeanor*, O'Neil claims *the right of every man* "so charged to be released from prison, and so admitted to bail on giving sufficient "securities.†

Turning next to the celebrated case for the abduction of Miss Turner by the Wakefields, it will be recollected that the offence was commenced in England, and continued and completed in Scotland.

If the offence has been completed in England, it would have been a *capital felony*. But in consequence of its having been stripped of its consummation in

* Easts Rep., 3rd vol., page 165.
† *Regina* vs. *Badger*, 4 Queen's Bench, Rep. Ad. et El., page 418.

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England, the indictment had to be for a misdemeanor. That the offence was one of the [illegible] enormous misdemeanors of modern times cannot be doubted. Indeed the le[illegible] counsel for the Crown, Sergeant Cross, in his opening address declared: "If this offence had been committed on English ground, two of the[illegible] "defendants would have been tried and condemned to an ignominious [illegible] "and probably executed upon the walls of this very castle 12 months ago. [illegible] as the offence *was a misdemeanor* only, the defendants were *on bail* until the moment of their conviction.*

The last case to which I propose to allude is the case of "Linford and Fitz[illegible]." In this case the defendant, a Justice of the Peace, was sued for refusing to take bail in a case of misdemeanor. Judge Coleridge, in the course of the argument, referred approvingly to the rule laid down by Sir Matthew Hale, to which I have already adverted, and also to the case of the *Queen vs. Badger*, and Chief Justice Denman observed: "The master of the Crown office mentions that in a "*celebrated abduction case*, in which the Cheshire magistrates refused bail, the "Court was of opinion they were bound to take bail, *as the offence was a mis-* "*demeanor only*."

Lord Denman, in [illegible] (the other Judges present being Coleridge and Wightman, and the [illegible] Justice Erle) after alluding to the practice in former times, observed: "[illegible] *for many years* the received opinion and *prac-* *tice* has been that *all persons accused of misdemeanor, whether common or other-* *wise, are entitled* to be admitted to bail."

The statement of Lord Denman, "that for many years the received opinion "and practice has been that all persons accused of misdemeanor, whether common "or otherwise, are entitled to be admitted to bail," is strongly confirmed by the fact that although we have reason to believe the most diligent search has been made by the learned Crown prosecutor, not a single case of misdemeanor has been [illegible] in which bail was refused before conviction.

I bear in mind that in the course of the argument at Montreal, the case of Lord Cochrane was referred to as one in which a prisoner, charged with misdemeanor, had been refused bail before conviction; but on reference to the 3rd Maule and Selwyn, page 10, it will be found that Lord Cochrane was out on bail until after conviction. I also recollect, that at the close of the argument in Quebec, the learned Crown prosecutor, drew our attention to the case of one Kelly, reported in the Times of the 22nd Nov. last, as an instance of bail having been refused in a case of misdemeanor. It is true that in that case the counsel for the prisoner in his address to the jury, said his client had been kept in prison four months, "bail having been most pertinaciously refused." But this statement is explained by what follows in the report; for we find that the same prisoner Kelly, after conviction, "appealed to the clemency of the Court, on the ground that he had been four months in prison *for want of bail*."

I shall now, in connection with the decisions of the English Courts, ad[illegible] the more important of the authorities cited by the learned Crown prosecu[illegible] tending to show that a distinction under the statute of Westmin[illegible]

* Burke's Trials, connected with th[illegible] Classes, page 376.

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between enormous misdemeanors and common misdemeanors with respect to the right to be admitted to bail. The passage from the 15th chapter of Hawkins, Pleas of the Crown,* doubtless a standard authority, supports the distinction contended for by the Crown in the case; and the opinion of Sergeant Hawkins is quoted approvingly in Chitty's Criminal Law † and in Burns' Justice.‡ It may, however, be observed, that the limitation which Sergeant Hawkins [illegible] should be put upon the general words of the statute, which are: "that persons guilty of some other trespass for which one ought not to lose life nor member are replevisable," has not the support of Lord Coke's commentary on the same statute, which, as Matthew Hale says, he has transcribed; || that the opinion of Sergeant Hawkins is expressed doubtingly as appears by the words "sed quære" added to the most important part of it; that the authorities cited by the learned sergeant were very old, even at the time he wrote; the only reporter referred to by Hawkins being Keilway of the time of Henry Eighth. And that the last case, tending to support the distinction made by Hawkins, is the Queen vs. Tracy, decided in the time of Queen Anne.

When, in addition to these considerations, it is borne in mind that Hawkins wrote about fifty years before the passing of our Habeas Corpus Act, it seems to me that upon the question as to what was, at the period last mentioned, the law of England on this subject, the opinion of Sergeant Hawkins, expressed doubtingly as it is, cannot detract very much from the weight of the long series of cases to which I have adverted, as determining, or tacitly admitting that a person charged with a misdemeanor is entitled to be bailed until convicted. It is also to be recollected that the opinion of Sergeant Hawkins is founded exclusively upon the statute of Westminster, which is no longer in force in England, or in this country; and it does seem to me that no one can interpret our own statute according to the rules evidently observed by Sergeant Hawkins, in interpreting the statute of Westminster, without coming to the conclusion that, at least, no Justice of the Peace can refuse bail in a case of misdemeanor.

As I have already observed, the opinion of Hawkins is referred to approvingly by Chitty; but, at the following page, Chitty says: "Individuals apprehended "for assault and other small misdemeanors, *or any offences below felony*, must be "bailed unless they are excluded from it by some special Act of Parliament."¶

Authorities were also cited as showing that the Court of Queen's Bench, in the plenitude of its power, may exercise an almost unlimited power as to the admitting of prisoners to bail.** But I understand those authorities as establishing that the Court of Queen's Bench may take bail in cases even of the greatest magnitude—but not as declaring that the Court could, consistently with justice, refuse bail in trivial misdemeanors.

* Hawkins Book, 2 page, ch. 15, sec. 45, 51; vol. 2, pp. 152, 155. (2) Chitty Crim. Law, page 96. (3) Burns, Justice, verbo Bail, vol. 1, page 146, ed. of 1[illegible].

† *Vide* foot note, p. 26.

‡ 6 Mod. Rep., 179.

|| Hale's Pleas of the Crown, vol. 2, page 128.

¶ Chitty Crim. Law, vol. 1, page 97.

** Petersdorff abridgment, vol. 3, page 303, verbo Bail, and authorities there collected.

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Much stress was also laid upon the 55th section of the chap. 102, C. S. C., which, after declaring that Justices of the Peace and county Judges may not admit to bail any person accused of treason or murder, except by the order of a higher Court, or one of the justices thereof—then provides that "nothing herein contained shall prevent such Courts or Judges admitting any person accused of misdemeanor or felony to bail when they may think it right to do so."

The object of this proviso was plainly to leave the discretionary power of the higher Courts and of the Judges untrammelled; but it does not give, and was not intended to give, those Courts or Judges a right to refuse bail in any case in which it ought theretofore to have been accepted.

I shall next consider the question as to whether the prisoner ought to be bailed, with reference to the statute law of England, from which our own statute has been taken.

By the 23rd section of the English Act 11th and 12th Vict., cap. 42, (intituled, "An Act to facilitate the performance of the duties of Justices of the Peace, "out of sessions, with respect to persons charged with indictable offences,") it is enacted that when any person shall appear or be brought before a Justice of the Peace charged with any felony or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with *certain misdemeanors* specially enumerated in that section, such Justice of the Peace *may in his discretion* admit such person to bail." The Law, then, after explaining clearly in what manner bail is to be given, continues as follows: "And when "any person shall be charged before any Justice of the Peace with any *indictable* "*misdemeanor*, other than those hereinbefore mentioned, such Justice, after "taking the examination in writing as aforesaid, *instead of committing him to* "*prison for such offence, shall admit him to bail in manner as aforesaid.*"

It is plain that, under the English statute, a Justice of the Peace has a discretionary power of admitting to bail with respect to the misdemeanors specially enumerated in the 23rd section, and that, with respect to *all other misdemeanors* the Justice of the Peace *is bound* to accept sufficient bail, if offered. No doubt, I believe, has ever been entertained as to this point in England. Mr. Glen, in his note upon the section under consideration, says: "For all other offences (except "treason) being indictable misdemeanors, the justices *must accept bail* if suffi"cient security be tendered."* And Mr. Stephens, with reference to the same Act, says: "The justices, however, have no power to bail for treason, while on "the other hand THEY ARE BOUND to bail in all cases in misdemeanor, except "such as the Act 11th and 12th Vict., c. 42, particularly enumerates."† And Mr. Oke, in his magisterial synopsis, speaking of the duty of a Justice of the Peace under the English Act, says: "That in *other misdemeanors* than those "specified he (the Justice) MUST take bail."‡

The misdemeanor of which the prisoner is accused is not one of those enumerated in the English Act, and therefore it seems that in England, under the 11th

* Glen's Jarvis Acts, page 43.
† Stephen's Commentaries, 4 vol., page 417.
‡ Oke's Magisterial Synopsis, page 682.

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and 12th Vict., cap. 42, a Justice of the Peace would be bound to accept sufficient bail if offered by any person charged with a misdemeanor, such as that of which the prisoner is *accused, however clear the proof* might be against him.

I now turn to our Canadian Act, the chap. 102 of the C. S. C.

It has been strenuously contended that a Justice of the Peace, acting under our statute, may, in the exercise of his discretion, refuse bail in cases of misdemeanor, and therefore that this Court must have the power to do so. This is a point of great and general importance; and it is our duty to prevent, as far as possible, any misapprehension respecting the duties of Justices of the Peace in accepting or refusing bail. I therefore shall briefly advert to those sections of our statute relating to this matter which appear to me of importance.

The 52nd section declares that where the evidence against a person charged with felony or suspicion of felony, is, in the opinion of the justice, " sufficient to " put such accused party on his trial," but " does not furnish such a strong " presumption of guilt as to warrant his committal for trial," such justice, " jointly with some other justice of the peace, MAY admit such person to bail."

The word " may," as here used, must be understood as conferring a power, and not as giving a discretion; for it cannot be supposed the Legislature intended it should be in *the discretion* of the justice to refuse bail in those cases in which, to use the words of the law, the evidence adduced is, " *in the opinion* " of the justice, "sufficient to put the accused party on his trial," but *does not* furnish such a strong presumption of guilt as to *warrant his committal for trial*.

The Legislature having thus, in section 52, provided that in cases of *felony and of suspicion of felony*, where the evidence does not warrant the committal of the accused for trial, bail " *may* " be taken by *two justices*—provide for the taking of bail in cases of misdemeanor, by *one* justice, in the next section, which is as follows: section 53, " when the offence committed, or suspected to have " been committed, is a *misdemeanor*, any *one* justice *may* admit to bail in man- " ner aforesaid; and such justice or justices *may*, at their discretion, require " such bail to justify upon oath, &c., and *in default* of such person procuring " sufficient bail, THEN such justice or justices may commit him to prison."

The word " *may* " in the first part of this section must here, as in the preceding section, be understood as conferring a power and not as giving a discretion. The object of the Legislature being to declare that although *one* Justice of the Peace is not allowed to take bail in cases of felony, yet that in cases of misdemeanor *one* justice may do so. It is also important to observe that although on this section the words " *at their discretion* " are used with reference to the power given to the justices to require the bail to justify, no such words are used with reference to the powers given to any one justice to admit a person accused of misdemeanor to bail.

The last clause of the section is particularly deserving of attention; it is: " And *in default* of such perso[illegible]uring sufficient bail, *then* such justice or " justices may commit him to [illegible]." Here the default of a person accused " to " procure sufficient bail " is in express terms made the condition upon which it shall be in the power of the justices " to commit him to prison." All doubt, however, as to the obligation, under our statute, of a Justice of the Peace to accept

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bail from a person accused of misdemeanor seems to me to be removed by the 57th section which contains the words "or if the offence with which the party is accused be a misdemeanor, then such justices *shall* admit the party to bail as "hereinbefore provided."

This is the provision of our [illegible] it obligatory upon Justices of the Peace to accept bail in cas[illegible]esent; and, as has been well observed by Mr. Justice Badgley—"the section 53 upon which the Crown prosecutor relies "does not regulate the principle of admitting to bail, but determines by whom "it may be exercised—namely by one justice." I think I have now made it plain that if, when brought before the Justice of the Peace by whom he was committed the prisoner had offered bail, such justice [illegible] been bound to bail him; and the authorities clearly establish "that if an offence be bailable, and the party at the time of his apprehension be unable to obtain immediate sureties, he may at any time, on producing proper persons as sureties, be liberated from confinement."*

Sir Matthew Hale expressly says, "That if a man be indicted or appealed for "such an offence wherein bail may be taken, the indictment or appeal does not "hinder his bailment, because it induceth no sufficient presumption of his guilt— "*if he were bailable before indictment he is bailable after.*"†

It may, however, be contended that although our statute makes it imperative upon Justices of the Peace to accept bail in cases of misdemeanor, it does not follow that the higher Courts and judges are bound to do so.

It will be found that the Courts and Judges in England, in determining in what cases they ought to allow bail, and in what cases they ought to refuse it, have been guided invariably by the Statute of Westminster, and the other statutes on the same subject, although those statutes do not, in terms, refer to the higher Courts; and Coke, Hale, Hawkins, and the other great authorities in criminal law, in determining what offences are bailable, and what offences are not bailable, refer exclusively to the same statutes. Sir Matthew Hale speaks of those statutes, "as the common landmarks touching offences bailable or not."‡

It may be added that it is the duty of the Superior Courts to compel Justices of the Peace to accept bail in the cases in which the statute requires them to do so, and to punish them if they act contrary to the statute; and it would be very unreasonable for a Superior Court to punish a Justice of the Peace for refusing to take bail, in a particular case, and yet for the Judges of that Court to refuse to accept bail in a similar case.

It has also been contended that the rule making a distinction between felonies and misdemeanors with respect to the right to be admitted to bail is a most unreasonable one, and ought not to be followed by this Court. But we know that the distinction between felonies and misdemeanors runs through the whole body of our law, and that we meet it at every stage of the proceedings in bringing offenders to justice. "If the felon fleeth from justice, and if in the pursuit he

* Petersdorff on Bail, p. 506, and authorities there cited.
† Hale's Pleas of the Crown, Vol. 2, page 132, and authorities there cited.
‡ Hale's Pleas of the Crown, Vol. 2, page 126.

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"is killed, where he cannot be otherwise overtaken," this will be justifiable homicide. Whereas if a misdemeanant be killed, under the same circumstances, it will be murder or manslaughter.*

Where a man charged with felony is being tried, whatever may have been his position in life before, he must take his place in the dock;† whereas the misdemeanant, if on bail, is not obliged to do so.‡

The rules of pleading are not the same in cases of felony that they are in cases of misdemeanor, and the consequences of conviction in the two cases are widely different.

It is therefore not surprising that the rules respecting the right to be admitted to bail are not the same in the two classes of offences. But all speculation as to the reasonableness or unreasonableness of the distinction under consideration is useless, as that distinction is, in express terms, continued by our own statute; which, as already observed, lays down one rule for cases of felony, and another and different rule for cases of misdemeanor.

And here, I must say, that the learned counsel for the Crown, it seems to me, allow their attention to be too exclusively engaged, by the danger that may result from admitting misdemeanants to bail, without sufficiently considering the dangers incident to the system for which they contend, namely: that Justices of the Peace may, in their discretion, refuse bail in cases of misdemeanor, and more particularly upon charges for what have been spoken of as enormous misdemeanors.

It is to be recollected that there are indictable misdemeanors of a very trivial character, and, as was well observed by the Chief Justice, it is not easy to say what offences ought to be classed under the head of enormous misdemeanors. Blackstone speaks of riots, batteries and libels,|| as "*gross and notorious misdemeanors.*" And among the instances of "enormous misdemeanors" given by Archbold,§ are "libels upon the Queen's ministers, the Judges and other high "officers reflecting upon their conduct in the exercise of their official duties." In England the law provides that justices *must* take bail in the offences last mentioned, and the cases cited establish that the Judges would feel themselves bound to accept bail in the same cases; whereas, according to the doctrine contended for by the learned counsel for the Crown, a Justice of the Peace in Canada, in his discretion, could refuse bail in a case of libel, and a Judge, in his discretion, could also in a like case refuse to accept bail before conviction. To me it seems that the dangers incident to a system which would give Justices of the Peace and Judges a discretionary power to refuse bail, before conviction in all cases of misdemeanor, would, to say the least, be quite as great as the dangers incident to the system which obtains in England. And I think it will hardly

* Foster's Crown Law, p. 271.

† Captain Douglass's case—tried as one of the seconds on the occasion of the duel between Lord Cardigan and Captain Tuckett—1st Car. and Mar., p. 195.

‡ Burke's Trials, (Wakefield case) already cited.

|| 4 Blackstone, p. 308.

§ Archbold's Criminal Pleadings, p. 96.

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be contended that Justices of the Peace or Judges in Canada should have more extensive discretionary powers than are vested in Justices of the Peace and Judges in England.

One of the advantages, then, which results from the division of offences into felonies and misdemeanors is, that it enables the Legislature to lay down a certain rule with respect to the taking of bail in a large class of cases. Doubtless some offences have been classed under the head of misdemeanors which, in consequence of changes in our social system, and other causes, ought to be found under the head of felonies; but it is more fitting that the classification of offences should be modified by the Legislature than that the fundamental distinction upon which it rests should be ignored by the Courts.

It now remains only for me to explain my views respecting the order under which the prisoner is detained in custody, and of which he complains.

With reference to this part of the case my attention has been drawn to the authorities cited, and to the doctrine laid down by the Chief Justice and myself in the case *ex parte* Donoghue.* I wish it therefore to be understood that I propose to adhere strictly to the principles laid down in that case. The rule that co-ordinate tribunals cannot interfere with each other, nor Inferior with Superior Courts, is I think well established both in England † and in the United States. And, as has been well said by an eminent American Judge, "without "this rule the *habeas corpus* law would set aside all order by allowing the lowest "of all subordinate Judges to annul, on constitutional grounds, the judgments of "every Court in the State."‡

So impressed am I with the respect due to judicial proceedings, that, although in the discharge of our duties as a Court of Error, we exercise higher powers than when we sit in this Court on the Crown side, I, nevertheless, am not by any means prepared to say that we could, upon a writ of *habeas corpus*, annul or set aside any order made on the Crown side of this Court. But, in the present case, it is needless to discuss that question; because this Court can grant the relief prayed for without putting itself in conflict with the order inpugned, which as I read it, in effect provides for the bailing of the prisoner by this Court—the concluding words of the order being, the prisoner "not to be discharged with- "out further orders from this Court."

It has, I know, been said that under this order this Court on the Crown side held by a single Judge, could admit the prisoner to bail; but that the same Court, sitting as a Court of Error in criminal, as well as in civil cases, and held by at least four Judges, has not the power to admit him to bail. But I cannot see anything in law, in reason, or in the order itself, to justify this distinction.

This Court, sitting as it now does, has, under an express provision of law, power to issue the writ of *habeas corpus*, and even if there were no such express provision of law, this Court could, I am clearly of opinion, issue that writ.

* Ex parte Donoghue, 9 L. C. Rep., p. 285.

† See on this subject Dime's Cases, 68 E. C. L. R., p. 566, and cases there cited; also 19 E. C. L. R., p. 454 and cases there cited.

‡ Opinion of Mr. Justice Laurie, Passmore Williamson's Case, Philadelphia, 1856.

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The order in question, therefore, as regards the taking of bail, contemplates the doing of an act which may be done as well on one side of the Court as on the other; and there is no reason for saying, or law which requires us to say, that it ought to be done on one side of the Court rather than on the other.

Having now, as I think, shown that there is nothing in the order of Mr. Justice Mondelet to prevent this Court from admitting the prisoner to bail, I deem it my duty to add that even if the learned Judge could, consistently with law and justice, have refused to allow the prisoner to stand out on bail, still, I think, that the order remanding him ought not to have been so framed as to prevent not only the learned Judge by whom it was rendered, but all the other Judges, from admitting the prisoner to bail *at any time in vacation.*

In the course of the few observations remaining to be made by me, I shall view the order in question in the light in which it appears to have been regarded by Mr. Justice Monk, that is, as having (whether legal or illegal) the effect of a valid order until set aside by competent authority—and when we hear that Mr. Justice Aylwin and Mr. Justice Mondelet hold it to be strictly legal, and that the sheriff has been ordered, in the most absolute terms, to hold the prisoner under it, we cannot, in *relation to the application of the prisoner to be bailed,* view the order in any other light.

My objections, then, to the order complained of, (in so far as it tends to restrain the action of all the Judges out of term,) are founded on the consideration, that the situation of a prisoner, with respect to his right to be admitted to bail, before conviction, may change from day to day.

A prisoner may, at one time, be unable to explain or weaken the evidence against him, so as to justify his being admitted to bail; and yet he may be able to do so at a subsequent period—for instance by the conviction for perjury of the witnesses against him: as has recently occurred in two well-known cases in England.* Or during his imprisonment the state of prisoner's health may be such as to make it the duty of the Court to bail him. Thus, on Saturday last, upon an application for a writ of *habeas corpus* by a person charged with a felony, formerly capital, the affidavit of the two physicians of the jail were placed before this Court, establishing that unless the prisoner were released from jail, it was improbable he could live until the time fixed for his trial. The judges unanimously ordered the prisoner to be let out on bail; and on Monday last we fixed the amount of bail to be taken. Our law affords speedy relief, at all times, for cases such as those to which I have just adverted, by allowing a judge, in vacation, to bail a prisoner, when a sufficient case is made out, whatever may be the nature of the charge against him. But for the prisoner before us (assuming the order not to be void, as I do, for the purposes of the present discussion,)

* On the 28th of February, 1861, Mr. Bewicke of Threepwood Hall, in the county of Northumberland, was convicted of shooting at two sheriffs' officers, in the execution of their duty, and was sentenced to penal servitude for four years. But *on the same day,* of the following year, the three witnesses upon whose evidence he had been convicted were convicted of perjury; and Mr. Bewicke, as the victim of a foul conspiracy, was pardoned. A Mr. Hatch, in the same way, a short time previously, obtained his pardon, in consequence of the chief witness against him having been convicted of perjury.

be supported by even a single precedent.

It was said by the learned counsel for the Crown that in the cases of *Reg. vs. McAtavy** and *Reg. vs. McGinnis*,† orders, similar to the one complained of, were made, and that the Court of Queen's Bench in Ireland refused to interfere. Those cases are certainly of importance as establishing that where a Judge at assize, who has had the facts before him, orders a person under indictment to be detained in jail until the following term, it is contrary to the practice of the Court for even the Court to bail him.

This rule seems to me most reasonable; but it must be confined to those cases in which it is in the discretion of the Judge to refuse bail; and if the offence with which the prisoner now before us is charged were a felony, and therefore within the rule, I would be slow to substitute my discretion for that of my brother Mondelet. I know that the prisoner has been twice tried without being convicted; and that is doubtless an element to be considered in determining whether a party accused ought to be bailed; but it is mainly by the depositions, and by the evidence adduced at the trial that the Judge is to be guided in deciding that question.

The law, it is true, has said that the question of the guilt or innocence of the prisoner is to be determined by the unanimous verdict of a jury; but the law has also said that, in cases in which bail is discretionary, it is for the Judge to determine whether the prisoner ought or ought not to be let stand out on bail; and, according to my view, a Judge has no more right to substitute the conduct of a jury upon one or more trials for his own opinion, upon the question as to whether the prisoner ought to be bailed, than he has to attempt to substitute his own opinion for that of the jury, upon the main question of the guilt or innocence of the prisoner.

Returning, however, to the two cases cited from Cox's Reports, I may observe that, even in those cases, although the prisoners were indicted for capital felonies, the order did not say the prisoners were to be held "without bail or mainprise." The addition of the words "without bail or mainprise" to an ordinary commitment, it may be said, is of no importance, because, "if the offence be bailable, "he that hath the power of bailing may bail,"‡ notwithstanding those words.

* 4 Cox, c.c. 444, *Reg. vs. McAtavy.*
† 5 Cox, c.c. 511, *Reg. vs. McGinnis.*
‡ 2 Hale, P. C., 135.

to dwell longer upon the two cases just adverted to, because in each of those cases, as already observed, the prisoner was indicted for a *capital felony*; and the observations made by the Judges in a case of capital felony after indictment found, where the general and almost invariable rule is not to admit the prisoner to bail without the consent of the Crown, cannot have much application in a case of misdemeanor where, certainly, the general rule is directly the other way.

Our attention was also drawn to the case of the Queen vs. Harris, as bearing upon the point now being considered. That case is also of importance as showing how much consideration is due to the opinion of the Judge, who takes the trial, upon the question as to whether the accused ought to be bailed;—Judge, now Chief Justice, Erle said in that case: "Under no circumstances should I bail a "prisoner in a case such as the present without communicating with the learned "Judge before whom he was tried;" and I think the reasonableness of the observation so made cannot even be questioned. But in the *Queen* vs. *Harris* the prisoner had not only been tried, but *regularly convicted*, and although we have been, in effect, asked to disregard the distinction between felonies and misdemeanors with respect to the right of the accused to be admitted to bail, it is not, I am sure, expected that we can overlook the difference between the position of a person who *has been convicted*, and that of one who has been twice tried *without being convicted*.

I shall conclude by recapitulating the points which I think have been established in the course of the foregoing observations.

They are as follows: 1°. That according to the well established jurisprudence of the Courts in England, before the passing of the 11th and 12th Vict., Cap. 42, prisoners charged with misdemeanors were entitled to be bailed. The words of Lord Denman, in the last reported case decided under the old law being: "for many years the received opinion and practice has been that *all* "persons accused of *misdemeanor*, whether *common or otherwise*, are *entitled* to "be bailed."

2°. That under the English Statutes 11th and 12th Vict., cap. 42, a Justice of the Peace could not refuse bail in a case such as the present.

3°. That by our Statute the chap. 102, C. S. C., Justices of the Peace are bound to take bail in all cases of misdemeanor.

4°. That this Court could not consistently with reason refuse to take bail in any case in which, under the statute, a Justice of the Peace is bound to take bail,

* 2 Hale, P. C., 133.

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the statutory directions to Justices of the Peace having always been regarded by the Courts as "the common landmarks" by which they ought to be guided in deciding applications to be admitted to bail.

5°. That there is nothing in the order of Mr. Justice Mondelet to prevent this Court from admitting the prisoner to bail.

6°. That that order is objectionable as tending to restrain the learned Judge by whom it was made and all his brother Judges from the exercise, during vacation, of a power vested in them by law for the protection of the liberty of the subject.

Considering these points established, and bearing in mind, firstly, that no instance in modern times has been found of any Court in England having refused to accept bail in a case of misdemeanor, and secondly that the prisoner has been tried twice without being found guilty; the conviction has forced itself upon my mind that we cannot, consistently with those rules by which we are usually guided in the administration of justice, refuse to admit the prisoner to bail.

It is with regret that I have found the Court divided as it is in this case; but this difference of opinion has been for me an additional reason to examine and weigh with the utmost care the authorities and arguments submitted, and may also in some degree account for the extreme length of these observations. I shall add merely that in explaining my views in this case I have spoken without any reserve of the objections to which, in my opinion, the order of my brother Mondelet is subject. Under any circumstances I know that he would wish me to do so; and I have the less hesitation in pursuing that course in the present instance, because, whatever doubts may exist as to the other points of the case, there can be none, in the mind of any reasonable person, as to the motives of my learned brother in making the order impugned. He had seen, in this case, two grave miscarriages of justice, and his object evidently was to prevent the case from ending in a total failure of justice. Moreover, although I express, and act upon my own opinion (as I am bound to do whatever may be my respect for the views of others) I do not fail to bear in mind that although the order complained of is opposed to the opinion of the majority of the Court, it, nevertheless, is fully approved of by my brother Aylwin, than whom there is no one more competent to judge of the matter.

Application for bail granted.

B. Devlin, for petitioner.
T. K. Ramsay, contra.
(W. E. B.)

MONTREAL, 2 MARS 1866.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., et MONDELET, J. A.

No. 55.

Groulx vs. *La Corporation de la Paroisse de St. Laurent.*

JUGE :—Qu'il n'y a pas d'appel d'un jugement rendu en vertu de l'acte municipal.*

Le jugement de la Cour de Circuit pour le district de Montréal, rendu le 25 avril 1865, condamnait le défendeur pour inexécution de ses devoirs d'inspecteur

* Vide, 23 Vict., ch. 61, sec. 67, p. 14, et 13 L. C. R., p. 498.

Groulx vs. La Corporation de la Paroisse de St. Laurent.

des chemins et ponts, à payer, à la demanderesse, la somme pénale de $120.

Devant la cour d'appel l'intimée fit la motion suivante :

Motion de la part de l'intimée, que l'appel interjeté par le dit appelant en cette cause soit renvoyé, etc. : 1° parce que le dit jugment dont le dit appel est interjeté, a été rendu en vertu de l'acte municipal du Bas-Canada de 1860.

2° Parce qu'en vertu du dit acte municipal, le dit appel en vertu de droit commun et statutaire est enlevé.

3° Parce qu'il n'existe en loi aucun appel tel que celui interjeté par l'appelant.

Le jugement de la cour d'appel est motivé comme suit :

La cour, après avoir entendu les parties sur la motion de l'intimée en date du 5 juin dernier, etc. :

Vu que le jugement dont on a interjeté appel, a été rendu par la Cour de Circuit en vertu des dispositions de l'acte municipal du Bas-Canada de 1860 qui enlève à cette cour toute juridiction à l'égard de tout jugement prononcé par la dite cour de circuit en vertu du dit acte ; la cour accordant la motion de l'intimée renvoie, déboute et met au néant le dit appel avec dépens contre l'appelant.

Moreau, Ouimet et Chapeleau avocats de l'appelant.

Girouard, avocat de l'intimée.

(P. R. L.)

MONTREAL, 8 SEPTEMBRE 1865

Coram DUVAL, J. C., AYLWIN, J., MEREDITH, J., DRUMMOND, J., et MONDELET, J. A.

No. 73.

Dupont et al., vs. *Grange.*

JUGE :—Que la demande en déclaration d'hypothèque, étant d'une nature réelle, est une cause appelable et que l'enquête doit être prise par écrit sur la réquisition de l'une des parties.*

Cette action avait été rapportée le 6 novembre 1863 devant la Cour de Circuit siégeant dans et pour le comté de Soulanges.

Les appelants avaient fait motion que cette cause fut considérée appelable et l'enquête prise par écrit.

La jugement de la Cour de première instance a rejeté le motion des appelants comme suit :

"Le Cour, etc., la motion de l'avocat des défendeurs en garantie demandant "que cette cause soit mise sur le rôle des causes appelables comme étant susceptible d'appel de sa nature, étant rejetée, faisant droit, etc."

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* Vide, 11 L. C. R 282, p. 13 L. C. R., p. 499, 4 L. C. J., p. 18.

Autorités des appelants.

Ch. 77, S. R. B. C., sec. 39, 25 Viet., ch. 10, s. 11.

1 Nouv. Den., p. 2, sec. 2, vo. action.

" " vol. 6, vo. Décl. d'hyp., No. 2.

2 Bourjon, liv. 6, ch. 1, No. 4.

Autorités de l'intimé.

Ch. [illegible] S. Ref. B. C., sec. 178.

Procédés de l'évocation nécessaire pour se prévaloir du droit d'appel en un tel cas.

Dupont et al. vs. Grange.

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 procédure en cour de première instance, la requête d'appel produite par les appelants en cette cause et sur le tout mûrement délibéré:

Considérant que l'intimé, demandeur en cour de première instance, s'est pourvu contre les appelants par une action en déclaration d'hypothèque;

Considérant que cette action en est une d'une nature réelle;

Considérant que le demandeur était en droit de demander et obtenir de la Cour, qu'il fût procédé à prendre l'enquête par écrit, et de faire rayer la dite cause du rôle des causes non appelables, sur lequel la dite cause avait été inscrite, attendu qu'elle est appelable de sa nature;

Considérant que les appelants ont régulièrement fait cette demande à la cour de première instance, le septième jour de mars mil huit cent soixante-et-cinq, et que, de suite, la dite cour l'a refusée;

Considérant qu'à cet égard et en ce refusant, la cour de première instance a erré;

Considérant que cette erreur de la part de la cour de première instance, suivie d'un jugement au mérite, doit avoir l'effet et a l'effet d'entacher d'erreur la jugement final rendu par la dite cour de première instance, le huitième jour de mars mil huit cent soixante-et-cinq; cette cour casse et met de côté les dits jugements de la cour de première instance, savoir: le jugement de la Cour de Circuit tenue à Soulanges, le septième jour de mars dernier et aussi celui du huitième jour de mars dernier, et procédant à rendre le jugement qu'aurait dû rendre la dite cour de première instance, annule et met de côté, comme nuls et non avenus tous les procédés en la dite cause depuis et compris le dit jugement du sept mars susdit; accorde la demande des appelants et ordonne que la cause susdite soit rayée du rôle des causes non appelables et mise sur celui des causes appelables, pour y être procédé suivant qu'il appartiendra.

Et cette Cour condamne l'intimé à tous les dépens, tant en cette cour qu'en cour de première instance, (l'honorable Jean François Joseph Duval, juge en chef, *dissentiente*) et ordonne enfin que le dossier soit remis à la cour de première instance.

Moreau, Ouimet et Chapeleau, avocats des appelants.

Doutre, et Doutre, avocats de l'intimé.

(R. R. L.)

MONTREAL, 8 MARS 1866.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., et MONDELET, J. A.

No. 53.

Harnois vs. *St. Jean*.

JUGE:—Que l'action en séparation de biens est valablement intentée dans le district où le défendeur est assigné *personnellement*, conformément aux dispositions de la section 26 du chapitre 72 des Statuts Refondus pour le Bas-Canada.*

L'appelante avait poursuivi le défendeur son marie en séparation de biens.

L'action avait été signifiée à l'intimé le 13 octobre 1874, *personnellement* en

* Kennedy vs. Bédard reported in 3 vol. L. C. Jurist page 285, reversed.

Harnois vs. St. Jean.

la cité de Montréal. Il fit défaut*. Le jugement de la cour supérieure à Montréal débouta l'appelante de sa demande comme suit :

La cour ayant entendu la demanderesse, etc., le défendeur ayant fait défaut, etc. ; considérant que les parties, en cette cause, ont contracté mariage en la paroisse de Lavaltrie, district de Richelieu, en février 1860, où elles ont eu depuis, et avaient encore au temps de l'institution de cette action, leur domicile et que l'action de la demanderesse contre le défendeur son mari en séparation de biens, devait être intentée dans le district où les parties ont eu depuis leur mariage et ont encore domicile, a renvoyé le demandeur de sa demande pour se pourvoir dans le district qu'il appartiendra.

Le jugement de la cour d'appel est motivé comme suit :

La cour après avoir entendu l'appelante *ex parte* par son avocat sur le mérite, l'intimé ne comparaissant pas, examiné le dossier de la procédure en cour de première instance, les griefs, etc.

Considérant qu'aux termes du chapitre 82, sec. 26, des Statuts Refondus du Bas-Canada, l'intimé défendeur en cour de première instance, bien que lors de l'assignation à lui faite en cette cause, fût domicilié ainsi que l'appelante, son épouse, dans le district de Richelieu où ils ont contracté mariage, a pu légalement être assigné dans un autre district pourvu que l'assignation lui fut faite *personnellement* ; considérant que le dit défendeur a été bien et duement assigné personnellement en la cité de Montréal, dans le district de Montréal, à comparaître en la cour supérieure du susdit district de Montréal, par sa dite épouse, *en séparation de biens*, de laquelle assignation, au reste, le dit défendeur ne s'est pas plaint : Considérant qu'il résulte de ce qui précède, qu'il y a erreur dans le jugement dont est appel, savoir : le jugement rendu par la cour supérieure siégeant en la cité de Montréal le 30 juin 1865, déboutant la dite action en séparation de biens, cette cour casse, annule et met au néant le dit jugement et procédant à rendre le jugement qu'aurait dû rendre la dite cour supérieure, ordonne que la demanderesse appelante sera et demeurera du jour de sa demande, savoir : le 13 octobre 1865, séparée quant aux biens d'avec le défendeur, etc, et la cour condamne le défendeur à tous les dépens, etc.

E. U. Piché, avocat de l'appelante.

(P. R. L.)

MONTREAL, 4 SEPTEMBRE 1865.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., ET MONDELET, J. A.

No 95.

Walker et vir vs *Le Maire et le Conseil de la ville de Sorel.*

JUGÉ :—Que la femme séparée de biens peut interjeter appel d'un jugement rendu contre elle, après le délai de l'an et jour expiré durant la vie de son mari.

L'appelante avait porté une action pétitoire contre les intimés devant la Cour Supérieure dans le district de Richelieu.

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* Depuis la mise en force de l'acte de faillite 1864, dans une semblable demande contre un commerçant seulemedt, l'action doit être portée dans le district où le défendeur commerçant est domicilié ; *exceptio firmat vim legis in casibus non exceptis.*

Walker et vir. vs. Le Maire et le Conseil de la Ville de Sorel.

Cette action avait été renvoyée sur une défense au fonds en droit le 12 janvier 1864.

Ce ne fut que le 17 de mars 1865 que l'appelante autorisée de son mari interjeta appel de ce jugement.

Le 1er Juin 1865, les intimés firent motion pour le renvoi de cet appel pour les raisons suivantes : 1o. Parcequ'il s'est écoulé plus d'un an entre la date du prononcé du jugement final dont est appel en cette cause rendu le 12 janvier 1864, et celle de l'émanation du Bref d'Appel en cette cause, le 17 mars dernier. 2o. En autant que le délai accordé pour interjeter un tel appel était passé et écoulé lors de l'émanation du dit Bref d'Appel. 3o. En autant enfin que les appelants ne peuvent aucunement se prévaloir d'aucune incapacité légale.*

Les intimés prétendaient, que vu que la prescription court contre la femme mariée séparée de biens; 2 Troplong, Prescription, No. 779; il s'ensuivait qu'elle était tenue d'interjeter appel dedans le délai d'un an conformément aux dispositions du chap. 77 des Statuts Refondus pour le Bas-Canada, sec. 27 et 55, et que ces dispositions ne devaient s'appliquer qu'aux cas des femmes mariées communes en biens à l'égard desquelles la prescription ne court pas, et de celles qui n'avaient pas été parties principales au procès.

Per Curiam.—Comme le Statut ne fait aucune distinction de la nature de celle invoquée par les intimés, leur motion est rejetée avec dépens.

Girouard, avocat de l'appelante.

Motion renvoyée.

LaFrenaye et Bruneau, avocats des intimés.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 30 NOVEMBRE 1865.

Coram MONK, A. J.

No. 2709.

Christie vs. *Malhiot.*

SERVITUDE—GARANTIE—RESCISION.

JUGE :—Que la stipulation de la part d'un acquéreur : " de souffrir les servitudes de toute nature qui pourraient exister sur la dite terre ou en sa faveur, lesquelles tourneront au profit ou à la perte de l'acquéreur, sauf à lui de se défendre de ce qui lui porterait préjudice et à profiter de ce qui lui serait utile à ses risques et périls, sans aucun recours contre le vendeur, le dit vendeur déclarant néanmoins ne connaître aucune servitude de l'une ou de l'autre espèce qu'un droit *de passage à pied ou en voiture* sur la dite terre en faveur de Pierre Monastesse, que le dit acquéreur sera obligé de souffrir comme susdit," n'empêche pas cet acquéreur de demander la rescision de la vente ou une diminution du prix de vente, si ce droit de passage est accompagné de la charge de l'entretien, à la connaissance du vendeur, mais non de l'acquéreur.

Le jugement suffit pour expliquer la nature de l'action, des faits prouvés et des questions qu'il résout.

" Considérant que l'acte de vente du 5 nov. 1859, porte garantie de " tous trou-" bles, dons, douaires, dettes, hypothèques, évictions, substitutions, aliénations et " autres empêchements quelconques " par le défendeur en faveur du demandeur ;

" Considérant que par le dit acte, le demandeur s'est obligé de supporter et " d'exécuter les charges et servitudes suivantes, savoir : " de souffrir les servitudes " de toute nation qui pourraient exister sur la dite portion de terre ou en sa

* Vide, ch. 77, sec. 27 et sec. 55, Statuts Refondus, B. C.

Christie vs. Malhiot.

"faveur, lesquelles tourneront au profit ou à la perte de l'aquéreur, (c'est-à-dire "le demandeur), sauf à lui de se défendre de ce qui lui porterait préjudice et à "profiter de ce qui lui serait utile, à ses risques et périls, sans aucun recours "contre le vendeur (savoir le défendeur), le dit vendeur déclarant néanmoins "ne connaître aucune servitude de l'une ou de l'autre espèce qu'un droit de passage à pied ou en voiture sur la dite terre en faveur de Pierre Monastesse, que "le dit acquéreur serait obligé de souffrir comme susdit;

"Considérant que par l'acte du 7 janvier, 1858, entre Messire René Olivier "Bruneau et Adolphe Malhiot et Charles Malhiot, il est dit et déclaré: "Que "chacun d'eux reconnaissant qu'il serait très-avantageux pour les dits Adolphe "Malhiot et Charles Malhiot que leur dite terre eut un droit de passage sur la "terre du dit Révérend Messire René Olivier Bruneau pour communiquer au "chemin de front du rang de la grande côte, et de même qu'il serait très-avantageux pour le dit Révérend Messire René Olivier Bruneau que sa dite terre "eût un droit de passage sur la dite terre des dits Adolphe Malhiot et Charles "Malhiot pour communiquer à son bois et au second rang, ils se sont réciproquement cédé, quitté et transporté, savoir: les dits Charles Malhiot et Adolphe "Malhiot ont cédé et transporté au dit Révérend Messire René Olivier Bruneau "qui l'a accepté pour lui, ses héritiers et ayant cause, le droit de passer sur leur "terre, ci-dessus désignée, tant à pied qu'en voiture, pour communiquer de sa "dite terre ci-dessus designéé au chemin du second rang, le dit passage devant "être à l'endroit qui sera fixé chaque année par les dits Adolphe Malhiot et "Charles Malhiot, leurs héritiers, et ayant cause et sujet à être changé de place "chaque année, à la demande des dits Messieurs Malhiot, leurs héritiers et ayant "cause, et le dit Révérend Messire René Olivier Bruneau a cédé et transporté "aux dits Adolphe Malhiot et Charles Malhiot qui l'ont accepté pour eux leurs "héritiers et ayant cause, le droit de passer sur sa terre ci-dessus désignée en "premier lieu, tant à pied qu'en voiture pour communiquer de leur dite terre au "chemin du dit premier rang, le passage devant être à l'endroit qui sera fixé "chaque année par le dit Révérend Messire René Olivier Bruneau, ses héritiers, "et ayant cause et sujet à être changé de place à la demande du dit Révérend "Messire Bruneau.

"Les dits droits de passage étant cédés par chacune des dites parties à la "charge par chacun des dits cessionnaires de fermer les barrières avec soin, les "ponts et l'entretien des dits chemins de passage seront à l'entretien de ceux sur "la propiété desquels ils seront. Car ainsi, etc."

"Considérant qu'il résulte de cette clause qu'il y avait une servitude active stipulée en faveur de la terre vendu au demandeur et une servitude passive en faveur de la terre maintenant appartenante au dit Pierre Monastesse, mentionnée dans la déclaration en cette cause, en vertu de l'acte de vente par Adolphe Malhiot à Pierre Monastesse du 8 janvier 1856, et que cette dernière servitude consistait en un droit de passage à pied et en voiture, tel que décrit dans la dite déclaration, avec l'obligation d'entretenir le dit chemin de passage."

"Vu qu'il résulte de la preuve produite en cette cause, qu'au temps de la vente du 5 novembre 1859, le défendeur connaissait parfaitement la nature et toute l'étendue de la servitude, en faveur du dit Pierre Monastesse, et considérant

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qu'il était de son devoir d'en faire connaître la nature et toute l'étendue au demandeur (l'acquéreur dans l'acte de vente du dit 5 novembre 1859) et qu'il aurait dû avertir l'acheteur de l'obligation qui existait d'entretenir le dit chemin de passage."

"Considérant qu'il ne résulte pas de la preuve produite en cette cause que le demandeur connaissait l'étendue de la dite servitude, dont il est question, lorsqu'il fit l'acquisition de la dite terre."

"Considérant qu'il appert par la dite preuve que l'entretien du dit chemin de passage diminue la valeur de la dite terre d'une somme d'au moins trois mille livres, ancien cours, et que partant le dit demandeur est bien fondé à faire contraindre le défendeur à opter entre la rescision du dit acte de vente du 5 novembre 1859 et le remboursement de la somme de $2,750 par lui payé à compte d'icelui et la réduction du susdit prix de vente jusqu'à concurrence de la dite somme de 3000 livres, ancien cours, égale à celle de $500."

"Rescinde, annulle et résilie à toutes fins que de droit l'acte de vente susmentionné du 5 novembre 1859 et en conséquence condamne le dit défendeur à payer au dit demandeur, sous quinze jours de la signification du présent jugement la dite somme de $2.750, avec intérêt à compter de ce jour; si mieux n'aime toutefois le dit défendeur, payer au dit demandeur, sous le dit délai de quinze jours, la dite somme de $500, comme réduction du susdit prix de vente, avec intérêt sur icelle à compter de ce jour et les dépens de cette action auxquels et dans tous les cas le dit défendeur est condamné et dont distraction est accordée à messieurs Doutre et Doutre, avocats du demandeur."

AUTORITÉS CITÉES PAR LE DEMANDEUR.

SOLON.—Servitudes, no. 7.— "Les servitudes sont contraires aux principes de liberté qui dominent nos propriétés, *comme nos personnes*, elles sont défavorables, etc., etc., et dans toutes les questions douteuses, il réclame la solution la plus conforme à la franchise des héritages."

Id. no. 53.—"Il est de principe certain que les fonds étant réputés libres, il ne faut apporter à l'exercice du droit de propriété d'autre gêne *que celle que les parties y ont apportées elles-mêmes, d'une manière claire, précise et non-réprouvé par la loi; le plus petit doute sur la nature de la servitude, son étendue, sur le mode de son exercice doit se résoudre en faveur de la franchise des héritages, etc.,* c'est là, notamment la règle la plus sûre et la plus généralement invoquée en matière de servitudes."

Id. no 571.—De droit commun l'entretien d'une servitude est à la charge du propriétaire du fond dominant.

FERRIERE, gr. cout., t. 2, p. 1484, no. 24.—"Il faut déclarer de quelles servitudes le fonds est chargé; autrement il est présumé vendu sans aucunes charges, *les héritages étant libres de leur nature.*

TOULLIER, t. 3, no. 665.

SOLON.—Servitudes, p. 39.

"Si l'héritage vendu se trouve grevé, sans qu'il en ait été fait de déclaration, de servitudes non apparentes, (qu'y a-t-il de moins apparent que l'entretien d'un droit de passage?) et qu'elles soient de telle importance qu'il y ait lieu de présu-

mer que l'acquéreur n'aurait pas acheté, s'il en avait été instruit, il peut demander la résiliation du contrat, si mieux il n'aime se contenter d'une indemnité."

Christie vs. Malhiot.

LALAURE.—Servitudes, Edition de Paillet, p. 221: "Et si (le vendeur) connaissant les servitudes dues par son champ, avait déclaré *d'une manière obscure et confuse, qu'il était du des droits de passage, mais dans des termes assez ambigus pour que l'acquéreur fut censé n'avoir point compris de quelle espèce de servitude l'héritage vendu était chargé*, il ne pourrait être garant de l'action en éviction, *mais il serait tenu de celle appelée en droit* EMPTI, comme ayant trompé l'acquéreur."

POTHIER, vente. no. 239.—Obligation du vendeur de déclarer les charges, à peine de rescision du contrat et de restitution de prix,—la fraude donnant lieu à la contrainte par corps,—l'absence de fraude donnant également lieu à rescision et restitution, mais sans contrainte par corps.

Idem, no. 193.—Vendeur doit garantir l'acquéreur de toutes demandes pour raison de charges réelles, autres que celles qui lui ont été déclarés, ou qu'il ne pouvait ignorer.

Id. no. 204, 210.—Sur l'effet de l'exclusion de garantie dans la stipulation contenue dans l'acte—no. 210: "Il faut en troisième lieu (pour que la vice de la chose donne lieu à la garantie) que le vice n'ait pas été, par une clause particulière, excepté de *bonne foi*, de l'obligation de la garantie. Le vice excepté de bonne foi, lorsque le vendeur, *qui ne connait pas* la chose qu'il vend, dans la crainte qu'elle n'ait un certain vice dont il n'a pas néanmoins connaissance, a stipulé qu'il ne garantit pas ce vice. En ce cas, la clause doit être exécutée, et l'acheteur n'a aucun recours contre le vendeur pour ce vice, si la chose vendue s'en trouve entachée. *Mais si le vendeur a, lors du contrat, une pleine connaissance de ce vice, et qu'au lieu de le déclarer, (ou de n'en déclarer que la partie la moins onéreuse), il stipule qu'il ne garantit pas ce vice; cette dissimulation du vendeur est un dol qui le rend sujet à la garantie, nonobstant la clause.*"

Id. no. 262:—"Il reste à observer que le vendeur est obligé à indemniser l'acquéreur non-seulement lorsqu'il a su que la chose n'avait pas la qualité déclarée par le contrat, mais même lorsqu'il a cru de bonne foi qu'elle avait cette qualité. Il en est de même à l'égard de la quantité."

Doutre et Doutre, pour le demandeur. Jugement pour le demandeur.
Dorion et Dorion, pour le défendeur.
(J. D.)

(EN REVISION.)

MONTREAL, 28 FEVRIER 1866.

Coram BADGLEY, J., BERTHELOT, J. ET MONK, J. A.

No. 67.

Ex parte SPELMAN.

Requérant un writ de certiorari.

JUGE:—1o. Qu'il n'y a pas lieu à révision d'un jugement rendu sur une demande pour un writ de *certiorari*. 2o. Que les seules causes sujettes à révision, sont celles qui sont appelables à la cour du Banc de la Reine.

Le requérant avait présenté une motion pour un writ de *certiorari* devant la Cour Supérieure siégeant à Montréal.

Ex parte Spelman.

Le 28 février 1865, il fut débouté de sa motion pour obtenir un writ de *certiorari.*

Il inscrivit cette cause pour revision devant trois juges à Montréal.

Le 23 mai 1865, les parties furent entendues sur le mérite.

Per Curiam. There are four cases under this title. The prosecutor has sued Spelman under one of the clauses of the Revenue Act, for having contravened the statute. The petitioner contends that the conviction rendered against him is bad. The Court will not discuss the merits of the application, because a preliminary question comes up, and its decision will have the effect of disposing of the case *in limine.*

There is no right of appeal to the Court of Queen's Bench, appeal side, from judgments rendered upon applications for writs of certiorari before the civil courts. The point, therefore, to be determined is, whether there is a revising power of such judgments? The Court is of opinion that there is no such revising power under the Act of 1864, 27 and 28 Vict., ch. 39, sec. 20 and 25. The test of a judgment being subject to revision is whether it is appealable or not.

As there is no appeal on a certiorari, there cannot be any revision. The proceedings in revision must be set aside, but without costs.

The judgment is motivé as follows:

The Court now here sitting as a Court of Review, having heard the parties by their respective counsel, in revision, upon the judgment rendered by the Superior Court in the District of Montreal, on the 28th February, 1865, maintaining the conviction of the said Justices of the Peace, etc., doth declare, that as a Court of Review, they are without jurisdiction in the present matter, and in consequence doth discharge the inscription of this cause for hearing, without costs.

Inscription for revision set aside, without costs.

Devlin, attorney for petitioner.

V. P. W. Dorion, attorney for prosecutor.

(P. R. L.)

(EN REVISION.)

MONTREAL, 30 NOVEMBRE 1865.

Coram BADGLEY, J., BERTHELOT, J., ET MONK, J. A.

No. 132.

Lecours vs. *La Corporation de la Paroisse de St. Laurent.*

JUGE:—Que le contribuable qui a protesté une corporation, pour l'obliger à exécuter certains travaux exigés d'elle par un procès-verbal, a droit d'obtenir un jugement pour le coût des protêts.

Le demandeur avait poursuivi la défenderesse pour certains dommages qu'il avait éprouvés par suite de sa négligence à exécuter un certain procès-verbal et à clôturer certaines propriétés.

Le jugement rendu par la Cour de Circuit pour le district de Montréal avait accordé au demandeur quatorze piastres, coût des protêts faits à sa requête contre la défenderesse pour l'obliger à se conformer à ce procès-verbal. Ce jugement ayant été porté en revision fut confirmé et de plus le demandeur y réussit

à obtenir une autre somme de quarante piastres pour dommages prouvés avoir été soufferts par lui.

Lecours vs. La Corporation de la paroisse de St. Laurent.

Per Curiam: The plaintiff has a right to demand and recover all costs legitimately expended for a demand of a right. Judgment for costs of protests, viz: $14 and also $40 damages.

Lesage et Jetté, avocats du demandeur.

Bélanger et Desnoyers, avocats de la défenderesse.

(P.R.L.)

DISTRICT D'ARTHABASKA, 13 FEVRIER, [illegible]

Coram POLETTE, J.

No. 430.

Hébert vs. Quesnel.

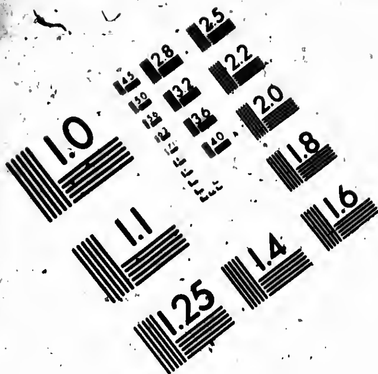
JUGÉ:—Que deux causes peuvent être réunies ensemble, sur une demande de l'une des parties par ordre de la cour, quand il y a connexité entre elles.

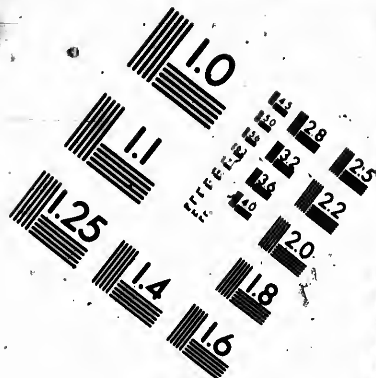
Par une action No. 407, à la cour supérieure, District d'Arthabaska, M. le shérif Quesnel intenta une action, *ex injuriâ*, contre N. Hébert, écuier, par laquelle il réclamait £5000 de dommages pour un libelle diffamatoire publié dans *Le Défricheur*, le 3 décembre 1863. A cette acte le défendeur plaida compensation d'injures par l'article que le demandeur avait publié dans *Le Défricheur*, le 10 décembre. Le 13 janvier 1864, M. le juge Stuart rejetta cette défense en compensation, *comme étant mal fondée en droit*, alléguant pour raison que le défendeur n'aurait pas dû plaider la compensation, mais faire une demande incidente. Le défendeur trouvant sa position, difficile et inextricable par cette décision de la cour, intenta la présente action contre M. le shérif Quesnel pour £5000 de dommages *ex injuriâ*; l'action étant rapportée en cour, le demandeur Hébert fit la motion suivante:

"Pour que la présente cause soit réunie, ne fasse qu'une seule procédure, un seul dossier avec la cause actuellement pendante devant cette honorable cour sous le numéro 407, dans laquelle le présent demandeur est le défendeur, la dite cause étant pour injures et par laquelle le dit Auguste Quesnel réclame cinq milles livres courant de dommages et la présente action étant pour pareille somme que le demandeur en cette cause réclame comme dommages pour injures du dit défendeur; les dites deux causes ayant la même cause et étant des demandes pour injures, *que les parties ne peuvent que compenser par une demande contre l'autre*, la réunion de ces deux causes facilitera les fins de la justice, évitera les frais et complications des procédures, et sans la réunion des dites deux causes, les fins de la justice ne peuvent être atteintes."

Après avoir entendu les avocats de chacune des parties, la cour, avant de prononcer son jugement, fit les observations suivantes:

La cour a à décider sur une motion du demandeur tendante à faire unir cette cause à une autre d'une même nature, entre les mêmes parties et pendante devant cette cour, dans laquelle le présent demandeur est défendeur et le présent défendeur est demandeur. Les faits sont comme suit:





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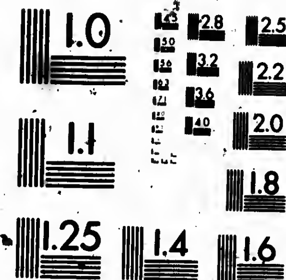

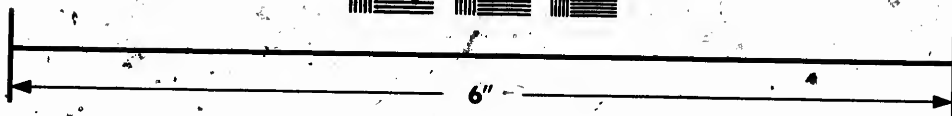

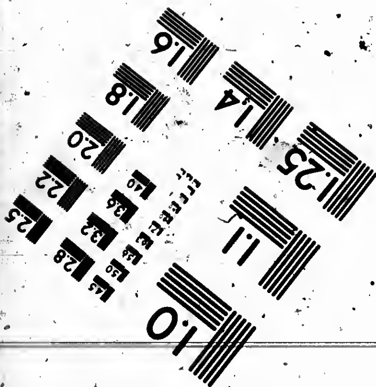

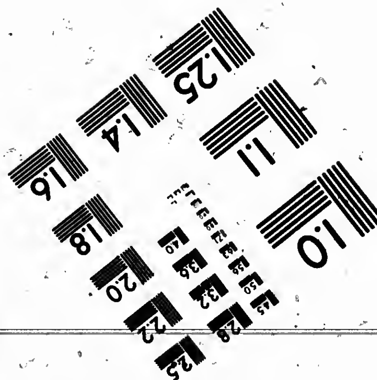

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Hébert vs. Quesnel.

Dans l'autre cause, M. Quesnel accusse M. Hébert d'avoir publié contre lui, sur *Le Défricheur* du 3 décembre 1863, un libelle diffamatoire, et réclame £5000 de dommages-intérêts en réparation des injures contenues dans ce libelle.

Dans la présente cause, M. Hébert se plaint que M. Quesnel a publié contre lui, sur le numéro suivant du même papier-nouvelle, celui du 10 décembre 1863, un libelle diffamatoire, et comme réparation des injures contenues dans ce libelle, il demande £5000 de dommages; ce dernier écrit est en réponse au premier.

Le demandeur actuel a plaidé compensation d'injures, à l'action de M. Quesnel. Il fait donc valoir doublement le libelle de celui-ci, en lui faisant servir de cause de son action contre M. Quesnel, et de moyen de défense, de compensation, à l'action dirigée contre lui-même; et s'il réussissait dans sa demande et dans sa défense, il retirerait deux fois la valeur que ce libelle pourrait lui procurer, en obtenant les dommages qui devraient compenser les injures publiées contre lui, et en s'exemptant de payer pour celles qu'il aurait publiées contre M. Quesnel.

Il y a donc connexité entre ces deux causes, elles sont tellement liées que le jugement de l'une peut, doit même, influer sur le jugement de l'autre.

" Connexité, c'est le rapport et la liason qui se trouvent entre plusieurs " affaires qui demandent à être décidés par un seul et même jugement."

4 Répertoire, de Guyot, p. 480, vo. connexité.

" Jonction, se dit de l'union d'une demande à une autre, pour y être fait " droit conjointement; ce qui arrive quand un procès est joint à un autre......"

1 Ferrier, Introduction à la Pratique, p. 91, vo. jonction.

" Connexité. C'est la liaison qui existe entre deux affaires dont le jugement de l'une doit influer sur le jugement de l'autre."

3 Rolland de Villargues, Dictionnaire du Droit Civil, p. 100, vo. connexité.

" Il y a connexité entre deux affaires, lorsqu'elles sont tellement liées, que le " jugement de l'une doit influer sur le jugement de l'autre.

" Si la contestation est connexe à une cause déjà pendante au même tribunal, " c'est le cas de demander la jonction des deux affaires; et si elle est portée à une " section différente, de demander le renvoi à la section saisie de la première."

2 Favard de Langlade, Répertoire, pp. 458, 460, vo. Exception, § 2, No. 9.

" Il y aura connexité si les points à juger ressortent des mêmes faits, s'ils " reposent sur l'interprétation des mêmes actes, s'ils dépendent des mêmes moyens " si la décision rendue sur les uns est de nature à influencer la décision des " autres."

2 Delzers, Procédure Civile, p. 133.

" Il y a connexité, lorsque, par son objet, une cause a tellement de rapport " avec une autre cause, soumise à un tribunal différent, que le jugement de l'une " influerait sur celui de l'autre, et que la même instruction peut dès lors suffire " aux deux."

1 Auger, Procédure Civile, p. 81, art. 1. No. 2.

1 Berriat-Saint Prix, Procédure Civile, p. 253.

" Il y a connexité toutes les fois que la demande qu'on forme est tellement " liée avec celle déjà intentée devant un autre tribunal, que le jugement de l'une " doit influer sur le jugement de l'autre, ce qui a lieu en trois cas: le premier,

Hébert vs. Quesnel.

lorsque la demande formée devant un tribunal influe sur la demande précédem-
"ment intentée dans un autre, de manière que la première doive être décidée
"comme conséquence de la seconde; le second, lorsque, *vice versa*, c'est la seconde
"demande qui doit être décidée comme conséquence de la première; le troisième,
"lorsque l'objet de la seconde demande est accessoire de l'objet de la première."

1 Nouveau Pigeau, p. 205.

"Quand deux demandes, sans être précisément formées pour le même objet,
"dérivent *du même fait* ou du même acte, qu'elles doivent se décider par les
"mêmes motifs et en quelque sorte l'une par l'autre, (comme çà peut être le cas
"ici) il y a connexité.

"Il n'est pas juste qu'une personne soit obligée à plaider pour le même objet
"dans deux tribunaux à la fois, ou exposée à l'inconvénient de deux jugements
"contraires, dont l'un mettrait obstacle à l'exécution de l'autre.

"En conséquence cet article autorise la demande en renvoi, quand la même
"contestation existe devant un autre tribunal, ou que deux demandes connexes
"se trouvent formées en même temps dans des tribunaux différents.

"Quand ces demandes existent simultanément dans le même tribunal, il faut
"les joindre, à moins que quelques circonstances graves ne s'y opposent; c'est le
"moyen de diminuer les frais et de prévenir l'inconvénient de plusieurs juge-
"ments contraires.... ....."

1 Thomine-Desmazures, Code de procédure, p. 223, des Exceptions.
L'auteur écrit sur l'art. 171 du code de procédure, mais cet article ressort de l'Ordonnance de 1667, Tit. 6. art. 3, qui reconnait les renvois pour causes de connexité.

"Dans le cas ou une demande connexe à une autre demande formée anté-
"rieurement est portée au même tribunal que celle-ci, que peuvent demander les
"parties?

"Elle peuvent demander la jonction des deux causes, où, si chacune se trouve
"soumise à une section différente, demander le renvoi de la cause la plus récente
"à la section saisie de la première affaire."

2 Carré et Chauveau, Lois de la procédure, p. 193, Question 731.
Les mêmes, p. 194, même question.

"D'autres, au contraire, regardent une telle exception comme mixte, attendu
"qu'elle intéresse tout à la fois celui qui la propose et, sous quelque rapport, le
"bon ordre de la justice, et en concluent qu'elle peut être proposée, même après
"les défenses, et que le juge doit y avoir égard, soit enfin d'éviter la pluralité et
"la contrariété des jugements, soit enfin de rendre la procédure plus régulière.
"Un acquiescement présumé, disent-ils, ne peut nuire à ce qui a été réglé pour
"l'administration de la justice. Nous sommes porté à adopter cette opinion..."

"La connexité est le rapport et la liaison existant en plusieurs affaires qui de-
"mandent à être décidées par un seul et même jugement. La loi ne détermine
"pas d'une manière précise ce qui constitue la connexité; cette appréciation est
"dans le domaine du juge......

"D'après ces principes, on doit réputer connexes:

"Les demandes que deux parties ont formées respectivement l'une contre
"l'autre devant deux tribunaux, en suppression d'écrits différents."

3 Bioche, Dictionaire de Procédure, pp. 665, 666, Nos. 85, 86, 87, vo. Exception.

Hébert vs. Quesnel.

La dernière citation fournit un cas d'une grande analogie avec celui qui nous occupe, et la petite différence qui se rencontre entre les deux espèces, n'empêche pas que le même principe doive gouverner les deux; car si dans l'espèce rapportée, l'on demande la suppression d'écrits, dans celui-ci, l'on conclut à des dommages résultant d'écrits; ce qui ne fait aucune différence quant au pouvoir d'ordonner la jonction.

Ce pouvoir de joindre deux affaires pour les instruire ainsi que pour les décider par un même jugement, existait dans l'ancien droit français comme dans le nouveau : les citations ci-dessus en font foi; et c'est aussi notre droit; et comme il existe de fortes raisons de joindre les deux causes dont il s'agit, la cour n'hésite pas à accueillir la motion, et à ordonner la jonction demandée.

Jugement 13 février 1866, déclarant la motion du demandeur absolue et ordonnant la jonction des deux causes, pour être instruites ensemble et jugées par le même jugement, sauf à disjoindre si le cas y échet.

Le jugement est motivé comme suit :

La cour, après avoir entendu les parties par leurs avocats, sur la motion du demandeur, du 13 octobre dernier, tendantes, pour les raisons y contenues à faire unir, joindre la présente cause à celle pendante devant cette cour sous le No. 407, dans laquelle le dit Auguste Quesnel est demandeur contre le dit Noël Hébert, examiné la dite motion ainsi que l'exploit du demandeur et le dossier dans chacune des dites causes, et en avoir délibéré, considérant : 1o que dans la cause d'Auguste Quesnel contre Noël Hébert, le demandeur poursuit en réparation d'injures contenues dans un prétendu libelle diffamatoire que le défendeur avait fait publier dans *Le Défricheur*, le 3 décembre 1863, et demande £5000 courant de dommages; 2o que le demandeur, dans la présente cause, poursuit à son tour en réparation d'injures contenues dans un prétendu libelle diffamatoire, que le éfendeur en cette cause aurait fait publier dans le numéro suivant du même papier-nouvelle, celui du 10 décembre 1863, et demande également £5000 courant de dommages, et que ce dernier libelle est en réponse au premier; 3o que dans la cause du dit Auguste Quesnel contre le dit Noël Hébert, le défendeur fondant sa défense sur le libelle du demandeur contre lui, plaide compensation d'injures et fait double emploi de ce libelle, en s'en servant pour poursuivre son action ainsi que pour se défendre de l'action intentée contre lui, ce qui lie encore ces deux causes plus intimement; qu'ainsi il y a connexité entre les dites causes : que le jugement de l'une doit influer sur le jugement de l'autre, que par conséquent, il est juste et équitable de prononcer la jonction des deux et que cette jonction est autorisée par la loi : ordonne que la présente cause qui est la plus récente sera unie et jointe à celle pendante devant cette cour sous le No. 407, dans laquelle le dit Auguste Quesnel est demandeur contre le dit Noël Hébert, pour être, ces deux causes, instruites ensemble et jugées par un seul et même jugement, sauf cependant à désunir et disjoindre si le cas y échet.

E. L. Pacaud, proc. de Noël Hébert.

M. Duval, proc. d'Auguste Quesnel.

(E. L. P.)

BEAUHARNOIS, 28 MARS 1865.

Coram LORANGER, J.

Génier vs. *Woodman et al.*

INSCRIPTION DE FAUX PRINCIPALE.—NULLITE DE DECRET.

JUGÉ :—Que les shérifs ou huissiers n'ont pas le droit de limiter le temps durant lequel ils recevront des enchères; que toute enchère offerte, avant l'adjudication, doit être reçue, quoique l'heure indiquée pour clore la vente soit expirée et qu'un décret fait contrairement à cette règle doit être annulé.

L'action avait pour objet de faire déclarer faux le rapport du shérif, qui disait avoir adjugé la terre du demandeur au plus haut et dernier enchérisseur, et d'obtenir la nullité du décret fondé sur ce rapport.

L'action était dirigée contre le demandeur dans la cause où avait eu lieu le décret attaqué, contre le shérif et contre les adjudicataires.

La substance des prétentions de la défense, telles qu'elles ressortent des plaidoiries et de la preuve, consiste en ce que l'officier représentant le shérif, dans la vente, avait intimé au public qu'il clorait la vente à une heure indiquée (onze heures ou midi) et qu'il avait adjugé au plus haut et dernier enchérisseur, à l'expiration de ce délai.

La preuve faite par M. Vilbon, ancien employé du shérif de Montréal, expose la pratique sanctionnée par le jugement. Il dit que le shérif de Montréal, en commençant une vente, intime au public qu'il clora sa vente à une certaine heure; que cela veut dire que l'enchère sera ouverte jusqu'à l'heure indiquée et ne sera pas close avant,—que si les enchères continuent après le moment fixé elles sont reçues jusqu'à ce qu'il soit bien constaté que la dernière enchère est la plus haute et bien réellement la dernière. Ci-suit le jugement :

"Considérant qu'il appert par la preuve que le défendeur Louis Hainault n'a pas, en sa qualité de shérif du district de Beauharnois et en obéissance au bref de *fieri facias de terris*, émané dans la cause No. 65 des dossiers de cette cour, à la poursuite des présents défendeurs, Woodman et Paige, contre le présent demandeur, Honoré Génier, vendu suivant la loi les biens immeubles du dit demandeur, et notamment la terre saisie, et contre le décret de laquelle le dit Honoré Génier se pourvoit en nullité par la présente demande; qu'il résulte au contraire de la preuve faite que l'huissier chargé par le shérif de l'exécution du dit bref n'a pas vendu la dite terre au plus haut et dernier enchérisseur, mais qu'il l'a adjugée aux défendeurs Paige et Woodman, pour l'enchère de £573 qu'ils ont offerte et qu il a refusé la surenchère d'Alexandre Cameron, qui, en temps utile a offert £574 pour la dite terre, laquelle offre le dit huissier a illégalement refusé d'accepter, ayant clos les enchères et adjugé la dite terre aux dits Paige et Woodman, malgré la surenchère du dit Alexander Cameron; considérant que le rapport fait à cette cour par le dit shérif sur le dit bref, qu'il avait adjugé la dite terre aux dits Paige et Woodman, les plus hauts offrants et derniers enchérisseurs, pour la dite somme de £573, a été entaché de faux et doit être déclaré faux et mis à néant; considérant que le dit Honoré Génier n'a pas été légalement exproprié au désir du bref; que le décret de la dite terre a été entaché de nullité et doit être mis à néant et les parties mises au même et semblable état

Regina vs. Daoust.

qu'elles étaient avant le dit décret,—maintient l'inscription de faux prise par le demandeur, déclare faux le dit rapport et le met au néant; déclare aussi nuls et de nul effet la prétendue adjudication de la dite terre et le décret d'icelle, en donne main levée au demandeur, remet les parties dans le même et semblable état qu'elles étaient avant les dits décret et adjudication et rejette les défenses des dits Woodman, Paige et Hainault, qu'elle condamne aux dépens de la présente instance."

Action maintenue.

Doutre et Daoust, pour demandeur.
Leblanc, Cassidy et Duranceau, pour défendeurs.
(J. D.)

MONTREAL, 25TH SEPTEMBER, 1865.

Coram BERTHELOT, J.

No. 1552.

Cameron vs. *Brega.*

HELD:—That in an affidavit for *capias ad respondendum* it is necessary to disclose the names of the persons from whom the information, that defendant was immediately about to abscond etc., was obtained.

The plaintiff in this cause sued out a writ of *capias ad respondendum*, upon which the defendant was arrested and gave bail to the sheriff.

The affidavit contained the usual allegations of indebtedness, and the belief that the defendant was immediately about to leave the province with intent to defraud, etc., and gave as one of the grounds for such belief that deponent had been informed "by two parties of good credit that defendant would soon leave the province."

The defendant moved to quash the *capias*, urging, amongst other reasons, that it did not appear by the affidavit where the debt was contracted. That the information that the defendant would soon leave the province, did not justify deponent's allegation that defendant was immediately about to leave the province. And that the names of the persons from whom such information had been obtained were not disclosed.

BERTHELOT, J., in giving judgment stated that the Court was of opinion that there was sufficient in the affidavit to show that the debt originated in Canada, at Quebec. But the objection that the affidavit did not disclose the names of the persons from whom deponent had derived his information, as to the intended absconding of the defendent, was more serious. The Court was of opinion that this omission was fatal, and accordingly gave judgment granting the motion and quashing the *capias*.

Motion granted and *capias* quashed, with costs.

M. Ryan, for plaintiff.
R. Laflamme, counsel.
D. S. Leach, for defendant.
T. K. Ramsay, counsel.
(D. S. L.)

MONTREAL, 6TH DECEMBER, 1864.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

JAMES BURNS,

(Defendant in Court below,)

AND APPELLANT;

FRANK ROSS,

(Plaintiff in Court below,)

RESPONDENT.

HELD:—That the plaintiff was justified in his belief of the defendant's being immediately about to leave the Province of Canada, with intent to defraud the plaintiff, from the fact that the defendant had bought from the plaintiff a large quantity of wheat for the price of $8293.75, payable cash on delivery, and had received delivery of the wheat, but had only paid a portion of the price, leaving a balance of $2993.57 unpaid; and that the defendant, upwards of two months afterwards, was about to go abroad to Scotland, his original domicile, where his family had resided for five years, without paying the plaintiff the balance, and without leaving any property in Canada out of which the plaintiff could get paid, and after repeated applications had been made to him for payment.

The facts and pretensions of the parties in this cause are fully stated in the report of the judgment of the Court below, appealed from. (7 L. C. J., p. 35, and seq.)

The judgment of the Court below was recorded as follows:

"The Court, having heard the parties, by their counsel, upon the petition of the said defendant, presented on the 13th of December instant, praying that the writ of *capias ad respondendum* issued on the affidavit of the said plaintiff, at the suit of the said plaintiff, and under which writ of *capias ad respondendum* the said defendant, petitioner, was arrested, be declared to have issued illegally; that the said defendant be released from custody and discharged, and all proceedings be set aside and declared null and void; and the sureties of said petitioner discharged from all liabilities under and by virtue of the proceedings in this cause had; having examined the said petition, the proceedings and the evidence adduced, and deliberated; considering that the said defendant hath failed to establish the allegations of his said petition, or to disprove the allegations and matters set forth in the affidavit of the said plaintiff, doth reject the petition with costs."

On the 6th of December, 1864, the above judgment was confirmed by the Court of Appeals.

Robertson, for appellant, said:—The evidence brought to repel allegations of fraud, or of a fraudulent intention, when no facts are stated from which fraud would be implied, and when fraudulent intent is given only as the belief of a deponent who does not state the grounds on which he founds his opinion, must necessarily be vague and inconclusive. The appellant in this cause has made the best proof possible, for him, under the circumstances; the testimony of men who have known him intimately for years, had large business transactions with him, and who declare that they have never known or heard of anything that would

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lead them to believe that appellant contemplated any fraud upon his creditors. It is indeed the only proof that could be brought, when no direct *act* of fraud is charged which could be disproved, and it would seem reasonable that after such testimony had been produced that a party alleging a belief of a fraudulent intention should be held to a strict proof of facts which would justify such a belief.

In the present case there is no proof of any act, on the part of the appellant, of anything from which any suspicion of a fraudulent intent, on his part, could be drawn. The only proof of his intention to leave Canada shews that such departure was for the ordinary purposes of his business, and this proof is to be found only in his own deposition, which states that he intended to go to Scotland, *when his business arrangements were completed*, to make business arrangements for the next year.

The judgment of the Court below was based entirely on the ground of the indebtedness of appellant to the respondent, and the fact that he intended to leave the Province for a time, although for the purposes of his business. The learned judge, at the time he rendered the judgment complained of, stated that he was perfectly convinced that the appellant was entirely innocent of any fraudulent intention, and that the arrest must be sustained only on the legal presumption of fraud, arising from his intended departure without meeting his indebtedness; and the appellant submits that under the evidence of record in this cause no such presumption arises to entitle respondent to his remedy against him as a fraudulent debtor, and that the respondent had other means of enforcing his rights against the appellant, under the circumstances.

There is no allegation in the affidavit that the deponent had ever been informed that the appellant was immediately about to leave the Province of Canada, *with intent to defraud his creditors or the plaintiff*; and the only allegation of any information given to deponent is "that he had been informed by William Dalzell, of the City of Montreal, produce dealer, that the appellant was immediately about to return to Scotland." And it is proved that Dalzell had left Canada before the institution of this action, and that he was a stranger in Montreal.

The pretensions relied on by the respondent in the Court below to sustain the arrest of the appellant, as alleged in said affidavit, were, 1st. The indebtedness of appellant to respondent, and his failure to pay on demand. 2nd. His having no office or domicile in Canada. 3rd. His intention to return to Scotland without making provision for the payment of the amount claimed; and, 4th. That he would not leave sufficient property in Canada to pay such amount.

It is submitted, that it is proved by the evidence of record for the appellant, that he has carried on business in Montreal and Quebec for upwards of twenty years, and, for the greater part of that time, has had his domicile and place of business in Montreal, and at the time of his arrest. That he had been in the habit of visiting Scotland for the last twenty years nearly every season, for the purposes of his business, and to make arrangements for the business of the ensuing year;

That such visits are usual for commission merchants, and are generally made during the winter season, after the close of navigation here;

Burns and Ross.

That the family of appellant was only temporarily absent in Scotland for the purposes of their education;

That appellant has never abandoned his domicile in Canada, and has continued in business in Montreal, and still carries on business in Montreal, and not elsewhere;

That, during the temporary absence of appellant, his place of business has always been open, and an agent here to transact business for him;

That the allegations of fraud, in the respondent's affidavit contained, are unfounded, and that the same was made without sufficient cause.

The appellant submits to this Court that in the absence of all proof of any fraudulent act or intentions that no sufficient legal presumption of fraud can be drawn from the proof of record by the parties to sustain the decision of the Court below, and he therefore asks from this Honorable Court that the said judgment be reversed.

Torrance, for respondent, said:—It is manifest that in the circumstances in which the present debt was contracted, the respondent had a right to oppose the withdrawal of his debtor from the country without the payment of the debt. The *capias* law has given the creditor a right to examine his debtor respecting his affairs after judgment maintaining the capias; and it is only reasonable that the creditor should have it in his power to learn from the debtor what became of this large asset of his estate, namely, the wheat delivered to the appellant payable cash on delivery, but not so paid. The arrest in the present case took place in consequence of the appellant failing to keep his engagement with the respondent to pay for the goods delivered. That a merchant should fail to keep engagements to be fulfilled at a future date is not necessarily a culpable failure, but the culpability of a merchant who receives a large quantity of goods on the faith that he will perform the contemporaneous act of paying for them, and who fails to pay, is of a very different character, and gives rise to the worst of suspicions. On receiving the goods, if he found himself unable to pay he could have returned them to his vendor with a confession of inability to fulfil his contract; such a breach of contract might be inconvenient to the vendor, but the consequences would have been far less disastrous than in the present case where the purchaser has failed either to pay for the goods or to return them.

It is impossible in the circumstances of the present case to avoid coming to the conclusion that the appellant was guilty of a fraudulent act in buying the wheat for cash, and receiving delivery of it without paying for it, and that fraud continued in his making arrangements for leaving the country without paying the amount of the respondent's claims.

The respondent submits that the appeal should be dismissed with costs.

DRUMMOND, J., *dissentiens:*—In this case the question was whether the plaintiff was justified in taking out a *capias* against Mr. Burns. His Honor thought he was not. He had been for a number of years a resident in Montreal, and his family were in Scotland, for the sake of having the children educated there. Mr. Burns had been in the habit of going to Scotland or England to promote business during the slack season. It was part of his commercial life to go to England occasionally. A great many merchants sent their children to

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England or Scotland to be educated. If the evidence in the case were sufficient to justify an arrest, there was hardly a merchant here who might not be exposed to the same treatment. It was true that Mr. Burns purchased wheat and had only paid part of the price, and that he was embarrassed; but there was not a tittle of evidence to show that he had any fraudulent intent in proposing to go to Scotland. His Honour believed that the Legislature intended to protect every merchant here, who left the country for a legitimate purpose. He thought the *capias* should have been quashed, but he had the misfortune to be in the minority on this occasion.

MONDELET, J., also *dissentiens*:—Although it was the interest of creditors in general that no one should be allowed to leave this country without satisfying the claims upon them, he was of opinion that the statute applied only to those cases where the debtor was leaving the Province with intent to defraud. There was one feature in this case which bore an unfavourable aspect, namely, the fact that defendant bought the wheat and sold it without accounting for the proceeds, or paying the party from whom he purchased it. But it did not follow that he intended to evade payment altogether. It was not the first time he had been to Scotland. He had already gone several times. His Honour had looked over eleven cases cited, but did not consider that any of them bore out the judgment in this case.

DUVAL, C. J.—The transaction was a cash transaction. Defendant purchased, stating that he would pay cash. He had not done so. How then did the case present itself to the Court? If plaintiff could have found his wheat, he would have had the right to revindicate it. Defendant, when called upon to pay, put off his creditor from day to day, and said he had no money. He sold the goods, and pocketed the money, and then said that he was going to Scotland. It was proved that he did not leave an office open here; not even a clerk. If Mr. Burns in reality had the intention of returning to the country, he had only himself to blame for the issuing of the *capias* which might have been avoided by satisfying the plaintiff's demand.

MEREDITH, J.—He believed that there had already been several decisions of the Superior Court bearing out the present one. There might be no fraudulent intention, but the fact looked like it. Having got property into his possession, defendant failed to pay part of the price; gave no explanation; made no provision for payment, and was preparing to leave the country. Under these circumstances plaintiff was justified in exercising his remedy.

Judgment confirmed.

A. & W. Robertson, for appellant.
F. W. Torrance, for respondent.
(W.E.B.)

AUTHORITIES FOR RESPONDENT.

Benjamin vs. Wilson, 1 L. C. R. 351.
Wilson vs. Reid, 4 L. C. R. 157.
Berry vs. Dixon, 4 L. C. R. 218.
Quinn vs. Atcheson, 4 L. C. R. 378.
Lefebvre *dit* Vermette vs. Tulloch, 5 L. C. R. 42.
Hassett vs. Mulcahy, 6 L. C. R. 15.
Tremain vs. Sansum, 4 L. C. Jurist 48.
McDougall vs. Torrance, 5 L. C. Jurist 148.
2 Bell's Comm: B. 6, p. 3, chap. 3.

SUPERIOR COURT.

MONTREAL, 28TH FEBRUARY, 1866.

Coram BADGLEY, J.

No. 78.

Poitevin vs. *Morgan*.

HELD:—1. That in action for verbal slander of this nature, the slanderous words themselves are not to be chiefly considered, but the motive and intention of the utterer and the occasion of their utterance.

2. That the truth of the imputation is not the issue, but the rightfulness of the occasion and the integrity of the motive, *bonâ fide* of its utterance.

3. That, if words were spoken *bonâ fide*, is for the Court, if *bonâ fides* existed, is for the Jury, and should be so submitted.

4. That answers of slander to inquire in the interests of the slandered, are privileged communications, and in this case, the answers should have been withdrawn from Jury.

5. That communications made in pursuance of some duty, legal or moral, by the alleged slanderer, or with fair and reasonable purpose of protecting his interests, are privileged and beyond the legal implication of malice.

6. That implied malice cannot co-exist with privileged communication; and, to support action, affirmative actual malice must be proved and found.

7. That malice in law is not simply ill will, but means a wrongful act done intentionally, with some other than a lawful object, and to gratify passions of slander.

8. That in this case, the occasion justified the utterance as privileged communication, which could only be overcome by proof of express malice.

The facts of the case are in the following judgment:

Badgley, J.—The declaration alleges the plaintiff's probity and honesty in his profession as a merchant's clerk, by which he supported himself and family, and obtained general esteem and confidence, whereby he acquired considerable profits in his position, to the great advantage of himself and family. The slander is charged as on the 12th of November, 1864, in a conversation held by the defendant respecting the plaintiff, heard and understood by several persons, and was as follows:—"I took him in the fact; it is "not the first time he robs me in this way; he robs me since he is in my "employ, and that was the same when he was at Walker's; he robbed him "like mischief; it is not the first time, it was not known before, but now all "is discovered, I have all the proofs in my hand, and himself did not deny it. "I think I shall have him arrested," and also the following words, "It is a "sore thing, what? that man, that Poitevin, to cheat me in that way, sending "parcels of goods to stores at different places, and getting them in the evening "to sell; after this I trust nobody, after this don't be surprised if I do dirty "things to the clerks." These are the words in the declaration, as therein translated from the French, in which language the imputation is set forth. The declaration also alleges, that the defendant made the same imputations against the plaintiff, before and after that day, without cause and from malice; that the publication had prevented his obtaining employment and wages for his support; that defendant had that day discharged plaintiff from his service, since when he had remained without employment, and that plaintiff had suffered in his honour and property to the amount of $10,000 of damages.

The defendant pleaded specially, that plaintiff on the said day was the hired servant and clerk of himself and his brother, who were trading together as Henry Morgan & Co., and as such clerk bound to perform his duty faithfully and honestly: that with the intention to cheat them, his employers, the plaintiff was in the habit of appropriating their goods to himself; that upon that day, the defendant having heard unfavourable reports against plaintiff, detected him in a gross

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attempt to defraud his employers, and that having intimated to him, that the matter should be investigated, the plaintiff then and there openly admitted his guilt, and entreated his employers' consideration on account of his wife and family, and not to expose his conduct, which would ruin him and them; thereby leading defendant to believe him guilty. That defendant's words were occasioned by plaintiff's conduct, and that thereupon defendant told him that the matter would be considered by himself and his brother, but that plaintiff should not remain in their service, and further, that during the plaintiff's service with Morgan & Co., he had transgressed the rules of their establishment, and thereby greatly injured them. A plea of general denegation followed, which concluded as follows: "That any words used by the defendant were occasioned by plain-"tiff's conduct, and were privileged." The replications were general.

The case was submitted to a jury upon the following articulation of fact, to which the respective findings are appended. 1st. "Did defendant speak words "charged, or any of them, and repeat them in presence of several persons in "relation to the plaintiff, and which, and when, and where? Yes. 2nd. Did "plaintiff's conduct during his service with defendant and his brother, author-"ize or justify the defendant's expressions against plaintiff as alleged in the "declaration? Not justified by evidence. 3rd. At the time when defamatory "words were so spoken of plaintiff, were his general character and reputation "known as good? Yes. 4th. Has plaintiff suffered, and to what amount? "$300."

It is difficult to find more unsatisfactory findings than the two first; manifestly the first is not an answer to the categorical inquiry contained in the first articulation, and the finding to the second articulation, necessarily intended as a consequence of the first one, scarcely conveys a definite meaning. But apart from this, what was the evidence adduced at the trial? The report has been taken in a very unsatisfactory manner, and is far from being either perspicuous or clear; but the following may be gathered from it.

That the plaintiff on the day named, and for some time previously, had been a clerk in the employ of H. Morgan & Co., who employed 40 or 50 like clerks in their service, who all were bound to observe certain rules for their conduct, with which the plaintiff was familiar, in the sale and delivery of goods at the establishment; amongst these especially, were the immediate entry of unpaid goods, and the placing of delivery parcels in a particular box, appropriated for them, whence the express carrier took them daily for delivery. The unpaid sales were to be noted with the initials of the selling clerk, and after verification of calculations by another clerk, the goods were to be parcelled and deposited in the particular box for delivery. That, on the morning of that day, the defendant heard from one of his clerks, a witness in the case, reports unfavourable to the plaintiff, to the effect that he was in the habit of sending parcels of goods out of the store to one Grinton's, in Notre Dame Street, in this city, where he took them up himself in the evening, and that he had done the same at Walker's, his previous employer. That on that morning, plaintiff having made up a parcel of goods, placed it under the counter, without having entered it, or noted or initialed it, and as the express carrier was taking away the last regularly deposited parcel,

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the plaintiff drew out his parcel from beneath the counter, and himself proceeded to give it for delivery to the carrier. That thereupon the defendant inquired for whom it was intended, and whether it had been entered or charged, and was told by the plaintiff that it was for one Desrochers, and that it had not been entered or charged. That it was only after this that the plaintiff noted the sale, whereupon the defendant, to test the correctness of the transaction, sent another clerk, Grier, to Desrochers with a bill of parcels, to ask for payment. The purchaser who was the brother-in-law of the plaintiff, and boarded with him at plaintiff's residence, had not been in the store to order the goods. Grier proved that Desrochers seemed to be unaware of the purchase, and surprised, refused the payment until, as he said, after the delivery of the goods, saying also that the matter was between him and the plaintiff, and that he would pay the latter. That Grier reported these circumstances to the defendant, but nothing further occurred until after the plaintiff's return from his dinner, after one o'clock, when he immediately warmly demanded of Grier why he had been so prompt in asking payment from Desrochers. Whilst discussing the affair with Grier, the defendant came to that part of the store, and after making inquiry into the cause of the discussion, he then and there, in reply to plaintiff's inquiry of him "why he "had sent to Mr. Desrochers to get his account collected before the delivery of the "goods," told the plaintiff that he had heard unfavourable reports against him, that he had been robbing him, and had done so before, and that he had done the same at Walker's, almost in the same words reported by the plaintiff himself in his evidence as a witness for the defendant; that plaintiff could no longer remain in their service, and that defendant would investigate the matter. That the plaintiff did not at the time deny the imputations, and followed the defendant up-stairs to the office, where, upon his remonstrating with defendant about his being discharged at that time, the defendant, in the presence of the book-keeper, repeated to plaintiff, what he had stated to him in the store, as above reported; that plaintiff again did not deny the imputations, but begged the defendant not to expose him on account of the disgrace which would fall upon himself and family, and that plaintiff was immediately discharged from their service. That the circumstances formed the subject of conversation amongst the clerks in the store, and that soon after plaintiff's discharge and departure, that same afternoon, upon the defendant's coming into the store where several of the clerks were talking over the event, he addressed those present, and said: "it is a sore thing that his "clerks should cheat them, the firm, so; that Poitevin had stolen some of their "goods, sending them to some place and calling for them himself afterwards;" and in reply to the inquiry of Dandurand, one of the clerks and a witness for the plaintiff, who asked defendant whether plaintiff had been discharged, and whether he had robbed them, whether the defendant knew that plaintiff had so acted, the defendant repeated the words above reported, and added "that the plaintiff "had done so, and had done the same at Walker's, and that he had acknowledged "it all." After this the defendant also said, speaking to his clerks, "that he "could not be able to trust any of them, and that they must not be surprised if he "did some dirty things to them!" That no other person was present there at the time, except one individual, who was in a distant part of the store, and quite

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unable to hear what the defendant had said. This seems to be all that was said upon the occasion.

Amongst the witnesses for the plaintiff whose testimony went to the jury, was Mr. Rodier, his friend, to whom he had communicated the fact of his dismissal, and who in his interest called twice upon the defendant, expostulated with him on both occasions, and endeavoured to prevail upon him to take back the plaintiff into his service. Upon both occasions he asked of the defendant the cause for plaintiff's dismissal, and enquired if plaintiff had robbed him, to which plaintiff replied, that he had robbed and deceived them, that it was not the first time he had done so, that he had played the same trick at Walker's. The defendant, he said, also spoke of the parcels sent to Grinton's, &c., &c. At the first interview, no third person was present; at the second, about a fortnight after the first, the defendant's partner was present with the bookkeeper. Before closing this reference to the testimony, it is proper to add, that the plaintiff himself was examined as a witness by the defendant, and has not altered the facts as above proved in evidence. The plaintiff availed himself of the opportunity of appearing as a witness to produce in evidence his written certificate of discharge from Mr. Walker's employment, in which he is stated to have been industrious and steady, and he added, that subsequently, he requested Mr. Walker to add the word "*honest*" to his certificate, which Mr. W. declined, simply, as plaintiff says, upon the ground, that "steady" conveyed the idea of "honest." Unfortunately for the plaintiff's veracity, Mr. Walker himself, a witness before the jury, explained matters differently, and swore that he refused to add the word *honest*, because *he did not believe him to be honest*; and Mr. Merrill, also a witness in the case, and likewise a former employer of the plaintiff, who also had discharged him from his employ, also proves that he too had a similar opinion of the plaintiff's dishonesty.

Now the declaration having charged the slander as spoken by the defendant *in a conversation in the presence of several persons, who heard and understood his words*, it was essential, in justice to both parties in this cause, to refer to the testimony adduced, for the purpose of fixing the time and occasion and also the form of the slander; and from the evidence adduced, it is manifest, that it rests solely upon the so-called conversation which occurred in the defendant's store, when he spoke to the clerks then present, almost immediately after the plaintiff's discharge and departure from the service. The question does not and cannot rest upon the communications made to Mr. Rodier, which were in their nature privileged, and made by the defendant to him as the plaintiff's friend and in his interest, and in reply to Rodier's inquiries with reference to the plaintiff's discharge and the cause of it; and the plaintiff's counsel at the argument of the cause before me, frankly admitted that the evidence of Mr. Rodier was privileged and not relied upon.

The action thus resting only upon this conversation between the employer and his clerks and servants, there being no evidence that defendant at any other time or place spoke in *any way* of the plaintiff, the question is not whether the verbal imputations were true or false, but whether the occasion justified the defendant; and for that effect, the unfavourable reports conveyed to him respecting the plain-

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tiff during his service with Morgan & Co., and previously with Walker, his wilful breach of the rules of his employers' establishment, his concealment of the parcel and its more than suspicious character, his entreaties to defendant for his non-exposure, declaring it would be his ruin and disgrace, the nature of the extensive business carried on by his employers, their numerous clerks employed in similar services with the plaintiff, the time and place where the conversation took place, and the subsisting relations between the persons, employer and servants, by and to whom the words were spoken and addressed, are all circumstances which must be taken and considered together as the *res gestae* to form that occasion. It is not the mere words themselves which are to be chiefly and only considered in actions of this nature, but the motive and intention with which they are uttered, and the occasion of their utterance, because the malice of the defendant either implied or expressed is the basis and constitutes the necessary ingredient in such actions.

Defences in actions of slander are either, 1st, a justification which consists in showing the entire truth of the charge, and this must always be specially pleaded.* Or 2nd, such circumstances as [illegible] away malice from the utterance by showing a just occasion and an authorized motive for the speaking. This latter may be shown under the general issue, or it may likewise be specially pleaded, by shewing that the speaking was on a lawful occasion and made under the belief of its truth, and without malice, or at least honestly and *bona fide*. This kind of defence is founded upon the consideration, that the business of society could not be conducted without the liberty of speaking in the honest pursuit of its lawful purposes, and that it would be contrary to common convenience to fetter mankind in their ordinary communications and beset them with apprehensions of vexatious litigation and actions of slander; but it has nothing to do with the truth of the charges, but only with the rightfulness of the occasion and the integrity of the motive of their utterance.†

Upon these points the jurisprudence of this Province has necessarily followed the English practice as in all respects the most fitting and convenient.

The defence rests, upon the second bar, and upon the question of the privileged nature of the communication made by the defendant to his clerks. Upon this point it is necessary to repeat, that malice is a necessary ingredient in slander, and the declaration usually charges the utterance to have been malicious; yet it need not necessarily do so, because the law itself, *prima facie* implies malice in the utterer of defamatory words to the injury of another. But the word *malice* must be understood in its legal signification, and is thus defined by Bayley J. in Bromage *vs.* Prosser, 4 B. and C. 247, and which has since been constantly accepted by courts and judges. "Malice in common acceptation means ill-will against a person, but, in its legal sense, it means a wrongful act done intentionally without just cause or excuse." By the French author

*Lillie *vs.* Price, 5 Ad. and El. 645. O'Brien *vs.* Clement, 15 M. and W. 435, 437. Woodword *vs.* Sander, 6 Car. p. 548, 549.

Smith *vs.* Thompson, 2 Bing N. C. 372, 381. Hastings *vs.* Lorck, 22 Wend., 410, 416.

†Somerville *vs.* Hawkins, 10 C.B. 1 Scott R. p. 583. McDougall *vs.* Claridge, 1 Camp. 267. Howard *vs.* Thompson, 21 Wend, 320-1.

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Grellet-Dumazeau *Tr: de la diffamation No.* 147, it is styled *une intention de nuire* which is made coextensive with *délit, un fait de conscience* explained, with a good deal of verbosity, to be, *l'esprit de dénigrement, de malice, de méchanceté, le désir de satisfaire une mauvaise passion, un ressentiment.* The English and French definitions plainly concur. Malice being so, every utterance having the other qualities of slander, if it be wilful and unauthorized is therefore malicious.*

Now any defence which shows a rightful occasion and an authorized motive, of course removes the legal presumption of malice, and matters thus protected are *styled* privileged communications. This is a very old rule of law in such cases; evidence of such matters are familiar to our jurisprudence where they are recognized as privileged communications. The old French text writers have furnished little assistance upon this subject of privileged communications, nor has the modern law done much to remedy the deficiency. In modern France it will be found, that the publicity given to the *diffamation* constitutes the *délit*, which character is removed from it, if the *diffamation* be made in a *place non pu-"blique, de même,* says Grellet, p. 118, *et à plus forte raison on ne saurait "donner ce caractère au cabinet d'un avocat, à l'étude d'un avoué, au cabinet "d'un médecin, à la boutique d'un artisan, au magazin d'un négociant, bien que "le négociant, l'artisan, &c., &c., se trouvent à raison de leur profession en com-"munication continuelle avec le public."* The French jurisprudence rests the privilege upon the place where the words are spoken, the English, upon the person to whom they are spoken, the principle at the root of both systems plainly being, that communications of this sort were not meant to go beyond those immediately interested in them at the time.

Now the operation of such evidence is, that the showing of a privileged occasion, *prima facie*, removes the quality of malice and puts upon the plaintiff the necessity of proving express or actual malice, which, if proved, would necessarily make the defence to fail entirely.† In Wright vs. Woodgate, 2 C. and M. R., Parke B. says, "the proper meaning of a privileged communication is "only this, that the occasion on which the communication was made rebuts "the inference *prima facie* arising from a statement prejudicial to the character "of the plaintiff, and puts it upon him to prove that there was malice in fact, "that defendant was actuated by motives of personal ill will, independent of "the occasion on which the communication was made." This proof of express malice appears to consist in all cases, in shewing *mala fides* in the defendant: that is, that the occasion was used colorably as a pretext for wantonly injuring the plaintiff, *ex. gra.* if defendant under colour and pretence of confidential communications, destroy plaintiff's character and injure his credit, or if a master *officiously* state trivial instances of a servant's misconduct, in order to prevent him getting a sound character from a former master, and then himself give him a bad character, the truth of which he is not able to prove; and other

* Bromage *vs.* Prosser, sup. Cockagne *vs.* Hodgson, 5 Car. sp. 543. Chalmers *vs.* Baynes, Q. C. M. B. 156. Brown *vs.* Croome, 2 Stark. 297, 301.

† Child *vs.* Affleck, 9 Barn and C. 403. Wright *vs.* Woodgate, Warr *vs.* Jolly, 6 Comp. 497.

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similar cases which it would be tedious to mention; and this is so, because the general rule applicable to such cases renders every one bound for an *intentional injury done by him to another.* This was well put in a recent case: "In questions of malice you cannot dissect a man's mind to see what he thinks; besides, malice does not mean actual ill-will, but that the words were spoken with some other object than a lawful one. If, therefore, there is evidence that a man spoke words not with a view of *justifying himself*, but of gratifying his passions, that is evidence from which a jury may find malice, but you must have some affirmative evidence," per Bramwell, J. This express malice being matter of fact and motive is, upon sufficient evidence, a question for the jury, to be submitted to them specially by the judge, and must be found by them, because, where a case of privileged communication is made out, *prima facie*, it will amount to a defence unless actual malice is found; hence, therefore, the jury must find express malice to take away the privilege from the communication.*

Properly, the question, whether the occasion is such as to rebut the inference of malice, if the words were spoken *bona fide*, is one of law, for the court; and whether *bona fides* existed is one of fact for the jury. In Coxhead *vs.* Richards, 2 Com. B. R., p. 589, per Cresswell J., "is not the rule this? If the publication "is *bona fide*, whether the occasion is such as to rebut the inference of malice, "is a question of law for the judge; whether the *bona fides* existed is a fact for "the jury? Such is the rule;" and per Coltman, J., "it is generally and rightly "held that the question whether a communication is privileged or not is of law "for the judge; but in considering whether the communication is privileged or "not, the condition necessary to make it privileged must be assumed, namely "the occasion of making it, in other words, whether there was any duty, public "or private, legal or moral, calling on defendant to make the communication."

The privilege which a communication receives must result either from some right on the part of the defendant to say what is complained of, as in the case of Hearne *vs.* Stowell 12 A. and E. 719.26 or some duty, public or private, legal or moral, under which the defendant is acting.† In Toogood *vs.* Spyring, 1 C. M. and R., 181, 194, it was held, per Parke B., "in general, action lies for malicious "publication of statements false in fact, and injurious to the character of another, "within well known limits as to verbal slander; and the law considers such publi-"cation as malicious, unless fairly made by a person in the discharge of some "public or private duty, whether legal or moral, or in the conduct of his own "affairs, in matters where his interest is concerned. In such case the occasion "prevents the interference of malice which the law draws from unauthorized com-"munication, and affords a qualified defence depending upon the absence of actual "malice. If *fairly* warranted by any reasonable occasion of exigency, and honest-"ly made, such communications are protected for the common convenience and "welfare of society, and the law has not restricted the right to make them within "narrow limits." The judge then refers to cases of character given of discharged servants, and proceeds, "If made with honesty of purpose to one who has an in-"terest in the inquiry, and that has been liberally construed, in Child *vs.* Affleck,

* Coward *vs.* Wellington, 7 Car., p. 536. Hastings *vs.* Luck, 22. Wend, 410, 421.

† Corkayne *vs.* Hodgkinson, 5 Car., p. 5[illegible]. Warr *vs.* Jolly, 6. Car., 497.

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"*sup.*, the simple fact that there have been some casual bystanders, cannot alter "the nature of the transaction. The business of life could not be well carried "on if such restraints were imposed upon similar communications, and if on "every occasion in which they were made, they were not protected. In this "class of communications is, no doubt, comprehended the right of a master "*bona fide* to charge his servant for any supposed misconduct in his service, and "to give him admonition and blame, and that done in presence of another per- "son does by no means of necessity take away the protection." So by Lord Denman in Tuson *vs.* Evans 12 Ad. and El. and in Padmore *vs* Lawrence 11. Ad. and El. 380.

When a communication of this kind is made out, the question for submission to the jury will be, whether the defendant has acted *bona fide*, intending honestly to exercise a right, or discharge a duty, or whether he has acted maliciously with intention to injure the plaintiff. See Pattison *vs.* Jones, 8 Barn. and Cr. 578.

Now, amidst the variety of cases reported of privileged communications are verbal answers to inquiries respecting the person complained of or discharged from service, made to persons in his interest, or to those where a communication is required by the interest of the person to whom it is made, and is reasonably called for or warranted by the relation in which the person making it stands to the other; and still more, when the matter concerns the common interests of both; in such cases the matter is privileged. Amongst these cases is the common one of a letter written or a statement made *bona fide* with belief of its truth as to the character of a servant by his former master to an inquirer about it. Grellet-Dumazeau holds the same doctrine in France, p. 155. "*Lorsque les renseigne- "ments sont demandés spontanément, l'ancien maître remplit un véritable devoir "en faisant connaître avec exactitude la conduite et les habitudes d'une personne "qu'il est question de recevoir au sein du foyer domestique et dans ce cas la "révélation des faits de la vie privée est autorisée de la manière la plus absolue, "et la gravité des intérêts qui la légitiment suffit pour écarter toute présomption "de l'intention de nuire; si donc le domestique prétend que cette intention existe, "c'est à lui de l'établir et les magistrats sont juges de la valeur de ses preuves.*"

Again, where the communication is made in the honest pursuit of the person's own interests, or in necessary self defence, such as a person who has been robbed, has a right, upon reasonable suspicion, to tax the suspected person with the theft, even though third persons were present; and, if not done maliciously, an action will not lie, and this is so by the French law also, Grellet, No. 247. But according to those cases in which the communication is protected when made by a person in the conduct of his own affairs, in matters in which his interest was concerned, as in Toogood *vs.* Spyring *supra*, or where the communication was made by a person immediately concerned in interest, on the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, as in Blackburn *vs.* Pugh, 2 Com. B. 611, or where the relative position is such that one has a right to expect confidential information and advice from the other, it may be a moral duty to answer such inquiries and give such information and advice; and the statements then made will be rendered lawful by the occasion, although defamatory of another person,

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as in Dunman *vs.* Bigg, Campb. 269. Todd *vs.* Hawkins, 8 cap. 88, and others; or where made by a person in the discharge of a public or private duty, legal or moral, or in the conduct of his own affairs, as in Toogood *vs.* Spyring above. Somerville vs. Hawkins, 10 C. B. In this last case the defendant called up and cautioned two of his shopmen against having any communication with plaintiff, who had been previously discharged by him on suspicion of theft, the defendant saying, "I have discharged that man for robbing me; do not speak to him or I "shall think you as bad as him." The communication here was held privileged, and per Maule, J., rendering judgment: "This comprehends all communi-"nications made *bona fide* in performance of a duty, or with a fair and reasonable "purpose of protecting the interest of the party using the words. In this case, "*supposing the defendant himself to believe the charge, supposition always to "be made when the question is whether a communication is privileged or not,* it "was his duty and also his interest to prevent his servants from associating with "plaintiff, a supposed thief." So in Taylor *vs.* Hawkins, 15 Jur. 746, 16 Q. B. 308, where the plaintiff, a shopman of the defendant, in one instance only was discovered to have embezzled money, he was sent for by defendant and in presence of another person, charged with the embezzlement and discharged. He was afterwards refused an engagement by one to whom his former master explained the reasons for discharging him, and upon his brother calling on defendant and inquiring why defendant had given such a character as prevented his being engaged, defendant answered, "He has robbed me, I believe he has robbed me for "years, I can prove it from circumstances under which he has been discharged "by me." This was held to be privileged on account of the *occasion*, and that defendant did no more than what a prudent and honourable man ought to have done; the words were spoken not at a distance of time from dismissal, the excess of statement was not malicious, the defendant being bound to tell the whole of the reasons in his mind with truth.

In this case, the plaintiff has moved for judgment upon the verdict whilst the defendant has made two motions, first, for judgment to be entered up for him *non obstante veredicto*, by reason of that conversation being privileged, and that no proof of express malice was made; and secondly, for new trial upon grounds stated in the motion. Without adverting to the evidence as to the plaintiff's general character, and the destructive rebutting evidence consequent upon his own attempt to establish his probity and honesty by Mr. Walker's certificate, it may be observed that the conversation alleged in the declaration at which the charges complained of were made, carries with it a privileged character, having occurred at the time of plaintiff's discharge from his employers' service, and in their store where the other clerks were employed in similar service. It applied to one of their fellow-servants, and was caused by his employer's belief in plaintiff's misconduct in the same service; it was spoken in the interest of the employer in respect of the honest and faithful duty of the clerks to their employers in business, in which it was the clerks' honest duty to protect their employers from loss; it was so spoken in the moral duty of the employer to his servants, to explain to them the misconduct of their fellow-servant, and to inform them of the full grounds for his discharge, to prevent similar misconduct on their part, and as a warning

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and caution to them given by him in his concluding words; and it was spoken in reply to the inquiries of one of the clerks as to the facts; the communication being so privileged, rendered it imperative upon the plaintiff to support his action by proof of malice in fact by the defendant, which was not done by him.'

The record shews that exception was taken as certified by the presiding judge to so much of his charge as was to the effect, 1° "that privileged communica "tions can only be where the charge imputed in or by it has foundation, and "is true;" and 2° "that what defendant talked in the hearing of Dandurand "and others present together in defendant's store of and concerning "plaintiff was not privileged communication or confidential." Now these two points of exception to the charge are in themselves fully supported by law and the authorities above referred to, and are good grounds for a new trial; and therefore, under the circumstances of this case as it appears in evidence, and with the points of exception taken as above, supported by legal authority, the plaintiff's motion for judgment in the verdict cannot be granted; the defendant's motion to enter up judgment for him *non obstante veredicto* might not absolutely be objectionable in law, but the legal propriety of its adoption in this case, is questionable. The motion of the defendant for a new trial will therefore be granted, the considerations for which abound in this record. Amongst them are, the privileged nature of the conversation upon which the plaintiff relies, the privileged nature of the communications to Mr. Rodier, whose testimony should have been withdrawn from the jury, the want of proof of express malice, the necessity for which should have been explained judicially to the jury, the ridiculously comprehensive finding of the jury upon the first articulation submitted to them, where in reply to the categorical question, "Did the defendant speak the words charged or any of them, and repeat them in presence of several persons in relation to the plaintiff, and which, and when, and where?" which is answered, *yes*. For these and others which might be mentioned, amongst which are the points of exception above taken to the charge, the defendant's motion for a new trial will be granted, and a *venire de novo* awarded.

Moreau, Ouimet, and *Chapleau*, for plaintiff.
Honble. *John J. J. C. Abbott*, Q. C., counsel.
John Monk, for defendant.
Robert Mackay, *F. Cassidy*, Q. C., } Counsel.
(J. L. M.)

MONTREAL, 30 NOVEMBRE 1865.

EN REVISION.

Coram BADGLEY, J., BERTHELOT, J., MONK, J. A.

No. 53.

Ex parte Beauparlant, Requérant un writ de *Certiorari*.

JUGE:—Qu'il y a lieu à révision d'un jugement rendu sur une demande ou motion pour un writ de certiorari et que sur révision; le jugement refusant le writ de certiorari étant jugé valable; sera confirmé avec dépens.

Le Requérant ayant fait motion devant la Cour Supérieure siégeant dans le District de Richelieu pour l'obtention d'un writ de certiorari, sur certaines omis-

sions d'allégations négatives, *negative averments*; dans la plainte et la conviction, il en fut débouté avec dépens le 21 Juin 1865.

Ex-parte Beauparlant.

Le requérant inscrivit cette cause pour révision à Montréal; et le 24 Octobre 1865, les parties furent entendues au mérite.

Le jugement de la cour supérieure siégeant à Montréal en cour de Révision est comme suit:

La Cour Supérieure siégeant à Montréal, présentement en cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le jugement prononcé le 21 Juin 1865, dans la cour supérieure siégeant dans le district de Richelieu, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré, considérant qu'il n'y a point d'erreur dans le susdit jugement, confirme par les présentes le dit jugement en tous points avec dépens.

LaFrenaye et Bruneau, avocats du Requérant.

Brassard, avocats du Poursuivant.

(P. R. L.)

DISTRICT OF IBERVILLE.

ST. JOHNS, NOVEMBER, 1865.

Coram SICOTTE, J.

The School Commissioners of St. Bernard de Lacolle vs. *Bowman.*

C. S. L. C., cap. 15, sec. 55, is in the following terms: "When in any municipality, the regulations "and arrangements, made by the School Commissioners for the conduct of any school, are "not agreeable to any number whatever of the inhabitants, professing a religious faith "different from that of the majority of the inhabitants of such municipality, the inhabi- "tants so dissentient may collectively signify such dissent, in writing, to the chairman of "the Commissioner, and give in the names of three Trustees, chosen by them for the pur- "poses of this Act."

HELD:—That a payer of School Rates in a School municipality in Lower Canada, though not resident therein, is an "*inhabitant*" of such municipality within the meaning and application of the section above recited.

As the holding in this case is based purely on an interpretation of the terms of the section above recited, it is unnecessary to state the grounds of action or the pretensions of the parties.

SICOTTE, J., in giving judgment said:

Le caractère libéral de notre législation, en matière religieuse, dans tous les temps, est un fait qu'on ne peut disputer. Par sa permanence, il a produit entre les races et les religions diverses qui existent sur notre sol, la confiance, un esprit mutuel de respect, de bienveillance et de charité. Chaque fois qu'il s'agit d'appliquer une loi, qui touche à la liberté religieuse, ce passé si constant, si universel dans ses tendances, constitue une chose importante dans la discussion. On n'a pas raison de soupçonner l'élément catholique d'avoir rétrogradé.

Tout le monde comprend que l'instruction de la jeunesse est la cause la plus énergique, le dissolvant le plus actif, le moyen le plus puissant pour influencer les idées religieuses, comme les tendances et les habitudes de toute la vie. De là, les justes susceptibilités, les réclamations bien fondées de chaque croyance, d'avoir la direction morale et religieuse de l'enseignement de ses croyants.

Notre législation laisse chaque dénomination libre dans son enseignement,

dégagée de tout autre contrôle que celui de la loi générale, et consacre dans l'ordre civil et politique, l'égalité des cultes et la liberté de conscience.

L'égalité des croyances devant la loi et le droit absolu de chaque citoyen au libre exercise de son culte et de sa religion, étant admis, il faut bien reconnaître que la direction de l'enseignement, est un corollaire essentiel et une conséquence logique de ces règles du droit naturel. Avec une loi basée sur ces principes, faite dans le but évident et avoué de leur donner un effet efficace et complet, on ne peut refuser d'admettre que les moyens de donner cet enseignement doivent être subordonnés aux principles de la loi.

Il est juste dans cet examen de tenir de suite compte à la cause, des déclarations aussi libérales que vraies, faites à l'audience par l'Honorable Avocat de la défense. "Nul doute," disait "M. Laberge, que l'intention du législateur, était de vouloir permettre à tous et à chacun d'employer sa contribution scolaire, suivant et d'après ses opinions religieuses." En effet, que le contribuable soit résident ou non, sa croyance est toujours la même, comme son désir de la protéger reste toujours fondé sur les mêmes raisons.

Ce que la loi voulait, c'était de prévenir toute cause d'irritation, de faire vivre toutes les classes dans cette sécurité qui assure la paix religieuse, de ne donner aucune prise à l'agitation des fanatiques ou des opprimés. Le législateur avait compris que si personne ne veut être opprimé, il est malheureusement trop vrai que chacun veut être oppresseur. Avec une sagesse qu'on ne peut trop louer, le législateur voulait ne donner aucune occasion à l'intolérance religieuse de s'abriter derrière l'intolérance municipale ou civile. Ce serait une étrange anomalie, qu'une loi aboutissant à deux résultats opposés quant à la même personne, et qui protégerait l'individu dans la plus haute expression de sa liberté, non à raison d'un principe, mais à raison d'un fait accidentel, tel que sa résidence, et que les immunités qu'elle confère, ne dépasseraient pas le seuil du patrimoine qu'il foule, ce serait une anomalie encore plus étrange qu'un ordre de choses consacrant le principe de la plus extrême liberté dans l'enseignement et dans les croyances, produirait dans les faits extérieurs des actes d'intolérance et d'oppression.

Il est indubitable que la loi consacre, sans déguisement, sans obscurité, et d'une manière aussi positive que claire, le droit du protestant comme du catholique, de contrôler l'emploi des fonds nécessaires au maintien des écoles communes, et de diriger par ce contrôle, l'enseignement de leurs enfants.

C'est un statut personnel, au-dessus par son principe, des subtilités comme des vicissitudes du sens des mots, et qui ne doit pas être limité à un lieu seulement. La volonté du dissident est la mesure de l'exercice de son droit, c'est une franchise qui doit suivre sa contribution, comme sa personne, *in omni loco:* autrement, elle serait impuissante et illusoire. Le principe de la loi, quant à la dessidence, réside dans la diversité des religions et non dans celle des lieux.

Suivant les paroles de Boullenois, sur une matière analogue: *habilis vel inhabilis in loco domicilii, est habilis vel inhabilis in omni loco.*

D'où peut donc venir la difficulté, le doute dans l'application de la loi.

On prétend que la loi s'est exprimé d'une manière tellement formelle, dans le cas de la non-résidence, que le juge n'a pas à distinguer quand la loi ne distingue

pas, et qu'il n'a plus à chercher une interprétation d'après le but, ou l'intention du législateur, ou d'après les principes, quand la loi contient un ordre positif et une disposition formelle.

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Je ne discuterai pas ce qui est si bien compris, que le pouvoir judiciaire ne doit pas s'immiscer dans la législation. Mais peu de causes sont susceptibles d'être décidées d'après un texte précis sur le fait en litige. C'est par les principes généraux, par la doctrine, par la science du droit, qu'il faut prononcer sur la plupart des contestations.

Si la science du législateur consiste à trouver les principes les plus favorables au bien commun, la science du juge est de mettre ces principes en action, de les étendre par une application sage et raisonnée aux circonstances; le rôle du juge est d'être aussi libéral et plus tolérant que la loi; son devoir, de ne jamais placer l'intolérance civile à la remorque des fanatismes.

Il appartient principalement aux juges de montrer l'exemple de la plus grande déférence pour les sentences et les opinions prononcées par les tribunaux: et c'est à raison de ce respect pour un jugement, auquel je ne puis acquiescer, que j'ai cru devoir entrer dans un examen plus étendu de la question, en étudiant la loi, sous ses différents aspects, en la décomposant avec impartialité, pour en comprendre la nature, le but, l'ensemble, et constater par ce travail son application à la cause.

Ce qu'il importe de fixer, c'est la sécurité de chaque habitant, en mettant fin à ces situations fâcheuses par leur équivoque, qui donnent presque droit à toutes les ignorances, à tous les fanatismes, de proclamer leurs exigences, en s'appuyant sur la loi interprétée et appliquée au point de vue égoiste, de chaque intérêt local, variant par le fait accidentel de majorités catholiques ou protestantes.

Voici la disposition qu'on invoque pour faire le défendeur déchu du droit de dissidence qu'il réclame, et qu'on lui refuse parcequ'il ne réside pas dans la municipalité des demandeurs. « Si dans quelque municipalité que ce soit, les règlements et arrangements des commissaires d'écoles, ne conviennent pas à un nombre quelconque d'habitants, professant une croyance religieuse différente de celle de la majorité des habitants de telle municipalité, les dits habitants dissidents collectivement pourront signifier leur dissentement par écrit, au président des dits commissaires, et lui soumettre les noms de trois syndics choisis par eux pour les fins de cet acte."

Ce texte est-il tellement précis, tellement clair que la lecture seule fasse comprendre qu'on a voulu exclure de l'avantage et du droit de la dissidence, les propriétaires non résidents? Pour juger cette question de langage et de signification, il suffirait peut-être de rapporter les deux Jugements contradictoires qu'on a cités, et la loi déclaratoire présentée par le Gouvernement en 1863, avec l'assentiment du département de l'éducation. L'opposition faite à cette interprétation, sur tous les points, et qui s'est manifestée dans des contestations judiciaires, parle contre une telle clarté et contre cette précision.

Quand la disposition d'une loi paraît contraire à son but, à son ensemble, à l'esprit général de la législation, aux tendances de la société comme à ses habitudes, on ne doit pas l'admettre dans un sens hostile à l'objet de la loi, et aux opinions de tous, à moins que l'intention du législateur ne soit évidente par l'ex-

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pression qu'il a employée, à moins que cet ordre ne soit formel, et ne laisse plus au Juge que le devoir d'appliquer la loi.

Il n'y a certainement pas telle précision, telle expression, tel ordre, dans la disposition, sur laquelle la demande s'appuie.

L'expression, les habitants, ou, *the inhabitants*, ne comporte pas en langage parlementaire, légal ou vulgaire, le sens absolu et nécessaire de la résidence. Elle est presque toujours employée pour désigner les propriétaires. Dans les statuts anglais, et dans les commentaires, elle signifie, le contribuable.

Les paroles de la loi des pauvres sont; "Overseers shall raise by taxation, of every inhabitant, and of every occupier of lands, houses in the parish."

Burns, dans ses commentaires, dit: "The taxation ought to be made upon the inhabitants and occupiers of lands within the parish, according to the visible estates and possessions they have within the parish."

Blackstone, traitant le même sujet, s'exprime ainsi: "The overseers are empowered to make and levy rates upon the several inhabitants."

Le Statut réglant l'entretien des chemins est dans ces termes: "An assessment upon all the inhabitants, owners and occupiers of land rateable to the poor, shall be made." Dans ces deux circonstances la taxe est imposée sur les personnes possédant des biens assujettis à la contribution, quelles résident ou non sur les biens. Cependant le Statut désigne le corps des contribuables par l'appellation, "the inhabitants."

Burns nous apprend comment on interprétait ces mots. "Abundance of orders have been quashed, for not setting forth that the persons (who by the statute must reside in the parish) where substantial householders, and describing them only as principal inhabitants and substantial householders without adding in the parish."

C'est assurément bien déclarer que pour ces juges, les mots: the inhabitants or householders, n'impliquaient pas essentiellement la résidence.

Phillips dans son excellent ouvrage sur la preuve, parlant du changement opéré par l'acte de Lord Denman, s'exprime ainsi: "Rated inhabitants were before that Act incompetent witnesses." Cette incompétence atteignait tous les contribuables, the rated inhabitants, qu'ils fussent domiciliés ou non sur la paroisse.

Ainsi dans le langage parlementaire de l'Angleterre, les mots "the inhabitants," signifient un propriétaire taillable, a rateable and a rated inhabitant, sans égard à la résidence.

L'édit de 1679 qui régla pour le Bas-Canada, l'obligation des paroissiens relativement aux constructions des églises, ordonne qu'elles soient bâties aux dépens des habitants.

Il a été rendu maintes ordonnances et maints Jugements depuis 1791, dans lesquels les propriétaires, dans la paroisse, résidents ou non, sont condamnés à contribuer pour la construction des églises, et sont appelés, "les habitants."

Dans la loi municipale de 1841, les électeurs sont désignés dans le texte anglais, the inhabitant householder, qu'on a traduit, les habitants tenant feu et lieu.

Le statut de 1845 qui reforma les conseils de District par les municipalités de paroisse, désignant les électeurs les indique ainsi, "les dits habitants étant des habitants tenant feu et lieu."

Dans le Haut Canada, le statut donne le droit de vote, lors de la première élection d'une municipalité, "to every resident male inhabitant, of sufficient property," et aux élections subséquentes, "to every male freeholder," porté sur le rôle de cotisation.

Il serait inutile de citer plus de textes, pour établir que les mots, les habitants, *the inhabitants*, n'ont pas dans notre langue Parlementaire, un sens absolu de résidence: autrement le législateur n'aurait jamais parlé comme on vient de le voir; les dits habitants étant des habitants tenant feu et lieu.

Ces mots indiquent l'universalité des intéressés, constituant la municipalité pour et par ces propriétaires. On ne compte dans la communauté qu'à raison de sa valeur taxable. Le rôle de cotisation est le seul livre légal dans lequel vous pouvez lire et apprendre les noms des habitants. Dans les meilleurs ouvrages, l'on se sert indifféremment des termes, les habitants ou les propriétaires, pour qualifier et désigner les intéressés, à raison de l'héritage qu'ils possèdent,

Denizart nous enseigne, que "lorsque des habitants d'une paroisse sont en cause pour des droits réels, ils comprennent les propriétaires des biens situés sur la paroisse, de manière que quoique ces propriétaires demeurent ailleurs, ils sont dans cette occasion, censés faire partie du nombre des habitants."

Curasson, dans son traité des actions possessoires, s'exprime comme suit: les habitants ont droit de jouir de tous les avantages et commodités que procure la vie, et de suite, réfutant, Pardessus, il ajoute: ce dernier convient que le propriétaire doit être indemnisé, si par le fait municipal, des habitants ne peuvent pas jouir de leurs aisances. Dans un jugement qu'il cite, accordant une indemnité pour un changement dans l'assiette de la vie on trouve un motif dans les termes suivants: "attendu que l'on ne peut mettre au nombre des charges que chaque habitant doit supporter, le dommage qu'un citoyen éprouve dans sa propriété."

Voilà pour le sens parlementaire et légal.

Le dictionnaire dit, *riche habitant*, comme le peuple, *un bon habitant*, pour indiquer un propriétaire riche, un cultivateur à l'aise, sans réserve de résidence spéciale.

Mais le statut même sur la matière, a donné l'interprétation, le sens que ces mots doivent emporter. La clause 34, ordonne qu'il y aura une assemblée des propriétaires de terre et habitants tenant feu et lieu, *landholders and householders*, pour choisir des Commissaires. Pour être électeur, il faut être propriétaire dans la municipalité.

La résidence n'est pas nécessaire comme dans les élections municipales pour donner le droit de vote; elle n'est pas requise non plus pour le vote politique; et c'est sans doute à raison de l'universalité de l'intérêt qui s'attache à l'instruction publique qu'on a placé les deux franchises sur le même pied.

Le propriétaire, quoiqu'il ne réside pas, fait donc partie du corps muncipal auquel appartient l'administration des intérêts scolaires. Il est déclaré par la loi même, faire partie du nombre des habitants. Il a droit d'avis, d'action dans l'organisation du conseil exécutif de la communauté. De là, découle ses immunités qui sont celles de tous les autres contribuables; il ne peut faire partie du corps politique, et cependant ne posséder que le droit de payer, c'est à raison de

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sa contribution qu'il fait partie de la communauté; et c'est le moins, qu'il possède, comme le résident, le droit de surveiller son emploi et sa destination.

Ce n'est plus droit local, partiel, exclusif mais droit public, général, intéressant toute la société au mêmed égré. Quand il s'agit d'améliorations matérielles purement locales, on peut avec raison réclamer l'emploi de cette contribution, de la manière que la majorité [illegible] le plus avantageux. Car alors le propriétaire non résident participe à cet avantage. Mais on ne peut raisonner ainsi quand il s'agit de la conscience, et des choses du domaine moral et religieux. Il n'y a plus de confusion d'une chose appartenant à tous et à chacun ; rien ne se règle et ne se détermine par le principe des majorités ; au point de vue religieux, chacun s'appartient exclusivement. Autrement, c'est la liberté d'enseignement et de croire, à la condition de n'enseigner et de ne croire que ce qui tombe dans les opinions de la majorité.

On semble avoir perdu de vue dans ces divergences d'opinions plus ou [illegible] égoïstes, l'examen de ce que le parlement voulait régler par la disposition dont il s'agit. Pour permettre l'existence d'une corporation de dissidents dans une municipalité, il faut qu'il y ait dans la municipalité même un nombre quelconque d'habitants, pour organiser et faire fonctionner la corporation. Mais une fois ce corps constitué, la loi ne distingue plus, elle déclare que le conseil de ces dissidents aura seul le pouvoir d'asseoir et de prélever l'impôt scolaire sur les habitants dissidents. C'est la croyance seule qui limite et désigne ceux qui appartiennent à chaque corporation. En effet, il n'y a de logique et d'impartial que la séparation des majorités et des minorités, sur la simple demande de ces dernières. Avant de résumer cette discussion, je crois devoir dire, que s'il y a quelques personnes qui ne partagent pas les opinions qui viennent d'être énoncées, elles ne peuvent nier toutefois, que le language de la loi, quant aux conditions du droit de dissidence, est au moins susceptible de l'interprétation que j'en ai donnée.

Cela admis, on retombe dans le domaine de la science du droit. Les règles générales que la sagesse des hommes éclairés de tous les temps nous ont enseignées pour expliquer les lois, doivent être étudiées pour guider l'opinion des juges comme le remarque Dwarris : The duty of the Judges, in the interpretation of the letter of the law, if difficulties occur, is to look to the spirit and object, and to be guided by rules and examples.

Quelques-unes de ces règles ont déjà été développées, [illegible] de les rappeler, et de faire l'application de quelques autres.

It is not the words of the law, disait l'ancien Plow[illegible] the internal sense of it that makes the law. The letter of the law is the body, the sense and reason of the law is the soul. Il est digne de remarque que notre législateur sur la matière transcrivait ces paroles presque litéralement, en déclarant, " que généralement tous mots, expressions et dispositions, doivent recevoir une interprétation [illegible]rale, aussi large et avantageuse, qu'il faudra, pour atteindre surement [illegible], et en mettre en force les différentes dispositions, selon son vrai [illegible] et intent[illegible]"

Dans l'espèce, l'intention du législateur n'est pas douteuse, elle est même admise dans le sens favorable à la dissidence du non résident. Et voici, comme

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le judicieux Dwarris résume l'enseignement et la jurisprudence en Angleterre. "The real intention, when collected with certainty, will always, in statutes, prevail over the literal sense of the terms. A thing which is within the object, spirit and meaning of a statute is as much within the statute as if it were within the letter.

La dissidence du catholique ou du protestant non résident is within the object, spirit and meaning of the statute.

Un jurisconsulte dont l'opinion doit avoir dans toute discussion légale, le plus grand poids, mais principalement dans l'étude des règles à suivre pour l'interprétation des lois, le sage Domat enseignait, que c'est par l'esprit et l'intention des lois qu'il faut les entendre et en faire l'application. Pour bien juger du sens d'une loi, on doit, dit-il, considérer quel est son motif, quels sont les inconvénients où elle pourvoit, l'utilité qui en peut naître. D'où il s'en suit, que s'il arrive que quelques termes de la loi, en quelques expressions d'une loi, paraissent avoir un sens différent de celui qui est d'ailleurs évidemment marqué par la teneur de la loi entière, il faut s'arrêter au vrai sens, et rejetter l'autre qui paraît dans les termes, et qui se trouve contraire à l'intention."

Avec la liberté des cultes et leur égalité devant la loi, le droit de la minorité est aussi absolu que celui de la majorité. Le vrai sens de la loi doit être une protection égale de ses deux droits; il faut rejetter l'autre sens qui peut paraître dans les termes, et qui mettant l'un à la merci de l'autre, est contraire à l'intention de la loi.

Il manquerait une observation importante sur cette partie du sujet, si on ne rappelait ce qui a été souvent exposé par les magistrats les plus éminents de la France et de l'Angleterre. Quand il s'agit de mettre de côté des principes d'éternelle justice, ou d'éluder des règles fondamentales, il faut que l'ordre comme l'intention du législateur soient exprimés, avec une clarté irrésistible, pour induire les tribunaux à supposer le dessein d'effectuer un tel résultat.

L'organisation actuelle fut décrétée pour garantir les catholiques comme les protestants de la crainte et de la possibilité de voir leurs contributions employées à propager des doctrines qui leur répugneraient.

La loi détruirait la loi, si elle pouvait, par son application dans une circonstance quelconque, détruire cette garantie.

On ne peut invoquer pour soutenir les prétentions de la demande, les raisons d'inconvénients: car leur système ne remédie à rien, ne peut que nuire à l'enseignement public, et fait naître partout par sa politique provocatrice le mal que le législateur voulait prévenir.

Il doit être juste en Canada comme en Angleterre, de dire avec le Baron Parke; "we must always construe an Act, so as to suppress the mischief, and advance the remedy, according to the true intents of the makers of the law.

L'examen que j'ai faite de la question, me semble démontrer à l'évidence, que le droit du contribuable de suivre l'emploi de sa contribution à l'enseignement public, est le corrollaire de son droit à l'exercice de sa religion et de son culte; que la loi examinée dans son but, dans son ensemble et dans ses détails, a consacré ce principe si juste et si nécessaire à la paix, dans un monde où les races s'abritent sous leurs contrastes, et les religions se protègent par leurs différences.

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Il semble également démontré que l'interprétation strictement légale du texte de la loi, d'après le sens parlementaire, et d'après le sens légal et usuel, ne peut comporter et admettre une exception à ce droit, qui découle de notre constitution civile et politique, comme de la loi naturelle.

Action dismissed.

John Hungerford, for plaintiff.
Charles Laberge, for defendant.
(W. E. B.)

COUR SUPERIEURE, 1866.

EN REVISION.

MONTREAL, 28 FEVRIER 1866.

Coram BADGLEY, J., BERTHELOT, J., MONK, J. A.

No. 611

Guèrremont vs. *Plante.*

JUGE :—1o. Qu'il n'y a pas lieu à révision d'un jugement rendu par la Cour de Circuit sur appel d'une conviction par un juge de Paix en vertu de l'acte d'agriculture. 2o. Que les causes sujettes à revision, sont celles qui sont sujettes à appel devant la Cour du Banc de la Reine.

Une action pénale avait été intentée par le demandeur contre le défendeur, devant un magistrat du District de Richelieu en vertu de l'acte d'agriculture. Le défendeur ayant été condamné à l'amende, interjeta appel de la décision, devant la Cour de Circuit pour le District de Richelieu conformément aux dispositions de l'acte 24, Vic., ch. 30; et cette décision fut confirmée par la Cour de Circuit pour le District de Richelieu, le 25 Novembre 1865.

Le défendeur inscrivit cette cause pour révision devant trois juges à Montréal. Le défendeur fit motion le 23 Février 1866, comme suit :

Motion de la part du dit défendeur en révision que la demande en révision en cette cause et l'inscription soit renvoyée avec dépens pour entr'autres la raison suivante ;

Parceque le dit demandeur en révision n'avait pas droit de demander la révision du jugement rendu par la cour de Circuit de Richelieu, vu que ce jugement est un jugement en appel et dont il ne peut y avoir révision devant cette Cour.

Per Curiam :—An inscription has been made in this cause to revise a judgment of the Circuit Court for the District of Richelieu, affirming a conviction made by a Justice of the peace, under the Agricultural Act, ch. 26 Con. St. L. C.

A motion has been put in, as preliminary to any proceeding, by which the inscription is moved to be rejected on the ground that this Court has no power to revise the judgment of the Circuit Court.

The Agricultural Act amended, 24 Vic. ch. 30, has provided for an appeal from any judgment rendered in virtue of the Agricultural Act, but it has provided for nothing further. This Court, sitting as a Court of Review, cannot revise judgments in cases that are not appealable to the Court of Queen's Bench, appeal side. The motion to reject the inscription must be granted and the record ordered to be remitted according to law.

The Judgment is as follows: " La Cour Supérieure siégeant à Montréal pré-

sentement en cour de révision ayant entendu les parties par leurs avocats respectifs sur la motion du défendeur en révision le 23 Février courant, que la demande en révision en cette cause et l'inscription soit renvoyée avec dépens pour les raisons qui y sont déduites, ayant examiné le dossier et la procédure et ayant délibéré, a accordé la dite motion et en conséquence a renvoyé et renvoie la dite inscription avec dépens contre le dit Alexis Plante.

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Inscription set aside.

Gauthier, attorney for Plante.
Germain, attorney for Guévremont.
(P. R. L.)

SUPERIOR COURT (IN INSOLVENCY).

MONTREAL, 31ST OCTOBER, 1865.

Coram BADGLEY, J.

No. 216.

In the matter of John Feron, an Insolvent, and *John Whyte, Assignee*, and *John Whyte, Petitioner.*

HELD:—Notwithstanding sec. 10 of Insolvent Act of 1864, sub-sec. 4, which authorizes the examination of any person upon oath respecting the estate of the insolvent, the wife of an insolvent cannot legally be examined concerning his estate.

On the 18th of September, 1865, on petition by the assignee an order was given by His Honour Mr. Justice Monk for the examination of Dame Margaret J. Darragh, the wife of the insolvent, touching certain real estate leased by the insolvent, which he averred to belong to his wife, having been given to her by her father.

A subpœna having been issued and served upon the said Dame Margaret J. Darragh, she appeared on the 5th of October last, and deposed:—"I am the wife of the said insolvent. I decline to be examined touching his estate and effects, on the ground that, being his wife, I am not liable to be so examined." The assignee then applied to His Honour Mr. Justice Badgley, in chambers, to compel the witness to submit herself to such examination.

This application was rejected. The grounds of rejection will appear from the judge's remarks.

BADGLEY, J.—In the case of this insolvent, the assignee petitioned for the examination of the insolvent's wife under the Act, when it was objected that she could not be examined, there being no law which authorized the examination of a wife respecting her husband's affairs. The case was submitted upon the deposition. It was the opinion of the Court that she could not be examined. The clause giving authority to examine "persons" respecting the estate of the insolvent, was copied from 6 Geo. IV., but in the English Act special authority was given to the commissioner to examine the wife. In this country, strange to say, a similar clause was in the bill, but it was struck out in committee, and formed no part of the Act as it now existed. There was a reason for this. Public policy did not allow domestic incidents to be brought before a Court of Justice. The ordinary statute law said specially that the wife shall not be a witness for or

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against her husband. Looking, therefore, at the policy of the law, and the fact of the special clause having been struck out, the Court could not grant the application.

Application refused.

Perkins & Stephens, for assignee.
(J. L. M.)

COUR SUPERIEURE,

(EN REVISION).

MONTREAL, 30 AVRIL 1866.

Coram SMITH, J., BADGLEY, J., BERTHELOT, J.

No. 82.

Moreau et vir vs. *Owler et vir.*

JUGÉ :—Que la clause que le locataire ne pourra céder et transporter ses intérêts dans le bail, sans le consentement par écrit du bailleur n'est pas une clause comminatoire, et sa violation donne lieu à la résiliation du bail.*

2°. Que le jugement en expulsion est déclaré commun aux cessionnaires du bail.

Les demandeurs ayant poursuivi en expulsion le défendeur Owler, à raison de la cession qu'il avait faite aux autres défendeurs de ces droits du bail qu'il avait obtenu du cédant des demandeurs ; et ayant été déboutés de leur demande, portèrent leur cause en révision.

La Cour Inférieure, siégeant en révision, maintint les prétentions des demandeurs et motiva son jugement comme suit :

La Cour Supérieure, siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties par leurs avocats, savoir : la demanderesse et le défendeur William Owler (les défendeurs Joseph Dorion et Pierre Cérat n'ayant pas comparu lors de la dite audition) sur le jugement rendu le quatorze avril courant, dans la dite Cour Supérieure, à Montréal, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré ;

Considérant qu'il y a erreur dans le susdit jugement du quatorze avril courant et qu'il doit être revisé, la cour procédant à cette révision et à rendre le jugement que aurait dû être prononcé par la dite Cour Supérieure ;

Considérant que la demanderesse a prouvé les allégués essentiels de sa déclaration, et nommément que le défendeur William Owler, a violé la condition et la clause stipulée au bail du huit octobre, mil huit cent soixante et deux, récitée en la dite déclaration, par laquelle il ne pouvait céder et transporter ses intérêts dans le susdit bail sans le consentement par écrit du bailleur, et que par les baux à loyer faits par le dit William Owler le dix-sept février, mil huit cent soixante et quatre ; à Pierre Cérat, et le dix-huit avril, mil huit cent soixante et cinq, à Joseph Dorion, et que depuis ce dernier bail, il y a eu violation en contravention à la dite clause et condition contenue au dit bail du huit Octobre mil huit cent soixante et deux, de manière à donner ouverture à la demande en rescision du dit bail :—a accordé et accorde les conclusions de la dite demande, et en conséquence la cour résilie, annulle et met à néant le dit bail du huit octobre mil huit cent soixante et deux, contenu dans l'acte fait et passé à Montréal, devant

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* Vide, 2 Revue de Lég., p.. 52.
2 L. C. Reports, p. 30.

Maître J. E. O. Labadie et son confrère, notaires, consentie par feu George Desbarats au dit William Owler, des prémisses mentionnées au dit bail, comme suit, savoir :

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" The house and premises situate at the corner of St. Gabriel and Ste. Therese " streets, of the city of Montreal, known as the Odd Fellows' Hall, including the " basement."

Et ordonne et enjoint au dit William Owler, sous deux jours de la signification du présent jugement, à abandonner la possession et jouissance des dits lieux à la dite demanderesse, et à défaut par lui de ce faire, sous tel délai, qu'il en soit expulsé sous l'autorité de la dite Cour Supérieure et ses meubles et effets mis sur le carreau et la dite demanderesse mise en possession d'iceux suivant le cours ordinaire de la loi, le tout avec dépens tant de la dite Cour Supérieure que de cette Cour de Révision. Et la cour déclare le présent jugement commun tant contre le dit William Owler que contre les autres défendeurs Joseph Dorion et Pierre Cérat. L'hon. Juge Smith ne concourre point dans ce jugement.

Moreau, Ouimet et Chapleau, avocats des demandeurs.

Leblanc et Cassidy, avocats des défendeurs.

(P. R. L.)

SUPERIOR COURT (IN INSOLVENCY.)

MONTREAL, 30TH NOVEMBER, 1865.

Coram BADGLEY, J.

No. 1948.

May vs. *Larue* et al.

HELD:—Where a writ of attachment has been issued under the Insolvent Act of 1864, the defendant will not be allowed to appear in the cause after five days from the return day of the writ even although his motion to that effect is supported by affidavits, that it was through an error on the part of his attorneys that the appearance was not fyled before the expiration of the five days.

In this cause a writ of attachment had been issued against the effects of the defendants, returnable on the 6th November, 1865. The writ was served and returned, and defendants not having appeared, default was entered against them.

On the 17th November, Messieurs Moreau, Ouimet & Chapleau made a motion on behalf of the defendants, that *main levée* be accorded them of the default entered up against them, and that they be allowed to appear in the cause. This motion was supported by two affidavits to the effect that the said attorneys had been instructed in due time to appear for defendants, but had made a mistake as to the return day of the writ, and Mr. Chapleau swore that he believed defendants had a serious defence.

Per Curiam. The terms of the statute are, "the petition must be presented "within five days from the return day of the writ, but not afterwards." With the law so positive, it is impossible to grant the motion.

Perkins & Stephens, for plaintiff. Motion rejected.

(J. L. M.)

CIRCUIT COURT, 1865.

MONTREAL, 9TH OCTOBER, 1865.

Coram MONK, J.

No. 109.

Proulx vs. *Dupuis.*

DIMES, VERBAL NOTICE—PROOF OF.

HELD:—In an action for *dimes*, that verbal notice given to a priest that a person had ceased to be a Roman Catholic, is not susceptible of being proved.

This action was by a priest for *dimes*. The defendant pleaded that he had for a long time ceased to belong to the Roman Catholic Church, and was in fact a Protestant, of which the plaintiff had notice previous to the pretended causes of action.

At *enquête* the following question was put to a witness: "Avez-vous été requis en aucun temps par le défendeur, de notifier le demandeur qu'il était protestant et dites ce que vous avez fait à ce sujet?"

The following objection was made by plaintiff's counsel: "Objecté à cette question, comme étant illegale en autant qu'elle tend à prouver un fait qui n'est pas susceptible d'être prouvé par temoin et qui ne peut être établi que par un acte notarié ou un écrit?"

MONK, J., maintained the objection, holding that verbal notice was not sufficient, and therefore could not be proved.

Loranger & Loranger, for plaintiff.

Torrance & Morris, for defendant.

(J. L. M.)

MONTREAL, 20TH OCTOBER, 1865.

Coram BERTHELOT, J.

SAME CAUSE—SAME HOLDING.

On the twentieth of October, the defendant made the following motion to revise the ruling of His Honour Mr. Justice Monk, in the above cause: "Motion on the part of the defendant that this Honourable Court do revise the ruling of the Honourable Mr. Justice Monk, at the *Enquête* in this cause, taken by consent of parties, on the ninth day of October instant month. The question put to the witness was the following: "Avez-vous été requis en aucun temps par la défendeur de notifier le demandeur qu'il était protestant et dites ce que vous avez fait à ce sujet?" The plaintiff made the following objection: Objecte à cette question comme étant illegale en autant qu'elle tend à prouver un fait qui n'est pas susceptible d'être prouvé par temoins, et qui ne peut être établi que par un acte notarié ou un écrit." The Honourable Judge maintained the objection. For moyens in support of the present motion, the defendant saith that the present demand of the plaintiff being for *dimes*, and the defendant having pleaded that he no longer belonged to the Roman Catholic faith, of which the plaintiff had notice long previous to the institution of this action, the said question was legal

and well founded in law, and a verbal notice of having left the Roman Catholic faith is sufficient and can be proved by parole evidence."

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Berthelot, J., rejected the motion.

Motion rejected.

Loranger & Loranger, for plaintiff.
Torrance & Morris, for defendant.
(J. L. M.)

MONTREAL, 28TH FEBRUARY, 1866.

Coram MONK, J.

SAME CAUSE.

HELD:—In Lower Canada *dimes* can only be exacted from those who profess the Roman Catholic religion.

2°—A written plea fyled in Court in answer to a demand for *dimes* to the effect that the defendant had ceased to belong to the Roman Catholic Church, and to profess the Roman Catholic religion, is a sufficient notice in writing of the fact and to exempt him from the payment of all *dimes*, claimed to have accrued after the fyling of said plea.

In this cause the plaintiff described the defendant as having professed and still professing the Roman Catholic religion and claimed from him £12 10s., as due him as curé of the parish of St. Philippe from the year 1863 to 1864.

The defence appears in effect by the preceding reports.

At *enquête inter alia* the defendant proved as a lost plea one which had been fyled by him in a former action for *dimes* by the plaintiff. The proof shewed that the said plea contained the allegations that the defendant had for many years ceased to belong to the Roman Catholic Church, and was in fact a Protestant, of which the plaintiff had notice.

As another branch of the evidence *interrogatoires sur faits et articles* were submitted to the plaintiff for answer. The second interrogatory was as follows: "Is it not true that at the time of the institution of this action the defendant had ceased to belong to the Roman Catholic Church, and to profess the Roman Catholic religion." The answer was "*Il parait que c'était le cas.*" Other answers were given to the same effect, admitting that previous to the causes of the action, the defendant had ceased to profess the Roman Catholic religion. Ample proof was made of the fact that defendant had ceased to attend the Roman Catholic Church from a period of nine or ten years, and that he attended a Protestant Church.

Loranger, J.—For plaintiff, at final hearing, contended that no notice in writing had ever been given by the defendant to the plaintiff that he had ceased to belong to his religion, and that until a formal notice in writing, or made before a notary, had been served upon the plaintiff, the defendant was liable to pay *dimes*. The mere fact of the defendant's attending a Protestant place of worship was not sufficient. He cited Gravel and Bruneau, 5 L. C. J., 27; Syndics and Fallon, 6 L. C. J., 258.

Morris, J. L.—For defendant, submitted that by the treaty of 1763 between Great Britain and France, Public Acts of Canada, vol. O., p. 26, liberty was given to Roman Catholics "to profess the worship of their religion according to the rites of the Romish Church, as far as the laws of Great Britain permit."

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That by 14 Geo. III, cap. 83, sec. v., p. 8, vol. O., Public Acts of Canada, it is provided: "The clergy of said Church may hold, receive and enjoy their accustomed dues and rights with respect to such persons only as shall profess the said religion."

That the defendant was sued as having professed and still professing the Roman Catholic religion. That the interrogatories put to the plaintiff touched the whole point at issue, and being answered in the affirmative, judgment must go for defendant.

That apart from the plaintiff's admission there was proof of record that the plaintiff had been formally notified in writing by the defendant of his change of faith. The plea fyled in a former action for *dimes*, although lost, had been proved, and contained all the notice that was necessary. In the case of Gravel and Bruneau, 5 L. C. J. 27, it was held that an ordinary letter served on the *curé* was sufficient. A plea fyled before the Court where all parties were present was a much more formal and solemn document than an ordinary letter. All the circumstances of the case shewed that the defendant was in good faith, and had for a number of years ceased to belong to the Roman Catholic Church, of which the plaintiff was aware, having received due notice.

The following is the judgment of the Court:

"The Court, after having heard the parties by their counsel, upon the merits of this cause, having examined the proceedings and proof of record, seen the admissions made by the plaintiff, and having upon the whole duly deliberated: Considering that by law *dimes* can only be recovered from persons who profess the Roman Catholic religion.

Considering that it is in evidence that in a former action by the plaintiff against the defendant to recover an amount of *dimes* claimed to be due, the defendant pleaded in writing that he had ceased to belong to the Roman Catholic Church, and had notified the plaintiff to that effect; and considering that said plea was in law a sufficient notice to the plaintiff of the fact that at the time it was fyled and subsequently thereto, the defendant did not any longer profess the Roman Catholic religion.

Considering that the plaintiff by his answers to interrogatories *sur faits et articles* has acknowledged that at the time mentioned in plaintiff's declaration, the defendant did not profess the Roman Catholic religion, and was in fact a Protestant, the Court doth dismiss the plaintiff's action with costs distraits to Messieurs Torrance & Morris, attorneys for defendant."

Loranger & Loranger, for plaintiff.

Torrance & Morris, for defendant.

(J. L. M.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9TH JUNE, 1866.

Coram DUVAL, CH. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

(No. 54.)

ABRAHAM BRAHADI,

(Plaintiff in the Court below,)

AND APPELLANT;

EUGENE BERGERON, *et al.*,

(Defendants in the Court below,)

RESPONDENTS.

HELD :—1st. That under 57 Sec. of 83 ch. of C. S. L. C., in cases of *Saisie Gagerie* in Circuit Court, the declaration need not be served by a bailiff, but may be *left* at the Prothonotary's office.

2nd. That the service of the declaration is sufficient, although an interval of five days do not remain between the service of the declaration and the return of the writ.

This was an appeal from a judgment rendered by the Circuit Court at Montreal, on the 30th day of September, 1865, by the Honorable Mr. Justice Badgley, whereby the action of the appellant, plaintiff in the Court below, was dismissed with costs, upon an *exception à la forme*, fyled by the respondents, defendants in the Court below.

The action of the plaintiff was for rent, and the process a writ of *saisie gagerie*.

The *exception à la forme* set forth the following grounds :—

1st. That it does not appear by the proceedings and return of the bailiff that the defendants, or either of them, were at any time served with the declaration.

2nd. That no declaration has ever been served on the defendants, as by law plaintiff was compelled to do.

3rd. That by law, five clear days should have been allowed between the service of the declaration and the return of the action, whereas, in reality, the declarations have never been served on the defendants, but irregularly deposited in the office of the clerk of the Court, for the defendants, on the fourth day of May instant, to wit: only three clear days before the return of the action.

4th. That the deposit of such declaration is irregular, unless made at least five clear days before the return of the action.

5th. That the said deposit of declaration at the office of the clerk of the Court is irregular and insufficent.

6th. That the *procès-verbal* of seizure by the bailiff's return on the writ does not appear to have been served upon the defendants,—allowing five clear days between the day of service and the return of the action.

7th. That no reasonable delay has been allowed between the service of the *procès-verbal* and the return of the action.

8th. That the bailiff's return, as regards the service of the declaration and *procès-verbal*, is irregular, insufficient, and null and void.

The writ of *saisie gagerie* issued, and was executed, as appears by the *procès*

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verbal of seizure and return of the bailiff annexed to the writ, on the 2nd May, 1865, and was made returnable on the 8th May, 1865; and the declaration which was to be *served*, was in due course left at the Prothonotary's office, as provided by law: that is to say, a copy was left for each of the defendants at the office of the clerk of the said Circuit Court, on the 5th May, 1865.

The plaintiff established the service of the declaration, by a duly certified extract from the record of the Court, fyled at the examination of Charles Bonacina, a clerk in the office of the Prothonotary, or clerk of the Circuit Court, in the following words:—

"1865—May 4. 3 copies of the declaration deposited this day for the "defendants."

And by the deposition of the said Charles Bonacina, who testified that "on the "fourth day of May, 1865, three copies of the declaration of the plaintiff were "brought to the office of the clerk of the Circuit Court, and left with him during "office hours, on that day, that is to say, between the hours of nine in the "morning and four in the afternoon, for the defendants respectively. That "they were immediately paraphed by one of the prothonotary, or clerk, of the "said Circuit Court, and the fact of them being so deposited for the defendants "was entered by him in the plumitif of the said Court, in the manner and in "words mentioned in the certificate. That the said copies were afterwards "called for by the defendant's attorney, or some one on his behalf, and to him "delivered when so called for."

The defendants adduced no evidence respecting the service of the declaration, but offered verbal testimony respecting the service of the *procès verbal* of seizure of a negative and desultory character, consisting of the deposition of three of their minor children, daughters, of Bergeron and Labadie, and a man of the name of Dupont, which not being admissible to destroy the *procès-verbal* and return of the bailiff, the defendants having neither inscribed *en faux*, nor by their said *exception à la forme* denied any of the facts certified by the bailiff in his *procès verbal* and return, the plaintiff deemed it necessary to attempt to rebut.

The sole ground alleged by the honorable Judges, in rendering the judgment of the Court, for dismissing the plaintiff's action, was, that, according to his interpretation of the law, it was not sufficient that the writ of *saisie gagerie* had been executed and served on the defendants five days before the day fixed for its return, but that the service of the declaration should have been likewise made at least five clear days before the return of the writ, notwithstanding the provisions of the 57 sec. of the 83 ch. of the C. S. of L. C.

The appellant submitted that there was nothing in the law to justify such an interpretation; on the contrary, that the 57 sec. of the 83 ch. of C. S. of Lower Canada, p. 721 (English edition), provided that "in all cases where the plaintiff *has obtained* a writ of *capias ad respondendum, saisie gagerie*, &c., service of the declaration specifying the cause of action on which such writ *has been issued*, might be made on the defendant either personally or by *being left at the office of the Prothonotary or clerk of the Court, into which or at the place where such writ is returnable at any time within three days next after the service of such*

writ, if the same have issued in term, or within eight days next after such service, if the writ has issued in vacation, etc.

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That the only other sections of the ch. 83 of the C. S. of L. C., relating to the service of the writ of summons and declaration, were the 8th section, requiring in the Superior Court that any writ of summons be served at least ten days before the day fixed for the return; the 44 section, which applies to both Superior and Circuit Courts, but contains the exception as to service of declaration, in cases such as provided by the 57 section; and the 170 section and its sub-section 2 and 3, which apply solely to the Circuit Court, requiring the declaration *in ordinary cases* to be annexed; or the cause of action to be mentioned in the writ; and that the writ of *summons* be served five days before the return.

The respondent, on the other hand, contended that the copy of the declaration in cases under 57 sec. of the 83 ch. of the C. S. of L. C., although left at the Prothonotary office, must be served, "signifiée," by a bailiff; that there was nothing in the 57 section dispensing with the "signification" of the declaration, nor was there anything in that section suspensive of the obligation of the plaintiff to give the defendants the five full days of delay required by the 170 section in respect of the service of the declaration. That in the absence of a formal provision abolishing the requirements of the 170 section, as to the interval of five days, the 57 section must be interpreted as merely exempting the plaintiff from serving the declaration with the writ, granting a "nouveau délai," for the service of the declaration, but not abolishing "l'ancien délai," required by the 170 section. That if the interpretation put upon the 57 section by the appellant be accepted, the plaintiff, who has in vacation eight days after the service of the writ to serve his declaration, might serve the writ on the first day of the month, making it returnable on the seventh, and serve his declaration only on the ninth, and thus compel the defendant to appear before the service of the declaration—a doctrine subversive of all justice, and adverse to the maxim that the action must be "*libellée*" *ut sciat reus utrum cedere vel contradicere debeat*—(Serpillon, tit. ii., s. 3.) The respondent cited the cases of Godfrey v. Kitchener, No. 1536, in Circuit Court, adjudged by Judge Smith, the 17th Nov., 1860, and Ward v. Cousine, by Judge Monk, 30th June, 1864, reported in 9 vol. L. C. Jurist, p. 28, in support of his pretensions.

In reply, the appellant urged that the 57 section contained the law governing the case—that it granted the delay, and that there was nothing in any other section requiring an interval of five days between the service of the declaration and the return of the writ. That if a case such as that supposed by the respondents, requiring the defendant to appear before service of the declaration, that the Court had power to grant him delay to plead. That as to the decisions of Judges Smith and Monk cited, they were inapplicable. That, besides, Judge Monk had, on the same day Judge Badgley dismissed this action on the exception, maintained the sufficiency of a similar service of the declaration in the case Raphael v. McDonald, reported p. 19 of 10 vol. of L. C. Jurist.

Per Curiam.—DUVAL, C. J.—The Court below mistook the section of the

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statute applicable to this case. The judgment of the Court below, dismissing the plaintiff's action on the *exception à la forme*, must therefore be reversed.

The judgment of the Court of Appeals was as follows:—

"Seeing that the grounds of demurrer assigned in the peremptory *exception à la forme*, fyled by the defendants in the Court below, are insufficient in law, &c., and that in the judgment pronounced by the Circuit Court, at Montreal, on the 30th Sept., 1865, maintaining the sad exception, there is error, this Court doth reverse, annul, and set aside the said judgment, and doth overrule the peremptory *exception à la forme* fyled by the defendants in the Court below, with costs in both suits against respondents, in favour of the appellant.

Judgment reversed.

Day & Day, for appellants.
T. & C. C. Delorimier, for respondents.
(J. J. D.)

COURT OF QUEEN'S BENCH, 1865.

MONTREAL, 7TH DECEMBER, 1865.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL, CH. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

(No. 1.)

HORATIO M. BOWKER,

(Defendant in Court below,)

APPELLANT;

AND

HORATIO N. FENN,

(Plaintiff in Court below,)

RESPONDENT.

HELD:—That the prescription of five years, under the Promissory Note Act, Ch. 64, of the Cons. Stat. of L. C., is so absolute that no acknowledgment of indebtedness or partial payment will take the case out of the statute; and if no suit or action be actually brought on a note within five years after its maturity it will be held to be absolutely paid and discharged.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, (*Monk*, Asst. J., presiding,) on the 31st day of December, 1863, condemning the appellant to pay, besides an amount of no interest in the case, the sum of $391.66, the balance of a promissory note made by the appellant, dated at Rochester, in the State of New York, and payable to the order of the respondent.

The appellant pleaded the prescription of five years under the statute, ch. 64 of the Con. Statutes of L. C.; and the respondent specially replied, that the operation of the statute had been interrupted, by acknowledgments and promises to pay in writing, and by a part payment on the note within the five years.

In the judgment of the Superior Court no special grounds or reasons were assigned, the appellant being condemned purely and simply to pay the amount demanded.

Robertson, Q. C.:—Under our statute, the lapse of five years is an absolute bar to an action on a promissory note, the proviso under the 24 George III., cap.

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2: "that every debtor * * * shall, if required, make oath that such promissory note is *bonâ fide* discharged and paid," being no longer in force.

The Con. Statute of L. C., chap. 64, sec. 31, enacts that "all notes made after the said day (1st August, 1849,) shall be held to be absolutely paid and discharged if no suit or action has been brought within five years, &c.;" and this is the only statute now regulating the prescription of notes in Lower Canada.

The statute of limitations, Consolidated Statutes of L. C., chap. 67, follows the English statutes 21 James I., chap. 16, and 9 George IV., chap. 14, which statutes by the terms, "any contract without specialty," are applicable in England to promissory notes. These English statutes have been extended by the Mercantile and Marine Act, 16 and 17 Victoria, chap. 113 and the Mercantile Law Amendment Act of 1856, (19 and 20 Vic. cap. 97), but it is contended that our Promissory Note Act being introduced subsequently to the Limitation Act of the Province, (10 and 11 Victoria, cap. 11), laid down a different prescription, and in effect rendered inapplicable to notes the provisions of the Limitation Act as to acknowledgment or promises to pay. It established, it is submitted, a complete bar to an action founded upon a note alone, and the defendant could not be called upon to make oath of payment when he invoked the prescription.

If our statute holds notes "to be absolutely paid and discharged," it meant that they must be taken as discharged for any balance not paid. The defendant is not now obliged to swear the note was paid, and it may fairly be held that a payment made by a debtor within the five years operates only as payment *pro tanto*, but does not amount to a promise to pay the balance. The debtor who pays part of a note, can still rely on the prescription when he invokes it, as resulting from the express language of the law. Proof of a partial payment simply establishes such payment, but ought not to be held to be "a new or continuing contract," as set forth in the language of the statute of limitations. The effect of the judgment appealed from is to add to the statute which enacts that *all notes* "shall be held to be absolutely paid and discharged, if no suit has been brought thereon within five years," the words "provided that an acknowledgment (in writing) or part payment of any note within the five years limited for presentation or previous to the institution of the suit, shall take such note out of the effect of this statute."

No such language is to be found in our Promissory Note Act, which differs also essentially from the old French law, and from the Code. The ordinance of 1763 says:—"Les lettres ou billets de change seront reputés acquittés après cinq ans * * * néanmoins les prétendus débiteurs sont tenus d'affirmer, s'ils en sont requis, qu'ils ne sont plus recevables."

The 186 article of the code de commerce says:—"Toutes actions relatives aux "lettres de change se prescrivent par cinq ans s'il n'y a pas condamnation, ou si "la dette n'a été reconnue par acte séparé. Néanmoins les prétendus débiteurs "sont tenus, d'affirmer, &c."

This prescription being founded on a presumption of payment, (Pothier, Change No. 203; 1 Pardessus, p. 483) the oath of payment might be required. If is

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submitted that under our statute the oath cannot be legally required, much less can interrogatories *sur faits et articles* or an examination of a defendant as witness, to establish a partial payment within the five years, and thereby to interrupt prescription. Pardessus (1 vol. p. 491-2) shews the distinction between the interruption of a prescription by an acknowledgment before the prescription was acquired, and a renunciation to a prescription after it was acquired. See also Troplong, Prescription, No. 76. 2 do., No. 613. Pardessus lays down a rule which may be held even more applicable under our statute as to notes than under the code, namely, that where the prescription is subordinated to the oath of the debtor, the debt subsists if the oath is not taken; but when it is without condition or *de plein droit*, the debt is extinguished by the simple lapse of time.

The acknowledgments relied on in the letters from the defendant to the plaintiff, do not constitute any interruption of the prescription nor any sufficient acknowledgment to take the case out of the English or L. C. Limitation Act, supposing the latter Act to be applicable to the case of notes.

These letters (see lists No. 23 and 43 of record) are in all thirteen in number. Seven of them (Nos. 28, 29, 30, 31, 32 and 45 of record) are dated *before the date of the note*, going back as far as 4th February, 1850, the note being of 15th September, 1856, and have no kind of reference to the note. Four of the letters (Nos. 26, 33, 34 and 35) dated *subsequently* to the note, make no acknowledgment of the note, or reference to it, so that only two letters can be found having direct reference to the note.

Letter "X," Feb. 6, 1857, (No. 24 of record):

"*If I can only sell this land*, I have no doubt that in the course of next summer I shall get out of your debt. I shall certainly make a great effort to send you a remittance next spring."

Letter "Y," 27 July, 1860, (No. 25 of record) being the letter quoted above, enclosing the cheque for $50.

"To this (land) I have looked to pay off your demand." He then alludes to having been robbed of $80, adding "this money I had put aside for you. The boy had spent it all. I never got back a farthing; now I am exceedingly anxious to get out of your debt, but if I am robbed of my property in Lima, (the land referred to) I almost despair of being able to pay you."

It is submitted that these allusions constitute neither an interruption of prescription, nor such an acknowledgment as under the statute of limitations would take the case out of the statute. There is but one letter written after the prescription acquired, that of the 24th September, 1861, (No. 35 of record) and it does not allude to the note.

"There must be an unqualified acknowledgment of the debt from which a promise can be inferred."—Chitty on Bills, p. 611.

"There must be proof *in writing* of a promise conformable to the declaration, an acknowledgment from which the Court can infer a promise to pay."—Evans *vs.* Simon, 9 Exch., 285.

According to the English doctrine the promise or acknowledgment should have been set up in the declaration, in order that the replication should support the declaration.

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"The constant replication ever since the statute to let in evidence of an acknowledgment is that the cause of action accrued, or that the defendant made the *promise in the declaration mentioned* within the six years, and the only principle upon which it can be held to be an answer to the statute is, that an acknowledgment *is evidence of a new promise, and as such constitutes a new cause of action*, and supports and establishes the promise which the declaration states. Upon this principle whenever the acknowledgment supports any of the promises *in the declaration* the plaintiff succeeds; where it does not support them, though it may shew clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails." Tanner *vs.* Smart, 6 B. & C., p. 606.

It was formerly held that the acknowledgment might be after action brought; but as the acknowledgment is now considered *as the ground of action and the subject of the declaration*, the promise, acknowledgment, or payment must clearly be before action brought. Byles on Bills, p. 402, Am. Ed. 1853, and cases cited there.

An acknowledgment bars the statute and amounts to a new promise, and therefore if made after action brought is no bar. In this case, Lord Denman held with Lord Tenterden, in Tanner *vs.* Smart, that the statute of limitation takes effect, not on a presumption that the debt was discharged, but on a new and distinct promise.

"If there be two undisputed but entirely separate debts a part payment within six years not specifically appropriated will not, as it seems, bar the statute as to either." 2 Taylor, Ev., Sect. 997.

Tindal, C. J., in Mill. *vs.* Fawkes, 7 Scott 452:

"When we find in the statute (9 Geo. 4., c. 14) that nothing therein contained shall alter or lessen the effect of any payment, &c., we have a right to suppose inasmuch as the statute has relation to barring the creditor's remedy * * * that the payment which is to take the case out of the statute must be expressly a payment in respect of that part of the debt which would, but for this provision, be barred by the statute. Inasmuch, therefore, as there is no evidence to show that *the debtor* intended to apply the payment in discharge of the earlier items, such payment does not exempt those items from the operation of the statute of limitations."

In England payment of money into Court will not take a bill or note out of the statute (of limitations) except as to the amount paid.—Reed *vs.* Dickens, 2 N. & M., p. 369.

Nor will payment of *principal* into Court revive a claim for *interest*.—Collyer *vs.* Willock, 4 Bing, p. 313.

In Hayden *vs.* Williams, (7 Bing, p. 168) Tindal, C. J. held that an acknowledgment which would have proved the debt, if the action had been brought *within* the six years, would not avail in any action brought after the six years, where the acknowledgment is declared to be the very ground of the action.

Snowdon, for Respondent.

The chief questions raised by this appeal are:—does a written acknowledgment or part payment interrupt the prescription applicable to promissory notes? and has there been a sufficient acknowledgment or part payment in this case?

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As to the former question there has never existed any diversity of opinion in any of our courts in Lower Canada since the law has been in force. The courts have always decided it in the affirmative. Our statute is based on the same grounds as those of England, France and America. All these statutes, although expressed in different words, seem to presume payment on the part of the debtor, and have for their object the necessity of clearing away old debts, which often give rise to tedious litigation. Taking this view of our law which, it is contended, is consistent with common sense and justice, it makes little difference what terms are used by the statute. It is in effect the same thing to say, "that no action for a debt shall be maintainable unless commenced within a certain period," and to say "that the debt shall be held to be paid if no suit is brought "within a certain period after it becomes due." Now these are the two ways in which prescription is applied to promissory notes, by the English Statute and the Canadian Statute. In both, the recovery of the debt is denied to the creditor, and if either mode of expression is to be considered absolute, the terms of the English statute could not be more so, as it excludes all right of action. Whereas the words of the Canadian statute "shall be held to be absolutely paid and discharged" clearly imply "shall be presumed to be paid," it does not deny the right of action, but if an action is brought after the specified period, the presumption will be against the Plaintiff. In the same way a person who has been absent in parts unknown for a certain number of years, is held to be dead, although he may afterwards return and resume his rights. The laws of prescription, although they may be found expedient, have always been considered opposed to justice and equity, and consequently in every country where they have prevailed, their operation has been delayed or altogether neutralized by subsequent promises or part payments of the debt. This principle has invariably been maintained in England, although its existence was not recognized in any statute previous to 9 Geo. IV., chap. 14. On reference to *Dwarris on Statutes*, p. 943, we find this view supported—he says: "Sec. 3 of this Act" (21 James I., c. 16) "fixes "a limitation of personal actions. In the case of simple contract debts the "doctrine of the courts (having for its object to enforce a moral obligation) has "been that an acknowledgment that the debt has not been paid takes the case "out of the statute."

Also in *Angell on Limitations*, p. 210—"The words of the statute of "James I. are express, that all actions on the case, &c., shall be commenced and "sued within six years next after the cause of such actions or suits, and not "after. In every form of action but that of assumpsit, the construction of "the statute has been in unison with the words and policy of the law. Thus "where the gist of the action is an injury committed, if the right of action is "once barred it is impossible to revive it by any admission however unequivocal "and positive; and it may be considered as an unvarying rule, in the case of "torts, that no acknowledgment will reserve it from the express language of the "statute. In the action of assumpsit, however, it is otherwise, and certain "admissions of the debt within six years have been adjudged to take the case "out of the statute; such admissions being considered as equivalent to new "promises made on the meritorious consideration of the antecedent liability, and "therefore affording a new and distinct cause of action."

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The same principle is recognised by our Consolidated Statutes, c. 67, s. 2; according to which an acknowledgment or promise must be in writing to take the case out of the statute of limitations.

The interpretation put on the statute may be looked on in another light. If the debtor has frequently, as in this case, besought the creditor for delay, pleading poverty and giving him promises in writing that he would pay the debt, it is plain that such promises are tantamount to an express renunciation of an acquired right under the statute. This renunciation of a right is clearly within the power of any one who has acquired it.

As to the question of the sufficiency of the part payment and acknowledgment in writing, there cannot be much dispute in this case, if the principle of interruption is allowed.

The appellant, according to his own admissions, owed the amount of the note, and $40 for an open account. Before prescription was acquired he remitted $50, the receipt of which was immediately acknowledged by the respondent as a payment on account of the note, as appears by a letter fyled by the appellant himself. If such a payment alone is not sufficient, it will suffice to refer to the words of the letter, accompanying the remittance, to show how complete the interruption was. The appellant says, "I had an offer for the land of $260;" and afterwards, "If I can only sell this land, I have no doubt that in the course "of next summer I shall get out of your debt." In letter marked Y, he says: "He," (meaning another intending purchaser) "offered me $100 for my right "and title of the whole; I told him that I had given you" (meaning the respondent) "Power of Attorney to sell it, and to you he must go and make "the bargain, also pay the money to you; I told him how much I was in "your debt. To this I have looked principally to pay off your debt." In the same letter the appellant says: "Last summer I was robbed of $80 by the "boy I kept to answer the door; he confessed, and was sent to prison for three "months. This money I had put aside for you." And further on: "Now I am "exceedingly anxious to get out of your debt, but if I am robbed of that "property I shall almost despair of ever being able to pay you."

The principles and precedents found in English Authors supply the proper test of the sufficiency of such acknowledgments and part payment.

Angell on Limitations, p. 218, says: It must be an "acknowledgment of "the justice of the debt in question so made as to amount in the eye of the law "to an implied promise."

Chitty on Bills, p. 614, says: "It is sufficient if it is an unqualified admis-"sion of a still subsisting liability, from which a promise to pay may be inferred "by law."

And *Taylor on Evidence*, vol. 2, p. 879.

The following acknowledgments were held sufficient:

Frost vs. *Bengough*, 8 Moore, p. 180.—"Sir: Business calls me on the sudden "to Liverpool. Should I be fortunate in my adventures, you may depend on "seeing me in Bristol in less than three weeks, otherwise I must arrange matters "with you as circumstances will permit. I shall leave town to-morrow night."

College vs. *Horne*, 10 Moore, p. 431.—"I have received yours respecting

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"plaintiff's demand; it is not a just one. I am ready to settle the account whenever plaintiff thinks proper to meet on the business. I am not in his debt "£90, nor anything like that sum. Shall be happy to settle the difference by "his meeting me."

Dodson vs. *McKay*.—4 N. & M. 327, § 6—"I can never be happy till I have "paid you; your account is correct. Would that I were enclosing the amt."

Gardner vs. *McMahon*—3 Q. B. 561.—"I am in your debt and will not avail "myself of the statute; but we do not agree as to the amount, and until this is "ascertained I can't move a step towards giving you satisfaction and doing "justice to my other creditors."

Waller vs. *Lacey*,—*M. & Gr.* 54 (*Taylor on Evidence, vol.* 2, *p.* 883)—"I send you my account, leaving a blank for balance, and beg that you will favour me with balance." *Taylor on Evidence, vol.* 2, *p.* 883. *Harrison's Digest, v.* 2, *p.* 1465.

As to the effect of a part payment.—It must appear that payment was made on account of a larger sum amounting to an admission of a greater sum being due and a promise to pay it. It is not necessary that the amount remaining due should be ascertained. *Taylor on Evidence, v.* 2, *p.* 884. *Angell on Limitations, p.* 961. *Walker* vs. *Butler*, 25 L. J., Q. B., 377.

It is further to be remarked that although the Respondent relied on these subsequent promises to take the case out of the statute, nevertheless the action was properly brought without reference to them. This principle is laid down in

Chitty's Statutes, vol. 1, part 2, p. 703, note 2—"Where the debt has been "revived by a general or unqualified promise or acknowledgment within the six "years, it is, in general, sufficient to declare on the original promise."—*Also*,

In *Harrison's Digest*, vol. 2, p. 1471.—"The plaintiff may declare on the "original promise, although he relies on a subsequent promise to take the case "out of the Statute of Limitations." *Leaper* vs. *Talton*, 16 *East*, p. 420. *Upton* vs. *Else*, 12 *Moore*, 303.

In view of the concurrence of all authorities and precedents, without an exception in this or any other country as to the principles which should govern in the interpretation of Statutes of limitation, it is submitted that the judgment in the Court below should be confirmed.

Aylwin, J., (*dissentiens*): I cannot concur in the judgment about to be rendered. The action was brought to recover $391.66, the balance of a promissory note, and $56.30 on an account, making in all $447.96. Judgment was rendered in favour of the plaintiff. The first plea set up prescription against the note, which bore date 15th Sept., 1856, the action being brought 16th July, 1862. The second plea admitted that the defendant had received teeth from the plaintiff to the value of $40, being two of the items charged under date September, 1856, and sought to be recovered; but alleged that this sum, and certain other charges in the account were overpaid by the sum of $50, improperly credited by the plaintiff on the note. The plea then alleged that the plaintiff, as agent of the defendant, had agreed to get possession of certain lands in Lima, [illegible] of New York, under a power of attorney, dated some eight years previously, but had failed to do so; alleging, also, that damage had accrued to the

defendant by the plaintiff's neglect. No evidence was adduced to support these allegations. To the first plea the plaintiff fyled special answers. 1st. Alleging interruption of prescription by acknowledgment to owe and promise verbally and in writing to pay, and that "he had paid the plaintiff moneys on account thereof, and of the interest accrued thereon." 2nd. An answer setting up that at the date of the note, the defendant was indebted to the plaintiff in $348.16 for money lent and advanced, goods sold, and interest accrued, and that for such indebtedness he gave the note sued on, which he failed to pay. There had been an examination of the defendant on *faits et articles*. The 62nd question was to this effect: Is it not true that you have within the period of five years immediately preceding the institution of this action, given the plaintiff to understand, in some way or another, that you would pay him the amount due him on the said promissory note? The defendant's answer was: I have written what was in the letter sent by me. I have not made any acknowledgment or promise to pay the note since it was acknowledged, or before, as a particular debt or note. This answer, taken with other answers of the defendant, is to my mind perfectly sufficient to establish an acknowledgment of the debt. It was argued, and it would be decided by the majority of the Court, that the prescription was a perfect bar to the action; but, in my opinion, the acknowledgment takes the case out of the statute. I would now refer to the case of Russell and Fisher, 4 L. C. Rep. p. 256; and to Pothier, Traité des Obligations, No. 846.

DRUMMOND, J.—I assent to the judgment which is about to be pronounced by the majority of the Court with some regret, but I feel myself bound to obey the plain language and meaning of the statute and not to substitute my own ideas of what I might consider equitable or just under the circumstances. I am of opinion that the appellant admitted his indebtedness to the respondent, but still the note, under the law, must be held to be absolutely paid and discharged.

MONDELET, J.—The question is one of interruption of prescription, against a note, for the recovery of the balance, on which an action has been brought, after a lapse of five years since the date the said note became due and payable.

The statute L. C. ch. 64, sec. 31, has by defendant been pleaded, and relied upon as a bar, an absolute bar, to the action.

Plaintiff has maintained, that within the five years, defendant has made acknowledgment of indebtedness, and promised to pay the balance due on the note. *Interrogatories sur faits et articles* have been submitted to defendant, and by him answered.

Interrogatories sur faits et articles were submitted to plaintiff, who is of Rochester, in the State of New York.—Those interrogatories were served in the prothonotary's office, under sec. 64, c. 83, L. C. Con. Statutes.—They were set aside by the court.

Two questions arise:

1st. Is the statute c. 64, s. 31, an absolute bar to the action, and is the note to be held absolutely paid and discharged, no suit having been brought within five years next after the day on which such bill became due and payable?

2nd. The statute L. C. Con. c. 83, sec. 64, being clear and precise, could

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the court below legally set aside the interrogatories *sur faits et articles* which were served at the prothonotary's office ?

It may also be added, that a question as to whether there is in fact legal evidence of interruption of the prescription of five years of the note in question, is to be determined.

Answer to the first question.

I am very much inclined to say that our statute is as stringent as the ordinance of 1510 relative to *rentes constituées* with reference to actions brought for five years' arrears.—Actions were to be dismissed if brought; no oath was required; it was an absolute bar and so held. With regard to the ordinance of 1629 for *loyers* it was different, and correctly held to be so; there was no such imperative enactment as in that of 1510. It was *une fin de non recevoir*, defendant pleading prescriptions had to swear.

The same view was taken of the articles 125, 126 and 127, of the *Coutume de Paris*. All these prescriptions were based upon the presumption of payment, and acted upon accordingly.

Our own statute of 1793, relative to promissory notes, was the only one which limited the obligations of defendant to swear he had paid, to the case of his being called upon to swear he had paid, and that he *bonâ fide* believed the note had been paid.

I therefore would say that in the present case, the L. C. S. ch. 64, sec. 31, has, with respect to promissory notes, the same effect as the old ordinance of 1510 with respect to *rentes constituées*, and does not admit of a plea, nor of evidence of *interruption de prescription*. I would go further and hold that, strictly speaking, this is not a question of prescription nor of interruption of prescription, but merely one of a total extinction of an indebtedness in the eye of the law. The note is to be so held to be absolutely paid and discharged.

I am of opinion that the Court below ought not to have set aside the interrogatories on *faits et articles*. The law may be inconvenient and hard in its execution, but there it is, and the judge should have obeyed it. Sec. 64 of ch. 83 is imperative.

I have great doubts as to whether, from the evidence, any court would be justified in saying and deciding that the acknowledgments to pay apply firstly, to the note, and whatever balance might at the time be due thereupon. The $50 paid cover the $40 for teeth sold to defendant.

Whether or not matters little to me, considering the view this Court takes, as the law as above explained.

I therefore come to the conclusion, that the judgment appealed from should be reversed, and that the action should by the judgment of this court be dismissed, and respondent should, of course, be condemned to costs in both courts.

MEREDITH, J.—This case is one of great importance; for the question which it presents must be of frequent occurrence and may affect interests of great magnitude; and I do not hesitate to say it, at first, presented considerable difficulty to my mind. That difficulty I am now inclined to attribute, not so much to the terms of the statute in question, as to the attempt which I (in common I believe with many others) have made to interpret its provisions, if not in accordance with the judgments

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under the English Statute of limitations, at least by the light of those judgments. But, after giving the subject due consideration, I think that the decisions, under the English Statute, tend rather to embarrass than to aid us in determining the course to be pursued under our law. In this, however, there is nothing surprising; because, although the two laws are on the same subject and, to some extent, have the same object in view, yet they are worked so very differently, as to lead to the belief that the framers of our law, being aware of the conflicting decisions under the English statute, and of the way in which the provisions of that law were neutralised by judicial interpretation, had determined not to take it as their model, lest the Canadian copy might share the fate of the English original.

We also know that the earlier decisions under the English statute are now generally disapproved of, and therefore cannot be considered as a safe guide to the meaning even of the English statute.

Lord Eldon, in Baille *vs.* Sibbald, declared that the statute of limitations had been construed with a view to defeat, not to promote, its object, and that the established construction was against its true principle.* Chief Justice Gibbs, in Hallings *vs.* Shaw—said that if the courts could retrace their steps and see all the consequences that have resulted, they would have seen it better to adhere to the precise words of the statute than to attempt to relieve in particular cases.†

And it was with reference to this statute, that Sir William Evans in his general view of the statutes of limitation, has said, that the Courts of Justice have as much authority now (when he wrote) to restore the law, as they had before to subvert it.‡

If the provisions of our statute were similar to the English statute of limitations, which they are not, the foregoing authorities are sufficient to establish that even in that case we could not derive much advantage from a reference to the earlier English decisions on this subject; and, as to those of recent date, they are governed by the provisions of the 9th George IV., c. 14, which have not been embodied in our statute, ch. 64, C. S. L. C., pleaded in this cause.

Assuming, then, that we are to interpret our own statute, irrespective of the English decisions already referred to, and bearing in mind its terms—which are in effect—that any promissory note made after the 1st August, 1849, "shall be "held to be absolutely paid and discharged, if no suit or action be brought there-"on within five years next after the day on which such note became due and "payable," it seems to me that under the provisions of this law, proof of the actual payment of part of the note sued on, within five years from the time the note became due, ought not to be considered as rebutting the presumption created by the statute, or as militating in any way against the defendant. On the contrary, the effect of such evidence, as regards the part of the note paid, is to add positive proof to the statutory presumption—and, as regards the remainder of the note, the presumption appears to me to be greatly the same as if no proof had been made.

* 5 Vesey, 185, cited in Angell on limitations, page 223.
† 7 Taunton 608, cited at same page in Angell.
‡ 3 Evans, statutes, page 236. Note 1.

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In like manner an acknowledgment of the debt, or a promise to pay it, within five years from the time the note became due cannot, as to the question of prescription, have any greater effect than ought to be given to a payment on account; for, by a payment on account, is meant not the mere payment of a sum of money, but the payment of a *smaller sum* on account of a *greater sum* due from the person making the payment to him to whom it is made.—2nd Taylor on evidence page 884, No. 992. A payment on account therefore includes, in effect, an acknowledgment of a subsisting debt—and if an acknowledgment of a debt, which accompanies a payment, is insufficient to prevent the operation of the statute, an acknowledgment of the debt, unaccompanied by a payment, cannot have any greater effect. The same reasoning extends to promises to pay, made within the five years—for where there is an unqualified admission of a subsisting liability, the law will infer a promise to pay.§ In a word, a payment on account involves an acknowledgment of the debt; and from such an acknowledgment of the debt, the law implies a promise to pay—and therefore whatever is the rule with respect to payments on account, must also be the rule with respect to acknowledgments and promises made within the five years from the note becoming due.

As I have already observed, the fact of the maker of a note having paid a sum on account of it, say a year after it became due, does not in any degree tend to weaken the statutory presumption that the whole of the note was paid within the five years; and, in like manner, if the maker of the note in the case supposed, when he made the payment on account, expressly promised to pay the balance, the making of the promise would have no tendency to show that he did not pay the balance of the note within the remainder of the five years.

The respondent wishes us to interpret the statute, as if the words declaring that a promissory note "shall be held to be absolutely paid and discharged if no "suit or action be brought thereon within five years, &c.," were followed by a proviso to the effect, "that if it appears that any part of such note were paid "within the said period of five years, then the said note shall not be held to be "paid and discharged as to the remainder." But the law contains no such proviso; nor could such a proviso have been embodied in it without rendering it absurd; and yet we are in effect called upon to interpret the law, as if that proviso formed a part of it. It has also been contended that it would be unreasonable to say that payment of any part of the principal or interest of a debt will suffice to prevent the prescription of six years established by our statute, chapter 67, C. S. L. C., and yet to hold that a like payment will not interrupt the prescription of five years established by chapter 64, of the same statutes. But there is the same objection to our attempting to interpret the prescription established by chapter 64 of the C. S. L. C., by chapter 67 of the same statutes, that there is to any attempt to interpret the chapter 64, by the English statute of limitations—that objection being simply that the terms in which the two laws are framed are so essentially different, as to make it impossible to interpret the one by the other—moreover, in addition to the difference between the enacting clauses

§ Chitty on Bills, page 614. Angell on limitations, page 218. Edition cited by counsel for respondent.

of the two colonial statutes, the Legislature has subjected the six years prescription established by our chapter 67, to a proviso respecting payments on account to which they have not thought fit to subject the prescription of five years established by the chapter 64.

I am quite aware that a strict interpretation of the terms of our Statute may, in certain cases, bear hard upon individuals; but the remedy is with the Legislature, and the result of the attempt made by the English Courts to exclude certain cases from the operation of their statute of limitations affords additional proof, if any were wanting, of the danger of attempting to modify a statute by judicial interpretation.

For these reasons I am of opinion that under the terms of our statute, we cannot avoid holding the note in question to be paid and discharged, as no suit or action was brought thereon within five years next after the day on which it became due and payable.

But judgment should be in favour of the respondent for the open account.

I think it proper to observe that the law on this subject has been materially changed by the Canadian code, which has lately received the sanction of the Legislature, and therefore the judgment now rendered cannot serve as a guide in solving questions of prescription that may arise respecting promissory notes made after our code shall have come into force.

The judgment of the Court was as follows:

"The Court, seeing that no suit or action was brought on the said note, within five years next after the day on which such note became due and payable; and considering, that in consequence thereof, and in virtue of the statute in such case made and provided, the said note must be held to be absolutely paid and discharged, and therefore that in the said judgment, in so far as it condemns the appellant to pay to the respondent the amount of the said promissory note with certain interest and costs, there is error, doth in consequence reverse, &c., &c., and proceeding to render the judgment which the court below ought to have rendered in the premises, doth dismiss the action and demand of the respondent for the amount of the said promissory note and interest, &c., &c., and it is ordered and adjudged that the respondent do pay to the appellant his costs in this Court."

Judgment of Court below in part reversed.

A. & W. Robertson, for appellant.

Snowdon & Gairdner, for respondent.

(S. B.)

(H. L. S.)

[REPORTER'S NOTE.] The statute has reference only to notes "*due and payable in Lower Canada.*" The note in question was dated *in Rochester, in the State of New-York*, and payable simply to the order of the payee. Can such a note be held to be a note "*due and payable in Lower Canada?*"

EN APPEL.

MONTREAL, 9 DECEMBRE 1865.

From the Superior Court, District of Montreal.

Coram AYLWIN, J., MEREDITH, J., DRUMMOND, J., et MONDELET, J.

No. 100.

OUIMETTE,

(*Defendant in Court below,*)
APPELLANT;

AND

GAMACHE,

(*Plaintiff in Court below,*)
RESPONDENT.

JUGÉ :—Que l'ouvrier n'a droit qu'à la valeur d'un mesurage simple des ouvrages gothiques par lui faits à une église et non du double ; n'y ayant aucune loi ni usage constaté à l'appui de cette prétention.

Le mari de la demanderesse par reprise d'instance, savoir : feu Louis Bédard, vait poursuivi pour la valeur de certains ouvrage allégués par lui avoir été faits à l'église de St. Alexandre.

La question principale soulevée devant la cour d'appel était de savoir si le demandeur était bien fondé à réclamer la valeur d'un mesurage double des ouvrages gothiques qu'il alléguait avoir faits a cette église.

Le jugement de la cour inférieure avait accordé ce mesurage double et étoit motivé comme suit : The court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon ; considering that the defendant hath not established by legal and sufficient evidence the material averments of his plea, in this cause fyled, doth dismiss said plea, and, proceeding to adjudicate upon the merits of the plaintiff's action and *demande*, seeing that the plaintiff hath proved by conclusive evidence the essential allegations of his declaration, the court doth maintain said action and *demande*, and doth adjudge the defendant to pay and satisfy to the plaintiff *par reprise d'instance*, the sum of sixty-one pounds seven shillings and seven pence current money of the Province of Canada, balance due upon a larger sum for the price and value of work done and materials provided for the same by the said plaintiff for the said defendant at his request as mentioned in the declaration in his cause ; with interest upon the said sum of sixty-one pounds seven shillings and seven pence from the twenty-second day of October, one thousand eight hundred and sixty-one, date of service of process, until actual payment of the costs of suit :

Ce jugement fut infirmé par la cour d'appel pour les motifs qui sont déduits dans son jugement qui est comme suit :

La cour après avoir entendu les parties par leurs avocats sur le mérite, examiné le dossier de la procédure en cour de première instance, les griefs d'appel et les réponses à iceux, et sur le tout mûrement deliberé :

Considérant que l'appelant défendeur en cour de première instance ne doit rien à la demanderesse par reprise d'instance, l'intimée, attendu que feu Louis Bédard, son époux demandeur en la cour de première instance, avait été dès avant l'insti-

Ouimette and Gamache.

tution de son action contre l'appelant bien et dument payé pas l'appelant, pour tous les ouvrages en plâtre et en enduits qu'il avait faits pour lui, dit Louis Ouimette, à l'église de St. Alexis, comme il appert par reçu en règlement de tous comptes en date du 16 août 1861, étant l'exhibit No. 1 de l'appelant, dit défendeur.

Considérant que la demande du dit feu Louis Bédard par laquelle il réclamait en sus de vingt-six sous ancien cours, par chaque verge de mesurage des ouvrages faits à la dite église par lui dit Louis Bédard était et est mal fondée, attendu que le dit Louis Bédard n'avait droit, comme en étant la valeur, qu'à vingt-six sous ancien cours par chaque verge de mesurage simple des dits ouvrages et non du double tel que prétendu par le dit Louis Bédard, n'y ayant aucune loi ni usage constaté à l'appui de la prétention du dit Louis Bédard qui réclamait ce surplus comme valeur d'ouvrages prétendus gothiques.

Considérant par conséquent, que dans le jugement de la cour de première instance, savoir : le jugement rendu par la cour supérieure siégeant à Montréal le 26 mai 1863, condamnant l'appelant, il y a erreur, casse, annulle et met au néant le dit jugement. Et procédant à rendre le jugement qu'aurait dû rendre la cour de première instance maintient l'exception du défendeur appelant et déboute l'action susdite intentée contre lui, avec dépens contre la dite demanderesse par reprise d'instance l'intimée, tant de la cour de première instance que de cette cour. Et il est ordonné que le dossier soit remis à la cour de première instance siégeant à Montreal.

Jugement infirmé.

Loranger and *Loranger*, avocats de l'appelant.
Louis Ricard, avocat de l'intimée.
(P. R. L.)

SUPERIOR COURT.

MONTREAL, 31st MARCH, 1866.

Coram BADGLEY, J.

No.

Russell vs. *Guertin et al.*

1st. In a sale of timber growing, with the right to cut the same, the only tradition that the vendor can make at the time is to point out to the purchaser the trees to be cut.
2nd. That where two parties claim title to movables and invoke possession thereof, the Court will refer to the respective titles as *Indicateurs.*
3rd. In a question as to which of two parties had first possession of movables, the possession of their respective vendors can be invoked.
4th. That a title to movables taken with knowledge of one previously given to another party, by the same vendor is of no avail, but fraudulent.
5th. That the contents of a lost document can be proven by verbal testimony after the loss established by affidavit, which is the regular way of proving such loss.

The facts of this case fully appear from the remarks of the Judge as follows:

BADGLEY, J.—On 21st July, 1864, Thos. Baxter, then in possession, as proprietor, of Lot 21 and W ½ of 22 of 10 Range of Wakefield, sold to the Cosgroves the whole of the pine timber on the lots, by a written agreement between them of that date. The timber was to be cut in November, and to be paid at the rate of

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$8 per 1000 ft. measured on the road-way. Baxter took the Cosgroves through the lots, pointed out the trees to be cut, and made delivery, as far as instant delivery could be made to the Cosgroves: this is proved. The area of the lots was 256 acres, as per *procès-verbal*. On the 1st Nov. following, the Cosgroves assign their right and purchase to the Plaintiff, W. M. Russell, by written engagement, for the consideration therein set forth, and on the 7th Nov. Baxter, in consideration of his said sale to the Cosgroves of 21st July, and of their assignment to said Russell, confirms to Russell and his employees the right and property in the timber sold, and assigns to Russell the right of cutting the said white pine timber off those lots, until the 1st May, 1865, and Russell binds himself to Baxter to fulfil the Cosgroves' engagement to him. These engagements are in writing, signed by the parties, Baxter and Russell. Lot No. 21 had been purchased by Thomas Baxter himself, in 1863. The W ½ of 22 was bought by him in the name of James Baxter, his brother, who has always lived in Scotland. Licence to cut timber was granted on W ½ the 22nd Dec., 1864, and transferred by Thomas Baxter, the real holder and licentiate, to the Plaintiff, the 23rd December. The Plaintiff's demand for the timber seized rests upon those titles. Defendants object, that on the 21st Oct., 1864, by bargain and sale, made with said Thomas Baxter, the same white pine timber was purchased by Guertin, one of the defendants, that the lots were soon after entered upon by him, and the timber begun to be cut down, and that the lumber so made belongs to him. Now the proof shews that 210 trees were cut down. (Pridham, the defendant's foreman, says over 200; Ferrand, having marked and counted, says 67 on Lot 21, 143 on Lot 22, making in all 210.) That the timber was very valuable, being the first cut over these lots; that the average was 70 feet, and that such timber was worth $3 per tree. (*Vide* evidence of Pridham—Cooke.)

It is a question of right in the timber, mixed up with possession. There is no doubt of the sale to the Cosgroves, with transfer to plaintiff, and Baxter's acknowledgment, nor of the sale to Guertin. Both sales were made by the same person, but with this distinction, that Guertin fully knew, at the time of his agreement with Baxter, of the previous sale to the Cosgroves, and that he only finally succeeded in overcoming Baxter's repugnance to sell to him also, by prevailing upon him to believe that the purchase of the Cosgroves was not valid, because no earnest had been paid, and by himself paying ten shillings as earnest, and most especially, by pledging his responsibility to stand between the Cosgroves and Baxter. This feature presents what Guertin considered a profitable dodge; but which is truly characterized as a fraud to cheat the Cosgroves, and the plaintiff as assignee, of their rights. It is true, the Cosgroves were to cut the timber in November, but before they had begun to do so, Guertin, late in November, began to cut down the trees, and had cut twenty of them when the plaintiff interrupted him, and forbade his cutting more. Guertin wilfully put aside the objection, and continued the work. Through his foreman, and by himself personally, he knew of the rights of plaintiff in the timber; but he continued to cut whilst the plaintiff, as the wood was cut, marked it with his own marks. The timber having been floated down to the mouth of the Gatineau, the plaintiff endeavoured to make it up into a raft; but defendant forcibly took it all, and rafted it himself;

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and upon plaintiff seizing the timber, by writ of revendication from Superior Court, at Aylmer, the defendants, in contempt of the writ, and of the possession under it, and of the guardians on the rafts, removed it across the river Ottawa to the Upper Canada side, out of the jurisdiction of the Lower Canada Court, and finally brought it down to St. Geneviève, at the back of this island, where it was stopped, and plaintiff succeeded in having his timber seized in this cause, under a writ of revendication, issued out of this Superior Court, by which the timber has been attached, and for which the defendants have given the required security.

Under these circumstances, the conflict between the parties, as to the right to the timber from the same vendor can only be determined from the facts of the case. The title to the Cosgroves was clearly a good title, notwithstanding that the cutting was only to be in November, and the consideration was only to be paid for when the manufactured timber was measured at the road-way. The bargain between them and Baxter was complete and perfect, and required no earnest money to make it good, or better than it was; both parties being satisfied with it. Guertin, the alleged subsequent purchaser, could not legally interfere with it. It preceded his alleged agreement, and, in that respect, was preferable to his; because, having sold to the Cosgroves, Baxter plainly could not sell to him. Besides this, his purchase was an admitted and acknowledged fraud upon the Cosgroves. But Guertin says he entered upon the land first, *a commencé l'exploitation de cette forêt*. But when Baxter went through his lots with the Cosgroves, and pointed out to them all the sold trees and gave all the possession that could be given of them standing there, it followed that thereby the Cosgroves had both title and possession. But it is asserted that both had possession, and the question is asked, whose was the best? If we must go back to the titles as indicators, that of the Cosgroves was the first and best. They had first title, and they also had hence the first possession. Guertin's subsequent title of possession could not prevail over them. A case occurred in France, reported in Solon No. 99, p. 89, something similar to this. The Ladies' Missionary sold to Usquin & Lefebvre by *Acte sous seing privé* of 9 Brumaire, 3,000 acres of wood. This was reduced into Notarial Acte, 29 *Brumaire* and registered. Their agent on 11 Brumaire sold the same wood to Thomas, which was again registered, but subsequently to the first. About the end of the month Brumaire, Thomas entered and commenced *exploitation de cette forêt*. Thereupon Usquin & Lefebvre sue him *en complainte*, to which Thomas replies *en complainte reconventionelle*. Of course, neither had the year's possession; but both fell back upon their vendors, the ladies, to make up their time.

This they had a right to do by law. The possession could not be given to one, and the property to the other; therefore it was necessary for the Court to fall back upon the titles, to determine to which of them, by the titles as *indicateurs*, the possession had been transmitted, and it was held that the ladies, having transferred their rights and possessions to Usquin & Lefebvre, could not transfer to Thomas a possession already transferred to the others, and that he could not acquire it. That Usquin & Lefebvre were really the only persons who acquired the actual possession, or rather the right to use that of the ladies, and that it was thus indifferent that Thomas had gone first into the wood some days before

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the others; that that fact gave him no right, and only caused the others a *trouble*, and was a trespass on his part. Moreover, that Thomas was without title, because it was subsequent to that of the others. "*Et dans le doute ou en conscience il faudrait toujours, quant à la possession seulement, se déterminer par celui qui a le titre plus apparent.*" This judgment, which was by a *juge de paix*, whose jurisdiction was limited to possession, was confirmed on appeal, and maintained *en Cour de Cassation by Arrêt.* Now in this cause the defendant Moisan, who was the supplier, and was connected with Guertin in the transaction, knew all about this matter as well as Guertin, and was manifestly a participator with Guertin in the trespass, and was as guilty as Guertin himself. It is proved that the Cosgroves' written agreement was lost, and, therefore, secondary evidence was admitted to establish it, and the plaintiff introduced the application for the admission of that secondary evidence by his own affidavit, stating the loss. The defendants have moved to reject the affidavit, but their motion must be rejected.* Defendants have also moved to reject certain portions of the testimony of Baxter, which refers to the purchase of the Cosgroves from him because the original agreement was not produced; but that motion must also be rejected, except in so far as it applies to that part of Chamberlin's evidence which is objected to as hearsay.

The judgment is in favour of plaintiff, declaring good and maintaining the *saisie revendication* for the 210 pieces, and condemning defendants and their sureties to deliver them up, or pay the value, $630, with interest and costs of suit.

Judgment for plaintiff.

Perkins & Stephens, for plaintiff.
Moreau, Ouimet & Chapleau, for defendants.
(J. A. P.)

COUR SUPERIEURE.

En Revision.

MONTREAL, 31 MARS 1866.

Coram Smith, J., Berthelot, J., Monk, A. J.

No. 2040.

Duvernay et al. vs. *la Corporation de la paroisse St. Barthelemy.*

Jugé:—Que dans les causes appelables à la cour de circuit, il n'est pas nécessaire de donner avis de la comparution.

Qu'un juge, en chambre, n'a pas de juridiction pour rejeter de la procédure une comparution irrégulièrement filée.

Qu'une fois la comparution du défendeur reçue par le greffier, il ne peut plus être procédé à jugement en vacance.

Cette action fut rapportée le 31 juillet 1865.

Le 1 septembre suivant la défenderesse a comparu sans donner avis de cette comparution à l'avocat des demandeurs. Le 6 septembre les demandeurs présentèrent une requête à son honneur le juge assistant Monk, en chambre, demandant le rejet de la comparution de la défenderesse. Aucun avis de cette requête ne fut donné aux avocats qui avaient signé la comparution.

* Vide the case Brown and Corporation of Quebec in appeal.

Duverney et al. vs. La Corporation de la paroisse St. Barthelemy.

Le même jour les conclusions de la requête sont accordées et les demandeurs inscrivent pour jugement en vacance comme dans une cause par défaut et jugement est entré en conséquence par le greffier.

La défenderesse inscrivit la cause pour révision du jugement inscrit par le greffier.

Les demandeurs firent d'abord une motion pour rejeter l'inscription pour révision sous le prétexte que le jugement rendu par le greffier en vacance n'étant pas un jugement final, n'était pas sujet à révision.

Cette motion fut rejetée et la cause ayant été plaidée au mérite, la défenderesse prétendit à l'argument, 1er. qu'il n'y avait aucune règle de pratique ni aucun statut qui exigeait qu'avis des comparutions fut donné dans les causes de la cour de circuit. Qu'en supposant que la comparution fut irrégulièrement filée, le juge en chambre n'avait pas de jurisdiction pour la rejeter. 2e. Que la comparution une fois entrée, le greffier ne pouvait pas entrer un jugement en vacance comme dans une cause par défaut jusqu'à ce que la comparution fut régulièrement rejetée du dossier.

Jugement a été rendu le 31 Mars dernier dans les termes suivants:

"The Court now here sitting as a court of review, having heard the parties "by their respective counsel upon the judgment rendered in the Circuit Court "of Montreal, on the sixth day of September one thousand eight hundred and "sixty-five, having examined the Record and proceedings had in this cause and "maturely deliberated, Considering that the defendants have established that "they did fyle their appearance at the greffe as stated, and considering that there "exists no law to compel the said defendants to give notice of such appearance "to the plaintiff in the Court below, and that the *Greffier* was bound to notice "such appearance, and that the application to reject the said appearance was "illegal and void, and considering that the said Greffier had no authority in law "to reject the said appearance. Doth declare the said appearance good and "valid, and doth reverse the said judgment of the sixth September, 1865, with "costs against the said plaintiffs."

Jugement infirmé.

L'hon. L. S. Morin, pour les demandeurs.
F. U. Piché, conseil.
Dorion et Dorion, pour la défenderesse.
(V. P. W. D.)

MONTREAL 30 MAI 1866.

Coram BADGLEY, J.

No. 2365.

Mignault vs. *Hapeman*.

JUGÉ:—Qu'il y a lieu à la cassation et nullité d'un mariage abusivement contracté et célébré par suite du défaut de consentement du père de la fille mineure, du défaut des publications de bans, du dol, fraudes, artifices et menaces du défendeur envers cette fille et l'empêchement dirimant existant entre les parties.

Le demandeur tant en son propre nom que comme tuteur à sa fille mineure, épouse du défendeur, aux fins de faire casser et annuler le mariage de sa fille

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mineure avec le défendeur; poursuivit le défendeur en nullité de mariage et allégua à l'appui de sa demande, que le défendeur est un aventurier étranger n'ayant aucune religion et n'ayant même jamais été baptisé et malgré les protestations et résistances de sa fille mineure et tandis qu'elle était éloignée et hors de la protection de son père, le défendeur, tant par ses solicitations que par ces menaces et par dol, fraudes et artifices la força à consentir à l'épouser le 24 de décembre 1863, devant un ministre protestant, suivant les rites de l'église protestante, hors la connaissance et contre la volonté et consentement de son père et sur présentation d'une licence de mariage frauduleusement obtenue par le défendeur et dans laquelle, elle était nommée et désignée sous de faux noms. Qu'immédiatement après ce mariage, la fille mineur du demandeur se fit ramener chez son père où elle a toujours vécu depuis. Qu'il y avait entre le défendeur en sa qualité *d'infidèle* et la fille mineure du demandeur catholique Romaine, un empêchement dirimant qui n'a jamais été levé par aucune dispense des Supérieurs ecclésiastiques. Le demandeur par ses conclusions concluait à la nullité de ce mariage

Le défendeur fit défaut.

Il fut prouvé par Messire Fabre, Chanoine de la Cathédrale de Montréal, que le défendeur lui avait déclaré "qu'il n'avait aucune religion" et que le défendeur était convaincu qu'il n'avait pas été baptisé. Il fut prouvé par le même témoin, que le rapt forme un empêchement dirimant et de plus que "l'empêchement de disparité de culte est celui qui consiste dans le mariage d'un fidèle avec une infidèle ou d'une personne baptisée avec une personne qui ne l'est pas, c'est encore un empêchement dirimant.

Le jugement de la Court est comme suit:

La Cour, etc., considérant que le demandeur a prouvé les allégués essentiels de sa déclaration et notamment que le mariage dont il demande par la présente action la nullité, contracté par la dite mineure Zoé Migneault, avec le défendeur, le 14 décembre 1863, et célébré alors et entré dans les régistres de l'église Presbytérienne Américaine de Montréal dans lesquels la dite Zoé Migneault est désignée sous les noms de Susan Sarah Agnès Migneault a été abusivement contracté et célébré par suite du défaut de consentement du demandeur, du défaut des publications de bans requises par la loi, du dol, fraudes, artifices et menaces employées par le défendeur pour obtenir le consentement de la dite Zoé Migneault, et afin, l'empêchement dirimant existant entre la dite Zoé Migneault et le défendeur et en fraude des droits de la dite mineure et de son père le demandeur;

La Cour, en conséquence, déclare le dit mariage nul et de nul effet, annulé, cassé et mis à néant et déclaré non avenu entre les parties à toutes fins que de droit, et remet la dite Zoé Migneault et le défendeur dans l'état où ils étaient avant la célébration du mariage et leur faisant défense expresse de prendre respectivement la qualité de mari et femme et de se hanter et fréquenter sous les peines de droit, le tout avec dépens contre le défendeur.

Jetté et Archambault, avocats du demandeur.

(P. R. L.)

MONTREAL, 30 MAI 1866.

Coram Badgley, J.

No. 1914.

Lafond vs. *Guibord et Malo* Opposant, et *Guibord*, Adjudicataire.

Jugé:—Qu'il n'est pas nécessaire que la signification de la règle pour folle enchère soit faite personnellement à l'adjudicataire, ni que la motion lui soit signifiée.*

Le 27 avril 1866 le demandeur fit motion pour une règle pour folle enchère contre l'adjudicataire rapportable le 17 mai 1866. Cette motion ne fut pas signifiée à l'adjudicataire.

Le douze mai 1866 le règle fut signifiée à une personne raisonnable de la famille de l'adjudicataire.

Le 21 mai 1866 les parties furent entendus sur la validité de cette règle et le 30 mai, la cour déclara la règle absolue.

Per Curiam.—It was not necessary to serve upon the adjudicataire the motion to obtain this rule and the service of the rule itself need not be personal.

Rule absolute.

Piché, Attorney for plaintiff.

Girouard, Attorney for defendant.

(P. R. L.)

COUR SUPERIÈURE, DISTRICT DE RICHELIEU,

SOREL, 14 MARS 1866.

Laprade vs. *Gauthier.*

Coram Loranger, J.

Jugé:—Que l'action possessoire à raison de troubles et nouvelletés, ne peut être maintenue par suite de l'incertitude de la possession respective des parties, et dans ce cas l'action sera renvoyée avec dépens.

Action possessoire de la part du demandeur, et demande de dommages pour voies de fait.

Les défenses du défendeur ayant allégué une possession contraire à celle alléguée par le demandeur, et la preuve étant contradictoire, la Cour a motivé son jugement comme suit:

La Cour, considérant que le demandeur n'a point prouvé qu'à l'époque des prétendus troubles et nouvelletés dont il se plaint, il avait été par an et jour en possession civile du terrain sur lequel il prétend que dans le mois de mars 1864, le défendeur a coupé du bois et commis des dépradations;

Considérant qu'il appert par la preuve que le terrain décrit au libellé de la demande, lequel est couvert d'arbres et de broussailles à l'endroit où les prétendues voies de fait ont été commises, n'a jamais été séparé du terrain qui l'avoisine en profondeur par des bornes légales ou naturelles délimitant une étendue de terrain sur lequel la possession du demandeur puisse être réputée avoir été une possession certaine, que sur ce point la preuve est insuffisante et contradictoire et ne saurait justifier le maintien de la présente action en complainte: a débouté

* Sed Vide 12 L. C. R., p. 176.

Laprade vs. Gauthier.

et déboute le demandeur de son action avec dépens, sauf par lui à se pourvoir en bornage ou au pétitoire comme il avisera.*

Action renvoyée avec dépens.

Germain, avocat du demandeur.
James Armstrong, avocat du défendeur.
(P. R. L.)

COUR SUPERIEURE; EN REVISION,

MONTREAL, 30 JUIN 1866.

Coram SMITH J., BADGLEY, J., MONK, Asst. J.

No. 675.

McConnell vs. *Dixon & Browne, opposant*, and *Nivin et al., opposants*, and *Browne, contestant*.

JUGE:—Que deux jugements, l'un rendu le 31 mai 1866 et l'autre le 3 juin 1866, qui ont été enregistrés le même jour et à la même heure sous deux numéros différents, comportent une hypothèque de même date et de même rang.†

Le produit de l'immeuble saisi et vendu sur dame Anne Smith, veuve Dixon, ayant été rapporté devant la Cour Supérieure à Sorel, dans le district de Richelieu, le Protonotaire par son rapport de collocation et de distribution a colloqué concurremment les opposants Philo D. Browne et William Nivin et al.

L'opposant Browne a contesté cette collocation, sur le principe qu'il devait primer les opposants William Nivin et al, pour les raisons déduites en sa contestation.

Le contestant Browne dans son factum en révision exposait ses prétentions comme suit:

La collocation faite au dit rapport du contestant et de William Nivin et consors *au prorata* de leur créance respective par le Protonotaire, est irrégulière, illégale, et blesse les droits du dit contestant.

La créance hypothécaire de Browne a été légalement enrégistrée avant la créance des dits William Nivin et consors.

La créance des dits William Nivin et consors n'a été enrégistrée que postérieurement à la créance hypothécaire du dit Philo D. Browne.

Le dit jugement obtenu par le dit Philo D. Browne, le trois juin dernier, a été enregistré sous un numéro antérieur à celui des dits William Nivin et consors, dont le dit jugement en date du trente-et-un de mai dernier, n'a été enrégistré que sous un numéro subséquent et partant subséquemment à l'enrégistrement du jugement du dit contestant.

Le dit Philo D. Browne ayant la priorité de numéro et d'ailleurs son jugement susdit ayant été enrégistré avant celui des dits William Nivin et consors, il doit être colloqué de préférence aux dits William Nivin et consors.

Le contestant Browne soutient que depuis la mise en force de l'acte sur les inscriptions hypothécaires il est nécessaire au porteur d'hypothèque *antérieur* d'enrégistrer *avant* le porteur d'hypothèque *postérieur* pour pouvoir le primer.

That as regards deeds *passed since* the Registry law came into force, and in

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* Vide, 5 L. C. Jurist, p. 157, and 8 L. C. Jurist, p. 163, Lalonde vs. Daoust.
† Vide, 12 L. C. Reports, p. 130, and 9 L. C. J., p. 208.

cases such as the present, the law declares in effect that a deed, *prior in date* to another, shall be inoperative against it *unless* registered *before it.*

McConnell vs. Dixon & Browne

Le contestant Browne soutient que vû que la créance hypothécaire de Nivin et al., est *antérieure* à la sienne, et que nonobstant cela, elle n'a pas été enrégistrée *avant* la sienne; partant la créance hypothécaire de Nivin et al., doit être déclarée d'aucune force, *inoperative*, nulle et de nul effet quant à lui Browne.

The claim of Nivin et al. is *prior* in date to that of Browne; notwithstanding which it was not registered *before it*, and therefore the claim of Nivin et al. must be held *inoperative* as against the claim of Browne.*

Les opposants Nivin et al. ont exposé leur cause comme suit:

Philo D. Browne and Wm. Nivin *et consors* both obtained judgments against Mrs. Dixon, one of the defendants.

On Monday morning, at 9 a.m., on the 3rd June last, both judgments were enregistered *together*. The judgment obtained by Browne bears a number from the Registrar *next preceding* that given to the judgment of Nivin's.

In the court below the claims thus enregistered were collocated concurrently in the report of distribution.

Philo D. Browne contested this report of distribution on the ground that he should be paid by privilege over the claim of Nivin's because the certificate of the Registrar on his judgment bears a number next preceding that of the latter's.

The Court below (LORANGER, J.) dismissed this contestation, and maintained, that these two claims were *alike*, both judgments, and both enregistered at the same time, the anterior number of the Registrar certificate gave Browne no privilege over the claim of Wm. Nivin & Co.

Wm. Nivin & Co. maintain that the cause of Chaumont vs. Grenier, in appeal, (ix Jurist, p. 208) and referred to by the contestant in his factum, sustains the judgment of the Court below, in so far as it is similar to the present case.

The contest there was between *two deeds of sale.* The Court of Appeals held, that though one of these bore a number by the Registrar preceding that borne by the other, yet they must be held to have been fyled concurrently, because they were both deposited with the Registrar on the same day and hour. But because by the registry ordinance a *deed of sale* creating a mortgage, becomes invalid unless it be filed *before* the deed of a subsequent purchaser; therefore the Court held also, that the subsequent deed extinguished the mortgage created by the prior deed *quoad* the property.

In this case, both claims are founded on judgments which by the said registration created mortgages. Nivin & Co.'s mortgage or claim is therefore not anterior to that of Browne's, as the latter has erroneously stated in his factum. Both mortgages being registered at the same time must be collocated together as having thus a co-equal privilege; for if Wm. Nivin & Co.'s claim is held to be fyled concurrently with that of Philo D. Browne's, therefore it must participate in the privilege which that registration awards to Browne.

*Vide, 12 L. C. Reports, p. 130—1st alinea—Judge Meredith's concluding remarks in the case of Chaumont vs. Grenier, and 9 vol. L. C. Jurist, p. 208.

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In cases of *sale*, one deed must be fyled before another to make it inoperative. In cases of mortgage, or like the present case, no condition is expressed or implied in the law which can prevent two mortgages from being enregistered at one time, and enjoy concurrent and equal privilege. For if Wm. Nivin & Co.'s claim has no equal privilege with that of Browne's, how can it be held (as has been held in appeal in Chaumont vs. Grenier) that they were enregistered at the same time? The time of the registration is the element of the privilege. Then Nivin & Co., as participants, in all the circumstances of that registration, are entitled to share equally in the results of the privilege.*

Le jugement de la Cour Supérieure, dans le district de Richelieu, rendu le 20 mars 1866, est motivé comme suit:

La Cour, considérant que les créances hypothécaires, en vertu desquels les dits Browne et Nivin et consors, ont été colloqués par concurrence et contribution sur les deniers déposés devant la Cour, ont été enrégistrées le même jour et à la même heure, savoir: le 5 juin dernier, à neuf heures du matin, leur rang et privilège hypothécaire étaient les mêmes et qu'ils devaient aussi être colloqués concurremment et par contribution, et qu'il s'en suit que la contestation de Browne, qui prétend primer Nivin et consors, est mal fondée, a débouté et déboute le dit Browne de ses moyens de contestation avec dépens. La Cour de Révisoin à Montréal, a confirmé ce jugement avec dépens.

Contestation renvoyée.

Lafrenaye et Bruneau, avocats de Browne.
Popham, avocat de Nivin et al.
(P. R. L.)

COUR DE CIRCUIT.

MONTREAL, 28 JUIN 1866.

Coram BERTHELOT, J.

No. 472.

Dansereau vs. *Fontaine dit Bienvenu.*

JUGÉ:—Que la caution simple n'est pas tenue au paiement des dépens d'une première action portée contre le débiteur principal et de ceux faits pour la discussion des biens de ce dernier si cette caution n'a pas été notifiée au préalable de cette poursuite.

Le demandeur réclamait $106.26 savoir: $43.80 pour le montant d'un billet notarié délivré en brevêt et consenti le 10 octobre 1861 par A. Belvald en sa faveur et que le défendeur avait cautionné avec intérêt depuis le 29 septembre 1861, et le surplus $62.46 pour frais encourus sur un jugement obtenu par le demandeur contre le nommé Belvald le 30 décembre 1865 pour le recouvrement de ce billet et pour discuter le biens du débiteur principal, Belvald.

Le défendeur plaida par exception: qu'en effet par acte reçu en brevêt le 19 octobre 1861 il se serait rendu caution simple en faveur du demandeur pour le

* See Lantesty vs. Renaud, 9 L. C. Reports, p. 298, also cited in Robertson's Digest, p. 333.

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dit [illegible] pour le paiement de cette somme de $43.80 avec intérêt, mais qu'il n'était pas tenu au paiement des frais de la première action, et qu'il avait offert de payer cette somme au demandeur avant l'institution de la présente action et il demanda acte de sa consignation devant la cour. Le demandeur consenti le 7 avril 1866 à ce que le dépot fut considéré fait, et le 11 mai 1866 le demandeur admit "que le défendeur avant l'institution de la présente action a offert et fait "offrir au demandeur de lui payer le montant du billet—ainsi que les intérêts,— "et que le demandeur a refusé."

Sur ces admissions, les parties furent entendues au mérite tant sur les offres que sur l'obligation de la caution de payer les frais de la première action et de la discussion des biens du débiteur principal et le jugement de la cour sur ces deux points est motivé comme suit:

La cour etc., considérant que le défendeur est bien fondé en sa prétention par lui soulevée par son plaidoyer qu'il ne peut être tenu en droit des frais que le demandeur a faits sur une première action par lui intentée contre le nommé André Belvald pour le recouvrement du billet du 19 octobre 1861 pour le paiement duquel le défendeur est devenu caution envers le demandeur; vû les admissions et consentements du demandeur; a déclaré les offres par lui faites en son plaidoyer bonnes et suffisantes et a ordonné et ordonne que la somme de $43.80 montant du billet et celle de $11.50 pour intérêts accrus sur icelle jusqu'au jour des offres faites par le défendeur et offertes par ce dernier dans et par son plaidoyer, soient payées et remises au dit demandeur et l'action de ce dernier déboutée pour le surplus avec dépens contre le demandeur.*

Action déboutée.

Jetté et Archambault, avocats du demandeur.
Cartier, Pominville et Bétournay, avocats du défendeur.
(P. R. L.)

MONTREAL, 31 MARS 1866.

Coram BERTHELOT, J.

No. 3339.

Terroux vs. Dupont, Défdr., et gardien mis en cause.

JUGÉ:—1o. Qu'un défendeur qui soustrait les effets saisis, pendant que l'huissier procède à les porter sur son procès verbal et qui use de violence envers l'huissier pour opérer cette soustraction ne peut-être déclaré en mépris de cour et condamné à être emprisonné.
2o. Que dans l'espèce, le défendeur qui agit ainsi ne doit être condamné qu'aux frais de la Règle et l'huissier doit de nouveau procéder à la saisie et vente des effets du défendeur.

Le demandeur avait obtenu jugement contre le défendeur le 14 septembre 1865.

Le 13 octobre 1865 le défendeur fait émaner une saisie-exécution contre les biens du défendeur et l'huissier fait son retour, par lequel il appert qu'ayant procédé à la saisie, le demandeur lui a refusé un gardien, a barricadé une des portes de la maison et a esquivé une partie de ses effets avant que l'huissier ait pu les inscrire sur son procès-verbal malgré les défenses du dit huissier. Que toutefois l'huissier ne pouvant trouver de gardien pour les effets qu'il avait pu

* Vide L. C. Jurist, p. 117. *Nye vs. Isaacson*

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inscrire sur son procès-verbal, a nommé le défendeur gardien. Ce rappot est appuyé d'un affidavit de circonstances.

Le demandeur le 10 novembre 1865 prend une règle de Cour, par laquelle il demande qu'attendu les retour et affidavit de Joseph Boucher, huissier saisissant il appert que le défendeur s'est opposé à la saisie en cette cause, a esquivé les effets saisis et les a soustraits des mains du dit huissier et a usé de violence vis-à-vis le dit Joseph Boucher, pour l'empêcher d'exécuter les devoirs que lui avait conférés cette Cour, le dit Adolphe Dupont défendeur en cette cause, soit déclaré en mépris de Cour et en rébellion à la justice, et en conséquence soit condamné à être emprisonné dans la prison commune de ce district durant tel temps qu'il plaira à cette cour de fixer, et que vu la soustraction des dits effets ainsi saisis, le dit Adolphe Dupont soit condamné à être emprisonné dans la prison commune de ce District après l'expiration de sa détention première jusqu'à ce qu'il ait payé la dette du demandeur en capital, intérêts et frais, ainsi que les dépens de la dite règle à moins que cause au contraire ne soit montrée le 13 novembre 1865.

Le demandeur comparait et plaide que tous les faits contenus dans la dite règle sont faux et que lui, dit défendeur, qui est en même temps gardien, a toujours été prêt comme il l'est encore, de livrer les effets saisis en cette cause et conclut au débuté de la dite règle avec dépens.

A la preuve, le demandeur prouve par l'huissier saisissant tous les faits contenus dans le rapport et affidavit du dit Joseph Boucher, huissier saisissant.

G. Doutre pour le demandeur, au mérite, plaida que le défendeur devait être déclaré en mépris de cour, vû qu'il avait usé de violence vis-à-vis de l'huissier pendant qu'il exécutait les fonctions que lui avait conférées cette cour. Il était illusoire d'ordonner à un officier de justice de saisir si, après l'avoir privé du droit de se faire accompagner d'un recors on le laisse à la merci d'un défendeur qui barricade ses portes, esquive et soustrait ses effets. Il est prouvé que des effets saisis ont été soustraits des mains de l'huissier avant que celui-ci eut le temps de les inscrire sur son procès-verbal.

L. O. David, pour le défendeur, plaida que le demandeur se déclarant prêt à remettre les effets saisis et à payer les frais faits pour entrer en possession de tels effets, la cour devait le lui permettre et le renvoyer des conclusions de la règle.

G. Doutre répliqua que les fins de la justice ne se trouvaient pas satisfaites par tels procédés. Quels moyens avons-nous de constater que les effets que le défendeur offre de remettre sont les mêmes que ceux qu'il a soustraits à la saisie? Les défendeurs useraient dorénavant de violence vis-à-vis des officiers de la justice et soustrairaient impunément leur effets, si la conduite du défendeur n'est pas sévèrement punie.

Per curiam.—La cour condamne le défendeur aux frais de la règle et ordre est donné de procéder de nouveau à la saisis et vente.

Doutre et Doutre, pour le demandeur.

Mousseau et David, pour le défendeur et gardien.

(G. D.)

COUR SUPÉRIEURE, DISTRICT DE JOLIETTE.

INDUSTRIE LE 19 MAI 1866.

Coram LORANGER, J.

No 407.

Amireau et al vs. Martel et ux.

JUGÉ :—1o. Que les époux qui par leur contrat de mariage, se font donation mutuelle en usufruit au cas de non survenance d'enfants, peuvent affranchir cette donation du cautionnement.

2o. Ils peuvent la subordonner valablement à la simple caution juratoire.

3o. En ce dernier cas, l'usufruitier qui a rempli la condition, c.-à-d. qui a fourni sa caution juratoire, a, vis-à-vis des nu-propriétaires, la même liberté que s'il eût été dispensé de tout cautionnement ou que si ayant été assujetti à un cautionnement fidéjussoire, il l'avait donné.

4o. En ce cas la femme usufruitière ne perd pas par le fait seul de son convol en seconde noces le bénéfice de sa caution juratoire, et ne peut être assujettie à un cautionnement fidéjussoire en faveur des héritiers de son mari.

5o. Elle peut cependant le devenir par les conventions de son second mariage, la stipulation de communauté par exemple, qui l'aurait dépouillée de l'administration des biens usufruités, pour en revêtir son mari, constituant par là une abdication de son administration.

6o. Si cette abdication est précédée ou suivie de circonstances qui mettent en péril les droits des maîtres de la propriété, ou constituent un abus de jouissance de la part de la femme et de son mari ou de tous deux, ils pourront être contraints à donner cautionnement fidéjussoire ou à subir le séquestre des biens dont l'usufruit est entré dans leur communauté.

7o. Le retrait de créances considérables fait par la femme pendant sa viduité, sans remploi au nom de l'usufruit et sans indication de leur origine quand elle les a replacées en son nom propre, joint à semblable retrait fait par la femme conjointement avec son mari lequel n'offre aucune garantie, et les a placées en son nom seul, constituent un abus de jouissance.

8o. Si outre les créances, la femme et son second mari ont employé le prix de vente du mobilier pour faire des placements de deniers au nom de la femme avant le second mariage et au nom du mari seul après, cette circonstance ouvre un moyen additionnel aux héritiers pour exiger le cautionnement.

LORANGER, J. :—Le neuf février 1846, François Amireau et Eulalie Lemire dit Marsolais contractèrent mariage, dont les principales conventions civiles consistèrent dans l'établissement du régime de la communauté, la constitution d'un douaire préfix de trois cents francs et la stipulation d'une donation mutuelle et viagère en usufruit en faveur du survivant, et à sa caution juratoire, de tous les biens meubles et immeubles, acquêts, conquêts et propres du premier mourant, au cas de non-survenance d'enfants, avec la seule exception faite par le mari d'une terre à lui appartenant.

Le premier Janvier 1864, François Amireau mourut intestat et sans enfants. Sa veuve, Eulalie Lemire dit Marsolais, la défenderesse, procéda le 10 mars de la même année, contradictoirement avec les héritiers collatéraux du défunt à l'Inventaire des biens de leur communauté, dont l'actif mobilier, composé de meubles, meubles meublans, linge, instruments d'agriculture, grains, argent monnayé, créances actives et autres semblables choses qui se consomment de suite ou se détériorent peu à peu par l'usage, fut arrêté, déduction faite du passif, à 43,355 frcs et 9 sous, a-c ; l'actif mobilier consistant en deux immeubles, qui devaient appartenir pour moitié en propriété et pour l'autre moitié en jouissance à la veuve, cette dernière moitié devant, à sa mort, retourner en propriété aux héritiers de son mari. Le 28 Avril de la même année, elle donna, en justice sa caution juratoire, et, le 30 il fut procédé à un partage établissant la part réciproque de la veuve et des héritiers dans la communauté; celle de la veuve s'élevant, y compris son douaire, à 25,774 frcs et 16 sols, a-c, et la portion des héritiers,

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à 25,906 frcs et 3 sols partageables entr'eux suivant leurs droits respectifs dans la succession du défunt; les conquêts immeubles devant être partagés par moitié.

La veuve Amireau reste en possession du tout à titre d'usufruitière, et, le 2 mars 1865, elle convola en secondes noces avec Louis Jérémie Martel le Défendeur, sous le régime de la communauté.

Une action est aujourd'hui intentée par les héritiers Amireau contre les époux Martel demandant qu'ils soient condamnés à leur donner caution fidéjussoire pour leur assurer la restitution intacte des biens sujets à l'usufruit de la défenderesse, lors de son extinction, sinon leur mise en séquestre.

Deux motifs appuient cette demande; le convol en seconde noces de la veuve usufruitière et la disssipation et divertissement allégués des biens chargés d'usufruit.

Subsidiairement, les héritiers Amireau demandent aux époux Martel caution suffisante pour le douaire de 300 francs, que la défenderesse a déclaré avoir reçu par le partage du 30 Avril 1864.

Par leurs défenses, les époux Martel soutiennent que la seule condition apposée par son contrat de Mariage à l'usufruit de la survivante ayant été sa caution juratoire, qu'elle a donnée, elle ne peut être tenu d'en donner une seconde, ni à raison de son convol en secondes noces, ni des prétendus faits de dissipation et divertissement qui sont imputés aux défendeurs et, qu'au surplus, ils nient; prétendant qu'au lieu d'avoir appauvri les bien chargés d'usufruit, ils en ont augmenté la valeur. Que quant à ce qui a rapport au cautionnement qu'on leur demande, à raison du douaire de 300fs. ils ne peuvent être contraints de le fournir, parceque. malgré ce qui peut être exprimé au partage, la douairière n'a point reçu son douaire, dont le prélèvement ne devait pas se faire sur la part des héritiers dans la communauté absorbée tout entière par son usufruit, mais qu'elle a le droit de prendre sur les biens propres restés dans la succession de son premier mari et exempts d'usufruit, biens à leur dire suffisants pour faire valoir le douaire. Qu'ayant un double émolument à titre de donataire usufruitière et de douairière, elle ne peut être tenue de les faire valoir tous deux, sur des bien assujettis en entier à la prestation de l'un deux; en perdant ainsi l'autre.

Il résulte, de la preuve authentique et des admissions des parties, que dans l'intervalle de son entrée en jouissance au second mariage, la défenderesse a retiré des créances au montant de 8800 francs, pour la plus grande part formé des capitaux de la première communauté et assuré par hypothèques, et, depuis son second mariage, elle a reçu avec son second mari une autre somme de 3,411 francs, ayant la même origine, formant en tout la somme de 12,211 livres.

De cette somme les défendeurs prétendent cependant qu'il faut défalquer celle de 2,534 livres que la Défenderesse a payée pour acquitter les dettes passives de la première communauté, pour son deuil et les frais funéraires du défunt, laissant une balance de 9677 livres dont la moitié représente la part des Demandeurs dans les Capitaux retirés et qui étaient chargés d'usufruit.

C'est de ce prétendu divertissement que les demandeurs se font, entr'autres, un moyen pour demander un cautionnement fidéjussoire.

Les Défendeurs, en fait, constatent ce moyen par une espèce de remploi qu'ils prétendent avoir fait de la somme retirée; et ils produisent une série de titres

hypothécaires, moins un, qui constatent qu'avant son second mariage la Demanderesse avait prêté, diverses personnes la somme de 7,260 francs, et que depuis, la seconde communauté a fait d'autres prêts au montant de 5,300 livres, formant une somme totale de 12,500 livres, et qu'ils ont en mains une somme de 1,115 livres en voiture, meubles et animaux, acquis par la seconde communauté; ce qui fait un excédant le 3,037 livres 14 s., a-c., sur les capitaux déplacés.

Par rapport aux placements faits par la seconde communauté, un fait remarquable et qui forme un des principaux éléments du litige, est qu'ils ont été faits au nom de Louis Jérémie Martel seul, et que c'est en sa faveur que sont consentis les titres de créances qui les constituent. De plus, une somme de quatre cents francs a été prêtée sur un simple billet chirographaire, celle prêtée au nommé Théo. Mazuret.

Ainsi, sur cette somme de 5,300 frs. retirée de la première communauté et prêtée au nom du second mari, la moitié savoir: 2,650 frs et 10 sls., appartiendrait auxdemandeurs, si elle avait été placée au nom de l'usufruit. Incident digne de remarque!

Le fait que dans les prêts, tant ceux faits par la défenderesse pendant sa viduité que ceux faits par son second mari, l'origine des deniers prêtés est dissimulée, mérite également observation. Il est aussi constant que ces derniers provenaient de la première communauté, puisque le défendeur Martel n'a apporté aucuns biens en mariage; du moins n'est-il fait aucune preuve à cet égard.

Rien non plus ne fait voir que les créances retirées fussent échues, cependant, en l'absence de preuves contraires, il y a lieu à la présomption légitime qu'elles l'étaient.

Nulle détérioration n'a été prouvée par rapport aux immeubles, et toute la preuve de dissipation des objets mobiliers consiste dans l'admission donnée par les défendeurs qu'ils les ont vendus, sans dire à quel montant, ni à quelle quantité.

De la part des héritiers Amireau, qui, si on en juge par leur déclaration, semblent avoir principalement fondé leur demande sur le convol de la veuve en secondes noces, comme ayant frappé de caducité la caution juratoire, et n'invoquent qu'en second lieu le retrait des capitaux et la dissipation des objets mobiliers, MM. Olivier & Baby leurs défenseurs ont pourtant fait de ce dernier moyen un des éléments importants de leur plaidoirie. Ils ont prétendu que ce n'était pas à titre de peine contre le convol en secondes noces de la veuve, qu'ils réclamaient la déchéance des immunités que lui avait assurées sa caution juratoire et qu'ils demandaient un cautionnement fidéjussoire, mais bien parce que, par son second mariage, elle s'était dépouillée de l'administration des biens chargés d'usufruit, et en avait revêtu un tiers, son second mari.

Que bien que le titre à l'usufruit, ses charges et ses émoluments reposent encore sur la tête de l'usufruitière, l'exercice en appartient au défendeur, comme chef de la seconde communauté. Que, quand son premier mari lui a fait donation de l'usufruit de ses biens à charge de caution juratoire, il ne pouvait prévoir un second mariage par lequel elle substituerait à l'administration des biens de ses héritiers une personne étrangère, un second mari, personnage dont la pensée est toujours odieuse au premier.

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Que, s'il avait supposé un tel mariage, il n'eut point restreint la stipulation d'un cautionnement au serment de sa femme. Qu'en exigeant que cette caution juratoire, il avait donné sa confiance à sa femme, qu'il s'était contenté de sa foi, ne doutant point de sa fidélité à conserver à ses héritiers les biens dont il lui donnait la jouissance. Comment aurait-il pu en agir ainsi vis-à-vis d'un inconnu qui se trouve aujourd'hui le seigneur et maître de son hérédité? Car en se remariant, la veuve Amireau à renoncé à toute administration pour en revêtir son second mari qu'elle a rendu maître de ses biens, en stipulant le régime de la communauté, aussi bien que de sa personne en l'épousant. Les biens, appartenant aux demandeurs, sont tombés virtuellement sous la puissance du défendeur Martel qui peut en user à sa volonté, en abuser de même, et les dissiper jusqu'à entière extinction. Et quelle sûreté Martel, qui est devenu l'usufruitier de fait, peut-il donner de sa bonne administration?—Aucune, puisqu'il n'a aucuns biens personnels. De quelle utilité peut-être aux héritiers la caution juratoire de sa femme? Elle a juré qu'elle administrerait fidèlement et qu'elle restituerait les biens, mais elle ne les administre plus et s'est mise hors du pouvoir de les conserver. Les nu-propriétaires se trouvent donc sans cautionnement aucun, sans sureté quelconque vis-à-vis l'administrateur de leurs biens!

Il est contre tout principe de droit et d'équité qu'un usufruitier entre en possession de biens, dont la propriété appartient à un tiers sans donner cautionnement, ont continué ces Messieurs. La maxime contraire a toujours prévalu, et à l'appui de cette prétention, aussi bien que de la première, ils citèrent de nombreuses autorités.

Si l'usufruitier est aux termes du droit commun, tenu de donner cautionnement, la femme usufruitière, qui se remarie et fait entrer dans une seconde communauté les biens que ces héritiers seront à la mort tenus de rendre à leurs maîtres légitimes, a-t-elle pu, par l'effet de son cautionnement, dispenser son second mari, chef de cette communauté ou cette communauté elle-même, de l'obligation d'en fournir un nouveau? S'il en était ainsi, la nécessité d'un cautionnement ne serait qu'illusoire, et rien ne serait plus facile que de s'en jouer, d'éluder les sages dispositions du droit à cet égard, et d'en pervertir l'esprit!

Et que l'on remarque, ont ajouté ces messieurs : que le cautionnement donné ici par la femme, est une simple caution juratoire, qui n'a pas emporté hypothèque, et n'a conféré aux héritiers Amireau, aucune sureté additionnelle à celle que la loi leur accordait contre l'usufruitière, qui, elle-même, a cessé de leur offrir les garanties qu'ils avaient lieu d'attendre de sa bonne adminstration, et de ses soins à conserver les choses léguées, puisque ce n'est plus elle qui administre.

Ainsi donc, vous avez d'un côté des nu-propriétaires, qui sont sans garantie pour la restitution de leurs biens, et de l'autre, des administrateurs infidèles qui les dissipent; puisqu'il est prouvé, par les aveux mêmes des défendeurs, qu'ils ont averti de larges sommes, provenant des créances actives de la première communauté, et qu'ils n'en ont point fait de remploi qui puisse assurer leur remboursement aux héritiers, lors de l'extinction de l'usufruit.

Après avoir passé en revue les diverses créances retirées par les défendeurs, et être entré dans des considérations de fait, dont la reproduction serait sans intérêt ici, puisqu'elles sont analysées plus tard ; les défenseurs des Amireau ont

soutenu que les prétendus remplois faits par les défendeurs, qui ont prêté au nom de la défendresse seule pendant son veuvage, et à celui de Martel seul, depuis leur mariage, les capitaux retirés, n'étaient point le remploi voulu pour garantir les héritiers; que c'était la seconde communauté qui restait créancière des sommes prêtées, qui sont devenues le gage des créanciers de cette seconde communauté, aussi bien que de ceux de Martel lui-même; que ces seconds prêts n'était d'aucune importance pour les demandeurs, qu'ils n'amélioraient en rien leur condition, et empiraient la cause des défendeurs; que ces retraits de capitaux et leur placement subséquent avaient constitué des faits de détournement et de divertissement, constituant un abus de jouissance.

D'ailleurs, quelle est la demande des Amireau? est-ce la déchéance du droit d'usufruit? Non. La dépossession des défendeurs, et notamment de l'usufruitière, comme condamnation directe? non; nous n'exigeons rien de semblable, ont dit ces Messieurs; nous demandons simplement la conservation de nos droits; nous voyons nos droits passer entre les mains d'un tiers, ne nous offrant aucune sûreté, et qui les dissipe. Une partie a déjà fait naufrage, le reste est en péril; avant l'entière consommation de notre ruine, nous demandons qu'on nous garantisse que ce qui reste de la succession du défunt nous sera restitué.

Les mesures conservatoires, sont toujours vues d'un œil favorable par les tribunaux, en ce que leur objet, n'est pas de trancher sur les droits des parties, mais de les conserver, d'en priver une au profit de l'autre, mais de les protéger toutes. La loi et l'équité doivent marcher de pair dans les matières contentieuses, leur autorité doit être la même; la première ne doit jamais être sourde à la voix de la seconde. Ce serait une preuve pénible de l'insuffisance de nos lois, qu'un cas où les tribunaux leur demanderait, en vain, les moyens de rendre justice.

Et c'est cette justice que nous réclamons, en demandant un cautionnement, qui, tout en conservant à l'usufruitière les bénéfices de sa jouissance, pendant sa vie garantisse aux héritiers, la restitution de leur propriété, à sa mort.

Pour ce qui est du douaire, il n'est pas nécessaire de discuter ici, si la veuve a déclaré bien ou mal à propos, l'avoir reçu par l'acte de partage, et si elle devait ou non, prendre sur les biens libres du mari. Elle l'a reçu et en a fait sa déclaration acceptée par les héritiers. Elle est non recevable, à faire prononcer qu'il sera pris sur d'autres biens sans une demande spéciale, à cet effet, et sans conclure à la rescision de cette partie du partage qui a rapport au douaire. Etant en viduité, elle a été saisie de son douaire; elle s'est remariée, et aux termes de l'article 285 de la coutume, elle doit donner aux héritiers de son mari, un nouveau cautionnement, que nous demandons aussi bien pour le douaire que pour la donation d'usufruit, constituée par le contrat de mariage.

De la part des héritiers Martel dont ils ont présenté la défense, MM. Prévost et Archambault, ont fondé sur des idées d'un ordre contraire, un système d'argumentation hostile à la demande.

Ils ont prétendu, qu'en thèse générale la donation d'usufruit, par contrat de mariage, est affranchie de la nécessité du cautionnement, et que la faveur dont jouit ce contrat est la cause de ce privilège. Qu'au cas où les parties sont restées muettes sur ce point, c'est-à-dire, n'ont chargé ni dispensé le survivant de cette formalité, il en est déchargé de plein droit, contrairement aux autres cons-

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titutions d'usufruit, qui engendrent la nécessité d'un cautionnement fidéjussoire dans le silence de l'auteur de l'usufruit. Si la loi dispense l'usufruitier par contrat de mariage de la nécessité du cautionnement, à plus forte raison pourrait-il en être expressément dispensé par le contrat même, ou mieux encore assujetti à un autre cautionnement moins onéreux, la caution juratoire. La donation d'usufruit par contrat de mariage diffère en cela du don mutuel, dont l'établissement ne peut exempter le donataire survivant du cautionnement. La raison de cette différence est sensible. Il est au pouvoir des époux d'établir les conventions civiles de leur mariage comme ils le jugent à propos. Ils peuvent s'avantager à leur gré, et se faire, sauf les retranchements des secondes noces, tous les dons possibles. Pouvant se donner sans restriction leurs biens en propriété, ne peuvent-ils pas, quand ils se les donnent en jouissance, se dispenser mutuellement de la nécessité d'une caution fidéjussoire ?

La raison qui prohibe la dispense du cautionnement en matière de don mutuel tire son autorité de la défense faite aux conjoints de s'avantager pendant le mariage. La coutume leur a permis une seule dérogation qui, à proprement parler n'en n'est une, pas c'est celle du don mutuel qu'elle a établie, sous les conditions de la plus stricte égalité, et qu'elle a asservie à la protestation du cautionnement, de crainte que cette égalité ne fût détruite.

Les époux Amireau se sont mariés à certaines conditions civiles couchées à leur contrat ; la dispense du cautionnement fidéjussoire, remplacé par la caution juratoire, en est une, et il est permis de supposer que sans cette stipulation, leur union n'eût pas eu lieu ; puisque le contrat de mariage est un contrat synallagmatique dont chaque stipulation faite par une des parties contractantes est censée contenir le motif qui a déterminé l'autre à contracter.

Du moins peut-on présumer que sans cette condition la donation mutuelle n'eût pas été faite.

Mais les demandeurs ont prétendu que le défunt, quand il a fait cette donation, ne pouvait prévoir que sa femme se remarierait, et que s'il eût prévu cette éventualité, il ne l'aurait pas dispensée du cautionnement.

Il n'y a qu'une réponse à faire à cette observation : c'est qu'un homme qui se marie et ne stipule aucune peine contre les secondes noces de sa femme, est censé avoir prévu la possibilité de cet évènement, avec moins de défaveur que n'en attache aujourd'hui les héritiers Amireau à celle de la défenderesse.

On a encore dit : la dispense a été accordée en faveur de la survivante, et ce n'est pas elle qui jouit de l'usufruit c'est un étranger, un tiers, un second mari.

Cet avancé n'est pas exact ; ce n'est pas le second mari qui est en possession du don qui en jouit ; c'est la défenderesse elle-même.

Il est vrai que ce n'est pas par elle-même mais elle jouit par l'intermédiaire de la communauté qu'elle a contractée par son second mariage.

S'il lui était loisible de se remarier et de rester en possession du don que lui avait fait son premier mari, elle avait le droit de faire toutes les conventions matrimoniales sanctionnées par les lois, et de ce nombre la plus naturelle, puisqu'en l'absence d'aucun contrat elle est stipulée par la coutume : le régime de la communauté.

On ne peut douter, continuent MM. Prévost et Archambault qu'avant son second mariage la veuve Amireau eût le droit de retirer les créances dont elle avait l'usufruit. Non seulement c'est le droit de l'usufruitier, mais ce droit lui incombe comme une obligation, puisqu'il est tenu des prescriptions qu'il laisserait encourir, et que le débiteur a toujours le droit de se racheter.

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Ce droit, l'a-t-elle perdu en se remariant? Personne ne peut le soutenir, elle s'est remariée sous le régime de la communauté, et le droit d'usufruit de créances mobilières, étant un droit mobilier, est entré dans la communauté. C'est donc à la communauté qu'a été transféré ce droit de retirer les créances. Elle seule pouvait les recevoir valablement et en donner quittance; la femme seule ne le pourrait. Et c'est exactement ce qui a été fait. Quel crime ont donc commis Martel et sa femme, ou Martel seul comme chef de la communauté, en faisant non-seulement ce qu'ils avaient le droit de faire, mais ce qui était de leur devoir de faire?

Par là les nu-propriétai[illegible] aucun de leurs droits, aucune de leurs garanties. Ils tiennent la [illegible]sable de sa propre gestion et de celle de la communauté; de plus ils [illegible] garant la seconde Communauté elle-même. Cette seconde Communau[illegible] sera, à l'extinction de l'usufruit, tenue de restituer un montant égal aux capitaux retirés. Le fait importe peu que la femme l'accepte ou qu'elle y renonce. Si elle y renonce, outre le recours individuel que les demandeurs ne cesseront pas de conserver contre elle comme leur personnelle obligée, ils conservent un même recours contre le mari comme ayant géré leurs biens; et si elle l'accepte, ils la tiendront responsable au double titre d'usufruitière et de commune; et dans cette obligation entrera le mari concurremment avec elle et pour sa part.

Les Demandeurs n'ont rien à craindre; car la seconde communauté, loin de s'appauvrir et avoir dissipé les créances retirées, s'est enrichi et les a fait fructifier de près d'un tiers au dessus des montants reçus. Les deniers prêtés par la seconde communauté l'ont été au nom du mari seul, il est vrai: mais c'est par lui comme chef de la communauté, ou plutôt c'est au nom de la communauté elle-même qu'ils l'ont été. C'était le seul mode rationnel de les prêter, parce que, l'eussent-ils été au nom de la femme seule, si semblabl[illegible] eût été légal, ils seraient encore tombés dans la Communauté.

Sous tous ces rapports, la demande de cautionnement et de séquestre dirigée contre les défendeurs est évidemment mal fondée.

Quant au douaire, ils ne peuvent être tenus de donner de cautionnement puisqu'ils ne l'ont pas reçu. En recevant pour douaire des créances ou des biens dont la défenderesse avait déjà l'usufruit à un autre titre, celui de donataire, elle n'a rien reçu comme douairière. Elle a tout simplement reçu ce qui lui appartient déjà, ou plutôt on l'a payé de son propre bien. Comment, pour se soustraire au cautionnement, à raison de ce prétendu douaire, pourrait-elle être tenue de demander la rescision d'une déclaration inefficace, faite au partage.

Tels sont en analyse les moyens invoqués de part et d'autre par l'habile plaidoirie des avocats des parties.

Comme on le voit cette plaidoirie a soulevé plusieurs questions dont la solution graduelle nous conduira à la décision de cette cause, aussi difficile peut-être

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qu'elle est nouvelle en ce pays, bien que plusieurs procès analogues aient été engagés et à diverses reprises jugés en France.

Ces questions, sans compter quelques points incidents qui pour être d'une importance mineure, ne sont pas sans intérêt et qui recevront leur solution, à mesure qu'elles se présenteront, sont les suivantes :

1°. Les époux, qui par leur contrat de mariage, se font donation mutuelle en usufruit, au cas de non survenance d'enfants, peuvent-ils affranchir cette donation du cautionnement ?

2°. Peuvent-ils la surbordonner valablement à la simple caution juratoire :

3°. En ce dernier cas, l'usufruitier qui a rempli la condition, c-a-d. qui a fourni la caution juratoire, a-t-il vis-à-vis des nu-propriétaires, la même liberté que s'il eût été dispensé de tout cautionnement, ou que, si ayant été assujetti à un cautionnement, fidéjussoire il l'avait donné ?

4o. La femme usufruitière par donation mutuelle faite par son contrat de mariage à charge de caution juratoire et qui l'a donnée, perd-elle par le fait seul de son convol en secondes noces, le bénéfice de sa caution juratoire, et peut-elle être assujetti par les nu-propriétaires, héritiers de son mari, à leur donner un cautionnement fidéjussoire ?

5o. Si elle n'y est pas assujettie par le seul fait de son second mariage, peut-elle le devenir par l'effet de ses conventions matrimoniales, la stipulation de communauté par exemple, dans laquelle serait entré la plus grande partie des biens usufruités, et par laquelle stipulation elle se serait dépouillée de l'administration de ces biens pour en revêtir son second mari, comme chef de leur communauté.

6o. Si l'abdication de l'administration est précédée ou suivie de circonstances qui mettent en péril les droits des nu-propriétaires ou constituent un abus de jouissance de la part de la femme ou de son second mari ou de tous deux, pourront-ils être contraints de donner ce cautionnement où a subir le séquestre des biens dont l'usufruit est tombé dans la seconde communauté ?

7o. Le retrait de créances considérables appartenant à l'usufruit, fait par la femme pendant sa viduité, et qui n'en a pas fait le remploi au nom de l'usufruit, mais qui les a prêtés en son nom propre sans indication de leur origine, joint à semblable retrait fait par la femme, conjointement avec son second mari, lequel n'offre aucune garantie personnelle, et au placement des créances au nom du second mari seul, constituent-ils des circonstances menaçantes pour la restitution de l'usufruit et un abus de jouissance!

8o. Si outre les créances, la femme ou son second mari ont employé le prix de vente du mobilier usufruité pour faire des placements au nom de la femme avant le second mariage et du mari seul après, cet incident offre-t-il un moyen additionnel aux héritiers pour demander le cautionnement ?

Pour parvenir à la solution de la question relative à la légalité de la remise du cautionnement, il faut d'abord définir l'usufruit pour connaître la raison qui fait exiger un cautionnement de l'usufruitier.

Le Code Napoléon, dont on peut sans crainte adopter les dispositions sur la matière de l'usufruit, puisqu'il n'a apporté presque aucun changement aux maximes de l'ancien droit, à telle enseignes qu'à part quelques légères modifica-

tions nécessitées par nos usages, notre code civil a copié mot pour mot les 46 articles qui en traitent; le Code Napoléon, dis-je, (article 318) définit l'usufruit "le droit de jouir des choses dont un autre a la propriété comme le propriétaire lui-même, mais à la charge d'en conserver la substance." Et en cela il n'a innové en rien; telle était la définition qu'en donnaient les Jurisconsultes Romains et Justinien en a fait un texte exprès. Nos codificateurs ont emprunté ce texte en son entier, je veux dire l'article 318 du Code français.

L'usufruitier doit jouir comme le propriétaire lui-même, c'est-à-dire en bon père de famille, en tirant tout le profit de la chose usufruitée, dont il doit cependant conserver la substance pour la restituer aux nu-propriétaires, lors de l'extinction de l'usufruit.

Si l'usufruit porte sur des choses immobilières il ne peut qu'en tirer les fruits naturels ou industriels, à la charge de les garder en bon état d'entretien.

S'il est constitué sur des choses fongibles ou qui ne peuvent servir sans consommation immédiate ou qui consistent en nombre, poids, et quantité, il doit, à la fin de l'usufruit en rendre une même quantité de la même espèce ou la valeur qu'elles avaient lors de l'ouverture de l'usufruit.

Quant aux choses qui se consomment ou dépérissent par l'usage, comme les meubles meublans, les animaux etc., l'usufruit doit les rendre dans l'état où elles sont lors de l'extinction de l'usufruit, si elles sont encore en existence, sinon, il n'a aucune responsibilité par rapport à elles vis-à-vis des nu-propriétaires, pourvu qu'elles n'aient point péri par sa faute.

Nous verrons plus tard quels sont les droits et les obligations de l'usufruitier par rapport aux créances qui jouent un grand rôle en cette cause.

Comme sûreté de l'obligation de conserver et de rendre en nature, en valeur ou en espèce la chose usufruitée et pour en assurer l'exécution, la loi a imposé à l'usufruitier l'exigence du cautionnement.

Tout usufruitier doit donner cautionnement fidéjussoire, s'il n'en est dispensé par la loi ou la volonté de l'homme, c'est à dire, en ce dernier cas par le titre constitutif de l'usufruit, et pour exemple du premier, le cas de détention à titre d'usufruit, de l'immeuble aliéné soit à titre onéreux, soit à titre gratuit; laquelle rétention est par la loi dispensée de cautionnement.

Il est cependant un cas où la loi comprime la volonté de l'homme et lui défend de dispenser son don en usufruit de la nécessité du cautionnement. C'est celui du don mutuel fait pendant le mariage, lequel étant une dérogation à la loi qui prohibe les avantages entre époux, a été permis par la Coutume à des conditions prescrites pour en assurer la parfaite égalité, et notamment à la condition absolue que bonne et suffisante caution sera donnée par l'époux survivant aux héritiers de l'époux prédécédé. Ainsi le veut l'article 280 de la coutume.

La question de la légitimité de la remise du cautionnement, quand la donation mutuelle en usufruit est faite par contrat de mariage, a été par les défendeurs, discutée dans l'affirmative bien que la demande n'ait pas expressément soutenu la proposition contraire. M. Prévost a cité des autorités notables auxquelles on peut en joindre d'autres, au soutien de la prétention que dans ce cas, le cautionnement peut être remis. Aux auteurs qui ont écrit sur l'ancien droit

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on peut associer les jurisconsultes modernes qui ont traité du Code nouveau et enseignent que l'affranchissement du cautionnement est loisible. La raison est d'ailleurs conforme au texte. La liberté des conventions matrimoniales a de tout temps reçu de la loi la sanction la plus favorable, hors le cas des secondes noces où certaines libéralités sont soumises à un retranchement salutaire en faveur des enfants d'un premier mariage. Les époux peuvent s'avantager non-seulement de leurs biens présents, mais encore de leurs biens futurs. Ils peuvent se donner leurs biens en propriété; pourquoi quand ils se les donnent en usufruit seulement, ne pourraient-ils pas se dispenser mutuellement, d'un cautionnement qui dans la prévision d'un prochain mariage, ne peut que jeter un doute injurieux sur la fidélité du survivant à remplir les obligations de leur traité? Pourquoi exiger impérieusement un porte-fort à la foi conjugale qui embrasse les obligations civiles, aussi bien que les devoirs religieux du mariage?

On ne peut donc à mon avis hésiter longtemps à dire que le cautionnement peut être remis par le contrat de mariage.

Un des auteurs cités par M. Prévost (Bourjon, Droit commun de la France,) semble dire que quand les conjoints ne s'en sont pas exprimés, le cautionnement est remis. Cette exception que fait Bourjon à la règle générale, qui dans le silence de l'auteur de l'usufruit prescrit le cautionnement et qu'il attribue à la faveur du mariage, je ne la vois nulle part ailleurs. Au surplus elle n'offre guère d'importance dans l'espèce actuelle où les conjoints se sont exprimés sur le cautionnement, en disant qu'il serait *juratoire*.

Ceci nous conduit naturellement à l'examen de la seconde proposition qui roule sur la suffisance de cette stipulation. Après ce que nous avons vu de la liberté d'affranchir la donation mutuelle faite par le contrat de mariage, de l'exigence du cautionnement, il n'est plus permis de douter de la parfaite suffisance de la caution juratoire.

Comment des héritiers qui ne pourraient forcer l'usufruitier survivant à la prestation du cautionnement fidéjussoire, quand il en a été affranchi par son contrat de mariage, pourraient-ils être reçus à soutenir que la caution juratoire ne leur offre qu'une garantie insuffisante? Si le pouvoir de faire le plus renferme la faculté de faire le moins, le donateur qui pouvait donner et n'exiger aucun cautionnement, pouvait indubitablement se contenter pour seule garantie de la *foi jurée* de l'usufruitier.

Voyons maintenent quel est vis-à-vis des nu-propriétaires la condition de l'usufruitière qui a donné sa caution juratoire.

Ayant rempli cette formalié, peut-elle être gênée dans sa jouissance par quelque autre exigence de leur part? Est-elle vis-à-vis d'eux dans une situation plus défavorable que si elle avait été dispensée de tout cautionnement, ou que si ayant été assujettie au cautionnement fidéjussoire, elle l'avait donné?

En appliquant ici les principes qui régissent l'exécution des conventions, il est difficile de ne pas venir à la conclusion: que dans ces trois cas la position de l'usufruitière est identiquement la même! Si elle a été dispensée de tout cautionnement, elle n'est tenue à rien, et ne doit compte à personne du bénéfice qu'elle retire de son affranchissement. Si elle a été obligée au cautionnement fidéjussoire, en le donnant, elle en est libérée; et pourquoi n'en serait-il pas

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ainsi de la caution juratoire ? A quoi était-elle tenue ? A jurer que, cessant l'usufruit, remise serait faite aux héritiers de son premier mari, en nature, espèce, ou valeurs des biens composant l'usufruit. Et elle a juré. N'est-elle pas aussi libérée de son engagement que si ayant été chargée de la prestation d'une somme de deniers elle en avait fait le paiement intégral ? S'il n'y a rien dans la loi des obligations qui répugne à la libération complète de la femme en ce cas, il faudrait montrer quelque texte emprunté à la loi du mariage ou de l'usufruit qui enseigne le contraire ; et pour ma part je n'en connais aucun. Les enseignements de la doctrine et l'autorité de la raison me paraissent concourir pour proclamer l'entière indépendance de la femme vis-à-vis des héritiers de son mari, et son affranchissement de tout cautionnement.

Ainsi a-t-il été jugé par la Cour Royale de Nancy le 2 mars 1843.

Après avoir donné sa caution juratoire, la veuve Amireau avait donc rempli son obligation envers les héritiers, et n'était sujette a aucune demande de cautionnement fidéjussoire, à raison des faits accomplis. A-t-elle pu le devenir à raison de son second mariage ?

Nous touchons donc à la quatrième question : La femme usufruitière qui a donné sa caution juratoire, ainsi qu'elle y était tenue, et qui se remarie ; perd-elle, *ipso facto*, le bénéfice de sa caution, et peut-elle être assujettie à raison de ses secondes noces, à un cautionnement fidéjussoire ?

Quoique vues avec défaveur parce qu'elles sont toujours funestes aux enfants du premier mariage, *quia magis cura liberorum quam viduitas injungeretur*, les secondes noces ne sont cependant passibles que des peines édictées par la loi ou portées par les dispositions de l'homme. Les retranchements de l'Édit des secondes noces forment une partie capitale des premières et la déchéance des libéralités faites à la femme survivante nous offre un exemple des secondes. Dans ce dernier cas, la peine doit cependant être renfermée dans les termes de la prohibition et ne s'étend pas d'un cas à l'autre, ainsi que jugé le 11 Janvier 1848 par la Cour d'appel de Douai qui a décidé : que le legs fait à la femme survivante par son mari, à charge de garder viduité, ne devient pas caduc par la naissance d'un enfant naturel.

Il paraît même que cette prohibition était réprouvée par l'ancien droit romain dont les lois de la Révolution ont, bien des siècles plus tard, reproduit les dispositions.

La loi 62 de cond. porte : *Cum vir uxori, si à liberis nupserit in annos singulos, aliquid legavit quid juris sit ? Julianus respondit : posse nubere mulier et legatum capere.*

Il a fallu que Justinien dérogeât à cette disposition des lois anciennes pour valider la prohibition d'un second mariage, en tant qu'emportant la déchéance de la libéralité ; et il l'a fait par la Novelle 22ème, dont l'autorité a toujours été suivie en France, moins pendant l'époque orageuse régie par la législation transitoire.

Je ne vois nulle part, qu'en thèse générale la survivante usufruitière qui se remarie devienne par le fait même, passible de cautionnement, si le second mariage n'a affecté défavorablement ses rapports avec les nu-propriétaires, héritiers de son mari. MM. Olivier & Baby, qui en ouvrant leur plaidoierie ont énoncé que

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ce n'était pas à titre de peine contre le second mariage de la défendresse, qu'ils réclament d'elle un cautionnement, ont cité un auteur qui pour n'avoir pas une réputation aussi étendue que d'autres jurisconsultes, n'en a cependant pas moins son mérite; Dupin, qui dans son traité *des peines des secondes noces*, enseigne que la femme usufruitière qui se remarie, devenant suspecte doit un cautionnement. Cette opinion qui me paraît isolée et que je ne trouve reproduite par aucune autorité notable, ne me paraît pas devoir être d'un grand poids sur le litige. Dupin, avocat au parlement de Bordeaux régi par le droit écrit, a en toute probabilité emprunté sa doctrine aux arrêts de ce parlement, étranger à la jurisprudence coutumière. Au surplus quand il parle du cautionnement dû par la veuve usufruitière qui se remarie, il ne fonde son opinion que sur la faveur que méritent les enfants d'un premier mariage, limitant visiblement la nécessité d'un cautionnment au cas où l'usufruitière a des enfants du mari qui a constitué l'usufruit. Or comme dans la présente espèce il n'y a pas d'enfants du premier mariage de la défenderesse, l'opinion de l'auteur ne paraît pas d'une grande importance. Dupin tire en outre un argument au soutien de son opinion de l'article 264 de la coutume de Paris qui porte: que la veuve douairière se remariant doit bonne et suffisante caution; et par analogie, il applique les dispositions de cet article à la veuve usufruitière par quelque titre que ce soit. Cette assimilation serait seule suffisante pour prouver l'inapplicabilité de son opinion. Chacun sçait que dans la coutume de Paris l'art. 264 forme une disposition unique qui doit être restreinte au cas de douaire et qui ne s'applique pas aux autres avantages de la femme. Sur la quatrième question, je conclus encore que par le fait seul de son second mariage, s'il n'a pas empiré la condition des nu-propriétaires, la veuve Amireau ne saurait être tenue à donner un cautionnement fidéjussoire. Ce serait alors comme peine, qu'elle y serait contrainte et je ne vois aucune semblable peine édictée par nos lois.

J'ai dit: s'il n'a pas empiré la condition des nu-propriétaires! Mais s'il l'a empiré, s'il a mis leurs droits en péril; si le changement d'état de la veuve lui ayant créé de nouveaux rapports civils avec son second mari, a altéré ses rapports anciens avec les héritiers du premier, s'il l'a frappée de l'incapacité d'administrer elle-même son usufruit et en a transféré la jouissance à son second mari; si de fait ce dernier est devenu maître pour n'en laisser que le vain titre à sa femme qui par les conventions de son mariage s'est réduite à l'impuissance de veiller à la conservation de la chose qu'elle doit rendre en nature ou en équivalent aux nu-propriétaires; les héritiers du premier mari qui étaient sans grief tant que la veuve ayant conservé son état était restée vis-à-vis d'eux dans la même condition de surveillance et d'administration, n'avait en rien altéré la situation que la constitution d'usufruit leur avait faite, seraient-ils recevables à se plaindre du nouvel ordre de choses et à adopter des mesures pour la conservation de leurs droits?

Telle est la cinquième question posée plus haut.

Pour bien apprécier cette question, il faut d'abord bien connaître l'obligation de l'usufruitier relativement à la conservation des choses usufruitées dont il doit la restitution aux nu-propriétaires, et les différents caractères que lui imprime la nature des biens à restituer. Ayant ainsi constaté les devoirs de la défenderesse en rapport avec l'administration et la conservation des biens immeu-

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..bles, meubles et créances qui composaient la succession dont elle avait l'usufruit, nous verrons si par son second mariage, elle y a manqué, comment elle y a manqué; et en quoi ce second mariage fait sous le régime de la communauté a pu mettre en péril les droits des nu-propriétaires; et quels droits il leur a ouverts?

La principale obligation de l'usufruitier et qui domine toutes les autres, est celle de jouir en bon père de famille; obligation qui emporte celle de veiller à la conservation de la chose dont il jouit pour en remettre la substance au nu-propriétaire. L'usufruit est un dépôt fait de la chose usufruitée entre les mains de celui qui en est revêtu, dont il doit tirer tout le profit légitime qu'elle peut donner, mais qu'il doit restituer intact à l'extinction de l'usufruit. C'est sans doute une tâche difficile à remplir, mais en acceptant l'usufruit, il en a assumé la responsabilité.

Avant de rechercher quelle est l'étendue des devoirs de l'usufruitier, il est cependant nécessaire de constater l'étendue de ses droits, qui diffèrent suivant la qualité des choses qu'embrasse l'usufruit.

Nous avons vu plus haut que le droit de l'usufruitier dans la chose immobilière est d'en recueillir tous les fruits naturels et industriels, à la charge de la tenir en bon état d'entretien.

Il est inutile de dire qu'il ne peut la détériorer lui-même, ni la laisser détériorer par d'autres; et que s'il le faisait il se rendrait coupable d'un abus de jouissance qui pourrait emporter la déchéance de son usufruit; parcequ'en l'espèce qui nous occupe, nul abus de jouissance des immeubles n'est reproché aux défendeurs, du moins n'en est-il prouvé aucun.

Occupons-nous donc les droits de l'usufruitière sur les meubles et les créances actives restées dans la succession de son premier mari, François Amireau. Nous avons vu qu'il existe, quant aux droits de l'usufruitier, une différence essentielle entre les choses fongibles, qui se consument par l'usage et qui ne peuvent servir à l'usufruitier sans consommation, comme les grains, les denrées, l'argent comptant et celles qui peuvent servir sans consommation, ou qui ne se dérériorent que graduellement. Par rapport aux premières, l'usufruitier en devient le maître absolu du moment où il en est mis en possession. Il peut les vendre, les donner, en disposer à son gré, en user, en abuser même comme de choses à lui appartenant en toute propriété; et sa seule obligation consiste à en rendre une pareille quantité de même espèce, à l'extinction de l'usufruit, ou la valeur qu'elles avaient lors de son ouverture.

Le droit du propriétaire, à la fin de l'usufruit, se résout en une simple créance mobilière contre l'usufruitier ou ses représentants. L'usufruitier est tout simplement vis-à-vis du nu-propriétaire dans la responsabilité de l'emprunteur vis-à-vis de celui qui lui aurait prêté, à terme, une somme de deniers sans intérêt; Nul abus de jouissance ne peut lui être reproché. Aussi les auteurs exceptent-ils les choses fongibles de celles par rapport auxquelles l'abus de jouissance peut emporter la déchéance de l'usufruit.

Cet usufruit, à proprement parler, n'en est pas un. Les mêmes auteurs pour déguiser l'anomalie que présente à la pensée la jouissance d'une chose dont on ne peut se servir sans la détruire, ont qualifié cet usufruit "de quasi-usufruit."

Il n'en est pas de même des meubles (que pour les distinguer des choses fon-

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[illegible]gibles ou périssables, nous appellerons *choses non-périssables*, qui ne se consument que graduellment par l'usage, et de cette espèce sont les meubles meublants, les animaux pris séparément, les instrument aratoires et autres choses semblables dont l'usufruitier peut retirer un usage [illegible] mais qui doivent être restituées dans l'état où elles sont lors de l'extinction de l'usufruit, de la détériorton, de la part même desquels il n'est pas responsable, s'il n'y a aucune faute de sa part. Par rapport à ces choses non périssables, le droit de l'usufruitier est aussi restreint que par rapport aux immeubles [illegible] vendre ni les donner ; il doit veiller à leur conservation comme un pere de famille vigilant ; non-seulement il est responsable de sa propre incurie, mais il doit même les protéger contre l'agression étrangère, quand il peut la réprimer.

En ce sens, il est, comme de sa propre faute, responsable de la faute d'autrui. Ce n'est plus comme par rapport aux choses fongibles, une simple créance mobilière, qui compète au nu-propriétaire, à la fin de l'usufruit ; c'est un droit de suite sur la chose qu'il peut revendiquer en nature dans quelques mains qu'elle [illegible]. Et si, par la faute de l'usufruitier, un tiers était en droit d'invoquer [illegible] adverse, l'usufruitier ou ses héritiers seraient non-seulement responsables [illegible] la chose, mais encore ils seraient tenus des dommages et [illegible] du propriétaire.

[illegible] de l'usufruitier à la restitution de la chose non-périssable nous donne la mesure, des soins qu'il doit apporter à sa conservation et de la vigilance de son administration !

Nous verrons plus tard, quand il sera question des créances, s'il peut commettre irrévocablement à des mains étrangères la conservation de la chose nons périssable en abbiquant l'administration, et quel droit engendre cette abdication, de la part du propriétaire, et, plus tard encore, si l'abus de jouissance de choses de cette nature donne lieu à la déchéance de l'usufruit ou à des mesures conservatoires contre l'usufruitier ?

Dans quelle des deux catégories doit-on faire entrer les créances usufruitées ? Dans la premiré ou la seconde ? En d'autres termes : du moment de l'ouverture de l'usufruit, l'usufruitier en devient-il le propretaire absolu ? Peut-il en disposer comme de sa propre chose, et le nu-propriétaire n'aura-t-il par rapport à elles qu'une créance mobilière, comme par rapport aux choses fongibles ? L'usufruitier n'a-t-il, au contraire, comme par rapport aux choses non-périssables, que le droit de jouir des fruits civils qu'elles produisent, à la charge de veiller à la conservation des capitaux qui doivent, à la fin de l'usufruit, être restitués au propriétaire ? Les créances sont-elles l'objet d'un véritable usufruit comme les immeubles et les choses non-périssables, ou d'un quasi-usufruit comme les choses fongibles ?

Pour résoudre ces questions il nous faut remonter à la définition même de l'usufruit. *C'est le droit de jouir des choses dont un autre a la propriété.*

Ainsi, toute chose qui peut procurer une jouissance [illegible], sans cesser d'appartenir à l'autre, qui peut être l'objet d'un démembrement utile à l'usufruitier, et dont la substance peut être restituée dans son [illegible] au nu-propriétaire, peut être l'objet d'un véritable usufruit. Qu'est-ce qu'une créance ? N'est-ce pas un être moral, dont le capital produit des fruits civils, par conséquent susceptibles de

démembrement? L'usufruitier ne peut-il pas jouir des intérêts d'une créance et en restituer le capital au nu-propriétaire?

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Prenons pour exemple une rente constituée. Le capital et les intérêts de cette rente ne sont-ils pas essentiellement distincts l'un de l'autre? L'usufruitier ne peut-il pas jouir de la rente annuelle, percevoir les arrérages et restituer le sort principal à la fin de l'usufruit, comme il peut jouir des revenus d'un immeuble, réaliser les profits que procure un meuble non-périssable, disons un bateau-à-vapeur, et les rendre, son usufruit cessant? Il est bien vrai que quand les créances deviennent exigibles et que l'objet de la créance est une somme d'argent, il a le droit de la recevoir, et non-seulement, c'est son droit, mais c'est son devoir. Car le débiteur peut toujours se libérer, et l'usufruitier est tenu des prescriptions ques on inaction laisserait encourir. Il est encore vrai que cette somme d'argent prend en ses mains le caractère d'une chose fongible, et du moment qu'il l'a reçue il en devient le maître absolu, comme si cette somme d'argent se fût trouvée dans son usufruit lors de son ouverture; qu'elle devient alors l'objet d'un quasi-usufruit, et que le droit du propriétaire par rapport à cette somme d'argent se convertit en une créance purement mobilière, dépouillée des accessoires qu'elle pouvait avoir pour en assurer le recouvrement, des hypothèques, par exemple, qu'aurait données le débiteur et que le propriétaire a perdues. Mais qu'est-ce que cela prouve? Tout simplement qu'en laissant à l'usufruitier la maîtrise absolue de la créance convertie en argent, la loi a cédé à la nécessité qui rend impossible l'usage d'une somme d'argent sans la livrer à la circulation. Ceci est une exception créée par un état particulier de choses qui a dû entrer dans la prévision de l'auteur de l'usufruit, et qui loin de militer contre la règle générale lui sert de démonstration. En effet de ce qu'une créance réalisée devient la propriété absolue de l'usufruitier, peut-on inférer qu'elle l'était avant son échéance? S'il en est ainsi, l'usufruitier mourant avant le rachat, la créance n'appartiendra pas aux héritiers de l'auteur de l'usufruit, mais bien à ceux de l'usufruitier; et les nu-propriétaires n'auront qu'une action contre ces derniers pour se faire rembourser le montant de leur créance. Non-seulement ils n'auront pas d'action contre le débiteur originaire de la créance, mais par celle qu'ils exerceront contre les héritiers de l'usufruitier, ils n'auront pas même le droit de demander la subrogation, puisque leur action est un simple recours en répétition.

D'un autre côté si les créances sont des choses fongibles dont l'usufruitier devient le propriétaire absolu en prenant possession des titres qui le constituent, il devient passible de la restitution intégrale du montant auquel elles s'élèvent, qu'il les retire ou non. Il est garant de l'insolvabilité de débiteurs comme il se charge du cas fortuit ou de la force majeure, au cas par exemple où une maison hypothéquée à la créance deviendrait la proie accidentelle des flammes, ou serait brûlée par l'ennemi; de la même manière qu'il est responsable de la valeur qu'avait la chose fongible à l'ouverture de l'usufruit, et qui a péri plus tard.

Condition bizarre et exorbitante de la simple obligation qui pèse sur l'usufruitier de jouir en bon père de famille!

La loi a tellement compris les créances dans la catégorie des choses restituables en nature, quand elles n'ont pas été rachetées, qu'en énumérant les fruits dont jouit l'usufruitier, elle compte les fruits civils de la chose usufruitée; don-

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nant clairement à entendre les fruits des créances. En disant qu'il jouira des fruits, ne dit-elle pas par implication que le capital ne lui appartient pas? Si le capital des créances appartient à l'usufruitier, il a le droit de les vendre, comme d'en consentir le transport et la novation. Les meilleurs auteurs, entr'autres Proudhon que l'on peut considérer comme un des maîtres sur la matière, lui refusent cependant ce droit. "Les créances, dit-il, vol. 2, No. 1054, sont bien destinées "à être éteintes au cas qu'on vienne à les rembourser; leur usage même consiste à forcer le remboursement des capitaux quand elles seront exigibles, en "sorte que l'usufruitier qui reçoit ou exige les remboursements, n'use que suivant la destination de la chose; mais elle ne sont pas destinées à être vendues "ou transformées en d'autres créances par la novation; l'usufruitier ne pourrait "donc vendre ou innover au préjudice du propriétaire et sans sa participation."

C'est sur ce principe qu'a été rendu un arrêt de la Cour de Bordeaux, du 19 avril 1847, par lequel il a été jugé: "Que l'usufruitier n'a pas, alors même "qu'il est dispensé de faire inventaire et de donner caution, le droit de consentir le transport ou la novation des créances faisant partie de l'usufruit. En "pareil cas, le nu-propriétaire est recevable à agir contre l'usufruitier pour cause "d'abus de jouissance, en révocation de son usufruit quant à ces créances."

Un des motifs de cet arrêt est le suivant: "attendu qu'une créance n'est "point par là même une chose fongible; que sans doute elle peut s'éteindre par "le remboursement; mais que l'usufruitier ne pourrait de sa seule autorité en "consentir le transport ou la novation."

De ce qui précède il suit donc rigoureusement que les créances ne sont pas des choses fongibles, que le capital en appartient au nu-propriétaire, et qu'étant obligé de le restituer, l'usufruitier est tenu de veiller à sa conservation de même qu'à celle des meubles non-périssables, comme il est tenu de veiller à celle des immeubles.

Il sera question des conséquences qu'entraine l'abus de jouissance des créances, en même temps que nous traiterons de l'abus de jouissance des meubles non-périssables.

L'obligation de conserver les deux étant maintenant constante voyons en quoi l'usufruitier qui se met dans l'impossibilité de veiller à cette conservation, en se dépouillant irrévocablement de leur administration, et en les soumettant à la puissance d'un tiers, viole cette obligation et à quel recours cette violation peut donner lieu de la part des héritiers?

Posons la question sous une forme plus pratique, voyons en quoi la défenderesse, en se mariant sous le régime de la Communauté dans laquelle est entré l'usufruit des meubles non-périssables et des créances restées dans la succession de son premier mari, et qui sont tombés sous la puissance du second, a manqué à son obligation de conserver, et quels recours elle a par là créés contre elle à la poursuite des demandeurs?

L'obligation de conserver la chose qu'il doit restituer soumet à des devoirs aussi variés qu'importants la personne de l'usufruitier. A l'usufruit est attachée une haute responsabilité; il est de la part de celui qui en est investi une occasion incessante de vigilance et de sagesse; et un légiste distingué, M. Hennequin,

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a eu raison de l'appeler: "l'art de profiter sans détruire, de jouir en conservant."

L'usufruitier devenant le gardien de la chose usufruitée, il est tenu d'entourer cette garde de la vigilance et des soins du père de famille, et il est responsable du préjudice qu'occasionne au propriétaire ce relâchement de vigilance. Il est garant des prescriptions qu'il laisserait encourir comme des pertes causées par l'insolvabilité que ses lenteurs auraient tolérées aussi bien que des priorités d'hypothèque acquises par des tiers sur son défaut d'inscrire en temps utile. Il ne peut vendre ou céder des créances, ni les soumettre à une novation préjudiciable pas plus qu'il ne peut vendre ou hypothéquer les immeubles. Ses pouvoirs ne sont plus sous ce rapport que ceux du mandataire, du *procurator in rem suam*, dont les droits sont limités à l'intérêt qu'il a de la chose, sur laquelle il n'a qu'une maitrise restreinte, ou bien encore du *procurator in rem alterius* ou *rem domini* en tant qu'il doit conserver la chose pour son maître.

Il ne peut, sous aucun prétexte, abdiquer la garde ou l'administration des choses restituables sans renoncer à l'usufruit, et non-seulement il est responsable de son fait, mais encore il l'est du fait d'autrui dont une vigilance ordinaire eût pu repousser l'agression. Ainsi, si dans son legs tombe une créance qu'un tiers revendique en justice, et se fait faussement adjuger, il sera responsable du paiement fait au prétendant, si ayant connu l'instance, il n'y est pas intervenu pour repousser ses injustes prétentions. Non-seulement il est gardien et mandataire, mais il est encore vis-à-vis des propriétaires dans la responsabilité du tuteur, relativement à la conservation des biens du mineur ; il est même tenu de la faute légère.

Les choses usufruitées sont censées lui avoir été laissées en dépôt avec faculté de s'en approprier les fruits, et à cet égard sa vigilance tient encore à celle du dépositaire.

Cette comparaison des devoirs de l'usufruitier avec ceux des autres possesseurs de la chose d'autrui nous conduit à la conclusion ; que tant que dure l'usufruit, il doit perpétuellement veiller à la conservation de la chose usufruitée.

Peut-il déléguer cette obligation ou céder son titre à l'usufruit ? Nul doute qu'il ne le peut sans la sanction du propriétaire. Il peut bien en affirmant son usufruit, céder les émoluments qu'il en retire, il peut transporter les intérêts des créances ; mais outre qu'il ne peut en aliéner le capital non remboursé, plus qu'il ne peut aliéner les immeubles, il ne peut indubitablement se soustraire à l'obligation personnelle de les conserver. Car nul acte de sa part ne peut le délier de sa responsabilité vis-à-vis du propriétaire, qui, pour avoir son recours concurrent contre le cessionnaire, n'en conserve pas moins dans son intégralité son recours contre l'usufruitier pour la restitution de la chose et des dommages résultant de sa mauvaise administration.

Il ne peut s'affranchir envers le propriétaire des conséquences fâcheuses résultant de la perte ou de la détérioration de la chose, mais est-il obligé de l'administrer personnellement ? Ne peut-il pas faire administrer par un tiers sans éveiller les justes [illegible] du propriétaire ? Si ce tiers agit en vertu d'une autorité précaire, d'un pouvoir révocable, d'une procuration, par exemple, je crois que l'usufruitier le peut. Ici l'acte du procureur ne lui est pas personnel ; c'est l'acte

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de l'usufruitier qui tient toujours son mandataire sous son œil, qui peut le renvoyer d'un moment à l'autre. Il me semblerait dur d'ailleurs de refuser à l'usufruitier l'assistance d'un préposé, de l'exclure des bénéfices du mandat!

Mais il en serait autrement, si ce tiers était revêtu d'un pouvoir permanent, en vertu d'[illegible]le.

Si, [illegible]ole par rapport au propriétaire qui conserve toujours comme on l'a vu, son recours contre l'usufruitier, une cession avait été faite au tiers de toutes les créances sujettes à l'usufruit avec remise de titres, disons des billets à ordre ou au porteur; si la conséquence de cette cession, quoique nulle en droit, avait en fait eu le résultat d'investir le cessionnaire de la propriété des créances; en ce cas, le propriétaire ne peut-il pas, sinon demander la déchéance de l'usufruit, du moins faire arrêter les créances entre les mains des débiteurs, ou demander cautionnement?

Passons à d'autres hypothèses. Supposons que l'usufruitier devienne en démence, et qu'avec ses autres biens, son usufruit passe aux mains d'un curateur: ou que négociant, il tombe en faillite, et, qu'avec la masse de ses biens, l'usufruit devienne sujet à la régie de ses créanciers!

Dans ces deux derniers cas, comme dans le premier, le propriétaire qui voit passer l'administration de ses biens en des mains étrangères, n'est-il pas recevable à recourir à des mesures conservatoires? Je ne vois rien dans les auteurs qui ait rapport au cas de l'interdiction, mais je lis dans Proudhon, qu'au cas où l'usufruitier failli a donné cautionnement, sa caution est déchargée par la faillite, qu'un nouveau cautionnement est dû, et qu'il en est ainsi au cas de la vente forcée de l'usufruit. Proudhon, dont l'opinion est partagée par Troplong en son traité du cautionnement, soutient qu'en ce dernier cas le nouvel acquéreur doit donner caution parce que la première a été déchargée, et que, même dans le cas où l'usufruitier aurait été dispensé du cautionnement, l'acquéreur en doit un, parce que la dispense a été personnelle à l'usufruitier et ne peut pas être étendue à un tiers. Il en est de même, dit-il, du cas de la subrogation que les créanciers peuvent réclamer dans les droits de l'usufruitier poursuivi en déchéance d'usufruit, suivant l'article 618 du Code Napoléon, pour abus de jouissance.

Quelle est la raison de cette décharge de la caution et de l'obligation d'en fournir une nouvelle?

Dans le premier cas, c'est que le fidéjusseur n'a cautionné que l'usufruitier et non son successeur à titre singulier; que l'aliénation de l'usufruit n'est pas un événement qui soit entré dans ses prévisions quand il a cautionné, et que le cautionnement est personnel et ne peut être étendu d'une personne à une autre. Dans le second, c'est que pour l'hypothèse où l'usufruitier a donné un cautionnement, ce cautionnement est devenu caduc, et que dans celle où il en a été dispensé, la chose est passée aux mains étrangères; que le nouvel administrateur est un tiers dont l'auteur de l'usufruit n'a pu prévoir l'intermixtion, et qu'il n'a pu conséquemment investir de la confiance qui a motivé sa dispense en faveur de l'usufruitier.

Que dit Proudhon du cas où, par son second mariage, la femme apporte en jouissance un droit d'usufruit conventionnel qu'elle a reçu par suite de son premier mariage, No. 861?

"Le mari auquel la femme apporte en dot un douaire immobilier qu'elle a "reçu par suite d'un précédent mariage, et qui lui apporte en jouissance tout "autre droit d'usufruit conventionnel, est-il soumis aux mêmes obligations que "le tiers acquéreur dont on vient de parler?

"Nous croyons qu'en thèse générale le mari doit être soumis aux mêmes "règles que le tiers-acquéreur; car il est vrai que la jouissance du droit d'u-"sufruit dont il s'agit devient la sienne; qu'elle lui est transférée, et lui appar-"tient personnellement; qu'en conséquence il se trouve, comme le propriétaire "du droit d'usufruit, débiteur des charges affectées à cette jouissance, d'où il "résulte qu'il doit être tenu de satisfaire aux mêmes conditions.

"Nous disons néanmoins en "thèse générale," parce qu'il y a quelques obser-"vations particulières à faire en ce cas.

"Le maître de la nue-propriété tient toujours la femme comme obligée per-"sonnellement, puisqu'elle reste toujours usufruitière en titre, en sorte que vis-"à-vis de lui, elle est responsable de toutes les dégradations qui seraient impu-"tables au mari; d'autre part, la femme a un recours hypothécaire sur les "biens du mari à raison de cette espèce d'indemnité, comme pour ses autres "droits matrimoniaux, recours que le propriétaire du fonds peut faire valoir "comme exerçant les droits de la femme, sa débitrice; ce qui donne une sûreté "qui peut être jugée suffisante, si le mari est lui-même propriétaire foncier, sans "qu'il soit besoin de recourir à un cautionnement proprement dit, qu'il n'aurait "pas d'intérêt réel à exiger, puisque le mari en tiendrait suffisamment lieu." Voyons si cette opinion de Proudhon peut s'appliquer à l'espèce qui nous occupe.

Par son second mariage la veuve Amireau s'est-elle mise hors d'état de veiller elle-même à la conservation de l'usufruit, a-t-elle apporté cet usufruit à son second mari, et ce dernier possède-t-il des biens qui rendraient les héritiers sans intérêt à demander un cautionnement puisque le mari en tiendrait suffisamment lieu.

[illegible] son mariage, la défenderesse a stipulé Communauté de biens dans laquelle sont nécessairement entrés ses biens mobiliers, la jouissance de ses immeubles, son droit d'usufruit des meubles non-périssables et les créances mobilières restées dans la succession de son premier mari, pour lesquels meubles et créances elle n'a fait aucune réserve. Elle en a donc soumis l'administration à la puissance de son second mari, sans l'autorisation duquel elle ne pourrait même les gérer. Or, qui jouit ici de ces meubles, de ces créances? qui les administre? N'est-ce pas le second mari? Quel rôle joue ici l'usufruitière [illegible] propriétaire du titre à l'usufruit, en a cependant transféré les droits à la Communauté? un rôle purement passif.

D'actrice qu'elle était, elle est devenue spectatrice de la dissipation possible des droits sur lesquels elle a perdu tout contrôle. "Notez bien, dit Troplong, "cautionnement, No. 152 *in fine*, que le second mari n'est pas dans la position "d'un fermier à qui la femme aurait loué son usufruit, ou d'un mandataire par "lequel elle le ferait gérer. La jouissance lui appartient, la femme est sous sa "dépendance et son autorité; elle ne peut pas jouir, elle ne peut pas agir."

Les rapports des maîtres de la nue-propriété vis-à-vis du possesseur de l'usufruit ont donc reçu une transposition radicale: ils sont en présence d'un nouvel admi-

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nistrateur qui n'a apporté aucuns biens qui puissent les protéger contre la dissipation du capital de l'usufruit.

Ainsi considéré, la position nouvelle, faite aux demandeurs, ne nous semble-t-elle pas légitimer leurs craintes et justifier leur recours à des mesures conservatoires ?

Le changement d'état de la veuve sous les conditions qui ont accompagné son mariage, n'est pas cependant le seul motif de leur demande. Ils prétendent que le second mari est un dissipateur qui met en danger la restitution des biens chargés d'usufruit.

Ce second motif qui me paraît l'élément important du procès, doit vitalement influer sur le premier moyen, en aggraver la force, en atténuer la portée suivant les circonstances, s'il ne doit pas en dominer la solution en entier.

Car quelque menaçante que soit la perspective, si l'état des faits, faisant céder la présomption à la preuve contraire démontre que les propriétaires ne courent aucun danger, ne sont exposés à aucune périclitation ; ils seront sans grief et leur demande de cautionnement deviendra superflue.

Il s'agit donc de savoir quelle a été l'administration du second mari, de connaître la condition qu'elle a faite à l'usufruit, pour juger de la suffisance des garanties offertes aux héritiers.

Ils reprochent aux défendeurs d'avoir retiré des capitaux de créances, outre le divertissement des meubles au montant de 12211 frs. et de n'en pas avoir fait de placement utile ; ce qui, suivant leur système, opère l'appauvrissement de la succession, établit un fait de dissipation et constitue un abus de jouissance.

Les défendeurs ne dénient pas cette assertion, ils donnent eux-mêmes, au contaire, un état détaillé des créances retirées, mais, ajoutent qu'ils les ont replacées avec un surplus considérable ; de sorte que, loin de diminuer les ressources de l'usufruitière, ils les ont augmentées et, par là, multiplié les garanties des nu-propriétaires.

Mais au nom de quoi ont été faits ces replacements de capitaux ? Est-ce au nom de l'usufruitière ou de la communauté, en qualité d'usufruitière, pour elle, avec indication de l'origine des deniers prêtés et de leur destination ?

Y a-t-il, en deux mots, véritable remploi des sommes retirées ?

Fait singulier et plein de signification ! Toutes les obligations et billets qui constituent les placements faits pendant la seconde communauté, sont au nom du second mari, au profit de la seconde communauté, si l'on veut : mais de l'origine, pas un mot, sur l'usufruit, silence complet ! de sorte que s'il y a eu enrichissement, ça été l'enrichissement de la seconde communauté, au moyen des capitaux provenant de la première.

Pour justifier l'anomalie des agissements du second mari en prêtant, en son nom, des capitaux provenant pour moitié de l'usufruit, ses défenseurs se sont retranchés dirrière le droit qu'avait l'usufruitière, et la Communauté, pour elle, de retirer les capitaux lors de leur échéance, et de disposer des deniers en provenant, devenus choses fongibles, comme leur propriété absolue ; proposition dont l'exactitude légale est irréprochable. Mais c'est précisément ce pouvoir de retirer les capitaux et de les faire tomber dans la Communauté comme conquêts, qui constitue un danger pour les héritiers, en les mettant à la merci du mari qui

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peut les retirer tous et se les approprier ; et c'est contre la possibilité de ce résultat justifié suivant les demandeurs, par la conduite passée du défendeur qu'ils veulent se mettre en garde, en demandant un cautionnement.

Comment, ont ajouté MM. Prévost & Archambault, les deniers retirés pouvaient-ils être placés autrement qu'au nom de la communauté ; et les prêter au nom du mari, n'était-ce pas effectivement les prêter au profit de la communauté ? Supposons que les placements eussent été faits au nom de la femme commune, et que cette stipulation fut valable, ne seraient-il pas tombés, par le fait même, dans la communauté ? Or, cette communauté enrichie de ces placements et dont la fortune s'accroît au lieu de diminuer, comme le démontre l'excédant des prêts sur les créances retirés restera toujours responsable de la restitution de l'usufruit que la femme y renonce ou qu'elle l'accepte.

A la question relative au mode de placement la réponse est facile. Si le mari voulait remplacer les deniers provenant de l'usufruit sans les dénaturer ou en détourner les profits, ne pouvait-il pas en déclarer l'origine et dire que le remboursement s'en ferait à la succession, à la charge de l'usufruit de sa femme ou de la communauté, comme la prestation des créances primitives aurait dû se faire elle-même ? Et n'en pouvait-il pas être ainsi des deniers prêtés par la défenderesse avant son second mariage et qui sont entrés dans la seconde communauté ? En ce cas, dans l'hypothèse de l'extinction de l'usufruit avant l'échéance des nouvelles créances, le capital serait devenu dû aux héritiers eux-mêmes. Pendant que, dans l'état de choses actuel, et sous le mode de placement usité, si l'usufruit s'éteint par le prédécès de la femme, et que ses héritiers renoncent à la communauté, les créances appartiendront pour le total au mari, et si ce dernier meurt avant sa femme, elles appartiendront, pour la moitié, à ses héritiers, si la femme accepte, et pour le total, si elle renonce.

Les demandeurs auront bien leur recours contre eux, mais comme ce sera un recours sans subrogation dans les créances, ils perdront leurs droits si la succession Martel devient insolvable. Et outre que les créances peuvent devenir le gage des créanciers personnels du mari, qui nous assure que de florissante qu'elle est aujourd'hui la Communauté ne tombera pas en ruine ?

C'est donc encore pour se protéger contre cette décadence possible de la Communauté, décadence contre laquelle le mari n'offre aucune garantie, que les demandeurs demandent cautionnement.

Les vicissitudes possibles de la seconde communauté repoussent donc l'assertion des défendeurs, que les héritiers sont en sûreté, parce qu'ils ont la communauté pour garante.

La prétention des demandeurs, qui me paraît conforme à l'équité, n'est-elle pas également fondée en droit ? Leur demande est de la nature d'une action conservatoire, et les mesures conservatoires sont toujours regardées avec faveur. Je ne connais pas de cas où notre droit, souverainement raisonnable parce qu'il est souverainement juste, refuse au créancier dont des droits non ouverts ou la créance non échue sont en péril, le moyen de les conserver.

Le nu-propriétaire serait vis-à-vis de l'usufruitier le seul auquel il denierait sa protection ?

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L'usufruitier, coupable d'abus peut être déchu de son droit. Nos codificateurs en ont fait un texte exprès, copié sur l'article 618 du code Napoléon suscité.

Le texte semble limiter l'abus aux dégradations commises sur le fonds, ou à son dépérissement, par faute d'entretien. Mais il est certain que cette disposition s'étend à tous les cas, où, par son défaut d'administrer en bon père de famille et d'apporter le soin du maître à la conservation de la chose, l'usufruitier met volontairement en danger les droits du nu-propriétaire.

A plus forte raison, doit-il s'appliquer au cas de détournement de la substance de la chose à son profit. Dans le cas où la déchéance est le fruit d'abus graves et entâchés de récidive, les juges peuvent la prononcer à titre de peine ; ils peuvent, dans des cas moins extrêmes, modérer la rigueur de la sentence et ordonner le séquestre avec perception des fruits pour les remettre à l'usufruitier. Ils peuvent aussi n'ordonner le séquestre qu'à défaut de cautionnement, l'intérêt du propriétaire étant la mesure du dispositif.

Les Tribunaux peuvent, en outre ordonner le cautionnement pour des faits impuissants à engendrer la déchéance. Ecoutons encore Proudhon sur la nature de ces faits aux No. 863 et suivants.

" Au reste, dit-il, il est sensible que pour que le propriétaire soit recevable à " exiger le séquestre ou la caution, il n'est pas nécessaire que l'usufruitier ait " commis des abus assez graves pour lui mériter la perte de ses droits."

" 863. Lorsque l'usufruitier est dispensé de fournir un cautionnement, l'héritier " doit-il être toujours non recevable à en exiger un par la suite ou à demander " le séquestre? Il en est de la clause de dispense du cautionnement, comme de " toute autre disposition qui doit être entendue sainement et interpêtée suivant " ce qu'exige le droit et la raison. Lorsque, par un concours de circonstances " imprévues, la dispense de donner une caution expose visiblement le propriétaire " à perdre ses droits, on ne doit pas hésiter d'en venir à l'établissement du sé-" questre, et cette mesure est alors tout à la fois dans l'intention présumée du " disposant, dans la nature des choses, et dans les principes de la plus rigoureuse " équité et de la saine raison.

" Et d'abord, si l'on veut bien rechercher l'intention présumée du disposant, " et que pour cela l'on s'attache à graduer les effets de sa bienveillance sur la " prédilection manifestée par la disposition même, il est naturel de voir que, dans " sa pensée, le propriétaire, appelé à recueillir un plus grand avantage, doit pas-" ser avant l'usufruitier auquel il n'a donné qu'une moindre valeur, et que, par " conséquent, il n'a jamais voulu que les intérêts du premier fussent sacrifiés à " ceux de celui-ci, ni à plus forte raison, exposés aux dangers de ses caprices.

" 864. Si nous interrogeons les principes de la matière, ils nous disent que " quand on ne donne qu'un doit d'usufruit, on ne confère que la faculté de " jouir à la charge de conserver, puisque l'usufruit n'est pas autre chose ; le " devoir de conserver est donc ici et, par la nature même des choses, un corré-" latif inséparable de la faculté de jouir ; si donc il arrive des circonstances telles " que l'usufruitier se trouve hors d'état de satisfaire à ce devoir, ou même dans " un état ou une disposition tels qu'on ne puisse plus compter sur lui pour l'ac-" complir, il est conforme à l'ordre des choses de modifier en lui la faculté de " jouir suivant la modification survenue ou découverte dans ses moyens de res-

"ponsabilité. Si nous voulons interroger les principes de l'équité et de la raison, "nous arrivons nécessairement au même résultat."

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"Les droits du propriétaire sont aussi respectables et aussi sacrés que ceux de "l'usufruitier, et ils sont en outre éminemment supérieurs, puisque d'une part il "s'agit de prévenir la perte de la chose elle-même, tandis que d'autre côté, il "n'est question que d'assigner un autre mode de jouissance à l'usufruitier en "forçant à souffrir le séquestre; or dans le concours de deux intérêts opposés, "l'équité résiste à ce que celui qui est prépondérant et principal soit immolé à "l'autre, et surtout à une simple convenance dans l'exercice de l'autre.

"865. La dispense du cautionnement ne peut être fondée que sur la con- "fiance qu'inspire la personne de l'usufruitier, soit sous le rapport de sa qualité, "comme sont le père ou la mère pour l'usufruit légal des biens de leurs enfants, "soit sous le rapport de sa conduite passée qui avait toujours parue être celle d'un "administrateur éclairé et soigneux dans ses affaires; soit enfin sous le rapport "de ses moyens de responsabilité, dérivant d'une fortune crue suffisante pour "mettre l'héritier à couvert de toute perte. Mais lorsque par la suite il se trouve "avéré en fait que l'individu auquel on accordait une entière confiance, n'en "devait mériter aucune, lorsque celui qu'on croyait riche, vient à tomber dans "la pauvreté, comment la justice serait-elle forcée de sanctionner l'erreur bien "démontrée du disposant?

"Et quand la dispense n'a été accordée que pour un état de choses qui se "trouve interverti et qui n'existe plus par la suite, ne serait-ce pas faire de cette "dispense la plus fausse application, si l'on voulait en étendre les droits au pré- "judice du propriétaire, à un nouvel état de choses qui n'était et ne pouvait être "dans la pensée du disposant?

"L'obligation de fournir un cautionnement est dans la règle générale; la "dispense est dans l'exception; il faut donc que le disposant ait clairement "voulu la dispense avant toutes ses conséquences, pour qu'elle doive avoir lieu, "et il ne peut être clair qu'il l'ait voulu, même pour un état de choses qu'il ne pou- "vait prévoir; par conséquent, ce nouvel état de choses doit faire entrer les parties "sous l'empire de la règle du droit commun, *benigne interpretari et secundum id* "*quod credibile est cogitatum, credendum est.*

"866. Il faut observer enfin que la dispense de donner caution est ici une "faveur purement personnelle à celui qui la reçoit, puisqu'elle n'est fondée que "sur la considération de la personne de l'usufruitier, un de ses propres moyens "de fortune: d'où il résulte qu'il n'y a que lui qui puisse en profiter et qu'il "ne pourrait en transmettre le bénéfice à d'autres: *ubi persona conditio locum* "*facit beneficio, ubi deficiente ea beneficium quoque deficit*; qu'ainsi, à sup- "poser que l'usufruitier qui avait reçu cette dispense vint à tomber en faillite, "les syndics de ses créanciers ne pourraient s'en prévaloir ni se refuser à la pres- "tation du cautionnement pour l'avenir." (618)

"Par ces considérations générales, nous croyons que nonobstant que l'usufrui- "tier soit entré en jouissance avec dispense de cautionnement, il peut encore être "mis dans l'alternative forcé d'en fournir un, ou de souffrir la mise en séquestre "dans les cas suivants:

"867. 1o. Lorsqu'il a malversé dans sa jouissance de manière à porter un pré- "judice notable au propriétaire."

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"D'une part, il est incontestable que l'usufruitier dispensé de fournir une cau-"tion, n'est pas pour cela dispensé de l'obligation de jouir en bon père de "famille, et que manquant à ce devoir, il se met lui-même hors de termes du "quasi-contrat, ou de la convention tacite qui a été formée avec lui lors de son "entrée en jouissance."

"D'autre part, il n'est pas moins certain qu'un propriétaire ne peut être placé "à côté d'un usufruitier qui abuse, pour y rester spectateur impassible de sa "ruine sans avoir aucun moyen d'y mettre obstacle. Enfin tout usufruitier qui "malverse peut être déclaré déchu de son droit pour cause d'abus de jouissance. "La loi qui sans aucune distinction accorde au propriétaire le droit de faire "prononcer cette espèce de commise, serait en contradiction avec elle-même, si "elle lui refusait le secours bien moins important qu'il pourrait trouver dans la "prestation d'un cautionnement, ou la mise en séquestre du fonds grevé d'usu-"fruit. Au reste, il est sensible que pour que le propriétaire soit recevable à "exiger le sequestre ou la caution, il n'est pas nécessaire que l'usufruitier ait "commis ces abus de jouissance assez graves pour lui mériter la perte de son "droit."

"868. 2o. Si, sans avoir commis des abus, aucun abus dans sa jouissance, "au préjudice du propriétaire, l'usufruitier est devenu insolvable, s'il est tombé "en faillite ou en déconfiture, et qu'il y ait encore dans la succession dont l'usu-"fruit lui a été légué un mobilier notable à conserver; des capitaux, des créances "actives à toucher, ou, dans le fonds, des réparations considérables à faire et pour "lesquelles il soit nécessaire de prévoir des épargnes sur les revenus, le séquestre "pourra être demandé et devra être ordonné à raison du nouvel état survenu "dans les facultés de l'usufruitier quoique rétabli par un mandat à la tête de ses "affaires: car il est sensible que la dispense de tout cautionnement et des causes "qui l'ont motivé pour les cas ordinaires, ne doit plus être considérée comme "obligatoire à l'égard du propriétaire, dans un nouvel état de choses qui sont de "la règle commune, qui était imprévu et qui ne suppose plus les mêmes moyens "de garantie."

Ce que Proudhon ne dit pas ici, c'est que l'usufruit prend fin par l'abus de l'usufruitier bien qu'il aît dnné le cautionnement. C'est du moins ce qu'enseigne Rousseau de la Como dans son *Recueil de jurisprudence*, au mot *usufruit*, et il se fonde sur la loi C. D. *de suspectis tutoribus*, sur la loi 205 *de regulis juris*, et sur la loi C. *quando liceat unicuique sine judice*. Il cite également un arrêt du parlement de Bordeaux de 18 janvier 1521, Maynard, Despeisses et divers autres arrêts du même Parlement de Bordeaux et de Toulouse. L'opinion du même Rousseau de Lacombe est citée dans l'article inséré au mot *usufruit*, au Réportoire de Guyot, copié dans celui de Merlin, où l'auteur s'appuie également de l'opinion de Papon, d'Argentré, Boyer et du Président favre.

Cette doctrine qui a prévalu dans la jurisprudence tant ancienne que moderne me paraît parfaitement fondée en raison. Ne vaut-il pas mieux arrêter le mal commis par l'abus en mettant l'usufruitier hors d'état de consommer la ruine de l'héritier, en le forçant à rendre ses biens, que d'atteindre la fin de l'usufruit, et laisser le propriétaire à l'incertitude de son secours contre la caution; suivant la maxime *melius est occurrere in tampore quam post exitum vindicare*.

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La perte des droits à cause d'abus n'est pas particulière à l'usufruit. N'est-il pas vrai qu'en droit, le défaut de l'accomplissement de la condition imposée à la libéralité en emporte la déchéance!

La demande en déchéance n'étant pas portée, la question de savoir si l'usufruitier doit perdre ses droits ne se présente pas: mais le principe sur lequel repose le litige est le même.

Un arrêt du 15 janvier 1836, rendu par la cour d'appel de Lyon, a décidé que l'usufruitier pouvait même être astreint à fournir caution bien qu'il en soit dispensé par le titre constitutif, si les immeubles comprenant la plus grande partie des objets de l'usufruit ont été vendus et convertis en capital mobilier.

La Cour de Cassation a jugé le 21 Janvier 1845: que l'usufruitier a le droit de jouir comme le propriétaire lui-même des choses soumises à l'usufruit. Par conséquent il a le droit de toucher les capitaux à leur échéance sans le concours des nu-propriétaires.

Et il a ce droit sans qu'il ait lieu de distinguer entre les capitaux dus avant et remboursés pendant l'usufruit, et les capitaux trouvés en espèce, au moment de son ouverture.

Bien que les capitaux soumis à l'usufruit soient consommés par l'usage, cette consommation doit être celle d'un administrateur soigneux et diligent, et le nu-propriétaire est fondé à se plaindre, s'il y a eu dégradation et détournement frauduleux à son préjudice.

Tel est le cas où l'usufruitier ayant eu, depuis l'ouverture de l'usufruit un enfant naturel qu'il a reconnu, a substitué aux placements des capitaux garantis par des hypothèques ou des privilèges, des placements sur simples billets en son nom personnel et en recélant l'origine des deniers.

En pareil cas, et alors surtout qu'il y a disparition d'une notable partie des créances, l'usufruitier peut être soumis à des mesures de précaution et de garantie. Ainsi il peut être condamné à représenter les valeurs touchées, pour que le réglement en soit fait contradictoirement avec le nu-propriétaire.

Il peut également être astreint à fournir caution bien qu'il en ait été dispensé par le titre constitutif de l'usufruit, à titre gratuit, une pareille disposition n'ayant été accordée que dans la supposition que l'usufruitier se conduirait en bon père de famille.

L'arrêt de la Cour de Bordeaux ci-haut cité a rendu le 19 Avril 1847 la décision suivante: L'usufruitier n'a pas, alors même qu'il est dispensé de faire inventaire et de donner caution, le droit de consentir le transport ou la novation faisant partie de l'usufruit.

Ainsi il ne peut convertir un billet ordinaire en billet au porteur.

En pareil cas, le nu-propriétaire est recevable à agir contre l'usufruitier, pour cause d'abus de jouissance, en révocation de son usufruit quant à ses créances.

Enfin, le 11 janvier 1848, la Cour d'Appel de Douai a jugé que: lorsque l'usufruitier d'une somme d'argent donne lieu de craindre que cette somme ne soit dissipée, les juges peuvent, pour garantir les droits du nu-propriétaire, ordonner qu'elle sera replacée avec le concours de ce dernier. Peu importe que l'usufruitier ait été dispensé de donner caution.

En contraste apparent avec ces quatre arrêts, j'en remarque trois autres, un

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de la Cour d'Appel de Paris, en date du 6 janvier 1826; un second de la Cour d'Appel de Bordeaux, du 11 mai 1832, et le troisième rendu par la Cour Royale de Nancy, le 22 mai 1833.

Par le premier de ces arrêts la Cour d'Appel de Paris a décidé que l'insolvabilité notoire de l'usufruitier d'une succession ne peut le faire contraindre au paiement des sommes qu'il doit à la succession ou à donner caution, pour leur sûreté, quand l'usufruit lui a été donné avec dispense de caution.

Si cet arrêt décidait en thèse rigoureuse que l'insolvabilité de l'usufruitier qui a été dispensé de caution ne peut jamais être un motif justifiant les mesures conservatoires, il serait en contradiction avec Proudhon qui cite l'insolvabilité de l'usufruitier imprévue de l'auteur de l'usufruit comme créant une des situations particulière devant lesquelles s'efface la dispense du cautionnement.

Mais en consultant l'espèce de ce arrêt, l'on voit que tel n'en a pas été le motif. Il s'agissait d'un mari pauvre lors de son mariage et que sa femme avait avantagé d'une donation d'usufruit. Après la mort de la femme, il fut poursuivi par les héritiers pour le montant des reprises de la défunte et condamné à les rembourser, mais après l'extinction de l'usufruit seulement. Les héritiers attaquant le jugement de première instance soutenaient que vu son insolvabilité, il devait leur payer le capital à charge de recevoir les intérêts.

La Cour d'Appel de Paris a avec raison rejeté cette prétention puisque l'état de fortune du mari était connu de sa femme lors de la constitution d'usufruit, et que cette insolvabilité ne tombait pas dans la classe des cas imprévus par l'auteur de l'usufruit.

L'arrêt de la Cour d'Appel de Bordeaux dont le texte porte: que le juge ne peut sur la demande du propriétaire ordonner caution lorsque par l'acte constitutif de l'usufruit ce dernier n'en a été dispensé d'une manière générale, a décidé tout simplement que l'usufruitier peut, sans qu'il soit tenu d'appeler le nu-propriétaire au paiement, retirer les capitaux de créances exigibles, et sans être obligé de procéder avec leur concours au placement des créances retirées.

Enfin, le troisième, celui de la Cour d'Appel de Nancy a de même jugé que l'usufruitier dispensé de cautionnement a le droit de recevoir les capitaux des créances à terme, sans l'assistance du nu-propriétaire, et sans être tenu de remplacer ces mêmes capitaux; mais un des considérants de l'arrêt en modifie la portée et explique la pensée qui a présidé à sa rédaction.

Attendu le fait, dit le considérant, que cette dispense de cautionnement est répétée deux fois dans le Testament de la Dame Gillet, qu'elle a donnée même accompagée de la dispense de faire inventaire, clause exhorbitante et inadmissible en droit, mais dont la présence doit au moins être considérée comme l'expression d'une confiance à laquelle les magistrats ne peuvent assigner de limites en astreignant le mari à ne recevoir les capitaux des créances qu'avec l'assistance du nu-propriétaire, et à les remplacer en créances de la même nature que les précédentes; ce qui serait une source d'entraves à la jouissance de l'usufruitier et serait sujet à des difficultés continuelles qui apporteraient la plus grave atteinte à ces droits. *Qu'à cet égard si le propriétaire avait des craintes pour la sûreté de la chose, si la mauvaise administration de l'usufruitier ou son insolvabilité survenue depuis l'ouverture du droit mettait en péril l'objet qui lui a été confié il*

pourrait être ordonné des mesures conservatoires ; mais que jusqu'alors il n'a été allégué aucun fait de nature à légitimer semblables craintes.

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D'après cet arrêt, *si le propriétaire avait des craintes fondées pour la restitution de la chose, si l'objet usufruité est en péril* (et ici, il s'agit de créances) *il peut donc être ordonné des mesures conservatoires* dont la plus efficace et la moins onéreuse est certainement le cautionnement.

D'après ces autorités, il serait difficile de ne pas conclure que, si l'ensemble des faits d'une cause démontre que l'administration de l'usufruitier met en danger l'objet de l'usufruit en raison de circonstances que l'auteur de l'usufruit ne peut pas être présumé savoir lors de la constitution, la dispense de l'usufruitier cède à l'intérêt du maître de la nue-propriété qui a droit à un cautionnement.

L'on conçoit que les faits qui constituent une situation périlleuse pour la propriété doivent être laissés à l'arbitrage du juge, dont la tâche difficile est de protéger les droits du propriétaire sans léser ceux de l'usufruitier, de concilier les intérêts rivaux.

Pour un, je ne connais guères de cas qui doivent plus éveiller la sollicitude des magistrats que celui d'une veuve usufruitière des biens délaissés par son mari, consistant principalement en créances qui, pendant sa viduité, ayant prêté en son nom, plus d'un septième des capitaux dus au propriétaire, passe à de secondes noces, par lesquelles elle abdique virtuellement l'administration des biens usufruités en faveur de son mari maître de sa jouissance, lequel n'offrant aucune garantie personnelle, convertit à son usage en moins d'un an un dixième des créances appartenant à la succession du premier mari, et des deniers qui les représentent s'en fait des revenus personnels. Et tel est le cas des défendeurs. Aussi j'estime que dans la présente espèce, les demandeurs ont droit d'obtenir caution pour la restitution des créances et qu'à défaut de caution le séquestre doit être ordonné.

Vient maintenant la question des meubles, puisque la demande de cautionnement embrasse tous les biens sujets à l'usufruit. Sur ce point, les héritiers Amireau n'ont fait d'autre preuve que celle qui résulte des admissions données par les défendeurs et de leurs réponses aux articulations des faits produites par les demandeurs.

Par leur articulation première, les demandeurs demandent s'il n'est pas vrai "que la défenderesse tant avant qu'après son convol en secondes noces a vendu "plusieurs effets et animaux appartenant à la communauté d'entre elle et feu "François Amireau son premier mari, et à la succession de ce dernier, et qu'elle "en a retiré ou que les défendeurs en ont retiré le prix ?"

Les défendeurs répondent : "Quelques effets mobiliers ont été vendus, mais "ils ont été remplacés par des effets mobiliers de cinq fois la valeur, ainsi qu'il "appert au document marqué K, produit avec les présentes."

Outre cette réponse, une admission qu'ils ont donnée et qui est produite à l'Enquête, admet simplement que les défendeurs ont vendu des effets mobiliers et animaux provenant de la succession du dit François Amireau. Et nulle autre preuve n'a été faite par les demandeurs relativement au divertissement du mobilier.

En ordonnant le cautionnement par rapport aux créances, je n'ai pas été mû par le fait unique du mariage de la défenderesse.

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Je dis au contraire : ce fait quelque grave qu'il paraisse, est subordonné aux circonstances, sous lesquelles il s'est opéré, et dont il a été précédé, comme aux éventualités qui l'ont suivi.

Deux faits sont communs aux meubles et aux créances, le mariage et le défaut de garantie donnée. Voyons si aux premiers comme aux secondes, on peut en joindre un troisième, le divertissement ou détournement?

Nous n'avons aucune preuve expresse de la quantité et qualité des meubles et animaux. Voyons si, par induction, nous la trouvons dans les états de compte produit par les défendeurs ?

Par ces états, les défendeurs font voir que le montant des sommes prêtées et payées par la défenderesse et la seconde communauté, en ajoutant une valeur de 1,115 frs. en meubles et animaux acquis par la seconde communauté excède de 3,937 frs. 4, sols. le montant des capitaux retirés.

Quelle peut être la provenance de ce surplus ? Quand le défendeur a épousé la veuve Amireau, il n'a rien apporté au mariage, du moins n'en a-t-il fait aucune preuve.

Il faut donc que cet accroissement provienne de la première communauté. Le montant des créances retirées par la veuve avant son second mariage était de 8800 frs. ; elle avait prêté 7200 frs. et payé 1188 frs., pour frais d'inventaire, frais funéraires et son deuil, faisant 8388 frs. ; ce qui ne lui aurait laissé en mains qu'une somme de 412 frs. quand elle s'est remariée. Depuis il a été retiré 3411 frs. 16 sols., qui, ajouté à 412 frs. donnent 3823, frs. 16 sous.

Le défendeur a prêté 5,300 frs. la défenderesse a payé, 1,346 frs. de dettes à la décharge de la première communauté ; la seconde communauté a acquis des meubles, animaux et voitures au montant dit ci-haut, de 1,115 frs. faisant en tout une somme de 7761 frs. Si de cette somme l'on déduit celle ci-haut de 3,823 frs. 16 sous, on trouve une balance de 3937 frs. 44 sous qui est exactement le montant porté par les défendeurs à leur crédit. Encore une fois d'où provient cette somme si ce n'est de la vente du mobilier de la première communauté reste indivis entre la veuve et les héritiers.

Dans quelle proportion ce mobilier a-t-il été vendu avant et après le second mariage? C'est ce que les défendeurs seuls connaissent, et qu'ils n'ont pas jugé à propos de révéler, s'étant contenté de dire que quelques meubles et animaux avaient été vendus et remplacés par d'autres dont il faut entrer la valeur dans le surplus de 3,937 frs. 4 s. qu'ils signalent ainsi qu'il le disent, *pour preuve de grande économie.* Economie facile à pratiquer puisqu'il ne s'agissait que de dépouiller la première communauté pour enrichir la seconde !

Je fais cependant une différence entre la somme de 1,346 f. payée pendant la seconde communauté pour acquitter une dette de la première, et les sommes puisées dans les ressources de celle-ci pour compléter les prêts faits par le second mari et acheter des meubles pour la seconde communauté. Car l'usufruitier a le droit de vendre des meubles pour payer les dettes et il importe peu que cette somme ait été payée par la vente des meubles ou le retrait des créances, le résultat étant le même.

Il faut donc défalquer cette somme de 1,346 f. de celle de 3,937 f. 4 s. ; ce qui laisse une valeur de 2591 f. 4 s. retirée en sus des créances, c'est-à-dire de la

vente des meubles et approprié au bénéfice du mari et de la seconde communauté, moitié de cette somme représentant la part des demandeurs dans les meubles de la première communauté.

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L'on conçoit qu'en rendant ainsi compte de la manière dont les défendeurs se sont appropriés le produit des meubles, j'en suis réduit à des suppositions qui me sont imposées par les défendeurs eux-mêmes qui n'ont pas jugé à propos de fournir au tribunal un compte plus explicite et plus complet. Ils montrent une balance considérable à leur crédit, et ne font pas [illegible] qu'elle provient d'autres biens que ceux de la communauté qu'ils ont mis à la contribution pour de très larges sommes prêtées en leur nom. Sur leur silence, j'en trouve naturellement l'origine dans la succession, et prononce en conséquence.

Si la conclusion est erronée, à qui la faute? si ce n'est aux défendeurs eux-mêmes, qui, s'ils ont acquis cette somme de 1285 frs, 12 sols., de leurs propres ressources, auraient dû nous le dire.

Je vois dans la gestion faite par les défendeurs du mobilier de la première communauté, le même péril pour les demandeurs, que dans la gestion des créances, et comme pour elles, je dois ordonner le cautionnement.

Pour ce qui est des immeubles chargés d'usufruit, les dangers que courent les héritiers ne peuvent pas être les mêmes que par rapport aux meubles et aux créances: la situation est au contraire toute différente. Il n'a été fait preuve d'aucune détérioration ou dégradation de ces biens dont la restitution à la fin de l'usufruit est certaine puisque la propriété n'en peut être atteinte par les aliénations qu'en pourraient faire les défendeurs.

Je juge donc que les demandeurs sont sans intérêt à demander caution pour les immeubles.

Reste la demande de cautionnement pour le douaire.

Il n'est pas douteux, en thèse générale, que la femme douairière qui se remarie ne doive bonne et suffisante caution fidéjussoire, puisque comme nous l'avons vu, la coutume contient une injonction positive à cet égard. Les défendeurs ne nient pas cette exigence; mais ils soutiennent que la défenderesse n'a pas reçu le sien, qui devait être pris sur les biens libres du mari, et qui l'a été sur la part de ce dernier dans la communauté, dont elle avait l'usufruit à un autre titre.

La demande étant d'une nature conservatoire ne justifierait pas un dispositif qui adjugerait sur le fonds du droit des parties à cet égard.

C'est pourquoi je m'abstiens de prononcer sur le point contentieux soulevé par les parties sur le mérite de la prétention du défendeur, eu égard au douaire de la défenderesse. Si elle a le droit de le recouvrer sur les biens libres du mari, nonobstant les déclarations qu'elle a faites au partage, son action lui est ouverte, et jusque là il me paraîtrait dangereux de la préjuger.

En attendant, en ordonnant qu'elle donne caution pour tous les biens mobiliers de la communauté, je mets en sauvegarde tous les droits et couvre toutes les éventualités, si elle a valablement reçu son douaire sur les biens, le cautionnement qu'elle devra donner, en assurera la restitution, sinon il sera toujours temps de le lui ordonner quand elle en fera la demande.

Je ne crois donc pas devoir plus ordonner le cautionnement pour le douaire que pour les immeubles.

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VOICI LE JUGEMENT :

Considérant que par son contrat de mariage avec François Amireau son premier mari, reçu le neuf février mil huit cent quarante-six devant Mtre. Eug. Archambault et son confrère, notaires, lequel contenait une donation en usufruit en faveur du survivant, à la charge de caution juratoire, la défenderesse a été valablement dispensée de tout autre cautionnement; notamment du cautionnement fidéjussoire, et qu'ayant en viduité, donné sa caution juratoire, elle n'a pu devenir par le fait seul de son second mariage astreinte à donner aux demandeurs de nouvelles sûretés, nulle peine de ce genre n'étant édictée pour la veuve usufruitière en pareil cas contre son second mariage.

Considérant néanmoins que par les conditions de ce second mariage et les circonstances qui l'ont précédé et suivi, la restitution des biens composant la succession du dit François Amireau dont la défenderesse est usufruitière, a été mise en péril par des faits qui peuvent être reprochés aux défendeurs individuellement ou collectivement; qu'il appert que la défenderesse a, pendant sa viduité, retiré des créances actives provenant de la première communauté qui a existé entre le dit François Amireau et elle, et dont la moitié appartenait aux défendeurs lequel défendeur n'a apporté aucuns biens et n'offre aucune garantie personnelle aux demandeurs comme héritiers de ce dernier, au montant de huit mil cent livres ancien cours; sur laquelle somme elle a prêté en son nom personnel la somme de sept mille deux cent livres même cours, sans révéler l'origine de ces créances, et sans en stipuler le remboursement, du moins en ce qui concerne la part des demandeurs en faveur de l'usufruit, dénaturant par là ces créances; ce qui a dû éveiller les soupçons des demandeurs et donner un prétexte légitime à leurs craintes;

Considérant de plus que par son second mariage avec le défendeur sous le régime de la communauté, la défenderesse a soumis à la puissance absolue de son mari comme chef de la communauté, l'administration et la jouissance de l'usufruit, se dessaisissant par là de tout pouvoir d'administration et de contrôle sur les biens usufruités, événement qui ne peut pas être entré dans les prévisions du dit François Amireau, quand il a stipulé la dispense de caution fidéjussoire, couchée en son contrat de mariage avec la défenderesse et qui a nécessairement aggravé la menace faite à la restitution des biens soumis à l'usufruit, et augmenté les craintes inspirées aux héritiers par la gestion de la défenderesse relativement aux créances.

Considérant enfin que du produit des créances actives retirées par les défendeurs après leur mariage, et de celui des meubles et animaux appartenant à la première communauté, vendus soit avant soit après le second mariage, le défendeur a fait en son nom personnel des prêts au montant de cinq mille trois cents livres, ancien cours; et qu'ainsi qu'il appert à l'état produit par les défendeurs en leur réponse à l'articulation de fait des demandeurs, le défendeur a acheté au profit de la seconde communauté des meubles, animaux et voitures à un montant de mille cent quinze livres ancien cours, que sur le défaut des défendeurs de démontrer l'origine des deniers qui ont servi à cette acquisition l'on ne peut qu'attribuer, à la même source que celle qui a servi aux placements de deniers faits par le défendeur à son profit individuel, c'est-à-dire : aux créances retirées et aux meubles et animaux de la première communauté, agissements qui ont constitué

des faits de détournements et divertissements justifiant le recours des demandeurs à des mesures conservatoires et notamment leur demande de cautionnement fidéjussoire, pour assurer, à la fin de l'usufruit, la restitution entière de leurs parts réciproques dans les créances actives et les meubles, animaux et effets mobiliers restés dans la succession du dit François Amireau, à la charge de l'usufruit de la défenderesse, sinon et à défaut de tel cautionnement leur mise en séquestre ;

Considérant cependant que les demandeurs n'ont prouvé aucun fait de détérioration des immeubles soumis à l'usufruit, qu'ils n'en allèguent même aucun, bien que leur demande de cautionnement et séquestre, embrassant l'universalité des biens de la succession s'applique également aux immeubles, et qu'ils ne peuvent non plus réclamer de cautionnement pour la restitution des sommes d'argent comptant restées dans la succession, choses fongibles dont la défenderesse est devenue propriétaire incommutable ; cette partie de leur demande doit être rejetée et, en outre, vu que les maîtres de la nue-propriété ne courent aucun risque pour la restitution des immeubles, et qu'il en doit être ainsi de leur demande spécifique pour cautionnement à raison du douaire préfix dont la défenderesse a donné crédit par l'acte de partage, cautionnement qui, bien que dû par la femme douairière qui se remarie serait ici inutile, puisque celui qui va être ordonné par la présente sentence, embrasse tous les biens mobiliers et créances actives restés dans la succession, et qu'ordonner ce cautionnement serait préjuger une question de fond qui n'est pas pertinement soulevée, notamment le droit de la défenderesse à demander son douaire sur les biens propres du dit François Amireau, et qui d'ailleurs ne peut pas s'engager régulièrement sur une demande de la nature d'une action conservatoire, comme l'est celle des héritiers Amireau ;

Rejette les défenses produites par le dit Louis Jérémie Martel et son épouse la dite Eulalie Lemire dit Marsolais, jusqu'à concurrence des condamnations qui vont être prononcées, et faisant droit à la demande condamne les défendeurs à donner sous un mois de la signification de la présente sentence, bonne et valable caution fidéjussoire à la satisfaction des demandeurs, sinon à celle d'un juge de cette cour siégeant en terme ou en vacance qui prononcera sur la suffisance de la caution qui sera offerte, qu'à la fin de l'usufruit, les héritiers et ayant cause de la défenderesse restitueront bien et fidèlement et dans leur intégralité, soit en nature soit en valeur, ou équivalent pécuniaire, ainsi qu'ils y seront tenus par la loi, la part revenant aux demandeurs suivant leurs droits respectifs et en quantités égales à l'étendue de ces droits dans les capitaux des créances actives, et les biens mobiliers qui leur appartiennent et qui sont restés dans la succession du dit François Amireau, à charge de l'usufruit de la défenderesse, sinon et ce délai expiré et à défaut de tel cautionnement suivant l'exigence de la présente sentence il sera procédé à l'établissement d'un séquestre dont le choix sera laissé aux parties si elles peuvent s'entendre, sinon à celui de la cour ou d'un juge d'icelle en vacance, lequel séquestre prendra possession de tous les meubles, meubles meublants, animaux et effets mobiliers quelconques et de toutes les créances mobilières appartenant à la communauté de biens qui a existé entre la défenderesse et le dit François Amireau et restés indivis entre cette dernière et les demandeurs ; le dit séquestre vendra les meubles, meubles meublants, animaux et effets mobiliers sous l'autorité de cette cour et dans la forme publique et accoutu-

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ince, il remettra la moitié du prix de vente, frais légitimes déduits ; aux défendeurs pour tenir lieu de la part de la défenderesse et l'autre moitié sera placée convenablement, et les intérêts en seront servis aux défendeurs la vie durante de la défenderesse, ou jusqu'à l'extinction de l'usufruit s'il prend fin autrement, et le capital en sera alors restitué aux demandeurs ou leurs représentants, suivant l'étendue de leurs droits. Quant aux créances aussi restées indivises, les titres en seront remis au séquestre qui en retirera les capitaux à fur et à mesure de leur échéance, en délivrera la moitié aux défendurs comme pour les meubles, l'autre moitié sera aussi placée et les intérêts servis aux défendeurs la vie durante de la défenderesse, et le capital livré aux demandeurs à la fin de l'usufruit.

La cour réserve cependant aux parties tous recours ultérieurs et conclusions nouvelles auxquelles elles aviseront pour parvenir au partage des créances de manière à ce que la part des défendeurs leur soit délivrée en nature et à procurer aux demandeurs sur la part de la défenderesse, le remploi des créances aliénées par elle et l'autre défendeur, et également de la valeur des meubles, meubles meublants, animaux et effets mobiliers vendus par eux et dont la moitié appartenait aux demandeurs sans cependant rien prononcer, à cet égard pour le montant.

La cour rejette le surplus des conclusions des demandeurs, et condamne les défendeurs au paiement des frais de la présente instance.

Olivier et Baby, avocats des demandeurs.

Prévost et Archambault, avocats des défendeurs.

(J. M. L.)

MONTREAL, 30th DECEMBER, 1865.

Coram BADGLEY J.

No. 337.

Exparte Adams, petitioner for a Writ of Certiorari.

HELD.—1st. That the return of the notice of motion for a writ of Certiorari made by a Bailiff under his oath of office is insufficient.
2. That such a return must be proved upon oath.*

In this case the petitioner moved on the 18th day of September, 1865, the Superior Court for a writ of *Certiorari*, to remove the judgment rendered by the Recorder of the city of Montreal, under the 14 & 15 Vic., ch. 128, sec. 55: The return of the notice of the motion was made by a Bailiff, on the 27th June, 1865, under his oath of office only. Such notice was not proved under oath, as required by the Imperial statute 13 Geo. 2, ch. 18, sec. 5, regulating proceedings upon Certiorari.

No objection was made by the prosecutor.

Per curiam.—The English statute requires proof of service by affidavit. The return by a Bailiff is insufficient.

Motion rejected.

Dunlop & Browne, attorneys for petitioner.

P.R.L.

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* Exparte Roy, 7 L. C. Juris., p. 109, reversed.

MONTREAL, 6TH JUNE, 1865.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

MOISE COUPAL,

(*Defendant in the Court below,*)

APPELLANT;

AND

SUZAN[illegible]

([illegible] *Court below,*)

RESPONDENT.

HELD:—1st. That in an action of seduction, the [illegible] the date of service of process, and no[illegible] be legally recovered from [illegible].

2nd. That in such an action, a condemnati[illegible] is excessive in the absence of proof that the seducer is wealthy and that th[illegible] specially aggravating circumstances attending the seduction.

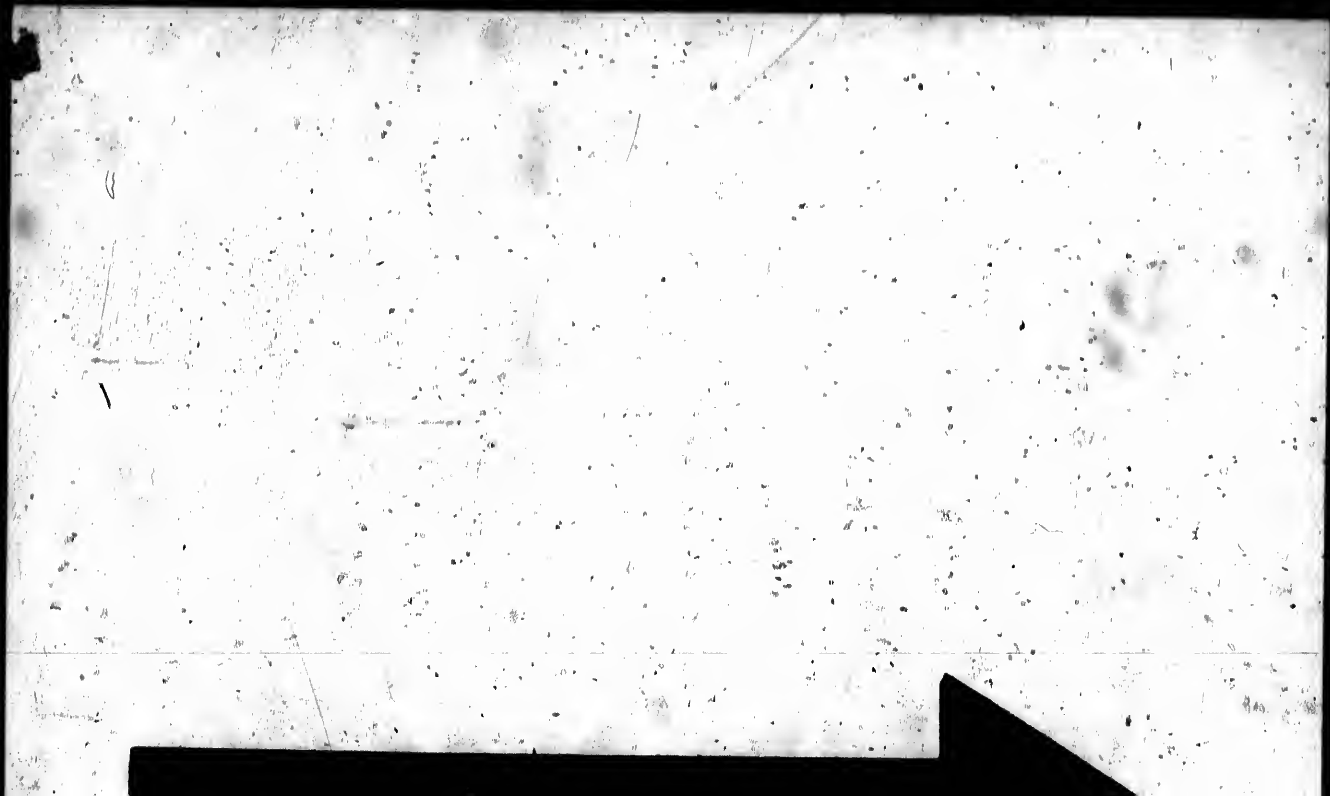
3rd. That under the circumstances of the present case, £100 damages were as much as the respondent could reasonably claim.

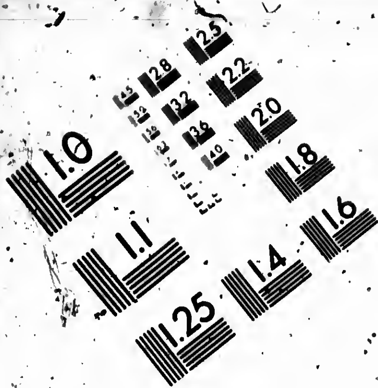
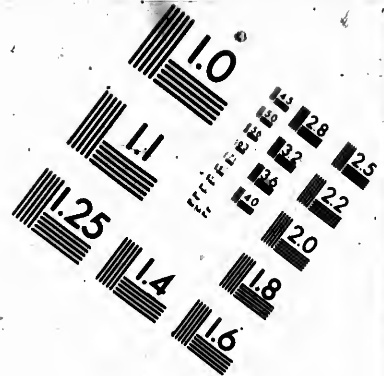
4th. That interest will not be allowed when the declaration in the case fails to demand it.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, (SMITH, J., presiding), on the 30th November, 1863, in an action *en déclaration de paternité.*

The following was the judgment of the Court:—

"La Cour, * * * considérant que la dite Demanderesse a établi par une preuve bien forte et suffisante tous les allégués de sa déclaration, et que le dit Défendeur a entièrement failli à prouver les faits allégués dans ses défense à cette action contre le caractère de la dite demanderesse, et qu'au contraire la preuve établit le bon caractère et conduite de la dite Demanderesse, et que si elle a failli dans cette occasion, ça été par les artifices et fausses promesses du dit Défendeur, la Cour déclarant le Défendeur père du dit enfant, duquel la dite Demanderese est accouchée le 16 avril 1861, en la paroisse St. Philippe, lequel enfant fut baptisé, au dit lieu de St. Philippe, sous le nom de Moïse, condamne le dit Défendeur à payer à la dite Demanderesse, pour la nourriture, entretien et éducation du dit enfant, une somme de £15 par année jusqu'à ce que le dit enfant ait atteint l'âge de sept ans, et ensuite à payer la somme de £30 par année, jusquà ce que le dit enfant ait atteint l'âge de quatorze ans, ces sommes à être payées par versements trimestriels et d'avance de $15 et $30, suivant l'âge de l'enfant, à commencer les dits paiements du 16 avril 1861, jour de la naissance du dit enfant; la Cour, en conséquence, condamne le dit Défendeur à payer à la dite Demanderesse la somme de £41 5 0, étant pour deux ans et neuf mois, depuis la date de la naissance du dit enfant, à venir jusqu'au 16 janvier 1864 de la pension accordée par le présent Jugement à la dite Demanderesse, pour la nourriture et entretien du dit enfant, et ensuite, c'est-à-dire, du dit 26 janvier 1863 les dits paiements trimestriels seront continués chaque trois mois, comme susdit, d'avance, jusqu'à ce que le dit enfant ait atteint l'âge de quatorze ans. Et la Cour condamne de plus le dit Défendeur à payer à la dite Demanderesse la somme de £500, pour dommages à elle causés par le dit Défendeur résultant des faits énoncés dans la déclaration en cette cause, avec intérêt sur la dite somme de £500



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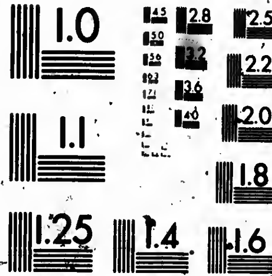
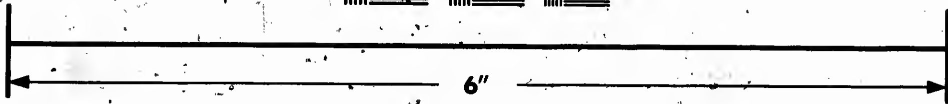

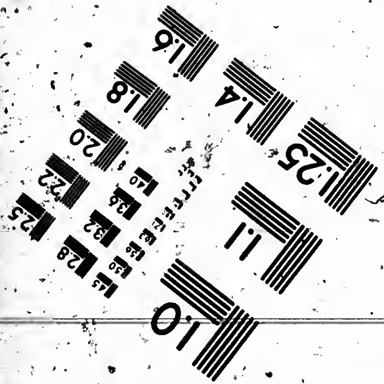
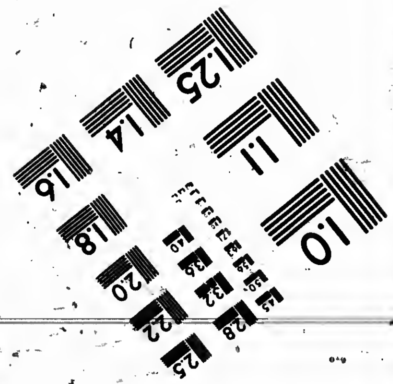

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Moïse Coupal and Suzanne Bondeau.

et sur la dite somme de £41 5 0, à compter du 10 avril 1862, jour de l'assignation en cette cause, et sur les divers paiements trimestriels à compter de leur échéance respective, jusqu'à l'actuel paiement et aux dépens distraits en faveur de M. Lanctot, Ecuier, avocat de la dite Demanderesse. La Cour réservant à la dite Demanderesse tous recours qu'elle peut avoir ou exercer contre le dit Défendeur pour la nourriture, entretien et éducation du dit enfant après qu'il aura atteint l'âge de quatorze ans."

The appellant claimed, amongst other things, that the condemnation of £500 was excessive, the appellant being a young man without any apparent property, and no specially aggravating circumstances being proved against him; also, that the condemnation for *frais d'entretien*, counting from the date of the child's birth, was illegal, and was not, moreover, demanded by the respondent's declaration, and that the condemnation of interest was wholly illegal, no demand whatever for interest having been made by the respondent's declaration.

The following was the judgment of the Court of Appeal:—

" La Cour * * * * considérant que bien qu'il soit prouvé que l'appelant est le père de l'enfant dont il est question, les faits divulgués dans la cause ne sont pas de nature à justifier une condamnation sévère ;

Considérant qu'en vue des circonstances de la séduction alléguées et des moyens pécuniaires de l'Appelant, les dommages accordés à l'Intimée par le jugement de la Cour de première instance sont exorbitants ;

Considérant que l'appelant a été condamné par le dit Jugement à payer à l Intimée en forme de pension pour la nourriture, l'entretien et éducation du dit enfant, depuis le jour de la naissance du dit enfant, savoir ; depuis le seize avril mil huit cent soixante-un quoique l'intimée n'ait conclu au paiement de la dite pension que de la date de son action qui fut signifiée le dix avril mil huit cent soixante deux et a été de plus condamné à payer intérêt sur les condamnations quoique non demandé par l'intimée.

Considérant enfin que dans le jugement rendu par la cour de première instance dans cette cause le trente Novembre mil huit cent soixante trois, il y a erreur, cette cour l'infirme, casse et annulle ;

Et procédant à prononcer le jugenent que la dite cour de première instance eût dû rendre (sauf les modifications requises par la mort de l'enfant, arrivée depuis la date du dit jugement) la cour condamne l'appelant à payer à l'intimée cent livres courant de dommages-intérêts et le condamne de plus à payer à l'intimée la somme de trente louis douze chelins et six deniers même cours (£30.12 6) pour la pension du dit enfant depuis le dit jour dix avril mil huit cent soixante deux, jour de l'assignation jusqu'au vingt-cinq avril mil huit cent soixante quatre date du décès du dit enfant, sur le pied de une livre cinq chelins dit cours, par mois, et cinq livres courant pour frais de gésine, avec dépens contre l'intimée dans cette cour et contre l'appelant dans la Cour de première instance."

Judgment of the Court below reversed.

Doutre & Doutre, for appellant.
Strachan Bethune, Q. C., counsel.
Magloire Lanctot, for respondent.
(S. B.)

MONTREAL, 6TH JUNE, 1865.

Coram DUVAL, C. J., AYLWIN J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

No. 66.

LOUIS HUET MASSUE,

(Defendant in the Court below,)

APPELLANT;

AND

JOSEPH DANSEREAU, FILS, *et al.*,

(Plaintiffs in Court below,)

RESPONDENTS.

HELD :—That money voluntarily paid in excess of six per cent interest during the time that the Statute 16 Vict., ch. 80, was in force, cannot be recovered back in an action *condictio indebiti*.

This was an appeal from the judgment of the Superior Court, at Montreal, in an action *condictio indebiti*, to recover back a sum of $540, alleged by respondent to have been paid to the appellant, in excess of lawful interest, and therefore without legal consideration and under false pretences.

The debt, in respect of which the amount claimed was paid, was composed of two amounts of £400 currency, for which notarial obligations were executed, one on the 30th day of May, 1853, and the other on the 18th of July of the same year, which were made payable in one year from their respective dates, with interest at the rate of six per cent. per annum.

The declaration alleged, that the amount in question had been paid, after the obligation had become due, and as additional or excessive interest beyond that stipulated, and had been exacted from the respondents in consequence of their inability to pay the debt then overdue.

The plea was, in effect, the general issue.

The appellant admitted, when examined as a witness, that he had received from the respondents various sums, in addition to the stipulated interest, amounting in the aggregate to £96 cy., but he contended that they were not paid as additional or excessive interest, but as a commission or reward for services rendered.

In all the transactions in question, the appellant was the agent of Aimé Massue, in whose favour the obligations were executed.

The judgment of the Court below was rendered on the 31st March, 1863, by the Honourable Mr. JUSTICE SMITH, in favour of the respondents, for the said amount of £96 currency, as follows:—

"The Court, * * * considering that the said plaintiffs have proved and established that the said defendant did exact and receive from the said plaintiffs, while acting for and on behalf of the said Aimé Massue, the father of the said defendant, in transacting the business of his said father in relation to the obligations referred to in the declaration, the sum of £96 over and above legal interest then due and exigible on the amount referred to in the said declaration, and for which the said plaintiffs received no value whatever or any consideration given.

Louis Huet Massue, and Jos. Dansereau, Fils, et al.

"And considering that the said defendant applied the said sum of £96 to his own use and behoof, and which is admitted by the said defendant in his deposition as witness in this cause, the Court doth condemn the said defendant to pay to the said plaintiffs the said sum of £96 current money of the Province of Canada, with interest thereon from the twelfth day of August, one thousand eight hundred and sixty-two, date of service of process in this cause, until actual payment, and costs of suit *distraits* to Mr. C. Archambault, the attorney for the plaintiffs."

DRUMMOND, J. (*dissentiens*):—La déclaration des intimés (demandeurs en Cour Inférieure) contient des allégués suffisants pour former la bâse d'une action *condictio indebiti*, savoir ; une action pour le recouvrement de deniers payés sans con sidération, et pour justifier les conclusions qui y sont prises.

La défense à cette action consiste simplement en une défense au fonds en fait et d'une exception péremptoire qui, réduite à sa plus simple expression, n'est autre chose qu'une répétition de la défense générale.

Par la bouche même de l'appelant, les intimés ont prouvé qu'à diverses époques, lorsqu'il se présentait pour retirer d'eux l'intérêt à six par cent, dû sur deux obligations consenties par les intimés, en faveur d'Aimé Massue, Ecuier, son père, il s'était fait payer par eux plusieurs sommes d'argent en sus de cet intérêt, les quelles sommes, qu'il s'était appropriées, se montaient à celle pour laquelle le Jugement dont est appel fut prononcé contre lui. c'est-à-dire à £96.

Il est vrai que l'appelant ajoute que ces diverses sommes lui furent payées à la suite de conventions formelles entre les intimés et lui, pour l'indemniser personnellement du trouble et des dépenses que pouvaient lui occasionner les délais qu'il leur ferait obtenir. Cette affirmation n'est d'aucune valeur dans sa bouche en autant qu'il n'a pas plaidé ces conventions qu'il invoque trop tard pour justifier sa détention injuste des deniers des intimés. Je n'hésiterai donc pas à dire qu'à mon avis le Jugement dont est appel doit être maintenu avec dépens contre l'appelant.

MEREDITH, J.—The acts complained of in this cause, as usurious, took place whilst the 16th Vic., c. 80, was our law on the subject. By the preamble of that statute it was declared, that "it is expedient to abolish all prohibitions and penal-"ties on the lending of money at *any rate of interest whatsoever*, and to enforce "to a certain extent and no further all contracts to pay interest on money lent "and to amend and simplify the laws relating to the loans of money at interest."

With this object in view, the Legislature repealed the 5th section of the 17th George III, which subjected persons taking excessive interest to very severe penalties, and by the 2nd and 3rd sections of the statute, enacted as follows:

"II. That *no contract* to be hereafter made in any part of this province for "the loan or forbearance of money or money's worth at any *rate of interest* what-"soever, and *no payment in pursuance* of such contract, shall make any party to "such contract or payment liable to any loss, forfeiture, penalty or proceeding, "civil or criminal, for usury; any law or statute to the contrary notwithstanding."

"III. Provided always, nevertheless, and be it enacted that every such con-"tract and every security for the same shall be void so far, and so far only, as "relates to any excess of interest thereby made payable above the rate of six

"pounds for the forbearance of one hundred pounds for a year, and the said rate "of six per cent. interest or such lower rate of interest as may have been agreed "upon shall be allowed and recovered in all cases where it is the agreement of "the parties that interest shall be paid."

The preamble of the statute in this case affords us a good clue to the meaning of the enacting clauses.

It tells us succinctly that "it is expedient to abolish all prohibitions and penalties on the *loan* of money *at any rate of* interest whatsoever," and that it is also expedient "to inforce, to a certain extent, and no further, all contracts to pay interest on money lent." It then repeals all the prohibitions and penalties established by the old law, and by the third section makes void contracts in so far as relates to any interest stipulated above six per cent.; but, by the second section it is declared, in effect, that no contract for the loan of money, *at any rate of interest whatsoever* and *no payment in pursuance of such contract*, shall make any party to such contract or payment liable to *any proceeding, civil or criminal*, for stipulating or receiving excessive interest. Now, the present action is a *civil* proceeding tending to make the defendant liable for excessive interest alleged to have been received by him; and therefore, I think, contrary to the statute.

There is also another view which may be taken of this case.

The law has declared it is expedient to abolish all prohibitions against the lending of, money at all rate of interest whatsoever, and has done so with respect to individuals.

The stipulation of interest, therefore, as proved at 9 and 12 per cent. was not a *malum prohibitum*, for the statutory prohibition had been done away with before the acts complained of, and there is nothing necessarily wrong in a moral point of view in the stipulation of interest at those rates; nine per centum, or even twelve per centum, may, under certain circumstances, be a more reasonable charge for the loan of money than six per centum under other circumstances.

There is no proof in this case that the rate of interest charged, however high it may appear, was unfair or unreasonable, and in the absence of proof it cannot be held that it was so. Under these circumstances, the promise made by the borrower subsequent to the abolition of the usury law, subjected him to a moral obligation in favour of the lender, and the existence of such moral obligation suffices to prevent the borrower from recovering the money so paid by him Toullier says: "C'est le cas de toutes les obligations naturelles, dont l'un des effets suivant les droits romains est d'empêcher la répétition de la chose payée, parceque dans ce cas on ne peut pas dire que le paiement soit sans cause."*

The code civil has adopted the same doctrine. The Art. 1965 declares "La "loi n'accorde aucune action pour une dette de jeu ou pour le paiement d'un "pari," and the article 1865 provides: "Dans aucun cas, le perdant ne peut, "répéter ce qu'il a volontairement payé à moins qu'il n'y ait eu de la part du "gagnant, dol, supercherie ou escroquerie" car a lors, says Toullier, "il n'y a pas

* Toullier II, vol. No. 87, page 106.

Louis Huet Massue, and Jos. Dansereau, Fils, et al.

d'obligation naturelle.*" It is true that the third section of our statutes makes void all contracts in so far as they relate to any excess of interest thereby made payable; but this provision, taken in connection with the clause abolishing all prohibitions and penalties on the loan of money, *at any rate of interest*, and also with the other provisions of the statute, must, I think, be understood as meaning that the law will not enforce any contract in so far as relates to any excessive interest thereby stipulated; thus leaving unimpaired the moral obligation resulting from the agreement.

In coming to this conclusion, I do not think we impugn the doctrine laid down by a majority of the judges of this Court in Nye and Malo. †

In that case, the Court held that a creditor who had received a certain sum, as excessive interest under an obligation, could not recover more than with the sum already paid would give him his principal and lawful interest.

We do not now say *we would*, under the statute in question, *enforce a contract* so as to give a creditor, either directly or indirectly, more than lawful interest. What we do say is, that, as by the statute under consideration, the prohibitions against taking interest beyond a fixed rate were repealed, a party who, in pursuance of his agreement, voluntarily pays more interest than the statute would have enabled the creditor to sue for, cannot recover the excessive interest without, at any rate, proving that his promise to pay such interest was made under circumstances of a nature to prevent him from being subject to the moral obligation to fulfil it.

I have felt constrained to direct my attention to the legal question to which I have just adverted, because I am not prepared to say that the judgment is wrong as to the facts.

It is true that the greater number of the allegations in the declaration are proved to be untrue, for instance:

The plaintiffs expressly allege that the sums of money which they seek to recover were received by the defendant for *his father*; that the plaintiffs were induced to pay those sums *by fraud* under *false pretext*, and without any consideration "par dol et fraude et sous de faux prétextes et sans considération "aucune," and that the defendant, now the appellant, appropriated the same to himself without any right or title so to do, "lesquelles dites sommes de deniers "le dit défendeur se serait au contraire appropriées sans considération aucune."

Each of these allegations is proved to be wholly untrue, by the evidence of the defendant, examined on behalf of the plaintiffs; but we have still in substance the following allegations:

That the plaintiff, upon a loan of money, and in pursuance of an agreement to that effect, paid to the defendant excessive interest over and above the rate recoverable by law to the extent of £96; that the defendant has that money in his possession, and refused to return it to the plaintiffs.

These allegations, which are proved, would, it seems to me, entitle the plaintiff

* See also Pothier, condictio indebiti, No. 156, vol. 2, page 780.

† 7 L. C. R., page 403, Nye and Malo.

to a judgment in his favour, were it not for the clauses of the statute already referred to, and for the reason that the money was paid in fulfilment of a moral obligation, and therefore cannot be recovered.

The following is the judgment of the Court:—

"The Court, * * * * seeing that the acts complained of as usurious "by the respondents are alleged by them to have taken place after the passing "of the statute sixteenth Victoria, chapter eighth, intituled 'An Act to modify "'the Usury Laws,' and whilst that statute was in force, and seeing that "by the preamble of that statute it was, among other things, declared that it "was 'expedient to abolish all prohibitions and penalties on the lending of "'money at any rate of interest whatsoever,' and that, by the second section "of that statute, it was enacted, 'that no contract to be hereafter made in any "'part of this Province, for the loan or forbearance of money or money's worth "'at any rate of interest whatsoever, and no payment in pursuance of such "'contract shall make any party to such contract or payment liable to any loss, "'forfeiture, penalty, or proceeding, civil or criminal, for usury; any law or "'statute to the contrary notwithstanding.' And considering that the present "action is a civil proceeding, tending to make the appellant liable for the exces- "sive interest alleged to have been received by him, and that the judgment "of the Superior Court, maintaining the said action, is contrary to the said "provisions of said statute, doth, in consequence, reverse the said judgment, to "wit, the judgment rendered by the Superior Court in this cause, on the thirty- "first day of March, one thousand eight hundred and sixty-three; and proceed- "ing to render the judgment which the Court below ought to have rendered in "the premises, doth dismiss the action and demand of the said respondents, "and doth condemn the respondents to pay to the appellant his costs, as well in "this Court as in the Court below."

(The Honourable Justices Aylwin and Drummond *dissentientibus.*)

Judgment of the Court below reversed.

Dorion & Dorion, for appellant.

C. Archambeault, for respondents.

(S. B.)

MONTREAL, 8TH MARCH, 1864.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., AND MONDELET, A. J.

No. 2.

W. F. GRANT,

(*Plaintiff in the Court below,*)

AND APPELLANT;

DAVID LOCKHEAD,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—That a writ of *Certiorari*, issued out of the Court of Queen's Bench, civil side, and addressed to the Prothonotary of the Court below, for the return of papers, and not to the Judges of that Court, will be quashed.

A writ of *Certiorari* having been sued out of the Court of Queen's Bench, sitting in Appeal, on the 1st December, 1865, and having been addressed to the

W. F. Grant, and David Lockhead.

Prothonotary of the Superior Court, for Lower Canada, district of Montreal, was, on the 9th December, 1865, returned by the Prothonotary, with certain papers annexed.

On the 8th March, 1866, the Court, having heard the parties, made the following order:

The Court, having heard the parties by their counsel respectively, on the appellant's motion, filed on the 1st day of March instant, and maturely deliberated thereon: it is ordered, inasmuch as the motion of the appellant for a writ of *Certiorari*, was submitted to this Court without any explanation of the object sought to be obtained by the said writ of *Certiorari*, and without any verbal intimation of the intention of the appellant to cause the said writ to be addressed to the Prothonotary of the Superior Court, and also without any objection having been made by the respondent, by means whereof this Court was led to regard the said motion as a motion of course, and in consequence, without the case having been taken *en délibéré*, ordered a writ of *Certiorari* to issue as prayed; and whereas the said order, which was obtained, is irregular and contrary to the course and practice of the Court, inasmuch as it directs the said writ of *Certiorari* to the Prothonotary of the Superior Court, instead of being addressed, as it ought to be, to the Chief Justice and Justices of the said Superior Court, doth in consequence reverse and set aside the said order, and doth quash and annul the writ of *Certiorari* issued in this cause under the said order; and doth further order that the return made by the Prothonotary to the said writ of *Certiorari* be taken off of the files of this Court.

Kerr, attorney for appellant. *Certiorari* quashed.

Mackay & Austin, attorneys for respondent.

(P. R. L.)

QUEBEC, JUNE, 1866.

(*In Appeal from the Superior Court, District of Quebec.*)

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., AND MONDELET, J.

JOSEPH F. BETTERSWORTH,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

CHARLES HOUGH,

(*Defendant in the Court below,*)

RESPONDENTS.

HELD:—That where a defendant, acting as a constable, received a notice of action for a malicious arrest and false imprisonment, under the Prov. Stat. 14 & 15 Vic. cap. 54, S. 2, (C. S. L. C. cap. 101,) in which the *place* where the party was arrested and imprisoned was not stated, this notice was insufficient and the plaintiff subjected to a non-suit.

If the day specified in the notice as the time when the arrest and false imprisonment took place be proved to be the day on which the defendent acted as a constable, the plaintiff, to avoid the necessity of a notice, will not be allowed to prove an arrest and false imprisonment made on the day previous, when the defendant was not a constable.

This was an appeal from a judgment of the Superior Court, rendered by STUART, J., on the third day of July, 1865, ordering a non-suit upon a motion made therefor, by the defendant's counsel, upon a point reserved at the trial.

Joseph F. Betttersworth, and Charles Hough.

The origin and facts of the case are as follows:

In the month of October, 1864, a raid was made upon the town of St. Albans, in the State of Vermont, by persons pretending to act under the Confederate States of America. Some of these persons were afterwards arrested in Canada, upon a warrant issued under the Extradition treaty with the United States, and were brought before Judge Coursol, who ordered their release. Thereupon Judge Smith issued his warrant for a second arrest of the parties, under the provisions of the same Treaty with the United States. This was on the 15th day of December, 1864. On the nineteenth of the same month Her Majesty issued a proclamation, offering a reward for the discovery and apprehension of the raiders mentioned in the warrant. The same day Mr. Hough, the defendant, arrested Joseph F. Bettersworth, the plaintiff, at the town of Levis, supposing him to be one of the persons mentioned in the warrant, and immediately brought him before Judge Maguire, who placed him in charge of Mr. Hough and constable Foy to be taken to Montreal, for further identification. *In the afternoon of the same day, the 19th December, Mr. Hough was sworn in as constable*, but at the time of the arrest he was not.

When brought to Montreal, it turned out that Bettersworth was not the person he had been taken for, and he was accordingly released.

On the 21st of the following month of January (1865) Bettersworth gave notice of action to Hough as follows:—

"To Charles Hough of the City of Quebec, Livery Stable Keeper, *acting as* "and pretending to be *a constable or Peace Officer* within the district of Quebec.

"We do hereby, as the Attorneys of Joseph F. Bettersworth, late of Bowling "Green, in the State of Kentucky, and now residing in the City of Montreal, "in the Province of Canada, *a soldier in the army of a certain belligerent* "*power*, calling and describing themselves as the Confederate States of America "according to the form of the statute in such case made and provided, give you "notice that the said Joseph F. Bettersworth will, at the expiration of one "calendar month from the time of your being served with this notice, cause a "writ of summons to be served out of Her Majesty's Superior Court for Lower "Canada, sitting at Quebec, against you, at the suit of the said Joseph F. Bet-"tersworth, for that you *on the twentieth day of December*, one thousand eight "hundred and sixty-four, unlawfully did apprehend and seize the said Joseph "F. Bettersworth, and unlawfully did detain and keep him a prisoner for a long "space of time, to wit, *for the space of four days*, and other wrongs to the said "Joseph F. Bettersworth then did, against the peace of our Lady the Queen, "and to the damage of the said Joseph F. Bettersworth of Ten Thousand "Dollars.

"Dated this twenty-first day of January in the year of our Lord one thousand "eight hundred and sixty-five.

"Holt & Irvine,
"Attorneys for the said Joseph Bettersworth."

The endorsement on this notice was as follows:

"The names of the attorneys who issue the within mentioned writ are Charles

Joseph F. Betterworth, and Charles Hough.

"Gates Holt and George Irvine, holding their office in St. Peter Street, in the "Lower Town of the City of Quebec.

HOLT & IRVINE."

On the 22nd February, 1865, a writ of summons issued, returnable on the 6th day of March following.

In the plaintiff's declaration it was alleged that, on the *twentieth day of December*, the said plaintiff was, at the town of Levis, arrested by the defendant, was brought by him to Quebec, and there kept a prisoner in his (Hough's) house for two days, and that, in so arresting him, the defendant acted *maliciously, wickedly, vindictively, and without any reasonable or probable cause.*

The pleas to this action were:—1st. *Not guilty*; and 2nd. That, under the circumstances, the defendant had every reasonable and probable cause for arresting the plaintiff, although a mistake had been committed as to the plaintiff being named in the warrant.

On this issue the following questions were settled for a jury by the honourable Judge who tried the cause:—

1. Did the said defendant arrest and imprison the said plaintiff in the month of December last, and where?

2. Had the Honourable James Smith, one of the Judges of the Superior Court, for Lower Canada, residing at Montreal, at that time, issued his warrant for the arrest of certain persons, and if so, whom, upon a charge of murder and robbery, committed at the town of St. Albans, in the State of Vermont, one of the United States of America; and was a proclamation duly issued offering a reward for the apprehension of the persons mentioned in the warrant of the said James Smith?

3. Was the said warrant put into the hands of the defendant as a constable, or peace-officer, to be executed?

4. Did the said defendant so arrest the plaintiff and detain him with or without warrant, and with or without reasonable or probable cause?

5. Did the plaintiff suffer any and what damage from his arrest and detention by the defendant?

At the trial the service of the above notice was duly proved, and the following motion was then made on behalf of the defendant:—

"That inasmuch as the notice of action now produced fyled in this cause "by the plaintiff does not state the cause of action *with reasonable clearness*, by "shewing *where* the acts complained of were performed, nor at what time, "nor that they were performed *maliciously* and *without reasonable or probable* "*cause*; and inasmuch as by the statute in such case made and provided the "plaintiff is bound and is not allowed thereby to give evidence *of any other* "*cause of action than* that stated in the said notice, and inasmuch as no legal "cause of action whatever is stated in the notice, the plaintiff be precluded from "the adduction of evidence in the cause upon the ground that the said notice is "no notice of action in conformity with the said statute and that a non-suit be "entered."

G. O. STUART, Q.C., in support of this motion, argued that the requirements of the statute (C. S. L. C., p. 901) had not been complied with, because the cause of action had not been specified with reasonable clearness *in the notice*,

and referred to the English statute (24 Geo. II., c. 44), substantially the same requiring notice to be given to justices and others, in which the words corresponding to the Provincial statute are that in the notice the cause of action must be *clearly and explicitly explained.*

The cases he cited were: *Lovelace vs. Curry*, 7 Term R. 631; *Strickland vs. Ward*, in note to last; *Martins vs. Upcher*, Adolphus & Ellis Q. B. R., *vol.* 3. *p.* 662, in which the same point arose as to whether it was necessary to state the place in the notice of action, it being decided in the affirmative, and that it was not enough to name the day; the next case cited was that of *Breeze vs. Jerdein*, 45 vol. English Com. Law R., p. 583, in which it was also held that *time and place* were *both essential.*

IRVINE, *contra*, having been heard upon this motion, a right was reserved to the defendant to move for a non-suit.

The appellant then continued to proceed with his evidence, and upon his attempting to prove an arrest and imprisonment anterior to the twentieth of December and the four following days, as stated *in the notice of action*, the respondent objected, and the objection was recorded and reserved.

The appellant proved that he was in custody on the twentieth, that the respondent had been then sworn in as a constable, and the other facts connected with the arrest, and then the following motion was made on behalf of the respondent, without prejudice to the motion already made, to wit:—

"That inasmuch as the defendant acted as a constable on the twentieth day "of December last, inasmuch also as the acts complained of in and by the "plaintiff's declaration are alleged to have taken place on the same day, inas- "much also as it is proved that the acts complained of were performed on the "same day, inasmuch as no malice on the part of the defendant is proved, inas- "much also as it has been proved that he acted with reasonable and probable "cause, and that the question of malice and reasonable and probable cause *is* "*a question of law* for this Court to determine, it be declared that no cause of "action against the defendant exists and that he be subject to a non-suit."

It had been proved that a warrant was issued for the arrest of the persons mentioned in the respondent's plea, who were charged with robbery and murder, that *on the twentieth of December and four following* [illegible] the period expressly stated in the *notice* of action and in the *declarati*[illegible] the respondent was a constable charged with a warrant against the St. Alban's raiders, sworn in as such on the 19th of December, and that he acted as such under the express orders of the Judge of Sessions at Quebec.

After the argument upon the last mentioned motion, the Court reserved to the respondent upon it also the right of moving for a non-suit on the ground therein stated.

The following motion was then made by the plaintiff:—

"Motion on the part of the plaintiff for *acte* of his declaration, that he restricts "and limits his demand in the present action to damages for the wrongful arrest "of the plaintiff, and his detention, up to the time of the alleged swearing in of "the defendant as a constable before Judge Maguire, in December last."

The plaintiff was allowed to fyle this declaration, and no judgment was pronounced upon it.

Joseph F. Hetterworth, and Charles Hough.

The case then went to the jury, when the following answers were given in by them:—

"TO THE 1ST QUESTION.—The defendant did arrest and imprison the plaintiff at the town of Levis in the month of December last.—TO THE 2ND "QUESTION. The Honourable James Smith had, at the time, issued his warrant "for the arrest of certain persons, to wit, Samuel Eugene Lackey, Squire Turner "Teavis, Alexander Pope Bruce, Charles Moore Swager, George Scott, Bennett H. "Young, Caleb McDowall Wallace, James Alexander Doty, Joseph McGrorty, "Samuel Simpson Gregg, Dudley Moore, Thomas Bronsdon Collins, Marcus Spurr "and William H. Hutchinson, and *a proclamation had been duly issued offering "a reward for the apprehension of the persons mentioned in the warrant of the "said James Smith.*—TO THE 3RD QUESTION. The said warrant was not put "into the hands of the said defendant as a constable or peace officer to be "executed.—TO THE 4TH QUESTION. The defendant did arrest and detain the "plaintiff without a warrant, and without a reasonable and probable cause.—TO "THE 5TH QUESTION. The plaintiff did suffer damage from his arrest and "detention by the defendant and to the extent of five hundred dollars."

In the Term after the trial a motion on behalf of the defendant was made for a non-suit; and a motion also was made by the plaintiff for judgment according to verdict.

The motion of the defendant was made on several grounds, and among others on the following:

That the notice of action was insufficient both as to time and place, and contained no ground of action whatever; that the plaintiff had endeavoured to change his cause of action by limiting his demand for damages to the arrest and detention before Hough was sworn in as a constable, namely to the morning of the 19th December, whereas this demand was not referred to in the notice or made by the declaration; which does not claim damages for any arrest or detention prior to the twentieth December, on which day it was proved at the trial Hough had already been sworn in as a constable.

On the third of July, 1865, STUART, J. gave judgment as follows on the defendant's motion:

The notice of action required by the Provincial statute is substantially the same as that required by a statute in England. It is not sufficient that the day alone, when the arrest and imprisonment took place, be stated in the notice, but the place where, which has been omitted. It is more necessary here than it is in England, where the cause of action attaches to the person of the defendant who can be sued anywhere. In this country the jurisdiction of the Court does not extend beyond the district in which the injury sustained was committed. In this case an arrest and imprisonment appear to have been made on the 19th December and the following days, partly in the district of Quebec and partly in the district of Montreal. Our statute enacts that the action must be in the place where the injury complained of was committed. Although in ordinary cases the date is not material, it is so in this, because on the 19th the defendant was not a constable at the time of the first arrest. The notice of action is for the 20th, when he had been sworn in as a constable, and in the declaration he is

charged with having acted as a constable on the 20th. But the counsel for the defendant ingeniously say that they will drop the 20th and go upon the 19th, as the arrest extended from that to the following days. But this cannot be; they say that the arrest was as a constable on the 20th, and they have given their notice for that and the following days. The place therefore should have been stated, and it was so held in the case of Martin *vs.* Upcher, Ad. & El. reports Q.B.R., p. 262, viz: That the notice must specify the place at which the act complained of occurred, and in rendering his judgment on the point, Lord Denman said, "The language of the Act requires that the causes of action shall "be clearly and explicitly contained in the notice, and unless *time* and *place* be "stated the cause is not clearly and explicitly stated. Lord Abinger, C.B., in "Bennett *vs.* Broughton, appears to have thought both necessary."

I am therefore compelled to grant the defendant's motion for a non-suit.

The following is the formal judgment from which this appeal was instituted:

"The court having seen and examined the proceedings of record and heard "the parties by their counsel, respectively, as well upon the rule of the second day "of May last, obtained by the defendant upon his motion for a non-suit and in "arrest of judgment, as upon the plaintiff's motion for judgment pursuant to the "verdict in this cause given.

"CONSIDERING that the declaration in this cause, which contains but one count, "after setting forth in the usual terms, an arrest and imprisonment of the plaintiff "by the defendant, at the town of Levis in the district of Quebec, on the twentieth "day of December last, proceeds with the allegation that the defendant, in arresting "and imprisoning the plaintiff, acted maliciously, wickedly, vindictively and with-"out any reasonable and probable cause, and without any lawful warrant what-"ever, and then and there falsely and wrongfully pretended that he was a constable "or peace officer, and that he had a lawful warrant for the arrest of the plaintiff, "whereas, in truth, he, the said defendant, was not a constable or peace officer, "and had no warrant for the arrest of the said plaintiff, and he, the plaintiff, had "not committed any crime whatever whereof he could be lawfully subjected to "arrest or imprisonment in this Province, and that the plaintiff had given to "the defendant notice of the institution of the present action for more than one "calendar month previous to the institution of the same, and that the plaintiff, "moreover, established in evidence that on the twenty-first of January last a "notice of action, addressed to the defendant by the name and addition of "Charles Hough, of the city of Quebec, Livery Stable Keeper, acting as and "pretending to be a constable or peace officer within the district of Quebec, was "by the plaintiff served upon the defendant; thus proving, as well by the de-"claration as by the notice of action, that the plaintiff's action is directed "against the defendant for alleged grievances committed by him when acting "as a constable or peace officer.

"AND CONSIDERING that it is established in evidence that on the said twentieth "day of December last, the said defendant was in truth a constable or peace "officer for this district, and was fulfilling the duty of such, and that, by law, no "writ could be sued out against him, nor can any judgment be rendered against "him in the present cause, unless notice in writing of the present action speci-

rai du créancier.

Le demandeur prouva de plus qu'il s'était désisté de l'écrit ci-dessus, en le remettant au défendeur personnellement le jour même qu'il lui avait été donné et avant son accomplissement.

Quant au compte offert en compensation, le demandeur prétendit qu'il avait été payé longtemps avant l'institution de action, par des loyers dûs antérieurement par les défendeurs. *M. Garault*, pour les défendeurs, soutint que l'écrit passé entre les parties, et la livraison du gage, faisait perdre au demandeur son privilége sur les autres meubles des défendeurs et annulait la saisie des meubles de ces derniers. Que le demandeur n'avait pas le droit d'instituer une action contre le défendeur, après l'engagement qu'il prétendit avoir été contracté entre les parties, et de plus, il nia le paiement du compte des défendeurs. Le tribunal, après l'audition des parties, déclara que le gage donné par les défendeurs au demandeur, ne privait pas celui-ci du privilège qui lui est accordé par la Loi, de saisir-gager les meubles des défendeurs.

Jugement pour le demandeur.

Laframboise & Joseph, avocats du demandeur.

M. Garault, avocat du défendeur.

(J. O. J.)

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warrant for the arrest of any one, he was not a constable, and he was discharg-
" ing no public duty, he was simply going on his own responsibility to arrest
" certain accused persons for the sake of obtaining a reward. It cannot be pre-
" tended that he was one of the persons intended to be protected by the Statute,
" that law was intended to apply to persons holding offices which compel them to
" discharge certain duties, and who commit errors in the *bonâ fide* discharge
" of duties which their office makes obligatory on them. The Counsel for the
" respondent in the Court below argued that because a proclamation had been
" issued offering a reward for the apprehension of the persons against whom
" Judge Smith's warrant had issued, it became the public duty of all her Ma-
" jesty's subjects to endeavour to arrest the accused, but such a proposition is
" too unreasonable to require an answer, and moreover the proclamation only
" calls upon the public to give information which will lead to the arrest of the
" raiders, and does not require private citizens to leave their own business to go
" in pursuit of them. The responsibility which the respondent incurred is well
" explained in the authorities: " If a private person apprehended another on

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... Walker, the other respondent, was also brought into the suit as defendant, in his quality of assignee to the insolvent estate of John Henry Clint, of Quebec, merchant, he being a claimant of the same property.

The Halls appeared to the action in the Court below, but were subsequently foreclosed, and the proceedings were conducted *ex parte* as regards them. In fact, the position which they assumed in the case was that of perfect indifference between the parties claiming the property; they did not desire, nor intend to raise, any contestation; they admitted having possession of the property, holding it *quasi* as stakeholders, and were perfectly willing to deliver it to Broster, the appellant, or Walker, the respondent, as the Court might determine. Under these circumstances, the whole contest lay between the two last-named parties.

The pleadings in the Court below, on which the issue was raised, were the declaration, a peremptory exception, a special answer and general issues.

The declaration alleged a contract, dated 1st July, 1864, by which the appellant sold to Clint all the lumber of a certain description to be manufactured out of the pine logs belonging to the appellant, and then at Montmorency mills, (which are owned and worked by the Halls); that Broster had given to Clint an order upon Hall for the delivery of the lumber sold; that Clint had subsequently become insolvent, and had never paid for the lumber; and that, notwithstanding the order, it had not been completely delivered to Clint, and that, in consequence of Hall having refused to deliver the lumber so remaining in his possession to Broster, the present action was brought, and the lumber seized.

... sued for damages occasioned by an omis-"sion in the performance of a public duty.

"3rd.—The last objection raised by the respondent and adopted by the Court "below was founded in an error as to the date of the arrest complained of; the "declaration alleges that the respondent arrested the appellant at Levis on the "20th December, whilst the evidence shews the arrest to have been on the 19th "of that month. In cases of this kind an error as to date has never been con-"sidered material; for English authorities on the subject the Court is referred "particularly to Addison on Wrongs, p. 425; Chesley *vs.* Barnes, 10 East, p. "80. The pleadings shew that the respondent was not led astray by this "error, for he alleges in his plea that the arrest took place on the 19th and that "the arrest on that day is the same as that complained of in the declaration. "This allegation would cover the error if it were material. But the respondent "argues: it is true that you intended to complain of and have proved an arrest "on the 19th December, and that is the arrest which I have justified in my plea, "but you have charged me with acts done on the 20th December, and on that "day I was a duly appointed constable for the district of Quebec, and because

to deliver all the lumber produced from his logs, and not sold to Messrs. Price & Son, to Clint; this order was duly accepted by Hall. *As the logs were sawn the lumber sold to Clint and that sold to Price were piled separately, and Clint's lot was delivered to him as he sent orders for it.* Hall states that the lumber sold to Clint was held to his order, and would not have been delivered to any one else. Clint paid to Broster in cash $1,000, and removed or shipped from Montmorency lumber to the value of $1,400. On the 20th October, 1864, Messrs. W. Price & Son, who represented the appellant in Quebec, furnished Clint with a bill of parcels of the lumber (No. 49 of the Record), headed "memorandum of sawed lumber from Mr. Broster's lot as per statement, dated "Montmorency Mills, 15th October, 1864, held for account of J. H. Clint, Esquire;" upon receiving this statement Clint gave his note to Messrs. Price & Son, on account of Broster for $1,600, and on the 31st December, 1864, became insolvent, and his insolvency was then publicly known. On the 24th January, 1865, he made an assignment under the Insolvent Act, having previously called a meeting of his creditors in accordance with the Act. On the 17th January, the appellant sent an order to Hall, forbidding him to deliver any more of the lumber to Clint. This order although relied upon to a certain extent by the appellant, could not have any effect on this case. If the lumber was in Clint's possession, Broster could not take it from him without his consent; and Clint was himself powerless to give any such consent, having at that time called a meeting of his creditors under the Insolvent Act.

After proof and argument, the Superior Court rendered judgment, main-

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§ 61, 63; 2 Greenleaf on Evidence, § 66. Same rule in Criminal and Civil pleading, 1 Greenleaf, § 65; Archbold and Criminal Pleading, 176; Stante vs. Pruket, 1 Campbell 473; 1 Starkie on Evidence, p. 454.

2nd.—In an action against a person fulfilling a public duty the plaintiff must give a notice specifying the cause of action with reasonable clearness. Cons. Stat. L. C., p. 901.

The plaintiff is bound by such notice and not allowed to give evidence of any other cause of action. Ibid. S. Section 2.

The action must be laid and tried within the district where the act complained of was done. Ibid. S. Section 3.

And under general issue all matters may be given in excuse. Ibid. S. Section 4.

3rd.—No place is mentioned in the notice which was essential, and sub-section 2 above cited applies. Lovelace vs. Curry. 7. T. R. 631, Martin vs. Upcher 3 B. Rep. p. 662. Adolphus and Ellis, Breeze vs. Jerdein 45 Eng. Com. Law rep. p. 583. Jacklyn vs. Fitche, 14 Meeson and Welsby 380. Asted vs. Stocks *et al.* 4 Bing. 509. 1 Greenleaf on Evidence, § 62. This *being a local action.*

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Held:—That th
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(Demandeur en Cour Inférieure),

ET

APPELANT ;

AUGUSTE QUESNEL,

(*Défendeur en Cour Inférieure*),

INTIMÉ ;

JUGÉ :—1o. Que l'avis à l'officier public en vertu de l'acte des Statuts Refondus B. C., chapitre 101, n'est requis que lorsqu'il a agit *bonâ fide* dans l'exécution de ses devoirs :
2o. Que si l'avis n'a pas été donné, la Cour ou le jury décidera par la preuve faite, si l'officier public a agit *bonâ fide* et par conséquent s'il avait droit à l'avis.

L'appelant avait obtenu un jugement, devant la Cour de Circuit pour le District d'Arthabaska, contre un nommé Frédéric Dubé, pour la somme de £21.13.8. avec intérêts et dépens :

L'appelant fut obligé, dans le but de prélever le montant du jugement, de prendre un bref *de terris* contre Dubé et de faire saisir et vendre par l'intimé qui est Shérif pour le District d'Arthabaska, deux terres qu'il possédait dans ce District.

Ces deux terres furent saisies et annoncées, par l'intimé, pour être vendues à son bureau, au Palais de Justice, au village d'Arthabaskaville le 11 Septembre 1862, à dix heures a. m.

L'intimé mit aux enchères la terre No. 1 : une personne présente offrit £25 ; l'appelant offrit £30, puis une autre personne £35, alors l'appelant crut devoir s'informer à l'intimé, et de lui demander le nom de la personne présente qui avait offert les £35, "A cette fin," dit la déclaration de l'appelant, "le dit demandeur "s'adressant là et alors au dit défendeur en sa dite qualité, dans un langage poli "et convenable lui demande : Monsieur le shérif, auriez-vous la bonté de me dire

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"defendant's motion for non-suit, and that, therefore, the judgment of the Court "below must be confirmed with costs."

Aylwin J., Meredith J., Drummond, J., and Mondelet, J., concurred.

Judgment confirmed.

Holt & Irvine, for appellants.
Stuart & Murphy, for respondents.
(J. T. W.)

SUPERIOR COURT.

MONTREAL, 30TH MAY, 1866.

Coram BADGLEY, J.

No. 431.

Ex parte Leroux, *for Certiorari.*

HELD :—That the commissioners to whom a writ of *certiorari* has been addressed, and who have failed to make a proper return, will be mulcted in costs.

The petitioner moved the Court, on the 17th May, 1866, for a rule against certain commissioners " auxquels le writ de *certiorari* a été signifié, en autant

droit à un avis il faut que l'officier public ait agi *bonâ fide* dans l'exécution de ses devoirs: et l'acte, chapitre 101, Statuts Refondus, B. C., sect 3e, était à ce sujet précis: "Les privilèges ainsi que la protection garantie par le présent acte "ne seront accordés qu'à tout Juge de Paix, officier ou autre personne remplissant des devoirs publics, pour aucune chose faite par lui dans l'exécution "de ses devoirs, que ces devoirs soient imposés par le droit commun ou par un "acte du parlement Impérial ou provincial seulement et à nulle autre personne "ou personne quelconque, soit juge de paix, officier et autre personne aura droit "à la dite protection et aux dits privilèges dans tous les cas où il a agit *bonâ* "*fide* dans l'exécution de ses devoirs."

L'avis n'est pas nécessaire, "if the act complained of be one which there was "no reasonable ground for supposing the justice authorized to do, he is not." Dickenson's Guide to Quarter Sessions, 5th Ed., by J. N. Tulfour, page 82, "the *bonâ fides* as well as reasonableness of suspicion being questions which the "jury are to decide, and which must be put to the jury in behalf of a plaintiff, "if he seeks to maintain his action without having given such notice." Idem.

Dwarris on Statutes, 2nd ed., pages 564, 583, 587, 704.
Status Ref. B. C., chap. 92, sect. 10 & 15.
Chitty's Practice, 2e vol., page 337, 2o Edit.
Allen on Sheriffs, page 64.
Archbold, Common Law Practice, page 350.
Archbold, Com. Law Pleading, 348, 350.
Payley on Conviction, pages 414, 415, 416 & 420.
Taylor on Evidence, page 1493.

adjudicataire, another defendant, for sums lower than its real value, and collusively between them, under a writ of *venditioni exponas de terris*, without any notices of said sale at the church door, under the writ *de terris*.

On the 24th January, 1862, the immovables of the plaintiff were seized for the judgment debt of said George Brush, by the sheriff, and on the 20th June, 1862, the deputy of the latter returned to the Court that he had received an opposition *afin de charge* as regards one of the lots of land seized and with regard to the other lots of land, no notices or advertisements had been made at the church door as required by law. C. S. L. C, ch. 85, sec. 4, and sec. 15, parg. 2, sec. 17, parg. 3, and sec. 22.

On the 21st October, 1865, a writ of *venditioni exponas de terris* was issued, and the sale took place on the 24th November, 1865. The plaintiff complained of the irregularity and illegality of such sale, which could not take place without fresh advertisements during four months, and the usual publications at the church door.

* 2 L. C. R, p. 53.

... to accede to the demand made upon him, a question which does not arise here, he may have conscientiously believed either that he was not obliged to give or bound to withhold the information sought for. But as to the other ground of action, it should be charitable construction beyond reason to admit that the respondent could have *conscientiously* believed that he was performing his official duty in using the coarse, insulting and wholly unjustifiable language imputed to him by the appellant. It is apparent therefore that on this ground of action he was not entitled to the notice provided by the statute for the protection of public officers acting *or honestly believing that they are acting in the discharge of their official duties.* But whether on either grounds the respondent was entitled to the notice provided by law was a question to be decided by the Court below, after having heard all the evidence both parties had to adduce. As we have borrowed our law on this subject from the Legislature of England, so should we take from her tribunals precedents to guide us in the interpretation of our statute. Now in England the proof of notice is made before the jury in the course of the trial, and it is left for the jury to accede from the aggregate of facts proved whether the public officer did or did not act in good faith as to entitle him to the protection of the statutes. So in my opinion, should the Court below have allowed the whole evidence to be taken and reserved for final decision, the question whether or not the respondent was entitled to the notice of action, I need not add that I am of opinion the judgment should be reversed and the parties allowed to go to proof in the ordinary course.

The statement made by the appellant, in setting forth his second ground of action as well as his first, that the respondent was acting in his official capacity,

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... considering that the plaintiff hath failed to prove the essential allegations of his declaration, and that the defendant George Brush hath established, by legal and sufficient evidence, the averments of his plea, doth dismiss the plaintiff's action with costs.

That judgment having been carried to the Court of Review, was confirmed by the majority of the Court, as follows:—

La Cour Supérieure siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties par leurs avocats respectifs sur le Jugement rendu le 30me jour de Juin mil huit cent soixante et cinq dans la Cour Supérieure siégeant à Montréal susdit, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré :

Considérant qu'il n'y a point d'erreur dans le susdit jugement, confirme par les présentes le dit jugement en tous points avec dépens contre le dit demandeur. L'Honorable Juge Berthelot ne concourre point dans ce jugement.

Action dismissed.

Dorion & Dorion, attorneys for plaintiff.
Abbott & Dorman, attorneys for defendant.
(P. R. L.)

the course of the sale, addressed the appellant in very insulting and abusive language.

As to the complaint of the appellant that the respondent refused to disclose the name of one of the persons bidding, there cannot, I think, be any doubt that the respondent was entitled to notice of action. Indeed, I incline to the opinion that the sheriff was not bound to disclose, *during the sale*, the name of the alleged bidder; and, certainly, there are many cases in which the publication of the names of bidders, during the sale, might have an injurious effect. At the same time, and in order to avoid misapprehensions, it may be well to add, that I think it the duty of the sheriff to keep a record of the name of each bidder, and of the amount bid by him.

As to the second part of the complaint of the appellant, that which has reference to the abusive language alleged to have been used by the respondent, the difficulty which the appellant has to encounter is mainly, if not exclusively, attributable to the form of his own declaration, in which it is alleged, in effect, that the respondent, in acting and speaking as complained of, so acted and spoke in his official capacity; thus, it seems, bringing the case within the words of the section already cited of the Act for the protection of public officers.

The appellant, on his part, relies on the 8th section of that Act as showing that, in order to enable a public officer to avail himself of the protection of the statute, "he must have acted *bonâ fide* in the execution of his duty."

deed of obligation, before Stuart, N. P., in favour of plaintiffs, for $2000, bearing a mortgage; that at the time of the passing of said deed, he owed the plaintiffs nothing, and that its possession, although purporting to cover or secure value had and received, were prospective, and that said deed was entered into for the purpose of obtaining advances of goods in the grocery trade at whatever time or times the defendants should require the same. That in the execution of the said contract, the plaintiffs had made advances to the defendant to about the amount of $1000. That a reduction should be made for goods unsuitable to the amount of about $400.

That the plaintiffs requested the defendant to give them, by way of accommodation, the note sued upon in this cause, and that said note was given without consideration or value, and only exigible at the expiration of the term of five years, as expressed in the deed. The plaintiffs answered especially that they admitted

* Vide No. 2157, *Vallée vs. Vallée, & Gauthier*, opposant—decided in Montreal in June, 1851.

[...]ollected that the statute in question is not intended to secure immunity to any class of persons who have acted improperly. It merely affords public officers, and other persons fulfilling public duties, in whose protection, and, it may be added, in whose time, the community at large have an interest, an opportunity, in the two classes of cases mentioned in the statute, of taking advice, respecting claims made against them, and, when necessary, of tendering amends, before they are liable to be involved in litigation. In these provisions there is, at least, nothing unreasonable. On the contrary, it would, I think, in many cases, be for the benefit of both parties if the plaintiff, in actions of damages, even against private individuals, were compelled to give his adversary a reasonable notice of the suit about to be instituted. Such a proceeding would secure to both parties time for reflection, and thus afford an opportunity for settlement before that course is rendered almost impossible, as experience shows it is, by the making of costs.

I therefore think that there is nothing in the statute in question which requires it to be subjected to a restrictive interpretation; and that, if the first section be read according to the usual rules of interpretation, the plaintiff must be held to have brought his case within its provisions; and if so the judgment appealed from ought to be confirmed.

Judgment.—The Court of our Lady the Queen, now here, having heard the parties *de novo* by their counsel respectively, examined, as well, the record and proceedings in the Court below, as the petition in appeal presented and produced by the said appellant, and mature deliberation on the whole being had; considering that the right of protection in public officers and the statute in their behalf is accorded to them for acts by them done in the performance of their public

[...] the goods were in due course delivered to the defendants' shipping agent in Liverpool, and forwarded by him to the defendants, *via* Portland and the Grand Trunk Railway.

On the arrival of the goods here, they were duly entered in bond, by the defendants' custom house broker, and, after more than fifteen days from the date of such entry, the cask was seized by the plaintiffs, as the unpaid vendors thereof, in the hands of the customs authorities.

At the time the goods were delivered to the shipping agent in Liverpool, the defendants were hopelessly insolvent, and continued to be so down to the date of the attachment; and, shortly after the seizure was effected, their estate was vested in an assignee, under the provisions of the Insolvent Act of 1864.

The defendants pleaded, in effect, that the delivery to the shipping agent in Liverpool was such a delivery as ousted the vendors of their remedy, more than fifteen days having elapsed before the seizure was made, and that the entry here, by the defendants' custom house broker, more than fifteen days before the attachment, was again such a delivery as deprived the plaintiffs of their remedy under the Custom of Paris.

* 8 L. C. R., p. 238. 4 L. C. J., p. 368.

(E.L.P.)

(CROWN SIDE.)

MONTREAL, 20TH OCTOBER, 1866.

Coram DRUMMOND, J., BADGLEY, J., and MONDELET, A. J.

Regina vs. *John Paxton.*

HELD :—That where a prisoner has been arraigned on a charge of uttering forged paper, it is not competent for the Court to order the trial, by jury, of a preliminary question raised by prisoner's counsel, to the effect that the prisoner had been extradited from the United States on a charge of forgery.

This was a motion, by the Crown, for a new trial.

The prisoner had been arraigned on a charge of uttering a forged promissory note, knowing it to be forged.

Instead of pleading to the indictment, the prisoner's counsel put in a preliminary plea, to the effect that the prisoner was a resident of Chicago, in the State of Illinois, one of the United States of America, and that he had been thence extradited on a charge of forgery, and could not therefore be legally tried here for any other offence.

To this preliminary plea the Crown fyled replication, denying the truth of its allegations.

The Court thereupon ordered a jury to be empanelled, to try the issue of fact set up in the preliminary plea, and a trial accordingly took place and resulted in a verdict, "that they (the jury) find the prisoner was extradited for forgery, "whereas he is actually indicted for uttering forged paper."

The Crown prosecutor then moved, that the finding and verdict of the jury be set aside and a new trial granted.

"Insolvency Act of one thousand eight hundred and sixty-four, invoked by the "defendants in and by their plea, is inoperative as against the plaintiffs, and "does not debar them the rights and privileges belonging to the said plaintiffs, "as set forth in and by their declaration and demand, doth dismiss the said plea, "and, proceeding to adjudge on the demand of the said plaintiffs, doth declare "the attachment, *saisie-revendication ou conservatoire*, * * * good and "valid, and doth rescind, annul, and set aside the sale of the said cask of cutlery "* * * and it is ordered that the said cask of cutlery * * * be "forthwith delivered and restored to the said plaintiffs, as the unpaid vendors "thereof. * * *"

Saisie-revendication maintained.

Strachan Bethune, Q.C., for plaintiffs.

A. & W. Robertson, for defendants and Int. party.

(S. B.)

my opinion before my brother Judges had expressed theirs. But owing to the short time that has intervened since the close of the argument, I have not had an opportunity of deliberating with them upon the subject, and therefore I requested that they would first state the reasons upon which they had founded their judgment. The question which we have been called upon to decide is one of very great importance; and was first, during the present term, presented to my notice under the circumstances which, for a more correct understanding of the matter, I shall now proceed to state. The Grand Jury returned twenty-eight bills of indictment against the prisoner, who, upon being placed in the dock and required to plead thereto, objected to the jurisdiction of the Court, upon the ground that his presence here was due to the fact that he had been extradited by the United States upon the demand of His Excellency the Governor General whose warrant charged him with the crime of forgery. For this alleged offence, said the prisoner, I am willing to answer and be tried. But I deny your right, now that you have obtained the possession of my body upon this accusation, to substitute in its place and stead the charge of uttering forged paper, another and totally distinct offence—one for which I was not extradited, and therefore one for which, by a just and legal interpretation of the provisions of the Treaty under which I was surrendered, I cannot, and ought not, be held to answer. This is, in substance, the objection taken by the prisoner, through his counsel (Mr. Devlin), and as I considered that this objection struck at the very foundation of the prosecution, and that it moreover originated a question of great public importance, if not of national importance, I granted delay to the prisoner to fyle a special plea containing his reasons for objecting to the jurisdiction

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... maintaining the answers of plaintiff to the opposition, and dismissing said opposition with costs.

Joseph, avocat du demandeur.

Bureau, avocat du défendeur.

(P. R. L.)

MONTREAL, 30 JUIN 1866

Coram MONK, J.

No. 253.

Bousquet vs. *Jodoin et al.*

JUGÉ :—Que sur motion pour amender le writ et la déclaration, après audition sur l'exception à la forme; il est permis au demandeur d'amender en par lui payant tous les frais et en ce cas l'exception à la forme est renvoyée.

Le demandeur avait actionné douze défendeurs ; l'un d'eux Jean-Baptiste Jodoin fit une exception à la forme produite le 28 mai 1866 alléguant entr'autres moyens que lors de l'institution de l'action ; le demandeur était domicilié dans

for a new trial, of which I shall now speak. At the argument, the learned Counsel for the Crown and for the private prosecutors contended that a new trial should be granted. Firstly, because the prisoner peremptorily challenged some of the jurors called to try the issue. Secondly, because the Governor's warrant, produced by the prisoner, afforded no evidence of his extradition, or of any crime for which he was extradited. Thirdly, that the judge erred in instructing the jury to the contrary. These are, I believe, the principal reasons which were relied upon in support of the motion. Now, referring to the first reason or objection urged by the Crown, it is sufficient to remark that there are authorities for and against the allowance of the right of challenge upon a collateral issue. The authorities which sustain this right are of the highest character, and for my part, although I am free to admit that the case is not devoid of difficulty, I see no reason to change the opinion I expressed at the trial, particularly as I hold it to be the duty of the judge, in a case wherein there is a conflict of authority, as in the one under consideration, to give the benefit of the doubt to the party accused. Besides, as has been well observed by my brother Badgley, the Crown does not complain of having suffered any injury by the challenges made, neither could it do so, because the jurors who tried the issue were taken from the jury panel, and were qualified to perform the duty required of them. Again, I may mention, that no formal objection was made to the prisoner's challenges at the time of the trial. Certainly none appears upon the record; on the contrary, it seemed to me, that there was an acquiescence in the proceeding on the part of the Crown. Upon this point, however, the majority of the Court are with the prisoner. The next, and really the only important point for con-

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A. Cross, counsel.

(F. W. T.)

MONTREAL, 30TH MAY, 1866.

Coram BADGLEY, J.

No. 2103.

La Banque Jacques Cartier vs. *The Canadian Rubber Co.*, and *Kavanagh*,

OPPOSANT.

HELD:—1st. That an opposition *à fin de conserver*, made through the ministry of an attorney, must contain an election of domicile.*

2nd. That upon an exception *à la forme* to said opposition appearing to be well founded, a motion to amend such opposition by inserting an election of domicile will be granted on payment of the costs.†

The opposant made an opposition *à fin de conserver* upon the proceeds of the sale of the goods and chattels of the defendant, on the 26th April, 1866.

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* Con. Stats. L. C., ch. 83, sec. 64.

† *Vide* 8 L. C. Reports, p. 477.

Sovereign, and without which the prisoner would not be now to-day here, proves nothing, notwithstanding that it distinctly shows upon its face a charge of forgery against the prisoner—a demand for his arrest, and an absolute command to Bissonnette to cause that arrest to be made and to bring his prisoner here. Need I say that I do not concur in the estimate put upon this instrument by my learned brothers; on the contrary I believe that the warrant itself is the highest and best evidence of what it contains, and that, taken in connection with the testimony of Bissonnette, my instructions to the jury, and their finding, were and are well founded in law and in fact. But setting this question of evidence aside, my learned colleagues have arrived at the conclusion that the verdict of the jury is worthless upon another and entirely distinct ground. They maintain that the issue between the Crown and the prisoner, as raised by their pleading, was improperly submitted to a jury, and that the question therein involved was one exclusively for the judge to determine. Now let it be borne in mind that this pretension is set up for the first time. It was not urged as a reason for the granting of a new trial by the Crown; it was not made an objection to the trial of the issue by the Jury; neither was it adverted to in the argument which took place yesterday. The idea has altogether originated with my learned brothers; and I must say that I think it is not difficult to show that it has not even the shadow of a legal foundation to rest upon. The issue tendered by the prisoner, and joined in by the Crown, was an issue of fact. In so many words he says, I was arrested in the United States upon a charge of forgery, and handed over to High Constable Bissonnette, to be brought to Montreal, there to undergo my trial for this offence, and not for the crime

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...ait à son procureur, et qu'elle n'avait pas été faite, ni signifiée dans les huit jours de la date du jugement interlocutoire dont se plaignait le défendeur, et parceque le dépôt n'avait pas été fait dans le même délai de huit jours.

Les parties ayant été entendues sur cette motion, la Cour sur délibéré, la renvoya avec dépens.†

Piché, avocat du demandeur. Motion rejetée.

Rose et Ritchie, avocats du défendeur.

(P. R. L.)

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* Vide, St. Ref. B. C., ch. 83, sec. 8.

† Vide, Règles de Pratique, ch. 3, règle 12.

and only triable by that mode. As to the other point raised, namely, the right of the Crown to a new trial, upon a collateral issue arising out of a case of felony, and where the verdict is in favour of the defendant, it is not required that I should discuss it, as the judgment of the majority of the Court rejects the application for a new trial, and is based upon grounds not contained in the motion or even made the subject of argument. I must say, however, that the Crown is fortunate in the failure of its application; seeing that, by the judgment just rendered, it has obtained, not, it is true, what was asked for by the motion, but still all that it could possibly desire—certainly far more than was expected or hoped for. I cannot conclude these remarks without expressing my regret, that the important question raised by the prisoner was not finally and more satisfactorily settled. It was my intention, when the question of law, arising out of the fact found by the jury, was argued, to have reserved the whole question for the consideration of the Court of Appeal. As I have before stated, it has arisen in our Courts for the first time, and is a question of national importance, growing out of a treaty obligation—the provisions of which should be wisely, liberally and strictly interpreted, and ever and always truthfully and faithfully executed. Entertaining these opinions, it now only remains for me to have my dissent recorded.

The following is the judgment of the Court, as recorded in the register: "That no new trial shall be had, inasmuch as no such collateral issue, as tendered "by said plea of the said John Paxton, should have been submitted to a jury: "that the proceedings previously to such motion shall be set aside: that the

pour de la dite saisie-gagerie, savoir : la somme de $35 pour le mois de mars 1865 et pareille somme pour le mois d'avril 1865, ordonne que les dits effets en tant d'iceux qu'il sera nécessaire seront vendus pour la satisfaction et paiement du présent jugement, la cour compensant les frais sur l'intervention et la contestation d'icelle entre le demandeur et le dit intervenant.

Sénécal, Ryan et DeBellefeuille, avocats du demandeur.

Kerr, avocat de l'intervenant.

(P. R. L.)

MONTREAL, 30 MAI 1866.

Coram BADGLEY.

No. 2044.

[illegible]ry vs. Rodier.

JUGÉ :—Que la [illegible] saisie [illegible] peut être exercée après les huit jours et en même après l'expiré[illegible]

Le demandeur [illegible] une maison pour un an, au défendeur, à commencer au 1er mai 1865. A la St. Michel suivante, Rodier quitta les lieux du consente-

No. 49.

ZÉPHIRIN NAUD,

(*Defendant in the Court below*),

APPELLANT;

AND

ELIZABETH SMITH,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD :—1st. That an error in the date upon which a judgment was rendered is not a ground of nullity.

2nd. That such an error can be remedied by the Court of Appeals in and by its own judgment.

An action in ejectment was instituted against the defendant in this cause on the 4th May, 1865.

The defendant contested the action.

After proof and hearing of the parties on the 12th May, 1865, the Circuit Court at Sorel, in the District of Richelieu, gave judgment in favour of the plaintiff. The judgment bears date the *fourteenth April*, 1865. On the 19th May, 1865, the defendant inscribed the cause for review before three Judges

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* The prisoner was subsequently tried and found guilty, but the Court refused to pass sentence until after the Court of Appeal shall have pronounced on the validity of the verdict. [Reporter's note.]

CIRCUIT COURT

MONTREAL CIRCUIT

Terroux vs. Gareau et al.

Coram BERTHELOT, J.

JUGÉ :—Qu'un gage spécial donné par un débiteur à son créancier pour sûreté de sa dette, ne fait pas perdre à ce dernier son privilège sur les autres meubles du débiteur.

Le demandeur avait émané une Saisie Gagerie par droit de suite, contre les meubles des défendeurs, pour la somme de $21.25 sur bail notarié.

Les défendeurs, plaidèrent par une exception péremptoire en droit, alléguant qu'avant l'émanation de cette action, un écrit avait été signé par eux, et remis au demandeur, lequel écrit était conçu en ces termes :

Terroux vs. Gareau et al.

"Comme gage et sûreté et garantie au paiement du loyer et des cotisations de l'année dernière, nous consentons à livrer à Mr. Charles A. Terroux, une barrique de vin de 36 à 37 gallons, jusqu'au paiement du dit loyer et cotisations que nous promettons lui payer dans dix jours de cette date, sans préjudice au privilège du dit Mr. Terroux, sur la dite barrique de vin pour sûreté de son dit loyer, tant du bas de la maison que nous avons occupée, que du haut de la dite maison qu'a occupé Mr. Gareau, l'un de nous; et dans le cas où le loyer de la dite maison ne serait pas payé au temps susdit, et les frais déjà faits, la dite barrique de vin demeurera la propriété du dit M. Terroux."

Montréal, 22 Mai 1865.

(Signé) GAREAU & CIE.
(") DAMASE GAREAU.

Les défendeurs produisirent de plus un compte prétendant être dû par le demandeur et qu'ils offrirent en compensation à celui de ce dernier. Le 12 Septembre 1865, la cause fut entendue à l'enquête et au mérite devant M. le Juge Berthelot. *M. Joseph*, pour le demandeur prétendait que l'écrit donné par les défendeurs au demandeur, ne liait pas ce dernier et ne lui faisait par perdre son privilége sur les meubles des défendeurs; car, pour que le demandeur se désiste de son privilège, il faut une convention spéciale, une stipulation expresse mentionnée dans l'écrit passé entre le créancier et le débiteur. Autrement, si un gage spécial est donné par un débiteur à son créancier, comme sûreté de sa dette, ce ne peut être qu'un privilège additionnel ou collatéral au privilége général du créancier.

Le demandeur prouva de plus qu'il s'était désisté de l'écrit ci-dessus, en le remettant au défendeur personnellement le jour même qu'il lui avait été donné et avant son accomplissement.

Quant au compte offert en compensation, le demandeur prétendit qu'il avait été payé longtemps avant l'institution de action, par des loyers dûs antérieurement par les défendeurs. *M. Garault*, pour les défendeurs, soutint que l'écrit passé entre les parties, et la livraison du gage, faisait perdre au demandeur son privilége sur les autres meubles des défendeurs et annulait la saisie des meubles de ces derniers. Que le demandeur n'avait pas le droit d'instituer une action contre le défendeur, après l'engagement qu'il prétendit avoir été contracté entre les parties, et de plus, il nia le paiement du compte des défendeurs. Le tribunal, après l'audition des parties, déclara que le gage donné par les défendeurs au demandeur, ne privait pas celui-ci du privilège qui lui est accordé par la Loi, de saisir-gager les meubles des défendeurs.

Jugement pour le demandeur.

Laframboise & Joseph, avocats du demandeur.

M. Garault, avocat du défendeur.

(J. O. J.)

QUEBEC, SEPTEMBER, 1866.

Coram DUVAL, C. J., AYLWIN, MEREDITH, DRUMMOND, and MONDELET, J.J.

In appeal from the Superior Court, District of Quebec.

JOHN BROSTER,

(*Plaintiff in the Court below*),

APPELLANT;

AND

GEORGE BENSON HALL *et al.*,

(*Defendants in the Court below*),

RESPONDENTS.

HELD:—That the acceptance by a third party or middle-man of a delivery order granted by a vendor in favor of a vendee, for goods to be manufactured by the third party or middle-man, and the setting apart these goods as subject to the vendee's orders by the third party or middle man, as they are manufactured, is a complete delivery, even though they should still be entered in the vendor's name in the books of the third party or middle-man.

This was an appeal from a judgment rendered in the Superior Court, in an action which was instituted on the 13th May, 1865, by the appellant, by means of a writ of revendication against the respondents, George Benson Hall, and Mary Hall, his wife, executors of the last will and testament of the late Peter Paterson, to revendicate a quantity of sawn lumber (deals and plank,) of the value of $2,000, in their possession, and which was claimed by the appellant as his property. William Walker, the other respondent, was also brought into the suit as defendant, in his quality of assignee to the insolvent estate of John Henry Clint, of Quebec, merchant, he being a claimant of the same property.

The Halls appeared to the action in the Court below, but were subsequently foreclosed, and the proceedings were conducted *ex parte* as regards them. In fact, the position which they assumed in the case was that of perfect indifference between the parties claiming the property; they did not desire, nor intend to raise, any contestation; they admitted having possession of the property, holding it *quasi* as stakeholders, and were perfectly willing to deliver it to Broster, the appellant, or Walker, the respondent, as the Court might determine. Under these circumstances, the whole contest lay between the two last-named parties.

The pleadings in the Court below, on which the issue was raised, were the declaration, a peremptory exception, a special answer and general issues.

The declaration alleged a contract, dated 1st July, 1864, by which the appellant sold to Clint all the lumber of a certain description to be manufactured out of the pine logs belonging to the appellant, and then at Montmorency mills, (which are owned and worked by the Halls); that Broster had given to Clint an order upon Hall for the delivery of the lumber sold; that Clint had subsequently become insolvent, and had never paid for the lumber; and that, notwithstanding the order, it had not been completely delivered to Clint, and that, in consequence of Hall having refused to deliver the lumber so remaining in his possession to Broster, the present action was brought, and the lumber seized.

Broster and Hall et al.

To this declaration the defendant Walker pleaded by a general issue, and also by a perpetual exception, in which he alleged that the contract between Broster and Clint had been completely carried out; that the lumber which had been manufactured from the logs was in the possession of Clint at the time he became insolvent, and was held by Hall as his bailee, and that it had passed to his assignee as part of his estate.

The plaintiff replied specially to this plea, alleging that the lumber should have been paid for by Clint when delivered, and that more had been delivered than he had paid for, and that the quantity which remained on hand at the time he became insolvent was held by Hall for the plaintiff Broster.

It will appear from this statement of the pleadings that the question at issue between appellant Broster and respondent Walker, as Clint's assignee, was whether the lumber was held for Broster or for Clint at the time the latter became insolvent.

The facts of the case, as shown by the evidence, are as follows:—The appellant Broster, in the year 1864, had a large quantity of saw logs at Montmorency, for the sawing of which he had made a contract with Hall; of the produce of these logs he had sold to Messrs. Price & Son the merchantable two-inch and three-inch deals; and by the contract in question in this cause he sold to Clint the remainder of the lumber to be manufactured from the logs, consisting of boards and cull deals. When the agreement between the appellant and Clint was made, but before the contract was actually signed, an order, dated Three Rivers, 21st June, 1864, was given by Broster, directing the defendants Hall to deliver all the lumber produced from his logs, and not sold to Messrs. Price & Son, to Clint; this order was duly accepted by Hall. *As the logs were sawn the lumber sold to Clint and that sold to Price were piled separately, and Clint's lot was delivered to him as he sent orders for it.* Hall states that the lumber sold to Clint was held to his order, and would not have been delivered to any one else. Clint paid to Broster in cash $1,000, and removed or shipped from Montmorency lumber to the value of $1,400. On the 20th October, 1864, Messrs. W. Price & Son, who represented the appellant in Quebec, furnished Clint with a bill of parcels of the lumber (No. 49 of the Record), headed "memorandum of sawed lumber from Mr. Broster's lot as per statement, dated "Montmorency Mills, 15th October, 1864, held for account of J. H. Clint, Esquire;" upon receiving this statement Clint gave his note to Messrs. Price & Son, on account of Broster for $1,600, and on the 31st December, 1864, became insolvent, and his insolvency was then publicly known. On the 24th January, 1865, he made an assignment under the Insolvent Act, having previously called a meeting of his creditors in accordance with the Act. On the 17th January, the appellant sent an order to Hall, forbidding him to deliver any more of the lumber to Clint. This order although relied upon to a certain extent by the appellant, could not have any effect on this case. If the lumber was in Clint's possession, Broster could not take it from him without his consent; and Clint was himself powerless to give any such consent, having at that time called a meeting of his creditors under the Insolvent Act.

After proof and argument, the Superior Court rendered judgment, main-

taining the plea of perpetual peremptory exception of the said William Walker, and dismissing the plaintiff's action with costs.

Brostor and Hall et al.

The judgment was confirmed.

The authorities chiefly relied on by the respondent Walker, and cited in his factum, are the following :—

Pothier, Vente, No. 313.
1 Troplong, Vente, p. 354.
6 Marcadé, pp. 221, 22.
2 Zachariæ, § 354.
Bell's Commentaries on the Laws of Scotland, vol. 1, pp. 108-10, 116, 117.

Parkin & Pentland, for appellant.

Holt & Irvine, for respondent Walker.

Judgment confirmed.

(I. T. W.)

COUR DU BANC DE LA REINE, EN APPEL.

QUEBEC, 16 SEPTEMBRE 1866.

Coram MEREDITH, J., DRUMMOND, J., TASCHEREAU, J., BADGLEY, J., BERTHELOT, J.

Appel de la Cour de Circuit pour le District d'Arthabaska.

No. 53.

GEORGE JEREMIE PACAUD,

(*Demandeur en Cour Inférieure*),

APPELANT ;

ET

AUGUSTE QUESNEL,

(*Défendeur en Cour Inférieure*),

INTIMÉ ;

JUGÉ :—1o. Que l'avis à l'officier public en vertu de l'acte des Statuts Refondus B. C., chapitre 101, n'est requis que lorsqu'il a agit *bonâ fide* dans l'exécution de ses devoirs :
2o. Que si l'avis n'a pas été donné, la Cour ou le jury décidera par la preuve faite, si l'officier public a agit *bonâ fide* et par conséquent s'il avait droit à l'avis.

L'appelant avait obtenu un jugement, devant la Cour de Circuit pour le District d'Arthabaska, contre un nommé Frédéric Dubé, pour la somme de £21.13. 8. avec intérêts et dépens :

L'appelant fut obligé, dans le but de prélever le montant du jugement, de prendre un bref *de terris* contre Dubé et de faire saisir et vendre par l'intimé qui est Shérif pour le District d'Arthabaska, deux terres qu'il possédait dans ce District.

Ces deux terres furent saisies et annoncées, par l'intimé, pour être vendues à son bureau, au Palais de Justice, au village d'Arthabaskaville le 11 Septembre 1862, à dix heures a. m.

L'intimé mit aux enchères la terre No. 1 : une personne présente offrit £25 ; l'appelant offrit £30, puis une autre personne £35, alors l'appelant crut devoir s'informer à l'intimé, et de lui demander le nom de la personne présente qui avait offert les £35, " A cette fin," dit la déclaration de l'appelant, " le dit demandeur " s'adressant là et alors au dit défendeur en sa dite qualité, dans un langage poli " et convenable lui demande : Monsieur le shérif, auriez-vous la bonté de me dire

Pacaud et Quesnel.

"quel est le nom de la personne qui a offert £35 courant? en se servant à peu "près d'expressions semblables."

"Le dit défendeur ès dite qualité au lieu de nommer au dit demandeur la "personne qui avait offert les trente-cinq livres courant pour le dit immeuble "en premier lieu désigné, ainsi qu'il y était obligé par la loi, refusa là et alors "de nommer la dite personne au dit demandeur et répondit au dit demandeur "avec colère, dans un langage grossier, impertinent, injurieux comme suit: "*il faut être un polisson comme vous l'êtes, un homme mal élevé, et ignorant* "*pour me faire une pareille question : je ne suis pas obligé de vous nommer la* "*personne qui a offert les £35 pour la terre en question ; c'est mon secret, je le* "*garde et vous devriez apprendre à vivre pour savoir comment vous comporter* "*dans un bureau comme celui-ci*," et autres paroles de même signification et teneur. Demande pour $200 de dommages. A cette action l'intimé répondit par une défense au fonds en fait.

La cause fut inscrite pour enquête et mériet le 10 mars 1864, et après avoir fait assermenter son premier témoin Frédéric Dubé, l'intimé objecta comme suit: "le défendeur s'oppose à l'audition du présent témoin quant à présent, "vu que le demandeur n'a pas produit l'avis requis par la loi, qui devait être "adressé au défendeur avant l'institution de l'action."

Cette objection fut maintenue par la Cour Inférieure et l'action de l'appelant fut en conséquence déboutée avec les dépens. "*The plaintiff hath omitted to* "*give to the defendant any notice of action as required by law.*"

Cette cause fut portée en appel et l'appelant maintenait que pour avoir droit à un avis il faut que l'officier public ait agi *bonâ fide* dans l'exécution de ses devoirs: et l'acte, chapitre 101, Statuts Refondus, B. C., sect 3e, était à ce sujet précis: "Les privilèges ainsi que la protection garantie par le présent acte "ne seront accordés qu'à tout Juge de Paix, officier ou autre personne remplissant des devoirs publics, pour aucune chose faite par lui dans l'exécution "de ses devoirs, que ces devoirs soient imposés par le droit commun ou par un "acte du parlement Impérial ou provincial seulement et à nulle autre personne "ou personne quelconque, soit juge de paix, officier et autre personne aura droit "à la dite protection et aux dits privilèges dans tous les cas où il a agit *bonâ* "*fide* dans l'exécution de ses devoirs."

L'avis n'est pas nécessaire, "if the act complained of be one which there was "no reasonable ground for supposing the justice authorized to do, he is not." Dickenson's Guide to Quarter Sessions, 5th Ed., by J. N. Talfour, page 82, "the *bonâ fides* as well as reasonableness of suspicion being questions which the "jury are to decide, and which must be put to the jury in behalf of a plaintiff, "if he seeks to maintain his action without having given such notice." Idem.

Dwarris on Statutes, 2nd ed., pages 564, 583, 587, 704.
Status Ref. B. C., chap. 92, sect. 10 & 15.
Chitty's Practice, 2e vol., page 337, 2o Edit.
Allen on Sheriffs, page 64.
Archbold, Common Law Practise, page 350.
Archbold, Com. Law Pleading, 348, 350.
Payley on Conviction, pages 414, 415, 416 & 420.
Taylor on Evidence, page 1493.

Pacaud et Quesnel.

Que l'action d'injures n'est prescrite que par l'an et jour : que l'injure faite par l'intimé à l'appelant ne peut par conséquent tomber sous l'action du Statut qui prescrivait l'action par six mois ; ce qui constitue en faveur des officiers publics une exception inconstitutionelle :

L'intimé disait : j'ai été poursuivi comme *officier public* pour acte fait par moi dans l'exécution de mes devoirs, comme tel j'ai droit à l'avis du Statut Refondus du Bas-Canada, chap. 101.

Drummond Juge dit :

The appellant brought the action of damages which has been dismissed in the Court below, on two grounds : 1st. For the alleged refusal on the part of the respondent, then and still sheriff of the district of Arthabaska, to communicate to him the name of an *enchérisseur* or bidder upon certain immoveable property seized at the suit of the plaintiff, while the sale was going on ; the 2nd ground upon which the action rests is for damages in the shape of indemnity for coarse and insulting language, alleged to have been used by the respondent in answer to the demand made by the appellant, that sheriff as well as magistrates and other public officers are entitled to the protection provided by the 101 ch. of Consolidated Statutes when acting in the *bonâ fide* performance of their official duties, viz., when doing things which they *conscientiously believe to be a part of their official duties*, can admit no reasonable doubt ; it therefore appears clear to me that with respect to the first ground of action, the respondent was entitled to the protection of the statute, for it is quite natural to suppose that, whether the respondent was bound in law or not to accede to the demand made upon him, a question which does not arise here, he may have conscientiously believed either that he was not obliged to give or bound to withhold the information sought for. But as to the other ground of action, it should be charitable construction beyond reason to admit that the respondent could have *conscientiously* believed that he was performing his official duty in using the coarse, insulting and wholly unjustifiable language imputed to him by the appellant. It is apparent therefore that on this ground of action he was not entitled to the notice provided by the statute for the protection of public officers acting *or honestly believing that they are acting in the discharge of their official duties*. But whether on either grounds the respondent was entitled to the notice provided by law was a question to be decided by the Court below, after having heard all the evidence both parties had to adduce. As we have borrowed our law on this subject from the Legislature of England, so should we take from her tribunals precedents to guide us in the interpretation of our statute. Now in England the proof of notice is made before the jury in the course of the trial, and it is left for the jury to accede from the aggregate of facts proved whether the public officer did or did not act in good faith as to entitle him to the protection of the statutes. So in my opinion, should the Court below have allowed the whole evidence to be taken and reserved for final decision, the question whether or not the respondent was entitled to the notice of action, I need not add that I am of opinion the judgment should be reversed and the parties allowed to go to proof in the ordinary course.

The statement made by the appellant, in setting forth his second ground of action as well as his first, that the respondent was acting in his official capacity,

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"*en sa qualité officielle*," should have no influence on the decision of the Court. These expressions do not alter the character of the facts alleged, and were evidently used in a loose and inaccurate manner for the purpose of urging upon the attention of the Court the aggravating fact that the respondent was standing before the public in his high office of sheriff while addressing insulting and defamatory language to the appellant.

MEREDITH, J.—In the present case it has been contended by the learned counsel for the appellant, that the respondent, as sheriff, is not entitled to the statutory protection given to public officers by the chapter 101 of the Consolidated Statutes of Lower Canada. In support of this view reference has been made to the doubt expressed by the late most lamented Chief Justice of this Court in the case of Irvine & Boston, as to whether a sheriff can avail himself of the provisions of the statute with respect to anything done by him in a civil proceeding; but after giving to this point due consideration, I must say I cannot see anything either in the letter or spirit of the law to exclude from its provisions a sheriff when sued in an action of damages, for anything done by him in the performance of his duty. Assuming then that a sheriff is a public officer within the meaning of the statute, the next question to be considered is, whether the respondent, as a sheriff, was entitled to notice of action with respect to the matters complained of in the declaration of the appellant. That declaration alleges two grounds of complaint: First, that the sheriff refused to disclose the name of a person bidding against the respondent for property which the laws had caused to be brought to sale, which it is alleged injuriously affected the sale of the property; and secondly, that the respondent, whilst acting as sheriff in the course of the sale, addressed the appellant in very insulting and abusive language.

As to the complaint of the appellant that the respondent refused to disclose the name of one of the persons bidding, there cannot, I think, be any doubt that the respondent was entitled to notice of action. Indeed, I incline to the opinion that the sheriff was not bound to disclose, *during the sale*, the name of the alleged bidder; and, certainly, there are many cases in which the publication of the names of bidders, during the sale, might have an injurious effect. At the same time, and in order to avoid missapprehensions, it may be well to add, that I think it the duty of the sheriff to keep a record of the name of each bidder, and of the amount bid by him.

As to the second part of the complaint of the appellant, that which has reference to the abusive language alleged to have been used by the respondent, the difficulty which the appellant has to encounter is mainly, if not exclusively, attributable to the form of his own declaration, in which it is alleged, in effect, that the respondent, in acting and speaking as complained of, so acted and spoke in his official capacity; thus, it seems, bringing the case within the words of the section already cited of the Act for the protection of public officers.

The appellant, on his part, relies on the 8th section of that Act as showing that, in order to enable a public officer to avail himself of the protection of the statute, "he must have acted *bonâ fide* in the execution of his duty."

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I do not, however, think that the 8th section of the statute was intended to restrict, or can be interpreted as restricting, the protection given to public officers by the first section.

The first section affords protection to officers and persons "fulfilling any "public duty;" the 8th section extends the protection to any officer or person, "where he has acted *bonâ fide* in the execution of his duty, *although in such* "*act* done he has exceeded his powers and jurisdiction, and has acted clearly con- "trary to law."

A comparison of the two sections with each other shows that the 8th section was not intended to interfere with the protection given, by the first section, to public officers, and others, "fulfilling any public duty." On the contrary, the eighth section in express terms declares that the statutory protection extends to a large class of cases with respect to which it might otherwise have been doubtful whether that protection could have been available. When therefore a defendant wishes to avail himself of the 8th section, he must, in accordance with the terms of that section, be prepared to establish "that he acted" *bonâ fide* in "the execution of his duty." And then, as a general rule, proof must be adduced before the Court can decide whether notice of action is necessary. But where a plaintiff himself brings his case within the first section, as I think has been done in the present instance, then as that section says nothing about good faith, I do not think any question can be raised on the subject. It is to be recollected that the statute in question is not intended to secure immunity to any class of persons who have acted improperly. It merely affords public officers, and other persons fulfilling public duties, in whose protection, and, it may be added, in whose time, the community at large have an interest, an opportunity, in the two classes of cases mentioned in the statute, of taking advice, respecting claims made against them, and, when necessary, of tendering amends, before they are liable to be involved in litigation. In these provisions there is, at least, nothing unreasonable. On the contrary, it would, I think, in many cases, be for the benefit of both parties if the plaintiff, in actions of damages, even against private individuals, were compelled to give his adversary a reasonable notice of the suit about to be instituted. Such a proceeding would secure to both parties time for reflection, and thus afford an opportunity for settlement before that course is rendered almost impossible, as experience shows it is, by the making of costs.

I therefore think that there is nothing in the statute in question which requires it to be subjected to a restrictive interpretation; and that, if the first section be read according to the usual rules of interpretation, the plaintiff must be held to have brought his case within its provisions; and if so the judgment appealed from ought to be confirmed.

Judgment.—The Court of our Lady the Queen, now here, having heard the parties *de novo* by their counsel respectively, examined, as well, the record and proceedings in the Court below, as the petition in appeal presented and produced by the said appellant, and mature deliberation on the whole being had; considering that the right of protection in public officers and the statute in their behalf is accorded to them for acts by them done in the performance of their public

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duty; considering that in such statute it is provided that no judgment or verdict shall be rendered against them for such acts, by them so done without the said protection of a month's notice of action; considering that the right to such protection depends upon the nature of the suit complained of, and upon the evidence to be adduced with reference to the same; considering that the ruling of the Circuit Court sitting at St. Christophe in the District of Arthabaska in this cause, on the tenth day of March, one thousand eight hundred and sixty-three, preventing the adduction of any evidence by the appellant without his preliminary production and fyling in the record of the said cause of such notice of action was contrary to law; considering therefore that in the judgment rendered by the said Court sitting at St. Christophe d'Arthabaska aforesaid on the twelfth day of the said month, dismissing the action of the said appellant, there was error, this Court doth set aside and annul the said judgment and ruling respectively, and doth order that the said record be remitted to the Court below, for the parties therein to proceed with their proof, as they may be advised according to law, and to take such further proceedings therein as the law and justice may appertain, the whole with costs of the Court, the costs of the Court below to await the judgment upon the merits of the said action.

Dissentientibus the Honorable Mr. Justice Meredith and Mr. Justice Taschereau.

E. L. Pacaud, pour l'appelant.

W. Duval, pour l'intimé.

(E.L.P.)

(CROWN SIDE.)

MONTREAL, 20TH OCTOBER, 1866.

Coram DRUMMOND, J., BADGLEY, J., and MONDELET, A. J.

Regina vs. *John Paxton.*

HELD:—That where a prisoner has been arraigned on a charge of uttering forged paper, it is not competent for the Court to order the trial, by jury, of a preliminary question raised by prisoner's counsel, to the effect that the prisoner had been extradited from the United States on a charge of forgery.

This was a motion, by the Crown, for a new trial.

The prisoner had been arraigned on a charge of uttering a forged promissory note, knowing it to be forged.

Instead of pleading to the indictment, the prisoner's counsel put in a preliminary plea, to the effect that the prisoner was a resident of Chicago, in the State of Illinois, one of the United States of America, and that he had been thence extradited on a charge of forgery, and could not therefore be legally tried here for any other offence.

To this preliminary plea the Crown fyled replication, denying the truth of its allegations.

The Court thereupon ordered a jury to be empanelled, to try the issue of fact set up in the preliminary plea, and a trial accordingly took place and resulted in a verdict, "that they (the jury) find the prisoner was extradited for forgery, "whereas he is actually indicted for uttering forged paper."

The Crown prosecutor then moved, that the finding and verdict of the jury be set aside and a new trial granted.

MONDELET, J., said, that after having considered the reasons contained in the motion, he was of opinion, firstly, that the prisoner had not, upon the issue submitted to the jury, the right to challenge peremptorily as he had done, and he was of opinion that upon this ground the verdict could not be sustained. Upon the other point raised, that the warrant of the Governor did not afford any evidence or proof of the extradition of the prisoner, he was also with the Crown, and was of opinion that the extradition of the prisoner was not a matter of fact to be inquired into by a jury, but to be determined by the Court; this, he said, was the opinion of the majority of the Court. And although the motion for a new trial would not be granted, the verdict, the defendant's plea, and all proceedings had thereunder, must be set aside, and the prisoner ordered to plead to the indictment.

BADGLEY, J., concurred in this view of the case, except that he did not consider the challenge of jurors a ground for objection, particularly as the jurors who found the issue were qualified to do so, and no complaint was made by the Crown that any injury or wrong had been done by the jury. He was also of opinion that Judge Drummond was right in refusing to admit the depositions sought to be introduced by the Crown. On all the other points he differed from Mr. Justice Drummond, and concurred in the judgment pronounced by Mr. Justice Mondelet.

DRUMMOND, J.—As I dissent from the judgment pronounced by the majority of the Court, I should, in accordance with prevailing practice, have enunciated my opinion before my brother Judges had expressed theirs. But owing to the short time that has intervened since the close of the argument, I have not had an opportunity of deliberating with them upon the subject, and therefore I requested that they would first state the reasons upon which they had founded their judgment. The question which we have been called upon to decide is one of very great importance; and was first, during the present term, presented to my notice under the circumstances which, for a more correct understanding of the matter, I shall now proceed to state. The Grand Jury returned twenty-eight bills of indictment against the prisoner, who, upon being placed in the dock and required to plead thereto, objected to the jurisdiction of the Court, upon the ground that his presence here was due to the fact that he had been extradited by the United States upon the demand of His Excellency the Governor General whose warrant charged him with the crime of forgery. For this alleged offence, said the prisoner, I am willing to answer and be tried. But I deny your right, now that you have obtained the possession of my body upon this accusation, to substitute in its place and stead the charge of uttering forged paper, another and totally distinct offence—one for which I was not extradited, and therefore one for which, by a just and legal interpretation of the provisions of the Treaty under which I was surrendered, I cannot, and ought not, be held to answer. This is, in substance, the objection taken by the prisoner, through his counsel (Mr. Devlin), and as I considered that this objection struck at the very foundation of the prosecution, and that it moreover originated a question of great public importance, if not of national importance, I granted delay to the prisoner to fyle a special plea containing his reasons for objecting to the jurisdiction

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of this Court, and to trial upon the several indictments returned against him. This plea was subsequently fyled, and in it the prisoner alleges that he resided in Chicago, in the United States, at the time of his arrest, which was made at the instance and upon the demand of the Governor General; and further, that he was then and there charged with the crime of forgery, and for that offence was his body demanded and surrendered by the United States, so that he might be tried here in Montreal where the crime was alleged to have been committed. He has also pleaded that he was put into the custody of High Constable Bissonnette, and by that Officer conducted a prisoner from the Province Line to the common jail of this District, where he has since been imprisoned, and that as the crime preferred against him is for *uttering forged paper*, and therefore not the crime of *forgery*, for which he was extradited, that he ought not to be compelled to answer to this new offence, or put in jeopardy therefor. To this pleading the Crown put in replication, denying the truth of the allegations contained in the prisoner's plea, and thereby denying, in truth, not only the cause of his extradition, but the very act of extradition itself. Upon this issue, so perfected, it became necessary for the prisoner to establish, by proof, firstly, that he was extradited, and secondly, that he was extradited for the crime of forgery. A jury was accordingly empanelled to try this preliminary issue, and after having heard the evidence adduced by the prisoner, there being none on behalf of the Crown, they found, by their verdict, that he had proved his plea, and that he was extradited for the crime of forgery. Hence the motion for a new trial, of which I shall now speak. At the argument, the learned Counsel for the Crown and for the private prosecutors contended that a new trial should be granted. Firstly, because the prisoner peremptorily challenged some of the jurors called to try the issue. Secondly, because the Governor's warrant, produced by the prisoner, afforded no evidence of his extradition, or of any crime for which he was extradited. Thirdly, that the judge erred in instructing the jury to the contrary. These are, I believe, the principal reasons which were relied upon in support of the motion. Now, referring to the first reason or objection urged by the Crown, it is sufficient to remark that there are authorities for and against the allowance of the right of challenge upon a collateral issue. The authorities which sustain this right are of the highest character, and for my part, although I am free to admit that the case is not devoid of difficulty, I see no reason to change the opinion I expressed at the trial, particularly as I hold it to be the duty of the judge, in a case wherein there is a conflict of authority, as in the one under consideration, to give the benefit of the doubt to the party accused. Besides, as has been well observed by my brother Badgley, the Crown does not complain of having suffered any injury by the challenges made, neither could it do so, because the jurors who tried the issue were taken from the jury panel, and were qualified to perform the duty required of them. Again, I may mention, that no formal objection was made to the prisoner's challenges at the time of the trial. Certainly none appears upon the record; on the contrary, it seemed to me, that there was an acquiescence in the proceeding on the part of the Crown. Upon this point, however, the majority of the Court are with the prisoner. The next, and really the only important point for con-

sideration, as urged by the Crown, is this:—Did the evidence adduced upon the trial of the preliminary issue sufficiently establish the fact of the prisoner's extradition, as set up in his plea, and the crime which was the cause of the demand having been made. His Honour Judge Badgley and Mr. Justice Mondelet have stated it to be their opinion that it was utterly insufficient to justify that conclusion. They maintain that the production and proof of the Governor General's warrant, charging, as it unquestionably does, the prisoner with the crime of forgery, and authorizing and commanding, as it further does, High Constable Bissonnette to require, and demand of, and from the United States, their judges, magistrates, and all other their officers whom it may concern, the body of John Paxton, the prisoner now here, so that he should be extradited for the crime of forgery, ought not to have been given to the Jury as evidence of the fact that he was charged with the said crime, or that he was extradited therefor. To my mind, however, it seems perfectly clear that the warrant of His Excellency cannot be thus disregarded, or put aside, particularly when we call to mind that Bissonnette was a witness upon the trial, and that he proved it was under and by virtue of this warrant the prisoner was surrendered and given into his custody by the United States. Surely it was this warrant that armed Bissonnette with authority to demand and receive the prisoner. Without it his mission would have ended in failure, he could not ask for the arrest of the prisoner—he dare not lay a hand upon him; and yet we are told that this warrant, emanating from the highest authority in the land, bearing the name and seal of the representative of the Sovereign, and without which the prisoner would not be now to-day here, proves nothing, notwithstanding that it distinctly shows upon its face a charge of forgery against the prisoner—a demand for his arrest, and an absolute command to Bissonnette to cause that arrest to be made and to bring his prisoner here. Need I say that I do not concur in the estimate put upon this instrument by my learned brothers; on the contrary I believe that the warrant itself is the highest and best evidence of what it contains, and that, taken in connection with the testimony of Bissonnette, my instructions to the jury, and their finding, were and are well founded in law and in fact. But setting this question of evidence aside, my learned colleagues have arrived at the conclusion that the verdict of the jury is worthless upon another and entirely distinct ground. They maintain that the issue between the Crown and the prisoner, as raised by their pleading, was improperly submitted to a jury, and that the question therein involved was one exclusively for the judge to determine. Now let it be borne in mind that this pretension is set up for the first time. It was not urged as a reason for the granting of a new trial by the Crown; it was not made an objection to the trial of the issue by the Jury; neither was it adverted to in the argument which took place yesterday. The idea has altogether originated with my learned brothers; and I must say that I think it is not difficult to show that it has not even the shadow of a legal foundation to rest upon. The issue tendered by the prisoner, and joined in by the Crown, was an issue of fact. In so many words he says, I was arrested in the United States upon a charge of forgery, and handed over to High Constable Bissonnette, to be brought to Montreal, there to undergo my trial for this offence, and not for the crime

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for which you have thought proper to indict me. The Crown replies: Your allegation is false; you were not arrested for forgery; you were not taken into custody by Bissonnette; you were not brought here from the United States. Are these, I ask, questions of law, to be determined by the Judge, or matters of fact to be enquired into by a jury? Could I, sitting here, as a Judge, undertake to decide that the prisoner's statement was true or untrue? What means had I of knowing how, when, or under what circumstances the prisoner appeared before me except through the witness box? Until the prisoner pleaded his extradition, and the circumstances under which it took place, I had no knowledge of it, and even then I had only his word for the truth of his assertion, and that was not sufficient. He had a right, however, to prove the truth of what he affirmed, and in no other way could he do this than by the examination of his papers and the intervention of a jury. There was no record before me showing that the prisoner was extradited, and upon which I could pronounce an opinion. On the contrary, I was informed by the pleading of the Crown that there was no extradition in the prisoner's case; and yet it has been said that I should have decided the fact—a fact which I neither did nor could know anything of—without proof, without the examination of a witness, without the assistance of a jury. Surely this can be no more considered within my province, as a Judge sitting in a Criminal Court, than the question whether the prisoner was or was not brought here a prisoner from the United States can be held to be a matter of law. I, therefore, adhere to my opinion as expressed at the time, and still hold, that the fact raised by the issue was the subject matter of trial by jury—and only triable by that mode. As to the other point raised, namely, the right of the Crown to a new trial, upon a collateral issue arising out of a case of felony, and where the verdict is in favour of the defendant, it is not required that I should discuss it, as the judgment of the majority of the Court rejects the application for a new trial, and is based upon grounds not contained in the motion or even made the subject of argument. I must say, however, that the Crown is fortunate in the failure of its application; seeing that, by the judgment just rendered, it has obtained, not, it is true, what was asked for by the motion, but still all that it could possibly desire—certainly far more than was expected or hoped for. I cannot conclude these remarks without expressing my regret, that the important question raised by the prisoner was not finally and more satisfactorily settled. It was my intention, when the question of law, arising out of the fact found by the jury, was argued, to have reserved the whole question for the consideration of the Court of Appeal. As I have before stated, it has arisen in our Courts for the first time, and is a question of national importance, growing out of a treaty obligation—the provisions of which should be wisely, liberally and strictly interpreted, and ever and always truthfully and faithfully executed. Entertaining these opinions, it now only remains for me to have my dissent recorded.

The following is the judgment of the Court, as recorded in the register: "That no new trial shall be had, inasmuch as no such collateral issue, as tendered "by said plea of the said John Paxton, should have been submitted to a jury: "that the proceedings previously to such motion shall be set aside: that the

"said John Paxton do plead and answer to the indictment forthwith; and that "the trial thereon do proceed."

The prisoner was then ordered to be arraigned on the charge preferred, and, being called upon to plead to the indictment, said: "I am here by virtue of an act of extradition, upon a demand made by His Excellency the Governor General in the United States, charging me with the crime of forgery; and I protest against being called upon to plead to or answer any other charge than that for which I was so extradited; and I also protest against the unfairness of the Crown in denying the fact of my extradition, which is a violation of the good faith that should mark every proceeding under the Treaty, and thus protesting, I plead not guilty."*

Verdict set aside.

T. K. Ramsay, (for Attorney General) *Pro Regina.*
Edward Carter, Q.C., for private prosecutor.
B. Devlin, for prisoner.
(S.B.)

MONTREAL, 9TH JUNE, 1866.

In Appeal from the District of Richelieu.

Coram DUVAL, C. J., MEREDITH, J., DRUMMOND, J., and MONDELET, A. J.

No. 49.

ZÉPHIRIN NAUD,

(*Defendant in the Court below*),

APPELLANT;

AND

ELIZABETH SMITH,

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—1st. That an error in the date upon which a judgment was rendered is not a ground of nullity.

2nd. That such an error can be remedied by the Court of Appeals in and by its own judgment.

An action in ejectment was instituted against the defendant in this cause on the 4th May, 1865.

The defendant contested the action.

After proof and hearing of the parties on the 12th May, 1865, the Circuit Court at Sorel, in the District of Richelieu, gave judgment in favour of the plaintiff. The judgment bears date the *fourteenth April*, 1865. On the 19th May, 1865, the defendant inscribed the cause for review before three Judges

* The prisoner was subsequently tried and found guilty, but the Court refused to pass sentence until after the Court of Appeal shall have pronounced on the validity of the verdict. [Reporter's note.]

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at Montreal, and urged before the Court of Review, amongst other reasons, the nullity of the Judgment, resulting from its erroneous date, and as having been rendered even before the institution of the action.

The Judgment was confirmed in Review on the 30th September, 1865, as follows :—

" La Cour Supérieure siégeant à Montréal présentement en Cour de Révision, " ayant entendu les parties par leurs avocats respectifs sur le jugement rendu " *le quatorze Avril* 1865, dans la Cour de Circuit pour le District de Richelieu, " ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement " délibéré ; considérant qu'il n'y a point d'erreur dans le susdit jugement; " confirme par les présentes le dit jugement en tous points avec dépens contre le " dit défendeur."

The defendant appealed from this judgment before the Court of Queen's Bench at Montreal, and submitted that the pretended judgment of the 14th April, 1865, had evidently been rendered without jurisdiction, and was a mere nullity, and relied on the case of Allen and La Corporation du Township d'Onslow.*

The parties having been heard in Appeal in the month of June, 1866, the date of the judgment being corrected, the judgment was confirmed, with costs against the appellant, by the Court of Appeals as follows :—

" La Cour après avoir entendu les parties par leurs avocats sur le mérite, exa- " miné le dossier de la procédure en cour de première instance, la requête d'ap- " pel produite par l'appelant en cette cause, et sur le tout mûrement délibéré; " considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour de " Circuit pour le Bas-Canada siégeant à Sorel dans le district de Richelieu, le 14 "*jour de Mai* 1865, ni dans celui rendu par la Cour Supérieure siégeant en cour de " Révision à Montréal, le 30 jour de Septembre 1865, confirme les dits jugements " avec dépens, contre l'appelant en faveur de l'intimé."

Lafrenaye & Bruneau, avocats de l'appelant.

Germain, avocat de l'intimé.

(P.R.L.)

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* In the case of Allen and La Corporation du Township d'Onslow, the judgment of the Court below was reversed; because it was rendered on a day on which it could not be pronounced.

The judgment in Appeal, rendered on the 7th day of March, 1865, at Montreal, is as follows :—

" The Court, * * * considering that the judgment complained of was rendered " on a day on which the same could not legally be pronounced, doth reverse, &c., and " doth order that the Record and proceedings be remitted to the Court, &c., in order that " the parties may take therein such further proceedings on the inscription made of the " cause for final hearing on the merits before the Court, as they may be advised. Costs " to be borne by each party. The costs below to be subject to the future judgment to " be pronounced."

MONTREAL, 6TH DECEMBER, 1864.

Coram DUVAL, CH. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., and MONDELET, A. J.

No. 1.

SIFFROID GOSSELIN,

(*Defendant in Court below*),

APPELLANT;

AND

J. BTE. RACETTE,

(*Plaintiff in Court below*),

RESPONDENT.

HELD:—That a public road, abolished as such by a *procès-verbal* of a Grand Voyer, under the provisions of the old Road Act of L. C., but ordered by such *procès-verbal* to remain open for the private benefit of certain individuals, is not subject to the jurisdiction of a Municipal Corporation, under the Act of 1855.

This was an appeal from a judgment rendered by the Circuit Court of L'Assomption (BRUNEAU, J., presiding), on the 21st November, 1861, condemning the appellant to pay the respondent the sum of $4, as damages, which were claimed by the respondent under the following circumstances:—

By a *procès-verbal* of Deputy Grand Voyer Lacroix, of date the 11th of June, 1805, there were ordered two public roads in the County of L'Assomption, one of which traversed a portion of the property presently owned by the respondent.

In 1835 both these roads were abolished as public roads, by order of the Grand Voyer P. L. Panet, who declared, in his *procès-verbal* of date of the 30th September, 1835, with reference to the road so traversing a portion of the respondent's property:—" Qu'il demeurera ouvert pour l'usage du dit François " Gosselin et Laurent Leroux, Ecuyer, et leurs représentants à l'avenir, les " seules personnes intéressés à garder le dit chemin de ligne pour leur sortie " particulière, qui l'entretiendront comme chemin privé et à leur usage seulement."

The appellant was a representative of said François Gosselin, and the respondent was one of the representatives of said Laurent Leroux.

By a *procès-verbal* of the Superintendent of the County of L'Assomption, dated the 17th of August, 1858, and duly homologated, the road so traversing a portion of the respondent's property, and which had been at all times since 1835 used and maintained as a private road by Gosselin and representatives (including the appellant), was declared to be abolished.

In virtue of the *procès-verbal* last referred to, the respondent closed up the road in question, and the appellant, considering the *procès-verbal* to be illegal and null, as being in excess of the powers conferred by the Municipal Act of 1855, demolished the fence; and the respondent, considering himself aggrieved by the act of the appellant sued him in damages.

The section of the Municipal Act of 1855, having reference to the matter in dispute, is the third, and in the French version is worded as follows:—" Cet

Gosselin and Racette.

" Acte ne sera pas applicable aux chemins ou ponts sous le contrôle des Com-
" missaires de Travaux Publics, à moins qu'ils ne soient abandonnés aux
" autorités municipales et jusqu'à ce qu'ils soient ainsi abandonnés, ni aux
" chemins qui sont en la possession de particuliers, ou de compagnies, en vertu
" de quelque loi ou règlement."

The Court below regarded the *procès-verbal* of the 17th of August, 1858, as valid, and binding in law, and consequently condemned the appellant to pay $1 damages and costs.

A majority of the Court of Appeal, however, thought otherwise, and the judgment of the Court below was reversed.

The following is the judgment in Appeal:—" La cour * * * * considérant
" que par l'Acte de Municipalités, chapitre vingt-quatre, section trois, des Sta-
" tuts Refondus du Bas-Canada, la Corporation et le Conseil Municipal du
" Comté de l'Assomption, n'a eu et n'a aucun droit de réglementer les chemins
" qui sont en la possession des particuliers.

" Considérant que le procès-verbal de Pierre Louis Panet, Ecuyer, alors
" Grand-Voyer du District de Montréal, en date du trente Septembre mil huit
" cent cinquante-cinq, est valide et a eu l'effet légal que le chemin de ligne dont
" il est question en cette instance, demeurât et il est demeuré ouvert pour l'usage
" d'entre autres, de celui que représente l'appelant.

" Considérant que le procès-verbal du sept Août mil huit cent cinquante-
" huit, de Louis Bolduc, Surintendant du Comté de l'Assomption, homologué
" le huit Septembre en suivant, n'a pu avoir et n'a pas eu l'effet d'abolir le
" chemin de ligne en question.

" Considérant enfin que par suite de ce qui précède, l'intimé demandeur en
" coup de première instance, était mal fondé en son action, laquelle aurait dû
" être déboutée.

" Considérant qu'il y a erreur dans le jugement de la cour de première
" instance, savoir ; le jugement rendu par la Cour de Circuit à l'Assomption, le
" vingt-unième jour de Novembre mil huit cent soixante-et-un, casse, annulle et
" met au néant le dit jugement et procédant à rendre le jugement que la dite
" cour de première instance eût dû rendre, déboute la dite action de l'intimé,
" demandeur en cour de première instance, et le condamne à tous les dépens tant
" en la dite cour de première instance qu'en cette cour.

" (*Dissentiente*, l'Honorable M. le Juge Meredith)."

Judgment of the Court below reversed.

Lesage & Jetté, for appellant.

Leblanc & Cassidy, for respondent.

(S.B.)

CRIMINAL APPEAL—RESERVED CASE.

MONTREAL, 9TH JUNE, 1866.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., and MONDELET, A. J.

Regina vs. *Daoust.*

FELONY—NEW TRIAL.

HELD :—That no new trial can be granted in a case of felony.*

MONDELET, J.—At the March Term, 1865, of the Court of Queen's Bench at which I presided, Daoust was tried on an indictment for forgery of an endorsation of a promissory note. From the evidence adduced at the trial there seemed no doubt, and I charged the jury—as I never shrink from doing where my conviction is strong—to return a verdict of guilty, and the jury did so. The most important evidence was that of Desforges, who stated that he had never authorized the prisoner to sign his name. The prisoner was subsequently put upon his trial for forging the same name on another note, and this time the jury found a verdict in his favour, on evidence tending to show that the prisoner had been authorized by Desforges to sign the name. The prisoner stood between two fires—between a verdict of guilty and a verdict of not guilty. Towards the end of the term, Mr. Ouimet, the prisoner's counsel, moved for a new trial on the first indictment, in order that the witness Legault, who testified that Desforges had authorized the prisoner to sign his name, might be heard. Mr. Johnson, who then represented the Attorney General, said that, under the circumstances, he did not think proper to oppose the granting of a new trial. I have presided at both trials, and being *au fait* with the circumstances of both, having no possible doubt that Daoust either believed himself authorized, or was really authorized to sign the name, considered it not only justice, but an imperative duty, to grant a new trial. I wish to be clearly understood on this point. First, because an imperative sense of justice urged me to it; and, secondly, because I believed the Court had the power to do it. In the following September Term, Mr. Justice Aylwin, who was then presiding, reserved the case for the consideration of the full Bench. It will be understood that my conviction must be very strong when I still adhere to it, though I find four Judges, for whose abilities I entertain such profound respect, differing from me in opinion. I start from this point: That the Court of Queen's Bench has the power to remedy any evil that comes before it, provided there be no law to the contrary. Starting from this point, I put the following question—When the first new trial in case of misdemeanour was had in England, was there any law that authorized the Court of Queen's Bench to grant it? I believe I am safe in saying that there was none. There being, then, no law, there must have been some principle; and, in my humble opinion, it must have consisted in this unlimited power, inherent in the Court of Queen's Bench, to do what it considered necessary in the interests of justice. If these premises are well founded, I proceed to ask, as the Court granted a new trial in a case of misdemeanour for the first time, from the conviction that it had the right and power to do so, why

* Vide 9 vol. L. C. Jurist, p. 85.

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should it not grant a new trial in cases of felony? Why remedy a small evil while it left the subject convicted of felony no recourse? For there is no writ of error on the evidence. I say, then, that if the Court of Queen's Bench has the right to order a new trial in case of misdemeanour of small importance, it has the right to order it in the more serious case of a felony. It is said that the Courts would constantly be assailed with applications if new trials were allowed for felonies, and that we would never be able to hang anybody. But surely that is no reason for refusing to give an innocent man an opportunity of establishing his innocence. Then again, in civil cases, new trials are constantly granted; nor is the trouble imposed on the Judges any consideration for refusing them. But, it is urged, the Courts in England have always refused to grant a new trial in cases of felony. I must say that, in my opinion, this is no reason for continuing to refuse it. Many things have been for centuries refused, and then the old practice has been departed from. Is it not true, for instance, that in all Courts counsel were prohibited from putting a question in cross-examination that did not proceed from the examination-in-chief? I remember the time myself. So at one time it was asserted that a jury could never be discharged after retiring to deliberate upon their verdict, nor could meat or drink be provided them till they were agreed. It is said that a man who has been convicted must go to the Executive, and ask for a pardon. Now, I do not relish the idea that an innocent man must go upon his knees before the Governor-General, or the Attorney-General, and ask for a pardon. Besides, is there not something incongruous in a man saying, "I am innocent, but I want a pardon." There is another case to be mentioned. It might happen that in times of high political excitement, such as I hope will never prevail in this country, that the Government might be desirous of getting rid of a formidable opponent, and if a conviction had been obtained against him, would not be inclined to grant a pardon. In Upper Canada a law exists allowing the Court to grant a new trial in cases of felony. Why have we not that law here? I answer, because the Judges have the power to grant a new trial without any special statute. I believe they did not require a statute in Upper Canada; but the people asked for a statute, thinking, perhaps, that the Judges might hesitate about granting a new trial.

MEREDITH, J.—The first point to be considered in this case is as to whether the main question submitted to us is one which, under the statute, could be reserved for our opinion. Upon this subject there has been much difference of opinion upon the Bench in England, and as all the arguments on the one side and the other with respect to what question may be reserved will be found in the well-known case of the Queen *vs.* Mellor,* I shall limit myself to a brief statement of the reasons which induce me to think that the question reserved is one which we have power to consider. The words of the law are very general: "The Court "before which the case has been tried may, *in its discretion*, reserve *any question* "*of law* which has arisen on the trial for the consideration of the said Court of "Queen's Bench, on the appeal side thereof." There can be no doubt that the question, "can there be a new trial in a case of felony," is a question of law; and I think that question may be said to have arisen "on the trial," because

* Dearsley & Bell, p. 468.

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to repeat the words made use of by Baron Rolfe (now Lord Cranworth) in the case of the Queen *vs.* Martin,* "the word 'trial' ought to be taken in a liberal "sense, and includes all the proceedings in the Court below." In the case just cited the Court for Crown Cases Reserved, composed of Wilde, Chief Justice, Wightman and Cresswell, Justices, and Baron Rolfe, unanimously held that a question of law raised by motion in arrest of judgment, *after the conviction* of the prisoner, may be reserved under the 11th and 12th Victoria, c. 78; that being the English Act establishing a court for Crown Cases Reserved.

The first question submitted to us by the learned Judge is, whether a second trial can be legally had in the present case, it being a case of felony, and I think that this highly important question may at this day be answered in very nearly the same words used by Chitty half a century ago, namely, "in case of felony or treason it seems to me completely settled that no new trial can be granted." There is, it is true, one case, the Queen *vs.* Scaife, in which a new trial was granted in a case of felony.

I have looked into several reports of this case, and they all concur in showing it was urged and decided exclusively on the ground that certain illegal evidences had been received, and not one word was said about the difficulty of allowing a new trial in a case of felony until all the Judges had given their reasons in support of the judgment. But then Mr. Dearsley, the counsel for the prisoner, "suggested "there was a difficulty in ascertaining what rule should be drawn, no precedent "having been found for a new trial in a case of felony." To which Lord Campbell answered: "That might have been an argument against our hearing the "motion." Now it seems to me that if it might have been an argument against the hearing of the motion, it might also have been an argument for the re-consideration of the judgment.

It may here be observed that the case just cited had been removed by *certiorari* from the Quarter Sessions to the Court of Queen's Bench, and it appears that where this is done, according to English practice, "the charge is dealt with *at the civil side of the court*, and is subject to all the incidents of a civil cause." Mr. Dearsley who, for what I have already said, appears to have been counsel for the prisoner, refers to this case in his small work called "Criminal Process," and after saying "all the authorities in the books go to show that in cases of felony, "or treason, no new trial can in any case be granted," adds, "though this position "is for the most part correct, it must be received with some qualification." He then, referring to the decision of the Queen and Scaife, says: "And the principle "seems to be this, that where such a case is removed into the Court of Queen's "Bench, and is sent down to be tried at *nisi prius*, that all the incidents of a "trial at *nisi prius* attach to it."

This much is plain, that whatever may be the rule with respect to cases moved by *certiorari* into the Queen's Bench, the rule with respect to cases tried in the ordinary course of law was, when the criminal law of England was extended to this country, and still is, that there cannot be a new trial in cases of treason and felony. Repeated attempts have been made in Parliament to change the law in this respect, and those attempts have been invariably resisted—not on the ground that

* 3 Cox's Criminal Law Cases, p. 447.

the law was not as stated by those who sought a change—but, on the contrary, on the ground that the change proposed would not be an improvement. It is true that in Upper Canada the distinction between misdemeanours and crimes of greater magnitude has been done away with, in so far as respects the right to obtain a new trial; but this has been done by statute, and if legislation for that purpose was necessary in Upper Canada, it is still more necessary here; for it is plain that if an application for a new trial were allowed, it ought to be made to the Court of Queen's Bench sitting in appeal, held by at least four Judges, and not to the Court of Queen's Bench, on the Crown side, usually held by one Judge. And it is equally plain that, under the existing law, such an application could not be made to the Court of Appeals.

It is not for the court to decide whether it is desirable to change our law so as to admit of a new trial in cases of treason and felony. I admit that it is difficult in theory to answer the arguments that have been urged for giving a party, in cases of the utmost moment, a right that is freely accorded to him in cases of much less importance, but no one who has had experience in the works of Criminal Courts can fail to see that there are practical objections of great gravity against the making of the change proposed. The Imperial Parliament upon several occasions has been called upon to consider this subject, and the opinions of almost all the Judges were obtained in relation to it. And we know the bill which was introduced by Mr. McMahon, in 1860, for the establishment of a Court of Criminal Appeals, the main object of which was to give a new trial in cases of treason, was not allowed to be read a second time, and was rejected without a division, and that the same fate attended a bill introduced by Mr. Britt, for the same purpose in 1861; another bill was, I believe, introduced in 1864; but in England the law on this subject still remains unchanged. Our law on this subject is the law of England, and, in the absence of Provincial Legislation, I think it would be nothing short of a usurpation on our part were we to attempt to exercise a power which the Imperial Parliament has deliberately and repeatedly refused to grant to any Court in England. For these reasons I am of opinion that the first question submitted to us by the learned Judge ought to be answered in the negative.

The second question proposed is as to the course to be pursued, should there be a motion to obtain a new trial.

This, it seems to me, and I say it with all deference, is a question to be determined by the learned Crown prosecutor, and, were we to answer it, I apprehend we would, in effect, offer that learned officer advice for which he has not asked, and by which he might not deem it consistent with his duty to be guided. I, therefore, submit that it will be well for us to abstain, for the present, from the expression of any opinion upon the second question submitted.

Drummond, J.—The law is fixed by the practice of the courts. If we are to adopt the principle laid down by Mr. Justice Mondelet—that we have no criminal law but what is contained in the statutes, and that each judge, where there is no statute, can wield unlimited power,—we may as well close our Courts of Justice. The administration of criminal law would become utterly impossible. The criminal

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law in this country is the law and the practise of the Courts as it existed at the time it was transplanted into this country. Whatever respect I may have for modern Judges, if they differ from what was the law at the time it was transplanted into this country, I shall follow the old law; and this law, as laid down by Kenyon and other eminent Judges, was clear beyond doubt that no new trial could be had in cases of felony. We have to administer the law as laid down in the books. If the Judges err in the view of the case, they err in about the best company of intellectual men that can be found in the world. We make no order; we merely say that Judge Aylwin was right in reserving the question, and that he was perfectly correct in refusing to proceed with a new trial.

DUVAL, C. J., concurred.

The Judgment is as follows:—"The Court 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 Montreal, it is considered, adjudged and finally determined by the Court "now here, pursuant to the statute in that behalf, that a second trial cannot be "legally had on the indictment found against the prisoner, Jean Baptiste "Daoust."

Mondelet, A. J., dissenting; motion for new trial refused.

On the 25th September, 1865, the following proceedings took place before the Court of Queen's Bench, Crown Side—Aylwin, J.

PROVINCE OF CANADA.
LOWER CANADA, TO WIT: } IN THE QUEEN'S BENCH.
DISTRICT OF MONTREAL.

Domina Regina

vs.

Jean Baptiste Daoust.

Upon an indictment for feloniously forging a certain indorsement of a promissory note for the payment of the sum of three thousand dollars, with intent to defraud, and with a second count charging the defendant with uttering the said indorsement, with intent to defraud, he was, on the 30th March last, tried before the Honourable Mr. Justice Mondelet, at this Court, in Montreal, and found guilty.

On the 20th April last, upon a motion founded upon two affidavits (of which motion and affidavits, together with the indictment, copies are annexed), the learned judge ordered that the verdict should be set aside and awarded a new trial.

On the 25th September last, Mr. Ramsay, on behalf of the Crown, moved that a day for the trial should be fixed, whereupon, being of opinion that I had no authority to take a second trial after the former verdict of guilty, I directed that the opinion of the Court of Queen's Bench in Appeal should be asked:

First, whether a second trial can legally be had; and,

Secondly, as the course to be pursued, should there be no authority to take the new trial.

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I have now respectfully to ask the opinion of this Court, in respect of the premises, and have directed the defendant to be admitted to bail, until the first day of the approaching term in Appeal.

Signed, T. C. AYLWIN.

Montreal, 25th September, 1865.

It is ordered *avant faire droit*, that the defendant do enter into recognizance to appear before this Court, at the first day of the next term, to wit: on Friday, the first day of June next, in the sum of $2,000, the principal and two sureties in the sum of $1,000 each, with intent that such things may, by the consideration of our said Court, be done and ordered what to law and justice shall appertain.

T. K. Ramsay, Crown prosecutor.

Gédéon Ouimet, Attorney for prisoner.

(P.R.L.)

MONTREAL, 19TH OCTOBER, 1866.

In Appeal from the Superior Court, District of Montreal.

IN CHAMBERS—*Coram* MONK, J.

GEORGE D. FERRIER,

(*Opposant in Court below*),

APPELLANT;

AND

ROBERT G. H. DILLON,

(*Plaintiff in Court below*),

RESPONDENT.

HELD :—That an opposant, who is not also defendant, appealing from a judgment dismissing his opposition, is bound to give security for costs only.

The appeal in this case was from a judgment rendered in the Superior Court on the 29th September, 1866, dismissing an opposition *à fin de distraire*, fyled on behalf of the appellant in cause No. 2359, Dillon vs. Harrison *et al.* The appellant now tendered security for costs only.

Perkins, J. A., on behalf of the respondent contended that security ought to be given for the amount of the debt as well as costs, and cited *Coutlée and Rose*, 6 L. C. Jurist, p. 186.

Lunn, A., for appellant, said that in the case cited the opposant was at the same time defendant, and that there was an obvious distinction between the position of a defendant becoming opposant and that of a third person.

MONK, J., said that undoubtedly the two cases were quite distinct. The appellant in this case can only be required to give security for costs.

Cross & Lunn, for appellant.

Perkins & Stephens, for respondent.

(A.H.L.)

SUPERIOR COURT, 1866.

MONTREAL, 16TH MAY, 1866.

Coram MONK, A. J., and a special Jury.

No. 1733.

McGibbon v. *The Queen Insurance Company.*

CONSTRUCTION OF FIRE POLICY—LIABILITY OF INSURERS FOR STOLEN GOODS.

HELD:—That under the terms of a contract between insurers and insured, whereby the insurers insure against loss or damage by fire, the insurers are liable for losses to the insured by goods stolen at a fire.

The *demande* of the plaintiff was for the recovery of the sum of $2243.95 cents, with interest from service of process alleged to be due to the plaintiff as assignee of the claim of Messrs. Ryan & Panneton, Traders of Three Rivers, under two policies of insurance issued by the defendants against loss or damage by fire, one policy bearing date the 8th June, 1865, for $2000, and the other bearing date the 26th December, 1864, for $4000.

The defendants met the demand by three pleas.

The first plea set forth the 12th condition of the policies, which was in these words: "Persons insured sustaining any loss or damage by fire, are forthwith "to give notice thereof to the company, or its agents, and within fourteen days "thereafter deliver in as particular an account of their loss or damage 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 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 appear any fraud or false statement, or that the "fire shall have happened by the procurement, wilful act, means or connivance "of the insured or claimants, 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."

The said first plea further alleged that the said Ryan & Panneton, the assured under the said policies, on or about the 5th June last, sent and delivered to the defendants their claim in writing, in respect of the loss alleged to have arisen as in the plaintiff's declaration stated, the same being verified by the oath of John Ryan, one of the insured, and thereby claimed from the defendants $2243.95cts.; and that such claim was false and fraudulent, and contained a fraudulent mis-statement, inasmuch as the assured never sustained a loss by fire to that amount, but, if any loss occurred by reason of the premises it did not exceed the sum of $744.10c., and by reason of such false and fraudulent mis-statement, and by the terms and conditions of the said policies, the assured thereby became, and were excluded from all benefit under the said policies, and the defendants became discharged therefrom.

Then followed the usual conclusion.

The second plea set forth that the policies in the declaration mentioned were conditional for the payment of losses sustained or which should happen by fire,

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but that the assured did not sustain loss or damage by fire, as in the plaintiff's declaration alleged, to the amount of $2243.95c, but that, on the contrary, the loss sustained by the assured, if any loss there was occasioned by the fire set forth in the declaration, so far as such loss arose or was caused by fire, amounted to the sum of $766.10c, and the rest of the plaintiff's claim, that is to say the sum of $1499.85c, is for goods claimed by the assured to have been owned by them at the time of the said fire and to have been stolen on the occasion thereof, for which last mentioned sum and the causes of such loss, the defendants are not and never were, by the terms of the said policies, or otherwise, bound or liable.

That on the 8th May, 1865, the defendants tendered to the plaintiffs the said sum of $744.10c, which was refused by the plaintiff, and the defendants have consigned the same in Court by this plea.

Wherefore, &c., &c.

The third plea was the general issue.

There were two questions involved in the contest:

1. Whether in the claim of the insured, as set forth in the first plea, there was a fraud or false statement avoiding the policy in the terms of the 12th condition thereof.

2. What was the precise amount of loss and damage by fire sustained by the insured for which the defendants were liable under the policy, and was the tender of the defendants sufficient to cover this loss and damage; and in particular were the defendants liable for goods lost or stolen on the occasion of the fire?

The defendants contended that the amount tendered, $744.10c, covered the amount of the loss of the insured covered by the policies.

Besides other questions, which for the purposes of this report will not be referred to, the two following questions were put to the jury:

NINTH. To what amount did the said Ryan & Panneton sustain loss or damage by fire, to wit at the date mentioned in the plaintiff's declaration in respect of the property referred to in the policy issued to them by defendants?

TENTH. Were any of the goods of the said Ryan & Panneton covered by the said policy stolen, and, if so, to what amount and value, on the occasion of the said fire, to wit, on the said sixth day of March, eighteen hundred and sixty-five?

The answer of the Jury to the ninth question was, "To the amount of two thousand two hundred and forty-three dollars ninety-five cents."

And to the tenth question, "we cannot say."

MONK, A. J., in charging the jury said:"

GENTLEMEN,—Your own intelligence and the attention you have bestowed upon this case will relieve me from the necessity of entering at length into the facts at this late hour. I shall merely call your attention to a few of the leading points which require to be noticed. In the first place, gentlemen, I may tell you that in cases of this description positive evidence is seldom or never to be obtained. Testimony sufficient to remove any reasonable doubt is all that is to be expected. We may suppose that all the evidence which could be adduced has been adduced, and the question then is, whether you believe that testimony.

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Some remarks have been made upon the appearance of Mr. Ryan and his partner in the witness-box. Well, gentlemen, I must tell you that it is an advantage for you to have these men before you. The law allows their testimony to be received; it is perfectly legal, and it will be for you to say, from a consideration of the manner in which their testimony has been given, and under all the circumstances of the case, whether you will refuse to place full credit in it, or whether you will believe every word they have said. It would, indeed, have been extremely strange if these men, who are acquainted with all the circumstances of the case, had not been placed in the box, that you might have the opportunity of hearing their testimony, of observing the manner in which they give it, and of ascertaining the degree of credibility to be attached to it, and I may tell you, gentlemen, that, so far as I am able to judge, I see nothing in the circumstances of the case—nothing whatever has been disclosed—that would induce me to disbelieve one word of their testimony. It may be different with you, but for my own part, seeing the manner in which they have given their testimony, I feel disposed to attach entire credibility to it; but it is for you, gentlemen, to say, whether you concur with me in this opinion. It is a matter of some importance, for, if you believe the evidence of Mr. Ryan, and of his partner, Mr. Panneton, and that their testimony is confirmed by the corroborative evidence adduced, you must come to this conclusion, that at all events there has been no misrepresentation, no fraud. It may be that the loss falls short of $2249.35. It is quite possible that, whatever credibility you may be disposed to attach to the evidence for the plaintiff, you may not be prepared to go to the extent of saying that the loss was $2243. This estimate may be fallacious, but there is one thing, gentlemen, which I think you may be sure of, and that is, that there is not a tittle of evidence which discloses fraud. The first plea of the defendants sets up that there was fraud and misrepresentation; that the policy was thereby avoided and that the action should be dismissed. But, as I have stated, I know of no circumstance that discloses fraud, and, therefore, you will not be justified in maintaining the first plea of the defendants under any circumstances. The fact seems to be that when Messrs. Ryan and Panneton were estimating the amount of their losses they made an express reservation with reference to property lost or stolen. Mr. Ryan made no secret about it. He said: "I have "no objection to appraise the property on the premises that has not been "destroyed by fire; but I have another claim for property lost or stolen." It is clear that Mr. Ryan made this express reservation when he named an arbitrator. He said, I will abide by the decision of the arbitrator with respect to the loss or damage by the fire, but I reserve my right to something more. Mr. Shortiss and Mr. Woods were named, and they assessed the damage done by the fire at $744. The Company seemed to have recognized this award, and there is no difficulty up to this point. But because Mr. Ryan subsequently sent in a further claim for $1400, for property lost or stolen at the fire, which claim he said he would send in, the company tell him, this is a fraudulent claim, and they said this not only because the claim had been sent in, but because they said it was impossible that goods to this amount should have been destroyed at the fire. But the fact of his giving notice of his intention to make the claim shewed

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that there was no fraud. All the witnesses agree in saying that the property lost was not destroyed by fire. Was it stolen, or was it destroyed in any other way? Well, gentlemen, I have no hesitation in saying that it was not destroyed by fire, and there is no evidence to lead us to the conclusion that it was destroyed in any other way. We have, then, to suppose that when the citizens of Three Rivers rushed to the scene of the fire, and the premises were gutted, that they went in, and without any restraint, like a band of barbarians, they carried off groceries, liquors, and whatever they laid their hands on. Mr. Shortiss was there and witnessed the confusion; and he says that it is not only possible but extremely probable that, in the removal of the property, a good deal of it disappeared. I think it is extremely probable, and it stands to common sense that, under the particular circumstances of this fire, a certain amount of the property, at all events, was carried away. Well, gentlemen, if you come to the conclusion that a certain amount of the property was carried away, I do not know whether you are justified in stopping short at any particular amount. If you think that only $100 or $500 worth was carried away, it will be for you to say whether you will stop short at this amount. For my own part, if I came to the conclusion that any portion of this property had been removed, I should have great hesitation in stopping at any particular figure. The fact that the property was removed under these circumstances justified Messrs. Ryan and Panneton in saying, even if they did not lose it all, that, taking their purchases and their sales, they would claim so much for property lost or stolen. If they were honest men, and it was not proved that they were dishonest, and if they really believed that they had all this stock, were they not right in making a claim such as this? They said—"here are the figures. We purchased between May, 1864, and March, 1865, goods to the amount of $14,000." There is no difficulty about this amount, for the invoices show that they have told the truth in this respect. Then they tell you, "We have deducted for sales for cash and on credit during the same period before the fire (allowing 20 per cent. for profit on sales) the sum of about $7000, leaving stock on hand to the extent of about $7000." With respect to the sales, if you think Ryan has told the truth, there can be no doubt about them. It would have, doubtless, been more satisfactory, if the sales book had been produced. You have no other evidence than that of Ryan himself; but, if he has told the truth, there was at the time of the fire this amount of goods on hand. After the fire, it was found, on a careful inventory being made, that about $4000 worth of goods remained, leaving a difference, unaccounted for except by the fire, of $2243. This amount is now claimed, and I think you may come to the conclusion that not only was there no fraud, but that this $1400 worth was really lost. It is for you to determine the fact, but it is my duty to tell you that I think the plaintiff is entitled to this amount. At all events you must reject the first plea, giving your verdict at least for the $744 tendered. You have then only to deal with this $1400. If you are satisfied that the property was stolen in the removal, that each person carried off a portion—and it must be borne in mind that it would not take long to carry away goods to this amount—if you are of this opinion, then you must come to the conclusion that this was a theft, a loss for which the Insurance Company

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are liable, and that they are liable for the whole amount claimed. If, on the contrary, you think that there is no evidence that this property was stolen or lost, or that it was stolen after the removal was completed, you may perhaps come to the conclusion that you cannot allow this claim for $1400. But no evidence has been adduced by the Insurance Company that this property was removed after the fire; therefore you must be of opinion that, if stolen at all, it must have been during the removal. I do not think, gentlemen, that it is necessary for me to add anything to what I have already stated. The articulation of facts is too lengthy to read to you at this late hour. The only questions that can give you any difficulty are these:

"To what amount did Ryan and Panneton sustain loss or damage by fire?" They must assuredly recover to the extent of $744; and if you think the circumstances of the case corroborate what was stated by Ryan, you cannot get out of giving them the whole of their claim. The next question is, "were any of the goods of Ryan and Panneton stolen, and if so, to what amount and value?" This question you must answer according to the evidence that has been laid before you. There is another question, as to whether the claim was fraudulent, which you will have no difficulty in answering in the negative.

The only two questions that can embarrass you are the two I have mentioned, and probably, gentlemen, when you look into the whole circumstances of the case, though it would have been more satisfactory if we had a detailed statement of the sales of these men, yet if you believe what they have sworn to be the truth, you will say that the plaintiff must recover the whole amount claimed, and that you are not justified in making any reduction.

With these remarks I leave the case with you.

The answer of the jury to the NINTH question put to them was "To the "amount of two thousand two hundred and ninety-three dollars ninety-five "cents."

Their answer to the TENTH question was "we cannot say."

The defendants subsequently moved the Court (BADGLEY, J.) for a new trial on the ground of misdirection by the judge at the trial, and also for a judgment *non obstante veredicto.*

The judgment of the Court (9th July, 1866) was in the following terms:

"The Court having heard the parties by their counsel upon the motion of the plaintiff of the 26th of May last, that judgment be rendered and entered up in his favor upon the verdict of the jury given in this cause on the 16th day of May, 1866, and also upon the motion of the defendants of the 21st day of said month of May last, that this action be dismissed without regard to said verdict *non obstante veredicto*, and that in the event of the defendants not being entitled to the dismissal of said plaintiff's action, that a new trial by jury be granted in this cause for the reasons mentioned and set forth in said motion, having examined the proceedings and considered the reasons assigned by said defendants, seen and examined the said verdict so given and rendered by the said jury, and having maturely deliberated; doth reject and refuse the said defendant's motion, and doth grant the said plaintiff's motion, and, in consequence, it is considered and adjudged that the plaintiffs do recover from the defendants the sum of two

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thousand two hundred and forty-three dollars and ninety-five cents current money of this Province of Canada, with interest thereon from the 23rd day of September, 1865, date of service of process, until paid, and costs of suit distraits to Messrs. Perkins and Stephens, attorneys for plaintiff."

Judgment for plaintiff.

B. Devlin, & J. A. Perkins & Stephens, for plaintiff.

Torrance & Morris, for defendants.

(F.W.T.)

Defendants' authorities as to non-liability of insurers for goods stolen: Boudousquié—De l'assurance, p. 273, 4, No. 232. Angell on Fire and Life Insurance, § 111 et seq. Marsden v. The City and County Assurance Co., 1 Law Reports, 232.

J. A. Perkins, for plaintiff, cited:

Angell—Insurance, 122 et seq. Alauzet—Insurance, 431. Boudousquié—Insurance, No. 294, pp. 340 et seq. 3 Kent Com., p. 374, N. C. Angell, sec. 115. 2 Pardessus, No. 595, p. 493, 586, 607, 8, 9. Quénault, Assurance, No. 66, p. 56, and Index 511. 1 Phillips Ins., 375. Digest of Fire Ins. dec., p. 365, 378, 9, 397, 444. Alauzet, vol. 2, p. 380. Grun and Joliat, p. 293-4.

B. Devlin cited:

Ellis, Insurance, p. 9, 10. Sumner's Reports, vol. 1, p. 435. Catlin vs. Springfield Ins. Company, N. Y. Reports, vol. 5. Shelden, p. 478. Gaties vs. Madison Ins. Company, Curtis dec. Supreme Court, vol. 12, 11, pp. 404. 2 Barn and Ald., Bush vs. Royal Exchange Ins. Company. 5 Barn and Ald., p. 171, Walker vs. Maitland. 7 Barn and Ald., p. 219, Bishop vs. Pentland. Emerigon, p. 419. Phillips on Ins., vol. 1, p. 688. Hill's Reports, vol. 1, p. 28. Am. Ins. Co. vs. Brien, Johnson's Reports, vol. 13, p. 257. Angell—Ins., p. 9, 164, p. 239.

Note.—The authorities cited by the counsel for plaintiff have been obligingly supplied by them to the editor.

MONTREAL, 28TH FEBRUARY, 1861.

Coram BADGLEY, J.

No. 1025.

Masson et al. v. *Leslie*, et al., and Dame *Marie Elmire Delisle* et vir., opposants, and *The Bank of Montreal*, opposants, contesting the opposition of the said Dame *Delisle*.

MARRIAGE CONTRACT—CONSTRUCTION—DOWER.

Patrick Leslie, on the 28th April, 1857, signed a contract of marriage with Marie Elmire Delisle, containing the following clause—"and in consideration of the said intended marriage, and that there shall be no community of property, *communauté de biens*, between the said parties, the said Patrick Leslie hath given and granted, and by these presents he doth give and grant unto the said Marie Elmire Delisle, his intended wife, accepting the same in lieu of dower, and of every other matrimonial right, claim, pretention and demand whatsoever, the sum of four thousand pounds current money of this Province, which said sum shall be paid by the heirs, executors or administrators of the said Patrick Leslie, as soon after his decease as circumstances shall permit, to the said Marie Elmiro Delisle, and their lawful issue by the said intended marriage, in case the said Marie Elmire Delislo shall marry the said Patrick Leslie, and not otherwise." The marriage took place, and Patrick Leslie having become insolvent, and his movables having been sold by the sheriff, his wife, Marie Elmire Delisle, claimed by her opposition to be paid out of the moneys levied by the sheriff, the total amount of her claim of £4000, unless the creditors should give security that on the death of Patrick Leslie, in case she survived him, she would be paid the said sum.

HELD:—That the demand of the wife could not be maintained according to the maxim "*jamais mari ne paya douaire*."

A writ of execution de bonis issued against the goods of the defendant, Patrick Leslie, under which the plaintiff made a levy of £114 11s. 0d. Divers oppositions were fyled against this money. One of them was by Dame Marie Elmire Delisle, the wife of this defendant.

Her opposition alleged that by contract of marriage, passed at Montreal, on the 28th April, 1857, before Maitre Griffin and his colleague Notaries, the opposant and her husband agreed to take one another as man and wife, and among other conventions stipulated that there should not be any community of property between them, but on the contrary, there should be a separation as to property and that each one should enjoy and possess separately the property belonging to him. "And in consideration of the said intended marriage, and that there shall be no community of property, *communauté de biens*, between the said parties, the said Patrick Leslie hath given and granted and by these presents he doth give and grant unto the said Marie Elmire Delisle, his intended wife, accepting the same in lieu of dower, and of every other matrimonial right, claim, pretension, and demand whatsoever, the sum of four thousand pounds current money of this Province, which said sum shall be paid by the heirs, executors or administrators of the said Patrick Leslie, as soon after his decease as circumstances shall permit, to the said Marie Elmire Delisle, and their lawful issue by the said intended marriage, in case the said Marie Elmire Delisle shall survive the said Patrick Leslie, and not otherwise."

That the said contract of marriage was duly insinuated and registered in the registry of insinuations of the Superior Court for Lower Canada, in the District of Montreal, on the 5th April, 1860.

That the said Patrick Leslie was then insolvent, and *en déconfiture*.

That the movable property seized and sold in this cause, at the suit of the plaintiffs, belonged to Patrick Leslie, one of the defendants.

That the opposant was therefore well founded in demanding that she be collocated for the amount of the money arising from the sale of the said movables of the defendant, Patrick Leslie, in deduction of the said sum of £4000, unless the creditors of the said Patrick Leslie should prefer to give good and sufficient security to the said opposant, that when the decease of the said Patrick Leslie should take place, in case she survived him, the said sum of £4000 should be well and duly paid to her.

Wherefore the opposant prayed that out of the moneys levied in this cause of the goods of the said Patrick Leslie, the said opposant be collocated the sum of £4000, or to the amount of the said moneys in deduction of the said sum, unless the other creditors of the said Patrick Leslie should prefer to give good and sufficient security that, when the death of the said Patrick Leslie should take place, in case of her surviving him, the said opposant should be well and truly paid the said sum of £4000 currency.

The Bank of Montreal also fyled an opposition against these moneys, for the payment of $4711.83.

The Prothonotary prepared a report of distribution, whereby the opposant, Dame Delisle, was collocated for £93 18s. 7d., on certain conditions mentioned in the report.

The report was contested by the Bank of Montreal, which averred that by the contract of marriage set out in the said opposition (of Dame Delisle), to wit: the contract of marriage between the said opposants of the 28th day of April, 1857, before Griffin and his colleague notaries public, the said Patrick Leslie, the husband of the said female opposant and one of the defendants in this cause, stipulates in favour of, and settles upon the said Dame Elmire Delisle, instead and place of dower and other matrimonial advantages, a sum of £4000, payable after the death of the said Patrick Leslie, and in case of her surviving him, as will more fully appear on reference to the said contract of marriage.

That the said Dame Marie Elmire Delisle hath been illegally collocated for the said pretended claim of £4000.

That the said claim of £4000 has no actual existence whatever, and can have no force in this case; that the stipulation contained in the said marriage contract, and cited in the said opposition in favour of the said Dame Elmire Delisle, was not accompanied with any delivery, is merely contingent (eventual), and was only conditioned upon the event of her surviving her said husband, Patrick Leslie, and has not now any existence, and cannot be maintained in law by the said opposant, as claimed in this case: that the said pretended claim of the said Dame Elmire Delisle, arising out of her said marriage contract, was stipulated in lieu of dower, and is therefore in law subject to the same conditions and dispositions, and should be considered and dealt with as a conventional dower (*douaire prefix*.)

That the collocation of the said Dame Elmire Delisle, in the said judgment of distribution, for the sum of £98 1s. 11d. currency, is illegal and unjust, and the

said opposition should be dismissed with costs, and the said report of distribution reformed and amended by the collocation of the said Bank of Montreal, contesting for the said amount of £98 1s. 11d. currency.

That the said opposant, The Bank of Montreal, has an interest in setting aside the said collocation, inasmuch as the said amount granted by the said report of distribution, is withdrawn from the individual estate of the said Patrick Leslie, one of the defendants, the balance of which individual estate, after the satisfaction of the private individual creditors, is liable to the creditors of the defendants in this cause, to wit, the said Bank of Montreal.

Wherefore the said Bank of Montreal, contesting, prays: that the said opposition be dismissed with costs; and that the said judgment of distribution be reformed and amended, and that the amount awarded by the said judgment of distribution to the said opponent, and by the said judgment conditionally awarded to Laird Paton, opposant, be so awarded to the said Laird Paton, without any such condition as that named in the said judgment of distribution, and that the said Laird Paton be unconditionally collocated for his share of the said sum of £98 1s. 11d. currency, for which the said opposant, Dame Elmire Delisle, has been illegally collocated, and that if there should be any balance after such collocation of the said Laird Paton, that the said balance be awarded to the said Bank of Montreal, the opposant contesting.

After issue joined, and the adduction of evidence, the parties were heard on the merits.

Dorion, for Dame Elmire Delisle, argued as follows:

Patrick Leslie et Dame Marie Elmire Delisle ont stipulé dans leur contrat de mariage, passé devant Griffin et son confrère, notaires, le 28 avril 1857, qu'il y aurait séparation de biens entr'eux, et que l'opposante aurait pour lui tenir lieu de tout douaire et de tous autres avantages matrimoniaux, une somme de £4000 courant,—que cette somme serait payée par les héritiers du dit Patrick Leslie, après sa mort, à l'opposante et aux enfants issue de leur mariage, mais qu'elle ne passerait pas aux héritiers de l'opposante dans le cas où elle mourrait avant lui et sans enfants.

M. Leslie était alors à la tête d'une maison de commerce considérable. Il avait en outre des biens d'une grande valeur provenant de successions.

En 1860, les pertes de la maison dont M. Leslie fesait partie, entraînèrent sa faillite. Les meubles de M. Leslie furent vendus et le produit en a été rapporté devant la cour pour être distribué entre ses créanciers.

L'opposante s'est présentée et par son opposition afin de conserver, elle a demandé a être colloquée pour sa créance de £4000 mentionnée dans son contrat de mariage, si mieux n'aimaient les créanciers de M. Leslie lui donner caution qu'ils rapporteraient dans le cas où cette somme deviendrait exigible.

Par la rapport de distribution préparé par le greffier, elle a été colloquée pour £98 1s. 11d. courant, y compris les frais de son opposition,—Sous la condition que Laird Paton, le seul créancier de M. Leslie qui eut produit une opposition, aurait droit de toucher cette somme en donnant caution à l'appelante de la lui rembourser aux termes de son contrat de mariage—et encore sous la condition

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que si elle recevait cette somme, elle en paierait l'intérêt à compter de l'expiration des délais données à Paton pour fournir son cautionnement.

La banque créancière de la société dont M. Leslie fesait partie a contesté l'opposition et la collocation de l'opposante, en alléguant que la créance réclamée n'avait aucune existence actuelle,—qu'elle n'était qu'éventuelle et qu'elle dépendait de la condition que l'opposante survivrait à son mari;—que de plus cette prétendue créance avait été stipulée pour tenir lieu de douaire; qu'elle était sujette à toutes les conditions d'un douaire préfix et qu'elle devait être considérée comme telle.

L'opposante soumet que son droit est incontestable.

Le créancier d'une rente viagère n'a qu'une créance éventuelle dont l'exigibilité dépend du temps que vivra la personne sur la tête de laquelle cette rente repose. L'acquéreur, l'échangiste n'ont que des créances éventuelles pour la garantie stipulée en leur faveur, cependant rien n'est plus commun que la collocation de ces sortes de créances, avec option aux créanciers purs et simples, de prendre les deniers en donnant caution pour le paiement de la rente à l'avenir ou de rembourser les deniers si celui à qui l'on a promis la garantie est troublé.

Les auteurs recommandent comme précaution utile aux appelés à la substitution, de s'opposer au décret fait sur le grévé, afin de protéger le droit qu'ils pourront avoir un jour si la substitution s'ouvre en leur faveur. Or, quel droit peut être plus éventuel que celui là?

Le créancier d'un droit ou d'une créance éventuelle peut donc faire tous les actes conservatoires qui tendent à lui assurer l'exercice de ce droit ou le recouvrement de cette créance lorsqu'ils deviendront exigibles—et puisque la loi ne fait aucune exception, cette règle doit s'appliquer lorsqu'il s'agit de la créance d'une femme mariée pour ses gains de survie.

Les exemples où de semblables réclamations ont été faites sur le produit des biens meubles sont assez rares, surtout sous l'empire du droit ancien. La raison en est sensible, c'est que tous les contrats de mariage devant être reçus par des officiers publics, la femme exerçait sur les immeubles du mari, l'hypothèque que ces actes lui conféraient de plein droit, sans qu'il fut besoin d'une affectation spéciale, ni d'enregistrement.

Ce ne pouvait être que dans des cas extrêmes qu'elle se trouvait obligée d'exercer son recours sur les meubles de son mari en déconfiture, elle qui avait une hypothèque sur tous les immeubles qu'il possédait ou qu'il avait possédé depuis son mariage—mais de ce que ce droit n'a pas été exercé plus souvent il ne faut pas en conclure qu'il n'existe pas.

Si les immeubles du mari avaient été hypothéqués à la sûreté des droits de l'opposante, elle aurait sans aucun doute pu faire toutes les oppositions nécessaires pour protéger sa créance. Elle aurait pu demander que les créanciers colloqués fussent tenus de lui donner caution qu'ils rapporteraient. L'adjudicataire lui-même n'aurait pas manqué de faire cette opposition afin de se prémunir contre le recours de l'opposante et dans l'un ou l'autre cas l'on aurait colloqué soit l'opposante, soit l'adjudicaire en donnant, comme cela a été fait dans cette cause, aux créanciers purs et simples l'option de prendre les deniers moyennant

caution de rapporter, qui d'en recevoir les intérêts. Si l'on peut exercer une créance éventuelle sur le produit des immeubles, pourquoi ne pourrait-on pas l'exercer sur le produit des meubles?

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Ce droit de la femme de se faire colloquer pour une créance éventuelle a été admis en France. Sirey rapporte un arrêt qui, en statuant sur les différentes créances de la femme d'un failli a maintenu sa réclamation pour un gain de survie, constitué dans un contrat de mariage passé en 1783. Cette décision est d'autant plus remarquable qu'elle est intervenue dans une espèce parfaitement analogue à la présente et qu'en vertu des dispositions spéciales du code de commerce, la femme aurait été privée de ce gain de survie, si son contrat de mariage n'avait pas été antérieur à la promulgation du code de commerce.

Laflamme, for the Bank of Montreal argued, as follows:

Le statut de 1859 (22 vict. chap. 4, sec. 1) a définitivement réglé la manière dont serait distribué le produit des biens d'une société entre les créanciers de la société et ceux des associés individuellement. En vertu de ce statut les biens de la société sont le gage exclusif des créanciers de la société et les biens individuels des associés restent le gage des créanciers particuliers de chaque associé. Les créanciers particuliers satisfaits, s'il reste une balance quelconque, elle est seule dévolue aux créanciers de la société.

Se fondant sur cette disposition du statut, l'opposante réclamait sur les meubles de son mari sa collocation à l'exclusion des autres créanciers.

La banque de Montréal étant créancière de la société et ayant produit son opposition pour $47,811, avait intérêt à éliminer la réclamation de l'opposante.

Le projet de distribution ayant admis cette réclamation et l'ayant colloqué à proportion, sur les deniers prélevés; la banque contesta l'ordre de distribution, alléguant dans sa contestation:

Que la réclamation de l'opposante n'avait aucune existence légale; que la stipulation faite au contrat de mariage en sa faveur pour la somme de £4000, n'était qu'un droit éventuel, un gain de survie et ne consistait qu'en espérance, que cette donation était faite au lieu du douaire, en tenait la place et devait être sujet aux mêmes dispositions légales, qu'on ne pouvait considérer cette libéralité autrement que comme un douaire préfix.

Les principes invoqués par l'opposante à l'encontre de cette collocation ont invariablement déterminé la jurisprudence dans ce sens. Il est inouï qu'aucune femme du vivant de son mari ait réclamé et obtenu sur les meubles sa collocation pour douaire. La maxime du droit français: "*Jamais mari ne paya douaire,*" n'a jamais été contesté ou contredite sur ce point et, cette jurisprudence est appuyée des autorités les plus imposantes dans notre ancien droit.

L'opposante, il est vrai, a prétendu que cette donation de £4000 consentie par le mari dans ce contrat de mariage n'était pas un douaire, et qu'on ne pouvait lui appliquer les règles du douaire.

Qu'on applique à cette libéralité faite par le mari dans ce cas la définition du douaire, qu'on l'analyse et l'on y verra tous les éléments du douaire. Ce n'est et ne peut être qu'on douaire préfix. Dans tous les cas on ne peut nier que ce soit un gain de survie et ce seul caractère le soumet à toutes les dispositions du droit français touchant le douaire.

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Avant la mort du mari, la femme ne peut exiger son douaire non plus qu'aucun de ses gains de survie, jusque là il n'existe aucune obligation, aucune créance.

The Court, (BADGLEY, J.,) rendered the following judgment:.

" Considering that in and by the contract of marriage made and executed on " the 28th April, 1857, before Griffin and colleague, notaries, between the said " Dame Marie Elmire Delisle and the said Patrick Leslie, the opposants, it is " stipulated that the said Patrick Leslie hath given and granted thereby unto " the said Dame Marie Elmire Delisle, his intended wife, accepting the same in " lieu of dower and of every other matrimonial right, claim, pretension, the sum " of four thousand pounds currency, to be paid by the heirs, executors or admin- " istrators of the said Patrick Leslie as soon after his decease as circumstances " shall permit, to the said Dame Marie Elmire Delisle and his lawful issue by " the said intended marriage in case she should survive the said Patrick Leslie " and not otherwise, with the stipulation thereto, provided that if the said Dame " Marie Elmire Delisle should predecease the said Patrick Leslie without surviv- " ing heirs of her intended marriage, the sum so stipulated should not be paid " to her heirs or representatives, but should be the property of the said Patrick " Leslie, and at his disposal; and it was further stipulated by the said contract " that the said Dame Marie Elmire Delisle did thereby renounce to all dower " and right of dower and every other matrimonial right, claim or pretension, " consenting that the said sum so stipulated should be in lieu thereof; and con- " sidering that the demand of the said Dame Marie Elmire Delisle in and by her " opposition in this cause fyled, under and by virtue of the said stipulations of " said contract of marriage to be collocated for the said sum of four thousand " pounds currency, in and upon the proceeds of the personal estates of the said " Patrick Leslie, now before this Court for distribution, is not founded in law, " doth maintain the contestation of the Bank of Montreal, contestant, of the " said claim, and doth reject her said opposition with costs, and doth order the " report of distribution fyled in this cause to be amended by striking therefrom " the fifth item thereof, collocating the said Dame Marie Elmire Delisle, and " rejecting the conclusion or order in the said report having reference to the said " collocation, and making such further or other distribution as to law and justice " may appertain in favour of the parties thereto entitled."

Contestation maintained.

Laflamme, Laflamme and Daly, for the Bank of Montreal.
Dorion, Dorion and Sénécal, for Dame Delisle.
(F. W. T.)

AUTHORITIES CITED ON THE PART OF THE BANK:

PREMIÈRE PROPOSITION.—Durant la vie du mari, la femme ne peut exercer aucune réclamation pour son douaire, ou aucun droit de survie sur les meubles de son mari devenu insolvable.

Il est nécessaire de remarquer d'abord que le statut de 1859, 22 Vict., ch. 4, sec. 1, ne peut recevoir d'application ici, attendu qu'il est postérieur au contrat de mariage de l'appelante, lequel est daté du 28 avril 1857, et subséquent à la formation de la société dont son mari faisait partie, et la question doit être examinée indépendamment de ce statut et au point de vue de notre droit coutumier seulement.

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Actes de Notoriété du Chatelet de Paris, p. 10.

"Nous, après avoir oui les anciens Avocats et Procureurs du Siége, les Gens du Roi "et les Conseillers, attestons et certifions à qui il appartiendra, que l'usage inviolable-"ment observé dans la Coutume de Paris à l'égard de la dot de la femme, est qu'il faut "considérer avec soin et application, lorsque l'on procède au jugement des questions qui "naîtront en exécution des contrats de mariage, s'il y a une convention spéciale, par "laquelle il est permis à la femme de renoncer à la communauté de son mari, et en y "renonçant reprendre franchement et quittement tout ce qu'elle a apporté en mariage, "même ses douaire et préciput : parce que, si, lors du contrat, cette stipulation précise "n'y a pas été mise, la femme, en renonçant, perd tout ce qu'elle a mis dans la commu-"nauté, et ne peut reprendre et demander que ce qui lui a été stipulé propre, et les "immeubles qui lui sont avenus ou donnés en ligne directe, ou echus par succession "collatérale. La raison est que le mari est le maître de la communauté, et par consé-"quent de tout ce qui y entre : et la femme, en y renonçant, n'y ayant plus de part, "n'en peut rien prétendre, et perd par conséquent tout qu'elle y a mis."

"Cette distinction ainsi connue, il est constant que la femme séparée d'avec son mari "dissipateur, peut discuter les biens de son mari, meubles et immeubles sur lesquels elle "n'a aucun privilège : si les biens du mari sont des meubles, la femme vient à contribu-"tion au sol la livre avec tous les créanciers du mari *et les enfants ni la femme n'entrent "point dans cette contribution sur les meubles pour le douaire, parce que le douaire n'a jamais "de lieu que par la mort naturelle du mari, et que, jusqu'à ce qu'elle soit arrivée la femme ni "les enfants n'ont aucuns titres pour se faire payer sur ces meubles qui ne sont pas suscepti-"bles d'hypothèque.*"

"Il n'en est pas de même quand la communauté ce disjoint par la mort naturelle du "mari ; car les enfants, renonçans à la succession de leur père, deviennent douairiers, "et en cette qualité ont pouvoir d'exercer leurs actions, et viennent à contribution au "sol la livre sur les meubles de leur défunt père, avec la femme et tous les créanciers, "sans aucun privilège entre eux."

"Si les biens du mari vivant, mais dissipateur consistent en immeubles, tous les cré-"anciers aussi bien que la femme, sont payés sur les deniers provenant des immeubles "*suivant l'ordre de leurs hypothèques*; et alors les enfants sont pareillement colloqués "dans leur ordre d'hypothèque pour le fond du douaire, laquelle hypothèque de la femme "se compte et remonte jusqu'au jour du contrat de mariage ; et après que la femme est "entièrement payée de sa dot, les enfants, auxquels le douaire est toujours propre "viennent en ordre d'hypothèque du même jour du contrat de mariage, mais après la "femme, avec cette différence, que, lorsque le mari est vivant et dissipateur, le fonds de "ce douaire s'emploie en acquisition de rentes ou d'héritages, pour appartenir aux "enfants après la mort naturelle de leur père ; et jusqu'à sa mort les revenus de ces fonds "employé pour le douaire, se touchent par les créanciers les plus anciens en hypothè-"que : mais quand la mort naturelle du mari est arrivée, alors les enfants deviennent "maître du fonds de ce douaire ; ils en jouissent en propriété, pourvu qu'ils renoncent à "la succession de leur père, l'usufruit néanmoins réservé à leur mère jusqu'à sa mort. "Ce que nous certifions véritable, et dont il est inutile de rapporter aucuns Jugements "sentences ou Arrêts, d'autant que ce sont des maximes qui se pratiquent inviolable-"ment, sans contradiction ni difficulté, conformes à l'esprit de la Coutume de Paris, et "à la disposition des articles 251, 255 et 256.

Cette autorité suffit pour constater la jurisprudence et la loi sur la question et elle ne laisse pas de doute sur le fait que la femme du vivant du mari ne peut exercer aucune réclamation pour son douaire sur les meubles de son mari en déconfiture. L'auteur de cette collection, Denizart, dit que "*ces actes ont pour objet de constater la jurisprudence "et les usages des différents siéges dont ils émanent.*"

1. Bourjon, Droit commun, p. 604, No. 5.

"La mort civile ne fait pas ouverture au préciput, c'est vrai gain de survi.

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"VI. A l'égard du douaire la mort civile du mari n'y fait pas ouverture, c'est gain "de service et par conséquent qui ne peut s'ouvrir que par la mort naturelle, autrement "ce serait ajouter à la convention.

"Il en est de même *de la donation qui serait faite à l'un des conjoints par l'autre en "cas de survie* ; la mort civile du donateur ne fait pas ouverture à une telle donation."

I. Laurière, p. 371.

"Tant qu'un père survit il ne doit point de douaire, et c'est une règle constante, en droit, que jamais mari ne paya douaire.

"Afin qu'une femme puisse avoir son douaire il faut qu'elle survive à son mari. Et "comme il est incertain, tant que le mariage dure, qui survivra du mari ou de la femme, "de là vient que la femme tant que son mari vit, n'a point d'action pour son douaire."

I. V. Revue de Législation, p. 122. Causes de Mercier et Blanchet & Bignel et Henderson.

Jugé.—Que le prédécès seul du mari donne lieu à l'ouverture du douaire de la femme et de tous les gains de survie.

Dans cette cause, le juge en chef Stuart s'exprime ainsi :

"Le douaire de sa nature et par la loi est un gain de survie qui n'échet à la femme "qu'après la mort du mari ; un secours, un moyen de subsistance qui lui est assuré "pour un cas particulier, celui où elle tombe en viduité. Telle est la volonté expresse "de la loi, la disposition de la Coutume de Paris, l'expression de la jurisprudence de "tous les temps, la doctrine et l'opinion de tous les juges et de tous les légistes.

Le juge Rolland s'exprime ainsi dans cette même cause :

"Il (le douaire) se prend seulement sur les biens du mari. Il s'agirait de le prendre "avant le temps voulu et stipulé, et de changer la nature de ce droit accordé par la loi "à défaut de stipulation. Par exemple, au cas de douaire Coutumier, d'ôter au mari "la moitié de ces propres, et cela parce qu'il est dans de mauvaises affaires ; ce ne serait "pas assez que la femme reprenne sa dot, il faut encore qu'elle s'empare de la moitié des "biens de son mari, de ce mari dont les biens sont à peine suffisants pour assurer sa "dot.............Pour donner lieu à ce droit de demander le douaire du vivant du mari, il "faudrait une clause bien expresse qui ne serait pas néanmoins, ce semble, exempte du "reproche d'être contraire aux bonnes mœurs.

"Le douaire n'étant exigible qu'au décès du mari, peut ne pas l'être en certains cas. "L'adultère de la femme, son abandon de son mari seraient des cas pour le lui refuser. "C'est donc dans l'intérêt des bonnes mœurs que la loi l'a voulu ainsi. Mais cette loi "deviendrait inefficace, si la femme pouvait prendre son douaire en vertu d'une conven- "tion, qu'on peut donc considérer sous ce point, comme contraire à la loi."

Donner lieu à une collocation continuelle sur les meubles, pour une créance de ce genre, c'est accorder une hypothèque sur les meubles, c'est violer la maxime : Les meubles n'ont de suite par hypothèque.

La loi admet sur le prix d'un immeuble, une garantie pour la collocation future d'une créance hypothécaire conditionnelle, parce que la propriété a été affecté hypothécairement à l'évènement. Si la condition arrive, la garantie hypothécaire devra y être attachée rétroactivement jusqu'à l'instant où l'obligation a été formée. Les parties [illegible] sont ainsi convenues. La propriété vendue par autorité de justice, pendant la suspension de l'obligation, faute d'échéance de la condition, doit être libérée, mais en même temps la garantie donnée sur cette propriété au créancier conditionnel doit lui [illegible] puisque la loi la reconnait. Pour concilier l'intérêt du créancier conditionnel [illegible] ration de la propriété, on adjuge les sommes de deniers au créanciers actuels, et on permet au créancier conditionnel de faire un acte conservatoire en obtenant des créanciers, qui reçoivent le prix de l'immeuble, l'obligation de rapporter.

Il serait absurde faire l'application de ce principe en fait de meubles. Le créancier conditionnel dont la créance n'existe pas n'a aucun lien, aucun droit sur les meubles du débiteur ; il n'a pas de créance, il n'a pas aucun privilège qu'il puisse perdre au sujet du que

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il ait à faire aucun acte conservatoire. Supposons que le débiteur dissipe activement ses biens, la créancière pour douaire ou pour gain de survie pourrait-elle prétendre saisir, arrêter tous les biens meubles du mari son débiteur pour sa créance non encore ouverte ? Assurément non. Et pourquoi, si ce n'est que parce qu'elle n'a pas encore de créance et qu'elle n'a aucun droit sur ces meubles. Cependant si on admettait le droit d'agir par voie d'acte conservatoire dans le cas de déconfiture on ne pourrait le lui refuser dans cette dernière hypothèse.

MERLIN, Rép. Acte Conservatoire "se dit de ce que fait quelqu'un pour empêcher "qu'il ne soit porté préjudice à ses droits."

"Un immeuble ne peut être soustrait aux recherches de celui qui le revendique quand "sa demande est légitime, mais il en est autrement d'un meuble ; celui qui le possède "peut aisément le détourner : il est donc juste que celui qui s'en prétend propriétaire "puisse faire tous les actes conservatoires convenables pour s'en assurer la restituion "quand il aura justifié sa demande."

Voir aussi CARRÉ ET CHAUVEAU, V. 1, P. 624, Note.

ROLLAND DE VILLARGUES, Vo. Acte Conservatoire.

Id do Vo. Ordre de Créancier.

Sous l'empire des lois de faillite en France et même ici, sous l'effet des lois de Banqueroute, on a dû faire une exception, parce qu'il s'agit alors de libérer le débiteur absolument de toutes ses obligations conditionnelles et autres, à même les biens dont la loi le dépouille ; il faut donc que le créancier conditionnel obtienne une garantie pour sa proportion d'indemnité, vû que sa créance va être irrévocablement éteinte, et de là vient qu'on reconnait son droit de participer dans le produit de la vente des meubles du débiteur.

2ième PROPOSITION.—Si l'on n'envisage pas cette donation comme un douaire ou gain de survie, ce ne peut être qu'une donation à cause de mort payable par les héritiers, sur les biens que le mari pourra laisser dans sa succession, et dans ce cas encore, la femme ne pouvait exercer aucune réclamation du vivant du mari.

COCHIN, V. 3, P. 520. "Dans les pays coutumiers les contrats de mariage sont susceptibles de toutes sortes de clauses. La maxime donner et retenir ne vaut, n'y est point "admise en contrat de mariage. Ainsi, nous permettons d'y faire un héritier, quoique "ce genre de disposition équivoque tienne en partie de la donation entre-vifs, à cause "de l'irrévocabilité, et de la donation à cause de mort, qu'il dépende de l'événement du "décès, et de ce qui se trouvera au jour de la mort, et qu'il appartienne à ces deux "espèces de donations, formant une espèce de composé de l'une de l'autre."

Voir le même auteur page 420, cause de Bertrand Wulmer le Camus contre Louis Philippe Morand. Dans cette cause une donation fut réputée faite à cause de mort. "C'était une donation *de* 15000 *livres à prendre après le décès de la donatrice, sur les premiers "deniers qui proviendraient des biens et effets de la succession, meubles et immeubles qu'elle "a dès à présent affectés et hypothéqués au paiement de la dite somme, pour par le dit Morand (le Donataire) ses hoirs et ayant cause, en jouir, faire et disposer en toute propriété "du dit jour du décès de la dite dame veuve Morand, jusques auquel elle se réserve l'usufruit et jouissance d'icelle, qu'elle reconnait tenir du sieur son fils à titre de constitut et "précaire.*"

Ces principes qu'une donation de ce genre ne peut valoir comme donation entrevifs, dit Cochin, ont été très solennellement confirmés par deux arrêts très récents.

"Le premier est celui de Bretoncelles."

"Le Sieur de Mareuil avait donné par acte du 7 Octobre 1719, *à la demoiselle de Gilliers, la somme de* 100,000 *liv. à prendre en immeubles qu'il laisserait à son décès.* Cette "donation fut contestée par la veuve du sieur de Mareuil, qui n'ayant été mariée qu'en "1724, n'avait qu'une hypothèque postérieure à la donation. La cause plaidée solennellement aux requêtes du palais, fut jugée en faveur de la dame Mareuil, par sentence

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"du 15 juillet 1733. Sur l'appel porté en la grand'chambre, où l'affaire demeura appointée à tour de rôle, est intervenu arrêt le 12 Février 1734, qui a confirmé la sentence avec amende et dépens."

"Cependant cette donation était accompagnée de toutes les clauses propres à caractériser une donation entrevifs, le donateur *avait donné dès à présent; il avait affecté et hypothéqué expressément tous ses biens; il s'était réservé l'usufruit pour tenir à titre de constitut et précaire:* en un mot, il n'y avait aucune des expressions qui s'emploient dans les donations entrevifs, qui ne se trouvât dans la donation; mais toutes ces clauses ne pouvaient pas effacer le vice radical d'une donation à prendre sur les biens qu'on laisserait au jour de son décès, et sur cette unique moyen la sentence et l'arrêt ont prononcé la nulité de la donation."

"Le second arrêt a été rendu en la deuxième chambre des enquêtes le 9 Avril 1735. Par un acte du 27 Avril 1719, le Sieur Marconels avait donné à André Soyer, a ce présent et acceptant, par donation entre vifs et irrévocable, les droits qu'il avait sur le Greffe en Chef de l'élection d'Arras, et une somme de 6,000 livres à prendre sur les plus clairs et apparents biens, tant meubles qu'immeubles, qui se trouveraient lui appartenir au jour de son décès; il s'était de même réservé l'usufruit par forme de constitut et précaire.

"Cette donation fut attaquée comme ne contenant point de tradition actuelle, et par l'arrêt confirmatif de la sentence du conseil d'Artois, elle fut déclarée nulle.........

"Les donations entre-vifs, ne peuvent être valables qu'autant que le donateur se dépouille dans l'instant de tout droit de disposer soit entrevifs, soit par testament, au préjudice des donateurs; or, toutes les fois qu'on ne donne qu'à prendre en effets de la succession, et sur les biens de la succession, on se réservé la liberté de disposer entre-vifs, et par conséquent la donation est radicalement nulle.

"Que l'on accompagne au surplus la donation de toutes les clauses de style, comme l'hypothèque, la réserve de l'usufruit et autres, toutes ces clauses ne changent point la substance de la donation à laquelle il faut toujours s'attacher; et comme elle ne réfère qu'à des biens incertains qui ne sont pas susceptibles de tradition, il faut nécessairement la prescrire."

Sirey.—1824, P. 106, cite un autre arrêt dans le même sens.

3ème proposition.—Le défaut d'insinuation de la donation exclurait la femme de toute réclamation au préjudice des créanciers. Le certificat d'insinuation apposé sur l'acte, produit après l'audition au mérite de la cause, doit être considéré comme nul et non avenu.

"Le contrat portant donation à la femme et n'étant pas insinué, le créancier subséquent est préféré à la femme, sur la chose donnée"

Arrêt prononcé à Pâques, 1595.

Montholon, Arret 80.

Pothier, Donation entre-vifs, page 21.

4° Sous l'empire du droit Romain et de la France dans les pays de droit écrit, la femme avait un privilège sur les effets mobiliers de son mari pour la répétition des deniers dotaux, mais ce privilège n'existait pas dans les pays coutumiers.

Actes de Notoriété par Denizart, p. 480. Acte du 4 Mars 1845.

"Nous certifions et attestons par acte de notoriété, que, quoique suivant la disposition des lois romaines, la femme ait un privilége sur les effets mobiliers de son mari, pour la répétition de sa dot, même de l'augment, cette maxime n'a lieu que dans les pays régis par le droit écrit et n'a point été admise dans les pays coutumiers, du moins dans la commune de Paris, qui contient une disposition précisément contraire à ce privilège, puisque par l'article 179, il est dit qu'en cas de déconfiture, chaque créancier vient à contribution sur les biens du débiteur et qu'il n'y a point de préférence ou prérogative pour quelque cause que ce soit.

MONTREAL, 9TH JULY, 1866.

Coram BADGLEY, J.

No. 2530.

Seghetti v. *The Queen Insurance Company.*

POLICY OF INSURANCE—CONDITION—FORFEITURE.

F. S. procured a policy of insurance from the Queen Insurance Company against loss or damage by fire to his goods to the amount of $800. The policy was subject to the following condition :—"XII. Persons insured sustaining any loss or damage by fire are forthwith to give notice thereof to the Company or its Agents, and within fourteen days thereafter deliver in as particular an account of their loss or damage 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 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 appear any fraud, or false statement, or that the fire shall have happened by the procurement, wilful act, means, or connivance of the insured or claimants, 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." A fire took place, and F.S. sent in a claim supported by his oath, to the effect that by the fire he had lost to the amount of $2129.77. The Court being of opinion that there was fraud and false statement on the part of the insured in making his claim, held that he had forfeited all benefit under the policy.

The plaintiff, Francis Seghetti, on the 4th November, 1865, effected an insurance against loss or damage by fire to his goods in Montreal, to the amount of $800, from the 4th November, 1865, to the 4th November, 1866. A fire occurred in the premises where the goods were, and the plaintiff made a claim for $800, the full amount of the policy, supported by his oath to a detailed statement, which exhibited a loss of $2129.77.

The defendants not having paid the amount of the claim, the present action was instituted to recover it.

The defendants met the demand by several pleas, alleging the 12th condition of the policy in the following words :—"Persons insured, sustaining any loss or "damage by fire, are forthwith to give notice thereof to the Company or its "Agents, and within fourteen days thereafter deliver in as particular an account "of their loss or damage 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 "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 appear "any fraud, or false statement, or that the fire shall have happened by the pro-"curement, wilful act, means, or connivance of the insured or claimants, 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 averring, 1st. A fraud in the statement by the claimant in this, that he affirmed that his loss by the fire was $2129.77, whereas, in fact, it was only $372.85. 2nd. A false statement by the insured. 3rd. That the fire occurred by the procurement, wilful act, means and connivance of the insured. There was also a plea to the effect that the insured procured the issue of the policy by a fraudulent misrepresentation at the time he applied for the policy, to the effect that his stock was then worth $2000 in cash, whereas, in point of fact, it did not exceed $500. The defendants also pleaded the general issue.

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The parties went to evidence, and, after hearing, the Court pronounced the following judgment:—

"The Court, &c., &c., * * * * considering that the said plaintiff, at "the time and for the purpose of effecting the said insurance with the defendants "mentioned in his declaration in this cause fyled, did, knowingly, falsely, and "fraudulently, and with intent to defraud the defendants, misrepresent to the "defendants the value of his stock or goods in his said premises in which the said "fire occurred, as in the said declaration mentioned, representing to the said "defendants a grossly exaggerated value of the said stock and goods, whereon "the said insurance was effected for part whereof, as stated in the said "declaration.

"Considering that the said plaintiff did knowingly, falsely, and fraudulently, "and with fraudulent intent against the said defendants, make and render to the "defendants a false and fraudulent and grossly exaggerated account and state-"ment, and did falsely and fraudulently affirm to the same, of the loss or damage "alleged to have been by him suffered and occasioned, by reason of the said fire, "in and upon his stock and goods covered by the said insurance in the said "premises, and did thereupon demand of the said defendants the amount of the "said insurance, * * * * * * "doth dismiss the plaintiff's action with costs."

Action dismissed.

Lanctot & Laurier, for plaintiff.
Torrance & Morris, for defendants.
(F. W. T.)

MONTREAL, 21ST MAY, 1866.

Coram BADGLEY, J.

No. 79.

Dubord vs. *Lanctot.*

CITY COUNCILLOR—QUALIFICATIONS.

HELD:—1o. That under 14 and 15 Vict. Cap. 128, Sec. 27, the petitioner complaining that any person exercises the office of Mayor, &c., must be a "citizen qualified to vote."

2o. That the amendment of the petition by the addition of these words "citizen qualified to vote" could not be allowed as the writ had been allowed to issue only on affidavits supporting the petition in its original form.

Alexis Dubord, of Montreal, Merchant, on the 21st March, presented a petition (*requête libellée*) to the Honourable Justices of the Superior Court sitting in term, alleging in effect *inter alia* that he was a natural born subject of Her Majesty of the full age of 21 years and upwards, and at all and every the times and periods thereinafter mentioned, and for more than one year prior thereto, had been and still was a citizen of the city of Montreal, a resident householder within the limits of the said city of Montreal, and seized and possessed to his own use as proprietor of real and personal estate situated therein exceeding in value the sum of £500 currency, after payment and deduction of his just debts,

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and as such was at the time of the nomination and election hereinafter mentioned duly qualified for the office of Councillor of the said city, and capable of being nominated and elected a Councillor to represent the East ward in th Council of the said city of Montreal.

That it became necessary that a nomination of a candidate to represent the East ward should be made on the 12th February last: that in pursuance of a resolution of the said Council, Joseph Poupart, Esquire, one of the said Council, was present at the weigh house of the Bonsecours market at ten of the clock in the forenoon of the said twelfth February last, and required the electors to name the person or persons whom they might wish to choose as councillors to represent the said East ward in the said Council: that two qualified electors in the said ward then present, Joseph Beaudry and Patrick Jordan, residents, and assessed and duly registered in the voters' list named the petitioner [illegible]rson chosen by them to represent the said East ward; that a demand w[illegible] made that Médéric Lanctot be elected councillor for the said w[illegible]eupon a poll was granted and election had, and subsequently the B[illegible] reported to the Council on 12th March, that the number of votes [illegible] the petitioner was 104 and for Médéric Lanctot, 112; that the Coun[illegible] thereupon declared the said Lanctot to be duly elected, who then subscribed the oath of allegiance and oath of office, and took his seat in said Council.

That the said Médéric Lanctot was not, at the time of his said election, nor at any other time before or since, capable of being elected a councillor of the said city of Montreal, and had not been and was not qualified according to law to exercise the said office of councillor of the said city representing the said East ward, he the said Médéric Lanctot not having been a resident householder within the said city for one year next before such election, and moreover he the said Médéric Lanctot not being then and there or at any other time, seized or possessed to his own use of real and personal estate or both, within the said city, after payment or deduction of his just debts, of the value of £500 currency.

That the petitioner being the only person duly qualified and capable of being elected to the said office of councillor, at the time the said nomination was h[illegible] as aforesaid, and in whose favour the votes of the electors in the said [illegible] ward were so given, and having been duly nominated as aforesaid, and no other person capable of being elected a councillor having been named and nominated at the time such nomination was appointed to take place, the petitioner ought by law to have been declared duly elected, and entitled to his seat as councillor representing the said East ward.

Wherefore, the petitioner prayed that this Honourable Court would be pleased to order that the said Médéric Lanctot, Esquire, do appear before this Court on such day as may be appointed to answer the present petition, *requête libellée*, and to show by what authority he exercises and assumes to exercise the said office of councillor of the said city of Montreal, representing the East ward thereof, and that by the judgment to be rendered in the premises by this Honourable Court it be adjudged and declared that the said Médéric Lanctot was incapable and disqualified to be a councillor of the said city, and to represent as such the said East ward in the council of the city, and he the said Médéric Lanctot,

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Esquire be by the said judgment, ousted and altogether excluded from the said office of councillor, and further, the petitioner prayed that this Honourable Court do further adjudge and declare that the petitioner was duly nominated to the said office of councillor, to represent the said East ward, and was and is entitled to exercise the said office, and should have been declared duly elected to the same; and lastly, that this Court do cause such order or writ of mandamus to be addressed to the Corporation of the Mayor, Aldermen and Citizens of the city of Montreal, as to law and justice might appertain, the whole with costs, &c.

The defendant met the *demande* of the petitioner by several pleas and firstly by a *défense en droit*, the reasons of which it will be sufficient to give without stating the other pleas, as the judgment was given only on the *défense en droit*.

These reasons were:

1o. Parce qu'il n'est nulle part allégué dans la dite requête libellée que les faits contenus en icelle sont appuyés par affidavits tels que requis par la loi.

2o. Parce que rien dans la procédure ne fait voir que la vérité des faits allégués par la dite requête libellée ait été appuyé d'affidavits accompagnant la dite requête, tel que requis par la loi.

3o. Parce qu'il n'est pas allégué dans la dite requête libellée que le demandeur réquérant est un "citoyen de la dite cité de Montréal, habile à voter à l'élection de conseillers pour quelqu'un des quartiers d'icelle." After issue joined, the case was then heard on the law issue and the following judgment given:

PER CURIAM.—The information, or *requête libellée*, in this cause has been presented by the unsuccessful candidate for the office of councillor for the East ward of this city, at the civic election for that office, held in February last. The statement of the proceedings had previous to and at the election, has not been complained of, nor the seating of the successful candidate, Mr. Lanctot, upon the ascertainment of the actual votes given, the latter having received 112 votes, and the petitioner 104. The information admits these facts, and also that Mr. Lanctot has satisfied the provisions of the city charter in taking the oaths required by law, and consequently taken his seat in the city council, but it objects against him that at the time of his election he was not qualified for election to the office of councillor, as not being possessed of real or personal estate, or both, within the city, of the value of £500, after payment or deduction of his just debts. It is only necessary to add, as regards this part of the case, that the petitioner has set out in his information his own qualification for the office of councillor as required by the charter, which has not been contradicted.

Upon the petition presented in this case, supported by affidavit, a writ was issued by the Court, formally requiring Mr. Lanctot to appear and answer to the information, *requête libellée*, against him, and to show by what authority he exercised or attempted to exercise the office of councillor. The writ was issued upon the judgment of this Court to that effect, and I do not, therefore, feel myself justified in adverting to its validity, the more particularly as this now pleaded exception in law has gone beyond the mere issue of the writ. It is possible, however, that after examination of the *requête* and supporting affidavits, and upon consideration of the section of the charter applicable to the matter, I might have

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had some doubt upon the granting of the application. Upon this formal matter, however, I am not called upon to determine, because Mr. Lanctot having pleaded to the information, *requête*, it is upon his plea in law, or demurrer to the *requête*, that the contention between the parties has been submitted. It is unnecessary to advert to the two first grounds of legal objection, having reference to the required affidavit in support of the information, but such as the produced affidavits were, they were sufficient for its support, such as it was. The third ground, however, is important, inasmuch as it charges that the information, *requête*, does not allege that the petitioner was "a citizen of the city of Montreal, qualified to vote at the election of Councillor for some ward of the city." To this objection the petitioner has given the general answer of the sufficiency in law of the allegations contained in his information to obtain the conclusions thereof.

By the 8th section of the 14th and 15th Vic., c. 128, the qualification for a councillor is fixed, namely, that he shall have been a resident householder within the city for a year next before the election, and also seized and possessed to his own use of real and personal estate, or both, within the said city, free of debts, of the value of £500; and he is also required by the 9th section, to be a natural born or naturalized subject. As already observed, the petitioner has fully and distinctly stated and alleged this his own qualification in his information.

In connection with this part of the case, it is necessary to state that the qualification for the civic voters is settled by the 23rd Vic., c. 72, in the 4th clause of that statute, which provides for their qualification, 1st, as owners of real property within the city of the assessed value of $300 and upwards, or of assessed yearly value of $30 or upwards; 2nd, as tenants or occupants of dwelling houses in the ward for which the election is held of the same assessed value as above, but requiring the tenant to have been in possession on the then next previous first of January, or a resident householder in the city at least the next previous first of May, &c.; and 3rd, tenants of warehouses, counting houses, &c., with the special proviso applicable to each, that none of them shall be entitled to vote at any such election unless he shall, previously to the first of January next before such election, have paid all the civic taxes due and payable by him. It is objected by Mr. Lanctot that the petitioner has properly stated his qualification for the office of councillor for which he was a candidate, but that qualification gives him no power to apply under the statute as he has done here, that he has not stated the voter's qualification, which alone and of itself was essential to justify his application, under the 27th sec. of the 14th and 15th Vic., whereby alone as a qualified voter he can legally question Mr. Lanctot's office as councillor.

The objection is quite correct in fact, inasmuch as the information alleged the councillor's qualification alone, and not alleged his qualification as a voter.

Now, the 27th section of the 14th and 15th Vic., under which this proceeding has been adopted, specially provides that "to facilitate the decision of cases in which the right or any corporation officer may be called in question, the Superior Court in term shall, on the information, *requête libellée*, of any citizen qualified to vote at the election of Councillor, supported by affidavit, &c., and complaining that any person exercises the office of Mayor, Alderman, or Councillor, have power to try and adjudge upon the right of the person so complained of to exer-

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cise the office in question, and to make such order, and cause such writ of mandamus to be addressed to the Mayor, Alderman, and citizens of Montreal, in fact to the Corporation, as to right and justice may appertain, which order or mandamus shall be obeyed by the Corporation and by all other parties, without appeal therefrom."

The proceedings, therefore, provided for in this section of the charter have reference manifestly to the legal tenure of office of the officer complained of, namely and solely the *right* by which he exercises that office, and seems to convey express judicial authority to the Court, as in this case, to try and adjudge by what right Mr. Lanctot exercises the office of councillor. This provision does not constitute the Superior Court into a tribunal, commitee or otherwise, to decide upon the claims of the rival candidates for the civic office in question, as is done in election contests of members of the Assembly before the legislative bodies, where one candidate may be unseated and another seated in his place; on the contrary, the jurisdiction of the Court is strictly legal, and is restricted to try and adjudge upon the right of the person complained of to hold and exercise his office. In the discharge of this judicial duty, it is expressly provided by the statute that the preliminary as well as substantial interest of the complainant, in setting the statute in motion against the officer, lies in his being *a qualified voter:* "Any citizen qualified to vote," the law in no part enabling the losing candidate, simply as such or under his special qualification for election as councillor, merely, to compel the action of the Court upon the provision of the statute. As already observed, the duty cast upon the Court is not to decide upon the result of the election as to which of the rival candidates shall be seated in the office, but to adjudge, upon the right of the officer *de facto* to exercise his office, if he shall have been found by the revisors to have received the majority of votes at the election. In this case, the information, or *requête*, is by the unsuccessful candidate for the office of councillor, as such, and upon his councillor's qualification only, and not as a qualified voter; therefore not coming within the terms of the statute which would justify the action of this Court, the demurrer or plea in law must be maintained, and the *requête* dismissed with costs against the petitioner.

After the judgment had been rendered, the complainant's counsel moved the Court to permit the information or *requête* to be amended by inserting the required qualification as a voter, but this was refused upon the ground that the amendment would change the substance of the information altogether, and would in effect be equivalent to a new *requête* which would not then be supported by the affidavits produced, and which would necessarily require the adoption of new proceedings and the issue of a new writ, the present writ having issued upon the allegation contained in the *requête* above, which did not set forth the only qualification, that of a voter, upon which he could have issued.

Petition dismissed.

Abbott & Carter, for the petitioner.
W. Laurier, for the defendant.
(F. W. T.)

EN REVISION.

MONTRÉAL, 29 SEPTEMBRE 1866.

Coram BADGLEY, J., BERTHELOT, J., MONK, J.

No. 635.

Pearce vs. Kelly and Massé et al. T. S.

JUGE :—Que la contestation de la déclaration d'un tiers-saisi doit être accompagné d'un avis au tiers-saisi d'y répondre.

Le demandeur contesta la déclaration du tiers-saisi Morgan qui avait déclaré ne rien devoir à la défenderesse. La contestation qui fut signifiée personnellement au tiers-saisi le 10 mai 1865, n'était accompagnée d'aucun avis, motion ou règle. Cette contestation fut produite le 11 mai 1865, et le 9 novembre 1865. Le demandeur prit un certificat de défaut contre le tiers-saisi qui n'avait point comparu. L'inscription à l'enquête par défaut sur cette contestation fut signifiée personnellement au tiers-saisi ainsi que l'inscription au mérite et le jugement de la Cour Supérieure siégeant à Sorel fut motivé comme suit : " La cour, après avoir entendu la plaidoirie de l'avocat du demandeur et contestant sur le mérite de la contestation faite par le dit demandeur de la déclaration du tiers-saisi James Morgan, la défenderesse ayant fait défaut, et le dit James Morgan n'ayant point répondu aux moyens de contestation, quoique mis en demeure de la faire, et n'ayant pas non plus comparu lors de l'audition de la cause : pris connaissance des écritures du demandeur faites pour instruire sa cause, examiné ses pièces et productions, dûment considéré la preuve et sur le tout avoir mûrement délibéré : Considérant qu'il est en preuve que le tiers-saisi qui n'avait aucun droit ostensible à l'immeuble et dépendances décrits aux moyens de contestation et appartenant à la défenderesse, és qualité qu'elle a été condamnée, l'a loué en son nom à l'autre tiers-saisi Antoine E. Masse, et ce pour soustraire le loyer du dit immeuble et dépendances aux justes poursuites des créanciers de la défenderesse et notamment du demandeur ; déclare icelle déclaration fausse, etc."

Ce jugement fut porté en cour de révision à Montréal par le tiers-saisi Morgan. *Germain* pour le tiers-saisi Morgan prétendit : qui le tiers-saisi n'avait jamais été mis en demeure de répondre à cette contestation qui lui avait été signifiée sans aucun avis de répondre dans les délais voulus en pareil cas. Que le demandeur n'avait pu procéder par défaut contre le tiers-saisi sans le notifier au préalable de répondre à cette contestation : ce qui n'avait jamais été fait, et en conséquence tous les procédés ultérieurs étaient irréguliers et nuls, et il cita à l'appui de ses prétensions, une décision rendue le 9 mars 1865, par la cour d'Appel en la cause de Selby et Mulholland, dans laquelle une semblable contestation fut mise de côté pour la même raison. Il prétendit que le tiers-saisi n'est pas tenu de comparaître et de repondre à la contestation de sa déclaration ; à moins qu'il ne soit notifié de la faire.*

Lafrenage, pour le demandeur, cita les Statuts Révisés (Revised Statutes) p. 142, class D., No. 10, Practice in various matters.

4 Wm. 4, ch. 4, sec. 4.

" Provided always, that if such plaintiff shall wish to contest the declaration " of the *tiers-saisi*, he may *move* the Court..

* Vide le projet du code de procédure civil du Bas-Canada, art. 625.

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"for *leave* to do so—and on obtaining such leave may file his contestation of "such declaration, &c., &c., &c., et il prétendit que cette disposition et la pratique ont été changées quant à la Cour Supérieure par les Règles de Pratique, 98 et 99, car la règle 98 exige que la contestation soit filée dans le délai de huit jours; or durant les courtes vacances; le demandeur est tenu de contester avant l'ouverture des termes.

Quant à la Cour de Circuit, la procédure n'a pas été changée par les Règles de Pratique; car il n'y a pas de règle de pratique pour la Cour de Circuit sur le sujet;—en sorte que ce qui est pratiqué à la Cour de Circuit n'influe pas sur la procédure à suivre à la Cour Supérieure.

Le chapitre 83 des Statuts Refondus pour le Bas-Canada, sec. 136, sous-sec. 2, dispense de la règle ou motion de la Cour exigée par les Statuts Révisés; et n'exige qu'une simple contestation pour obliger le tiers-saisi de répondre et plaider dans un district même, étranger de celui de sa résidence, et cela, dans les deux cours, tant la Cour Supérieure que la Cour de Circuit.

Cette contestation est donc suffisante sans règle, motion ou avis, et est assimilée à la contestation d'un rapport de collocation.

Le jugement de la Cour de Révision infirmant celui de la Cour Supérieure rendu à Sorel, est motivé comme suit:

The Court now here sitting as a Court of Review, having heard the parties, to wit, the said tiers-saisi James Morgan and the said plaintiff contesting, by their respective council, upon the judgment rendered in the Superior Courts in and for the district of Richelieu, on the fourteenth day of March, one thousand eight hundred and sixty-six, having examined the record and proceedings had in this cause, and maturely deliberated; Considering that the proceedings had in this cause by the said plaintiff on his contestation of the declaration fyled herein by the said James Morgan, one of the said *tiers-saisis* for the foreclosure of the said James Morgan from answering the said contestation without previous notice of such foreclosure given to the said James Morgan, are contrary to law, and the practice of the Court;

Considering that there is error in the said judgment of the Superior Court of Richelieu, rendered on the 14th March, 1866, and that the said judgment is premature; Doth revise and set aside the said judgment, and proceeding to render such judgment as should have been rendered by the said Superior Court, doth reject from the record all the proceedings had herein by the plaintiff contesting, on and after the eight day of November last inclusive, save and except the plaintiff's motion by him fyled for the production herein of certain documentary evidence in support of his said contestation, and save and except the said documentary evidence filed as aforesaid, and doth order that the said parties shall and may take such proceeding in the said cause as they may be advised, and as shall be in accordance with law and practice of the Court, the whole without costs to either party in the Court below and in this Court.

Gauthier, avocat du demandeur.

LaFrenaye, conseil.

Germain, avocat de Morgan.

(P. R. L.)

MONTREAL, 20 OCTOBRE 1866.

Coram MONK J.

No. 661.

Cardinal vs. *Bélanger.*

JUGE.—1o. Que le demandeur qui intente l'action possessoire en complainte, doit alléguer qu'il possède depuis un an et jour avant le trouble dont il se plaint.

2o. Que sur une défense en droit l'action sera déboutée, si le demandeur n'allègue qu'il possède que depuis plus d'un an avant l'institution de l'action, quoiqu'il fasse remonter le trouble, jusqu'à un mois avant l'institution de l'action.

Le demandeur poursuivait, le 14 août 1866, le défendeur en dénonciation de nouvel œuvre, alléguant qu'il possédait depuis plus d'un an avant l'institution de son action, et que le défendeur venait de construire, un mois avant l'institution de l'action, un nouvel œuvre qui le troublait dans la possession paisible de son immeuble.

Le défendeur attaqua l'action par une défense en droit, et prétendit que le demandeur, n'alléguant pas qu'il possédait l'immeuble pendant un an et jour avant le trouble, n'était pas recevable dans son action, et demandait le renvoi de l'action avec dépens.

L. Bélanger pour le défendeur, argumenta ainsi :

Le demandeur allègue dans son action qu'il est en possession comme propriétaire d'un terrain qu'il désigne, depuis plus d'un an avant l'institution de la présente action, et que le défendeur dans le courant de juillet dernier l'a troublé et continue depuis à le troubler dans sa possession depuis lors tant par des bâtisses qui déversaient leurs eaux sur son terrain qu'en prenant vue sur ce terrain. L'action a été intentée le 14 août, 1866. L'action est évidemment une action en complainte.

Le défendeur prétend que le demandeur n'a aucun droit à une telle action (en complainte) à moins de faire voir qu'il (le demandeur) a eu la possession de ce terrain sans trouble pendant au moins un an et jour ; parceque la possession, à moins qu'elle ne soit de l'an et jour et sans trouble, ne confère aucun droit ; elle n'est qu'une possession imparfaite qui ne peut conférer la saisine, ni aucun droit quelconque, surtout en matière de complainte. Ce principe est bien établi dans les auteurs suivants :

Guyot : Répertoire T 4, verbo complainte page 291, 1ère colonne : " Quatre " choses sont nécessaires pour former la complainte, &c. &c. 2de colonne : " Il " n'est pas nécessaire pour former la complainte d'être fondé en titre de propri- " été ; il suffit de justifier d'une possession annale par les derniers exploits qui " ont précédé immédiatement le trouble, &c. &c."

Bourjon, droit commun de la France, T 2, p. 510 : " Passons au temps pour ce " nécessaire. La possession à ce titre, c'est-à-dire à titre de propriétaire, doit " avoir duré un an et jour et sans trouble, sans cela il n'y aurait pas lieu à la " complainte, parceque ce n'est qu'après ce temps qu'on est regardé comme ayant " une possession civile, d'autant plus que cette action ne peut compéter à deux " pour sa totalité, et qu'en ce cas elle appartiendrait à l'avant dernier possesseur " et non au possesseur actuel. ' Il faut donc ce temps de possession pour fonder " la complainte et la présomption qui en est la base."

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Troplong, P[illegible] Nos. 311 & 312, T 1er, commente le nouveau et l'ancien droit sur cette [illegible]stion et décide dans le même sens.

Toullier, T 11, Nos. 123, 124, 125, 126 et 127, page 155 et suivantes, décide dans le même sens.

Poncet, des actions, page. 136, No. 90 : "En d'autres termes, nous disons que les "fondements essentiels de l'action possessoire sont : 1o la saisine, 2o la nouvelleté."

Et à la page 110, No. 74, il définit ce que c'est que la saisine ou possession civile ou parfaite et en donne les caractères. D'après lui il est évident qu'il faut avoir possédé un an sans trouble, pour exercer la complainte.

Les autorités citées par le demandeur sont toutes plus applicables à la réinté-grande, mais nullement à la complainte.

Gonzalve Doutre pour le demandeur.

Quoique le défendeur n'ait pas attaqué la nature de l'action, il est nécessaire de la bien définir.

Sous le droit Romain, la dénonciation de nouvel œuvre se faisait de trois manières. Celui [illegible] plaindre pouvait s'adresser au préteur, et le requérir d'en défendre la c[illegible]. D'un autre côté, il pouvait user de son autorité privée et déclarer [illegible] ou par écrit, à l'auteur du nouvel œuvre, ou à ses ouvriers, qu'il [illegible] de le continuer. Enfin la troisième manière était plus originale, elle consistait à jeter une pierre sur le terrain où commençaient les travaux.

La première de ces dispositions passa seule dans le droit français.

Charondas nous dit que longtemps avant la coutume de Paris, il fallait l'autorité du juge, et cette nécessité s'est transmise dans l'ancienne comme dans la nouvelle jurisprudence, sur le principe que l'on ne peut se faire justice à soi-même. Il a été jugé par arrêt du 11 juillet 1830, que les actes extrajudiciaires ne peuvent que mettre en demeure la partie qui construit ou a construit le nouvel œuvre.

Les auteurs pensent différemment sur la nature de l'acte en dénonciation de nouvel œuvre. *Carré* décide que ce n'est qu'une demande incidente à une action possessoire. *Dalloz*, au contraire, pense que si le nouvel œuvre a été fait sur le fonds du voisin et empiète sur le terrain du possesseur, la voie seule de la complainte est admise. *Favard* partage l'opinion de *Dalloz*.

Merlin d'accord avec *Curasson*, *Garnier* et les auteurs les mieux estimés sur les actions possessoires, pense que dans tous les cas l'action possessoire est seule recevable.

Cette opinion a prévalu dans notre droit, et l'action possessoire est régulièrement employée pour dénoncer un nouvel œuvre.

Le *Code Napoléon* a beaucoup modifié la *Coutume de Paris* sur la possession annale. Il faudra d'abord faire cette distinction, que sous la Coutume la possession annale est d'*un an et jour* tandisque sous le Code Napoléon elle n'[illegible] que d'une année seulement. Toutefois cette distinction n'est pas admise s[illegible] débat. Nous voyons *Garnier*, *Toull*[illegible] déclarer que le premier jou[illegible] ne doit pas compter.

La possession vaut titre pour le m[illegible] dans la possession.

Coutume de Paris, Art. 96. " Quand le possesseur d'aucun héritage [illegible]

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"réel réputé immeuble, est troublé et empêché en sa possession, il peut et lui *loist* "de soi complaindre et intenter poursuite en cas de saisine et de nouvelleté *dedans l'an et jour du trouble*, à lui fait et donné au dit héritage ou droit réel, contre "celui qui l'a troublé."

Partant du principe que la possession vaut titre, la Coutume donne au possesseur le droit de complainte lorsqu'il est troublé dans sa possession, pourvû qu'il exerce son action dedans l'an et jour du trouble. Passé cet an et jour, ce trouble devient une possession pour l'auteur du trouble, puisque le possesseur l'a toléré pendant ce long laps de temps.

Ferrière, dans ses commentaires sur cet article de la Coutume, dit que l'action doit être intentée dans l'an et jour, que la possession soit réele et actuelle et que le possesseur ait été réellement troublé. Nous ne trouvons rien ni dans la Coutunie, ni dans les commentaires, qui exige absolument la possession pendant une année. Au contraire la possession la plus courte avant le trouble suffit, et la seule condition exigée est que l'on ne laisse pas écouler l'an et jour du trouble.

L'ordonnance de 1667, Titre XVIII, article 1er, n'exige pas d'avantage : "Si "aucun est troublé en la possession et jouissance d'un héritage ou droit réel ou "universalité de meubles qu'il possédait publiquement, sans violence, à autre "titre que de Fermier ou Possesseur précaire, peut, dans l'année du trouble, former "complainte en cas de saisine et nouvelleté contre celui qui a fait le trouble." Et dans ses commentaires, *Jousse*, page 257, dit : "Celui qui est troublé dans "sa possession, a, pendant l'année du trouble, la liberté de se pourvoir ou par "complainte ou par demande au pétitoire ; mais après l'année du trouble, il ne peut plus se pourvoir par demande au pétitoire."

Il n'est donc pas parlé de la possession annale; tout ce qui préoccupe la Coutume et l'ordonance est la prescription annale de l'action possessoire : elle doit être intentée dans l'année du trouble, sinon elle n'est pas recevable.

Ferrière, Dictionnaire de Droit, vo. Complainte, page 474, dit : "Il faut pour "intenter complainte avoir possédé pendant an et jour." Cependant il déclare "que la Coutume n'exige pas cette condition. A la page 475 : "La complainte "doit s'intenter dans l'an et jour du trouble."

Guyot Verbo, complainte, déjà cité par le défendeur. Page 295 : "La com- "plainte doit être formée dans l'au et jour du trouble après lequel temps on "n'est plus recevable."

Pothier, Traité de la Procédure, page 106. "L'Ordonnance de 1667 déclare "que la complainte doit être intentée dans l'année du trouble." Page 107: "Le fait de la possession pendant l'année qui a précédé immédiatement le trou- "ble, est celui qu'il faut prouver."

Pothier, Coutume d'Orléans, page 845, No. 52 : "Cette action doit s'intenter "dans l'année du trouble ; autrement, si je ne m'y oppose, soit de fait, soit en "formant le complainte dans l'an et jour, celui qui a fait l'enterprise acquerra "contre moi la possession : car on acquiert possession en jouissant sans trouble "par an et jour."

Ancien Denizart, vo. complainte, page 567 : "Pour intenter la complainte, "il faut avoir la possession dans le dernier temps et y être troublé."

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Nous indiquerons quelles modifications le Code Napoléon a apportées à cette matière, cela nous démontrera pourquoi les auteurs qui ont traité sur le Code parlent de la possession annale, plutôt que de l'an et jour du trouble.

Nous venons de voir comment la Coutume et l'ordonnance entendent l'action en complainte, et nous avons vu qu'elles ne parlaient nullement de la possession annalé avant le trouble. Voyons maintenant le *Code Napoléon* (*Procédure*) art; 23 : " Les actions possessoires ne seront recevables qu'autant qu'elles auront " été fournies *dans l'année du trouble*, par ceux qui, *une année au moins*, seront " en possession paisible par eux ou les leurs, à titre non précaire."

Les auteurs qui ont écrit depuis le Code ne sont pas tous d'accord pour admettre ces deux conditions : possession annale avant le trouble, action possessoire intentée dans l'année du trouble quoique le Code les exige.

Carré et Chauveau, lois de procédure civile, vol. 1er, art. 107, page 109, citant *Duparc Poullain* vol. 10, page 705, qui dit : " Si le trouble a été fait par un " tiers qui n'avait dans la chose ni droit, ni possession, le possesseur qui a été " troublé n'est point obligé de prouver sa possession annale avant le trouble; il " lui suffit de justifier qu'il possédait et qu'il a été troublé." *MM. Carré et Chauveau* ajoutent que " *Duparc Poullain* écrivait sous l'ordonnance de 1667 qui " ne portait pas comme l'art 23 du Code, que l'action possessoire ne serait recevable que de la part de ceux qui, *depuis une année au moins*, auraient été en possession paisible. L'art. 1er du tit. 18 de l'ordonnance se bornait à indiquer " le délai dans lequel il fallait intenter cette action."

Cette disposition du Code rencontre un grand nombre d'objections, elle paraît blesser la justice. *Carré et Chauveau* la critiquent assez sévèrement : " Si " l'on admettait que le possesseur troublé par un tiers ne peut exercer l'action " possessoire qu'en prouvant qu'il a possédé pendant un an, il en résulterait " qu'on laisserait dans la possession une personne qui ne l'aurait que depuis " quelques jours ou quelques mois et qu'on lui donnerait ainsi un titre qui ne " peut résulter que de la possession annale. Mais entre deux possesseurs, dont aucun n'a acquis la possession annale, n'est-il pas naturel de prononcer en faveur " de celui qui a possédé le premier, et par conséquent depuis un plus long espace " de temps."

Garnier critique aussi cette disposition : " Une possession actuelle, dit-il, est tou- " jours respectable, nul ne peut l'entraver, ni en dépouiller celui qui l'a à moins " qu'il n'ait lui-même une possession plus ancienne, qui n'ait pas été interrom- " pue pendant un an ; ce dernier, qui peut d'ailleurs avoir onze mois et vingt " neuf jours de possession, est assurément plus favorable que le perturbateur, qui " n'en a pas du tout. Si l'on s'occupait à reviser le Code de procédure, cette " disposition nous paraitrait devoir être réformée. Cette reforme serait fort " essentielle, elle mettrait le Code de procédure en harmonie avec les principes " du droit établis par le Code civil."

Le Code Napoléon n'a donc pas apporté une modification qui recontre l'approbation des Jurisconsultes.

Carré et Chauveau, vol. 1er, page 107 : " Nous convenons que l'on peut avec " avantage invoquer contre nous l'article 23, en ce qu'il semble n'accorder l'ac- " tion possessoire que sous la condition d'une possession annale, sans distinguer

"le cas où elle serait fournie ou contre le propriétaire ou le précédent posses-"seur."

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"Mais lorsqu'un texte de loi pris dans toute la rigueur de ses termes conduit "à des conséquences qui blesseraient la justice, on doit présumer que telle n'a "pas été l'intention du législateur, et suivant la maxime: *et si tamen verba "legis hunc habeant intellectum, tamen mens legislatoris aliud vult*, on doit "l'interprêter dans le sens le plus conforme à la raison et à l'équité.

"C'est pourquoi adoptant sans réserve la distinction de Duparc-Poullain, "reproduite par M. Pigeau, nous répétons qu'il faut distinguer deux sortes de "troubles apportés à la jouissance d'un possesseur de moins d'un an, et celui "apporté par une personne qui n'a point encore possédé."

En citant ces auteurs si recommendables, nous avons voulu bien faire comprendre que le Code Napoléon a modifié la Coutume et l'ordonnance de 1667 sur la complainte.

La coutume de Paris et l'ordonnance de 1667, comme partie intégrante de notre législation, doivent être suivies. Nous ne trouvons nulle part dans ces deux sources de notre droit la nécessité de la possession annale avant le trouble. Les auteurs sous le Code Napoléon le reconnaissent en signalant l'innovation introduite par l'article 23 du Code de procédure. En réponse aux autorités citées par le savant avocat du défendeur, il faut remarquer d'abord que *Guyot* à la page 295, revient à suivre le principe de la Coutume et de l'ordonnance. Ensuite *Bourjon*, qui est l'autorité la plus forte en faveur du défendeur, indique lui même où il a puisé son principe. Il a soin de ne pas citer la Coutume de Paris et l'ordonnance, car ni l'une ni l'autre ne déclare que la possession d'an et jour avant le trouble soit nécessaire. *Bourjon* s'appuie principalement sur *Duplessis*, qui, lui, tire son principe de la loi salique. Voici comment répond *Ferrière*.

Coutumier, vol. 1er, page 1527: "Pour la preuve de cet ancien usage de "France que prétend tirer Duplessis de la loi salique, *il est certain que cette loi "n'en dit pas mot*. Voici seulement ce qu'elle dit au chapitre 47, sur la "fin: *Si autem quis migraverit in villam alienam, et ei aliquid infra duo "decim menses secundùm legem contestatum non fuerit, securus ibidem consistat "sicut et alii vicini.* Ce qui prouve véritablement que celui qui a possédé pen-"dant un an ne peut plus être inquiété dans sa possession par action possessoire; "*mais cela ne dit pas que pour intenter la complainte, il faille avoir possédé la "chose en question pendant un an.*

Quoiqu'il en soit, le présent article de notre Coutume, ni l'article 1, de l'or-"donnance de 1667, titre 18, qui en a été tiré et qui y est conforme, ne l'ordonnant "pas, *je crois que cette possession d'un an n'est pas aujourd'hui dans notre cou-"tume une condition requise pour pouvoir intenter la complainte*, mais qu'il "suffit pour cela de justifier sa possession non vicieuse, pour y être maintenu ou "réintégré, quoiqu'elle ne soit pas d'un an, comme cela a pu être autrefois requis "et comme cela peut l'être encore dans quelques Coutumes."

Comme on le voit, l'autorité de Bourjon perd toute valeur, puis qu'elle s'appuie sur Duplessis et que ce dernier s'appuie sur la loi salique qui ne dit rien de cela.

Quant aux autres autorités du défendeur, elles sont d'auteurs qui ont écrit

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sous l'empire du Code Napoléon qui règle la question contrairement à la coutume et à l'ordonnance.

Il est regrettable que la Code Canadien n'ait pas réglé la question. Quant au projet du Code de procédure, il n'[illegible] non plus. La logique repousse la possession annale avant le tr[illegible] dit si bien Garnier, une possession actuelle est toujours [illegible] ne peut l'entraver, ni en dépouiller celui qui l'a à moins qu'il n'ait lui-même une possession plus ancienne, qui n'ait pas été interrompue pendant un an; la possession qui peut avoir duré onze mois vingt neuf jours de possession, est assurément plus favorable que celle du perturbateur qui n'en a pas du tout. C'est sans aucun doute ainsi qu'en ont jugé la Coutume de Paris et l'ordonnance de 1667 en [illegible] la possession annale avant le trouble. Voici au reste l'absurdité à laquelle conduit la doctrine de la défense, à la suite d'une vente ou aliénation suivie d'exécution, l'action possessoire ne compèterait à personne pendant au moins onze mois et vingt-neuf jours. L'ancien possesseur n'aurait plus d'intérêt à l'exercer, le nouveau possesseur ne pourrait le faire avant d'avoir possédé durant un an et jour. En sorte, que durant ces onze mois et vingt neuf ou trente jours le possesseur n'aurait que l'action pétitoire pour repousser les aggressions dirigées contre sa possession.

Per Curiam. Les autorités citées par le défendeur sont suffisantes pour maintenir sa défense en droit, et l'action du demandeur devrait être déboutée avec dépens.

Sur motion du demandeur, il lui est permis d'amender sa déclaration.

Doutre & Doutre, pour le demandeur.

Bélanger & Desnoyers, pour le demandeur.

(G. D.)

MONTREAL, 23 JANVIER 1856.

Coram MONK, J. A.

No. 1703.

Tracey et vir vs. Dumre et al.

JUGE :—Que le bailleur qui a exercé une saisie-gagerie par droit de suite, pour du loyer non échu, est tenu de prouver que les lieux loués ne sont plus suffisamment garnis de meubles pour assurer le paiement du loyer.

Les demandeurs poursuivirent les défendeurs en expulsion et pour la rescision d'un bail notarié en date du 1er mars 1855, alléguant que depuis le 8 novembre 1855, "les défendeurs avaient enlevé et transporté la plus grande partie des "meubles et effets et marchandises qui étaient dans la maison ou voûte en qui "servaient à la garnir et meubler pour sûreté du loyer, et que la dite maison ou voûte n'était pas suffisamment garnie de meubles, effets et marchandises pour assurer le paiement de la somme de £62,10s, montant de deux quartiers de loyer qui seraient échus le premier mai alors prochain.

Les défendeurs plaidèrent à cette action entr'autres choses que le maison ou voûte était suffisamment garnie de meubles, effets et marchandises pour assurer le paiement du loyer.

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A l'enquête, il fut prouvé que les défendeurs avaient enlevé toutes leurs marchandises du magasin en question, et les avaient envoyées dans des boîtes au canal de Lachine pour être expédiées dans le Haut-Canada, et que le seul meuble qui restait dans le magasin était un coffre-fort valant £75.

Après audition des parties, la cour débouta les demandeurs de leur action et motiva son jugement comme suit :

La cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure, pièces produites et preuve et avoir sur le tout délibéré : considérant qu'il résulte de la preuve produite que la maison ou voûte mentionnée dans la déclaration de la demanderesse, est suffisamment garnie, conformément à la loi, pour la sûreté du paiement du loyer réclamé par la présente action, et qui sera dû le premier mai prochain, et vu qu'il n'y a rien dans la dite preuve ou procédure qui justifie les conclusions de la déclaration de la demanderesse, par lesquelles elle demande la résiliation du bail du premier mars 1854, maintient la défense des défendeurs et déboute la dite action avec dépens.

Cherrier, Dorion et Dorion, avocats des demandeurs.

Lafrenaye et Papin, avocats des défendeurs.

(P. R. L.)

En Revision.

MONTREAL 29 SEPTEMBRE 1866.

Coram Smith, J., Berthelot, J., Monk, J.

No. 285.

Levesque, demandeur, vs. *Beaupré*, défendeur, et *Beaupré*, opposant.

Jugé :—1o. Que l'omission de la signature du procureur *ad litem* du créancier exécutant ou de ce dernier sur le writ *de terris*, n'emporte pas la nullité de la saisie.

2o. Que la règle de pratique 78 se trouve abrogée par les dispositions de la section 140 du chap. 83 des Statuts Refondus, du Bas-Canada.

Le jugement en cette cause dont la révision était demandée, maintenait l'opposition afin d'annuller faite par le défendeur à la saisie de ses immeubles en vertu du writ *de terris* émané en cette cause à la poursuite du demandeur le 6 décembre 1865, et annullait la saisie immobilière avec dépens contre le demandeur. Ce jugement fut rendu à l'Industrie, district de Joliette, le 21 juin 1866, sur le principe que le writ *de terris* n'était pas signé ou endossé par le demandeur ou son procureur au désir de la règle 78, chap. 13, des règles de pratique de la Cour Supérieure mises en force en l'année 1850.

Le demandeur soumit à la cour de révision : 1o. que cette règle de pratique n'est que directrice et non absolue, et en conséquence, n'emportait pas la nullité du writ non revêtu de la signature du demandeur ou de son procureur. 2o. Que cette règle de pratique avait été rappelée, et qu'en conséquence, le writ *de terris* était valable. Status Refondus du Bas-Canada, chap. 83, sec. 140.

Après l'audition des parties, la cour de révision a renversé le jugement et a motivé le sien comme suit : La Cour Supérieure siégeant à Montréal, présentement en cour de révision, ayant entendu les parties par leurs avocats respectifs, sur le

Levesque, demandeur, vs. Beaupré, défendeur, et Beaupré, opposant.

jugement rendu le 21 juin 1866, dans la Cour Supérieure siégeant dans le district de Joliette, ayant examiné le dossier et la procédure dans cette cause, et ayant pleinement délibéré; considérant que la 140ème section du chapitre 83 des Statuts Refondus pour le Bas-Canada a eu l'effet d'abroger la règle 78 du chap. 13 des règles de pratique de la cour supérieure publiées en l'année 1850, et qu'en ce il y a eu erreur dans le jugement susdit du 21 juin dernier, a cassé et annulé le susdit jugement du 21 juin dernier, et le met à néant à toutes fins que de droit avec dépens contre le dit opposant.

Godin et Desrochers, avocats du demandeur.

Champagne, avocat du défendeur.

(P. R. L.)

EN REVISION.

MONTREAL, 29 SEPTEMBRE, 1866.

Coram Badgley, J.; Berthelot, J.; Monk, J.

No. 1276.

Loiselle et al vs. Loiselle.

Jugé:—1o. Que le tuteur rendant compte n'est point tenu aux frais de la demande en reddition de compte s'il ne l'a pas contestée.

2o. Que cette question n'est pas laissée à la discrétion de la Cour comme sont la plupart de celles qui ont rapport aux dépens.

Les demandeurs Michel Loiselle et Appoline Loiselle, épouse d'Adolphe Trudeau, par leur action intentée le huit octobre mil huit cent cinquante huit demandaient au défendeur un compte de l'administration qu'il avait eue de leurs biens, depuis qu'il avait été nommé leur tuteur le quatorze juillet mil huit cent quarante.

Le défendeur a répondu à cette action le sept janvier mil huit cent cinquante neuf, qu'il avait toujours été prêt à leur rendre compte de sa gestion et administration, et qu'il produisait ce compte dûment affirmé avec les pièces justificatives et autres pièces appartenant aux demandeurs qu'il avait eu en sa possession; que par ce compte il ne devait rien aux demandeurs qui étaient endettés envers lui.

Il concluait à ce que acte lui fut donné de la production de son compte et des pièces qui l'accompagnaient et à être déchargé de l'action des demandeurs avec dépens.

Subséquemment les parties s'arrangèrent hors de Cour au moyen d'un compromis réservant la question des dépens.

La Cour, appelée à décider cette question, a condamné le défendeur au paiement des frais par jugement du vingt huit février mil huit cent soixante et six. En révision, le défendeur exposa ses prétentions comme suit:

Le défendeur soumet que ce jugement est mal fondé.

1o. Parce que par la loi le tuteur ne doit jamais être condamné aux frais de la demande en reddition de compte, et qu'il n'est tenu des frais que lorsqu'il a mal à propos contesté la demande.

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Cette question n'est pas laissée à la discrétion de la Cour comme sont la plupart de celles qui ont rapport aux dépens.

L'ordonnance de mil six cent soixante et sept, art. 18 du Titre 29 la décide formellement : " Le rendant ne pourra employer dans la dépense de son compte les frais de la sentence ou de l'arrêt par lesquels il est condamné de la rendre, *si ce n'est qu'il eut consenti avant la condamnation.*"

Sur cet article Rodier s'exprime ainsi : " Le comptable peut porter en dépense............ Les frais de sentence ou arrêt qui aura ordonné qu'il rendra compte supposé qu'il y ait consenti avant la condamnation et non autrement."

Ferrière, des Tutelles, p. 337.

" Cet article porte que le rendant employera dans la dépense, son voyage, &c. " ...... *et les frais de la sentence ou de l'arrêt qui le condamne de rendre compte* " *dans le cas où il a consenti avant la condamnation.*"

Meslé, des Minorités, ch. 12, No. 15, p. 100.

" *Si la sentence ou arrêt qui condamne à rendre compte est intervenue du con-* " *sentement du rendant compte, il peut en employer les frais dans la dépense du* " *compte suivant l'ordonnance,*" p. 401. La tutelle est une charge personnelle où le tuteur ne doit que ses soins sans aucune diminution de ces biens.

Denizart, Actes de notoriété, p. 155.

" A l'égard des frais faits pour parvenir à rendre le compte, l'usage est de les " employer aussi à la charge de l'ayant, en observant de retrancher ceux qui " avaient pour objet d'en retarder injustement la reddition ; ces sortes de frais " doivent être payés comme frais de mauvaise contestation, par celui qui les a " mal à propos faits."

Ancien Denizart, Vo. Compte, No. 85.

" Les frais et dépens occasionnés par la reddition des comptes sont à la charge " de ceux pour lesquels les comptables ont géré, et si c'est un tuteur qui est " comptable il est dans l'obligation d'avancer ces frais sauf à les répéter ; *mais* " *dans les frais de compte il ne faut pas compter ceux des contestations engen-* " *drées par les débats ;* ceux-là sont, comme tous les autres dépens, à la charge du " plaideur téméraire qui succombe."

Pothier, des Personnes, No. 196.
Pigeau, Procédure civile, T. 2, p. 34.

" Nous condamnons la partie de B à rendre compte...... dépens compensés " entre les parties que celle de B pourra employer en frais de compte " P. 35 : " Lorsque le rendant a fait une mauvaise contestation on le condamne aux dépens " qu'elle a occasionnés."

Ces autorités ne laissent aucun doute sur la loi et l'usage suivis en France ; et il est à remarquer que cet usage existait malgré l'art. 1 du titre 31 de l'ordonnance de 1667 qui fait défense aux Juges sous quelque prétexte que ce soit de renvoyer les parties sans dépens, mais leur fait une loi de condamner la partie qui succombe.

Cet article n'est pas en force ici, c'est une raison de plus pour donner à l'art. 18 du titre 29 tout l'effet qu'on lui donnait en France.

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La Cour n'avait donc aucune discrétion à exercer ; elle devait condamner les demandeurs aux frais, parcequ'il n'était plus question de les charger en dépense dans le compte, ayant été rendu et tout ayant été réglé entre les parties à l'exception des frais.

Mais supposant que la Cour aurait eu quelque discrétion à exercer, cette discrétion devait s'exercer en faveur des défendeurs et non en faveur des demandeurs.

Le défendeur est le père des demandeurs, il ne conteste pas l'action ; au contraire il présente son compte peu de temps après le rapport de l'action et sans attendre une condamnation ; ce cas est infiniment plus favorable que celui prévu par l'art. 18 du titre 29 de l'ord. 1667, et néanmoins la Cour n'a pas même compensé les frais; mais elle a condamné le défendeur à tous les dépens.

La Cour de Revision a infirmé le jugement du 28 février, 1866, et a motivé son jugement 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 in and for the District of Montreal, on the 30th day of December, 1865, having examined the record and proceedings had in this cause, and maturely deliberated; considering that there is error in the said judgment of the 30th December, 1865, in condemning the said defendant, the heretofore tutor of the plaintiffs in this cause, in costs upon this action to *rendre compte* by the said plaintiffs against the said defendant, inasmuch as the said defendant as such tutor *rendant compte* is not liable for such costs, doth revise the said judgment, by setting aside so much thereof as condemns the said defendant to the costs of this action, and doth order that each of the said parties do pay his own costs, and finally doth condemn the said plaintiff to the costs of this Court of Revision in favour of the said defendant.

The Honourable Mr. Justice Monk dissenting.

Cartier, Pominville & Bétournay, avocats des demandeurs.

Dorion & Dorion, avocats du défendeur.

(P. R. L.)

SUPERIOR COURT.

MONTREAL, 9TH JULY, 1866.

Coram BERTHELOT, J.

No. 289.

WILSON *vs.* DEMERS.

HELD:—That the prescription of a promissory note made in a foreign country, and payable there, is to be governed by the *lex fori*, and not by the *lex loci contractus*.

The plaintiff, in his declaration, alleged the following facts:

"That on the 12th of September, 1857, the defendant, who was then carrying "on business in partnership with his brother Hector Demers, in Fond du Lac, "Wisconsin, in the United States, under the name of Demers Bros.; at the City "of New York, in the State of New York, one of the said United States, gave "as a co-partner as aforesaid, to the firm of L. O. Wilson & Co., merchants, of "that city, a promissory note, signed by the said Demers Bros., whereby the "latter promised to pay L. O. Wilson & Co., or order, at the Bank of the North "West, at Fond du Lac, at Wisconsin, $1120.47, four months after the date "aforesaid; that after the making and delivery of said note, L. O. Wilson & Co. "duly transferred it to the plaintiff; that on the maturity of the note it was "duly presented for payment, at the place where it was made payable, whereupon "payment was refused, and the note protested; that on or about the date of the "protest of said note the defendant and his brother suddenly, secretly, and "fraudulently, departed from their domicile in Fond du Lac, and from the "United States; that since then, and to the 19th April, 1866, the plaintiff had "caused diligent search to be made for the defendants, but without success; "that on or about the date last aforesaid, the plaintiff for the first time dis- "covered the residence of the said defendant and of his said brother; that since "the maturity of the said note the domicile of the defendant and his said "brother hath been in Lower Canada, and that they have had no domicile since "in the United States; that by the laws existing in the said State of New York "and in the State of Wisconsin, at the times of the making and of the maturity of "the said note, the absence of the said defendant as aforesaid suspends the statute "of limitations existing in these States, and gives to the plaintiff a right to sue "for, and recover from the defendant, the amount of the said note; that the "defendant hath recently dissolved partnership from his said brother, and that "by law heretofore and still existing in the said States, the plaintiff hath still a "right to sue and recover the amount of the said note from the defendant; and "therefore, under the circumstances aforesaid, he hath also a right to sue and "recover from him thereon in Lower Canada."

To this declaration the defendant demurred, on the ground that the note is prescribed by the *Statute of Limitations* of Lower Canada.

Girouard, pour le défendeur: Le demandeur poursuit le défendeur pour $1773.80, montant d'un billet promissoire consenti par lui aux Etats-Unis, où il était aussi payable.

Le demandeur allégue de plus qu'à raison de certains faits, qu'il expose, le billet en question n'est pas prescrit par la loi étrangère. Le défendeur soutien

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plaidant l'exception de prescription de cinq et six ans, a produit une défense en droit, par laquelle il prétend que le billet en question n'est pas soumis à la loi étrangère, *lex loci contractus*, mais à loi de notre pays quant à ce qui regarde la prescription.

La prescription en matière de commerce est une limitation, une déchéance, une négation de l'action, et en conséquence elle est soumise à notre loi, suivant la maxime qu'en matière de procédure on suit la loi du lieu où les procédés sont institués. Voir la cause de Côté *vs.* Morrison, 8 L. C. Rep., p. 252, 2 Jurist, p. 206, per Smith, J.

La cause de Fenn et Bowker décidée durant cette année, peut aussi être citée comme précédent.

On prétend que le ch. 64 des Statuts Refondus du Bas Canada ne frappe que les billets "payables dans le Bas-Canada"; mais la 12e Vict. ch. 22 statuait également sur les billets à l'étranger; et comme celui dont il s'agit a été fait et est même devenu dû avant les Statuts Refondus, il se trouve soumis à la 12e Vict. Mais encore si cette dernière ne le regarde pas, alors il est sujet au Statut des Limitations, 10 et 11 Vic. ch. 11, comme étant "a simple contract without specialty."

D'ailleurs, ceci est pleinement justifié par les dispositions de nos lois statutaires et aussi par la jurisprudence internationale de tous les pays où la législation anglaise en matière de prescription a été adoptée. Voici une longue liste d'autorités auxquelles on peut encore en ajouter d'autres :

13 Peters, 327; 2 B. & Ad. 413; 1 id. 284; 10 B. & Cresw, 903; 3 Burge's Com. on Col. and For. Laws. 883; 4 Cowen, 528, note 10; Id. 530; 1 Gall. 371; 2 Mason, 151; 3 Johns, ch. 190; 6 Wend, 475; 1 Green's N. J. Rep. 68; 3 Peters, 270, 277; 5 id. 466; 8 id. 373; 13 id. 312; 13 Serg. & R. 395; 2 Rand. 303; 3 J. J. Marsh, 600; 8 Vern, 150; 3 Gilman, 637; 1 Meigs, 31; 7 Missouri, 241; 9 How, U. S. 407; 36 Maine, 362; 1 Penn. State R. 381; 2 Mass. 84; 3 Conn. 472; 2 Bibb. 207; 2 Bailey, 217; 1 Hill, S. C. 439; 2 Dall. 217; 1 Yeates, 329; 1 Caines, 403; 1 Johns, 139; 3 id. 263; 11, id. 168; 4 Conn. 47; 2 Paine, C. C. 437; 2 S. & M. 682; 1 Ross' Leading Cases, 383; Angell on Limitations (ed. 1861), p. 56 and *seq.*; 5 Johnson, N. Y., 152; 10 B. & C. 816; 2 Bing. N. C. 202; 1 Smith's Leading Cases (ed. 1866), p. 954, No. 786; Story Conflict of Laws, § 576, p. 766 and *seq* (ed. 1865); Wheaton, International Law. p. 187; 1 Bing. N. C. 151; 2 id. 202; 10 Barn. & Cres. 903; 13 East, 439; 2 Q. B. Rep. U. C. 265; 9 Martin's Rep. 435; 2 an. Louis. Red. 315; id. 646; 3 id. 221; 4 id. 235; The English Jurist, 1851 à 1855, p. 122.

Il y quelques auteurs, tels que Story, qui, tout en admettant qu'on peut toujours plaider la prescription de la loi du pays où l'action est prise, pensent néanmoins qu'on devrait admettre la prescription du lieu du contrat, chaque fois qu'elle a été acquise avant l'action, et qu'elle anéantit non pas tout simplement l'action, mais le droit et la dette elle-même; mais cette question, sur laquelle Bateman, *Commercial Law* (1865), offre aussi de longs commentaires, est étrangère à cette cause.

En France, la question paraît être controversée. Suivant Pothier (prescript. No. 251), c'est la loi du domicile du créancier qui gouverne; et suivant Merlin (*Répert., vo.. gens de main morte*, p. 634, col. 1, et pres. p. 498, N° 7 et t. 17, p. 403 et 404) et Dunod (pres., part. 1ère ch. 14) c'est au contraire la loi du

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domicile du débiteur. Troplong affirme qu'il faut suivre la loi du lieu du paiement parce que c'est là que le contrat est considéré avoir eu lieu. Pardessus est de son avis, et quelques autres encore.

Quelque soit d'ailleurs l'opinion des juristes français, elle ne peut gouverner ici. Notre limitation ou déchéance qu'on appelle improprement "prescription," est tout-à-fait différente de la prescription du droit français, tant ancien que nouveau. Suivant notre Législature Provinciale, la prescription se rapporte avant tout à l'action, et si le débiteur est libéré, c'est parce qu'il n'est plus soumis à l'assignation judiciaire et que son engagement est dégénérée en obligation purement naturelle.

En référant aux décisions de Huber *vs.* Steiner, Lippman *vs.* Don, per Lord Brougham, Story, *Conflict of Laws*, et quelques autres commentateurs, on trouvera encore d'autres raisons concluantes.

Cette question, quand bien même elle ne serait pas réglée par notre Statut, devrait encore être décidée par les lois Anglaises et non par les Françaises, parce qu'elle tient essentiellement à la nature de la prescription Anglaise introduite en ce pays, à l'ordre public et même au droit international—aux relations des étrangers avec les sujets ou résidants britanniques.

Aussi les codificateurs n'ont pas hésité dans leur rapport sur la prescription page 63, à déclarer que, l'introduction de la loi anglaise ayant eu lieu en matière de prescription des affaires commerciales, toutes les matières qui s'y rattachent sont soumises à la loi anglaise. C'est, ajoutent-ils, ce qu'expose l'article 8, qui consacre la doctrine de Huber *vs.* Steiner et de Lippman *vs.* Don.

Le demandeur dira peut-être que cette question ne pouvait pas être soulevée par une défense en droit. Nous devons dire qu'elle l'a ainsi été au désir des deux parties pour s'exempter des lenteurs et frais d'une enquête et de l'envoi de commissions rogatoires. Mais d'ailleurs le demandeur a lui-même provoqué cette défense en droit, en avançant dans sa déclaration que le billet, n'étant pas prescrit par la loi du pays où il a été fait et payable, il ne l'était pas ici. Le défendeur a tout simplement répondu qu'en supposant les faits de la déclaration vrais, il n'avait rien à faire avec la *lex loci contractus*, mais bien avec la loi de ce pays.

Comment maintenant pourra-t-on prétendre sérieusement que la loi de ce pays a besoin d'être plaidée par *exception* ou *fin de non recevoir*. Sa disposition est-elle un fait supposé inconnu ? Les juges ne peuvent-ils la mettre à exécution que si elle est invoquée ? Soutiendra-t-on encore que cette Cour n'a pas le droit de renvoyer *de plano* un appel pris après les délais ; la chose a même été faite il n'y a encore que quelques années. Pour quelle raison de différence voudrait-on que l'on paraisse ignorer la disposition qui regarde la *limitation des actions*, aussi positive et rigoureuse que celle qui établit la prescription du droit d'appel. Cette prescription des affaires commerciales n'est pas seulement un privilège que le débiteur peut, ou ne peut pas invoquer ; elle est d'ordre public comme celle de l'appel, une déchéance, une négation, une prescription, formelle et positive de l'action.

Cette doctrine peut paraître nouvelle, mais elle ne l'est pas, (Dunod, Prescription, p. 110,) Carondas (Quest. t. 22, ch. 4) et Ferrières (sur Paris, t. 6, § 1,

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N° 15) étaient d'avis que lorsqu'il y avait un terme fixé par les ordonnances et que la partie agissait après son expiration, le juge devait lui opposer d'office qu'il était déchu. Car, disent ces auteurs, le juge doit juger suivant l'ordonnance, qui est en ce cas un règlement de police et un droit public.

Même sous l'empire du droit français, suivant lequel la prescription n'a aucunement le caractère de la nôtre, la jurisprudence qui a introduit la nécessité de l'exception de prescription a paru à plusieurs auteurs comme un non-sens et une erreur des praticiens. On trouve une intéressante dissertation sur ce sujet dans Troplong, *Prescrip.* N° 84 et suivants.

Mais il y a plus dans ce cas-ci. Le défendeur a plaidé au fonds même *par défense en droit*, que la loi étrangère ne peut toucher l'action prise ici, qui est régie par notre loi. Comment le juge peut-il alors ne pas prendre connaissance de cette dernière et en refuser le bénéfice à celui qui l'invoque comme sa libération.

Ce point a été décidé dans le sens de l'Intimé, croyons-nous dans la cause de Giard *vs.* Lamoureux, N° 45, au terme d'appel de Mars dernier.

Popham, for the plaintiff:

I. The first proposition the plaintiff would sustain, is, that the *lex loci contractus*, or if not that, the law of the place where the *note was made payable*, should govern the note in this case, and not the *lex fori*.

This question is one that properly belongs to the department of private international law—

"Which determines before the Courts of what nation each suit should be "brought, and by the law of what nation it should be decided. (Westlake "Private Inter. Law, Art. 1.)

This department of law derives its principles from the Civil Law. M. Foelix (Droit Inter. privé vol. i, art. 96, p. 209) says "Les lois romaines ont déjà con- "sacré le principe, que la matière du contrat est régie par la loi du lieu où il a été "passé." In page 212 he says, "but when the *acte* expressly stipulates that it shall be *executed elsewhere*, *then* it must be governed by the law of the place of execution"; and in page 214 he adds:

"Ce principe a été emprunté à la loi romaine L. 21 ff., De obl. et Act. "Elle repose sur la circonstance qu'en fixant un lieu pour l'exécution du con- "trat, les parties sont censées avoir voulu faire tout ce que prescrivent les loix "du même lieu. Tel est le sentiment de Paul Voët, Joan Voët, Christin, "Sande, Boullenois, Story, Huber, Pardessus, &c.

Merlin, (Quest. de droit, vo. prescription,) holds the law of the *lex fori*, or that of the domicile of the debtor, will regulate a case like the present; but he fails to draw the distinction between a debt made payable generally, and one payable in a particular place. Boullenois, T. I. p. 530; T. II. p. 488, and Pardessus, Droit Com. No. 1495, both observe this distinction, and in the latter case sustain the application of the law of the place where it is made payable. Such is likewise the opinion of Christin, Burgundus, Mantica, Fabre, cited by M. Felix, p. 221.

On the other hand, certain authors maintain, that no other *prescription* than that existing in the place where the obligation was created, can be pleaded. (Hert, Mansord, MM. Rocco, Reinhardt, Shafner.)

"Cette opinion," says Felix (p. 22) "*peut-être la mieux fondée en théorie, a* "*aussi été adoptée par la Cour Royale de Douai et par la Cour Royale de Paris.*"

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"In a note on this passage, by M. Demangeat, he reviews the various opinions held by writers on this question, and states that the opinion adopted by Felix and the *Cour Royale* de Paris is that which now generally prevails. *Savigny*, the eminent Prussian jurist, in his commentaries on Civil Law, sustains the doctrine, that the prescription of the place must govern, and where no place of payment is specified, then that of the place where the contract was created. Ibid 223 note.

This is likewise the doctrine of Troplong.

"L'action personnelle se prescrit par la loi en vigueur de lieu *où doit se faire le paiement.*"

In a foot note he adds:

"*Pothier est le seul qui soutienne que la prescription est reglée par le cas du* "*domicile du Créancier, mais c'est une erreur difficile à comprendre dans un* "*jurisconsulte d'un aussi grand sens.*" *Prescription No.* 38.

This view is also sustained by Pardessus in a more explicit manner:

"Ainsi, lorsqu'un débiteur oppose la prescription, *le droit d'user de ce moyen*, "la durée de cette prescription, *seront réglés par le droit du lieu où il a promis* "*de payer.*"—*Droit Commercial*, vol. vi. art. 1495, p. 383.

II. It is hoped the foregoing authorities will be deemed sufficient to show that the law of the *lex loci contractus*, or that of the place where this note is specially made payable, ought to be applied. It is immaterial which, in this case, as the law of both states are identical on the point at issue. The plaintiff now proposes to show, that our Municipal law, if it be applied, would sustain his right of action.

The Con. Statute of L. C., chap. 64, is the only statute regulating the prescription of notes, made subsequent to the 1st August, 1849. The 31st sec. expressly limits its operation, as regards prescription, to notes "*due and payable in Lower Canada.*" It is clear then it can have no application to this case. The defendant's attorney relies: 1st, upon the statute of limitation; and 2ndly, on some decisions in England. The English decisions will be referred to further on. The statute of limitation is equally inapplicable, although it is on this *statute* the demurrer appears to be based. True, the first section contains the words "any lending or contract without specialty," which in England is held applicable to promissory notes. But our Promissory Note Act was introduced *subsequently* to the Limitation Act (10. & 11 Vic., cap. 11), and it has specially laid down a different prescription. The Limitation Act must therefore be considered imperative in the present case. This view seems to have been conceded by the appellant's counsel in Bowker *vs.* Fenn. (X. L. C. Jurist, p. 121); and therefore, it is submitted, the demurrer ought to have been dismissed irrespective of the merits or demerits of the declaration.

Côté *vs.* Morrison (II. L. C. Jurist, p. 206). In that case the Superior Court sustained the application of the Statute as to the prescription, but in the Court of Appeals the judgment was *not* sustained on that, but on other grounds. The present case, however, differs from it in important particulars. In this

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case the note is not only made in a foreign country; but unlike that in Côté & Morrison, it is specially made *payable there*. As has been already shewn, Boullenois, and others, who sustain the *lex fori*, or domicile of the debtor, where *no* place of payment has been stipulated, hold the reverse, where the place of payment has been specially stated. This, as well as other differences, exist between this case and that of *Bowker & Fenn*.

But in the case of *Addams* vs. *Worden* (VI. L. C. Rep. 237), a decision was rendered by the Court of Appeals sustaining the right of pleading and proving the statute of limitations of the State of New York to an action instituted here on a judgment obtained in that State on a promissory note.

III. Thirdly, the plaintiff submits that granting the law of the *lex loci contractus* to be inapplicable; and that a note similar to that in question may, under ordinary circumstances, be prescribed by our Provincial statute; nevertheless, by the law of this country, the facts set up in the declaration, *if true*, suspend the prescription, and also give rise to a question of fact, and not of law, in consequence of which the demurrer ought to be dismissed.

The case last cited, of *Addams* vs. *Worden*, furnishes one of the grounds for this assertion. The defendant pleaded the statute of limitations in the State of New York. This plea was rejected. In Appeal, the Court held to the right of *pleading and proving* this statute. The following is an extract from the judgment having reference to this plea:

"Seeing that the Statute of New York pleaded by the appellant in the Court "below cannot be judicially noticed, but must be first *proved as a fact* before "the Courts of justice in Lower Canada can decide upon its nature and effects, "and that the Court below in overruling so much of the second exception of the "said appellant as asserts the said Statute as a ground of defence was premature, "and that therefore in the said judgment of the 15th December, 1852, by "which the said ground of exception is dismissed, *there is error in that respect*," &c., &c.

In this case the plaintiff has specially set up the law of limitations of New York and that of the State of Wisconsin, invoking by his declaration their provisions on behalf of a note made in New York and payable in Wisconsin, as the defendant in Addams & Worden, invoked by his plea. If, in the latter case, there existed the right to *prove* the foreign statute, the authorities cited in the first part of this *factum* assuredly establish a still stronger claim to that right here.

The second ground for the third position of the plaintiff is supplied by a principle, recognised in our law. *Contra non valentem agere nulla currit prescriptio*. Pothier, standing as he does almost alone in the advocacy of the *lex fori*, also adopts this maxim; and admits that prescription cannot begin to run but from the day the creditor has the power to bring the action. *Ob.* part III. Ch. 8, Art. II. Sec. 2, Art. 679 & 80 *Ibid.* Prescription Art. 22. Two other principles of the Civil Law are likewise recognised by our Courts. *Non debet alteri par alterum iniqua conditio inferri. Factum cuique suum non adversaria nocere debet.*

"On n'est pas," says La Merle, "recevable à se plaindre ni à se prévaloir de

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"son propre fait, de sa négligence, de son imprudence, *à plus forte raison de sa* "*faute*, au préjudice d'autrui." *Fins de non Recevoir, Ch. VII., p.* 144.

These citations are closely applicable to this case. The plaintiff's declaration also alleges the secretly and suddenly absconding of the defendant from his domicile about the period of the maturity of the note; that the plaintiff had since made diligent search for him, but without success, until the month of April last, when he for the first time found defendant in this Province; that in consequence of this fraud by the defendant he was unable to institute any action upon the note according to the laws existing in New York and in Wisconsin, and consequently by these laws, as well as by that of Lower Canada the statute of limitations was, as regards the note, suspended.

If then the law of this country tells us that prescriptions cannot run but from the day the creditor has the power to bring his action, and that no one can plead to the detriment of another the consequences of his own fraud, or negligence, surely then the plaintiff has a right to prove his allegations that he was unable to institute an action on the note before the expiration of five years from its maturity, and that the cause of such inability arose solely from the acts and frauds of the defendant.

IV. It has been stated in a foregoing remark that the defendant's attorney partly relies upon certain decisions in the English Courts, in his argument on his demurrer.

These decisions have recently been commented upon by Mr. Westlake in Arts. 250, 251, 252 & 253 of his work on Private International Law. They consist of two cases of appeal from the Scotch Courts, where the Civil Law prevails, and where the *lex loci contractus* was applied, viz: Campbell *vs.* Steiner, and Fergusson *vs.* Fyffe; and two English cases, viz: The British Linen Company *vs.* Drummond, and Huber *vs.* Steiner; the latter decided on the opinion of the civilians, Huber and John Voet. In these cases *lex fori* was applied, because it was supposed the prescriptions invoked were questions of procedure which belonged to the *lex fori*. The author shows that this opinion rests, as he says, "*on two fallacies.*"

"There is nothing," he adds, in another part of Art. 250, "at the bottom, in "any statute of limitations, but an essential modification of the rights created "by the jurisprudence in which it exists, and which *is therefore incapable of a* "*just application of rights created by the jurisprudence of another country.* "The rule here advocated," (namely, that of the *lex loci contractus*,) "is also "as Savigny remarks, the most reasonable, because it excludes both the arbitrary "will of the plaintiff to choose between competing forums that which allows the "largest term of prescription, and the arbitrary power of the defendant to defeat "his creditor by removing his domicile to the forum which allows the shortest "term *and avoiding while it runs personal presence in the special forum of the* "*obligation.*"

In a note on Art. 250, this jurist states that the authorities cited by Story in sustaining the *lex fori* "are a little overstated," and in the conclusion of Art. 252, on this question, he says:

"*The whole subject is still open for the higher English tribunals.*"

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The fallacy of contending that the plea of the statute of limitations is simply a plea to the remedy, and not a discharge of the contract, and therefore a plea to be governed by the *lex fori* is also combated, by a recent work on the Commercial Law of the United States, by W. O. Bateman, sects. 144 et *seq.*

These views have been adopted recently by the Queen's Bench, in Upper Canada, in the case of Darling *vs.* Hitchcock. This was an action on a promissory note, made in Upper Canada but payable in Montreal. Previous to the institution of the action, the note had become prescribed by our statute, establishing a prescription of *five* years, but it was unaffected by the statute of limitations in Upper Canada, establishing a prescription of *six* years. The defendant pleaded the Lower Canada Act as a bar. The plaintiff demurred to the plea, setting up the *lex fori;* but after an elaborate argument, the demurrer was dismissed.

The plaintiff respectfully hopes that the foregoing authorities will be held by this Court to establish :—

Firstly, That this question is one to be decided by Private International Law, and that, according to the opinion of the majority of writers on that department, the law of the *lex loci contractus*, or that of the place where the note was made payable, should be applied to the present case.

Secondly, That even if the *lex fori* be applied, the allegations in the declaration raise questions of fact, which exempt them from a demurrer; and,

Thirdly, Admitting the declaration to be demurrable, that the demurrer should not have been based on the statute of limitations, as it has been, in this case.

After hearing the argument in support of the demurrer, the Court rendered a judgment, maintaining the demurrer, and dismissing the action:

"The Court having heard the parties by their counsel upon the *defense en* "*droit* pleaded by the defendant to the action and demande of the plaintiff "in this cause, examined the proceedings of record, and having on the whole "duly deliberated, doth maintain the said *defense en droit*, and doth dismiss the "said action, with costs."

Demurrer maintained.

Popham, for plaintiff.
Girouard, for defendant.
(P. R. L.)

QUEBEC, 26TH, 27TH, 28TH NOVEMBER, 1866.

Coram MEREDITH, CHIEF JUSTICE.

AND

A SPECIAL JURY.

No.

Harris vs. *The London and Lancashire Fire Insurance Company.*

HELD :—That in the absence of satisfactory evidence that certain goods, the value whereof is claimed under a fire policy, were either actually destroyed or damaged by fire, or stolen, the claim therefor cannot be recovered.

This was a trial, before a special jury, in an action for the recovery of $2877, claimed by the plaintiff as the value of certain goods belonging to him and insured by The Company, defendant, alleged by him to have been destroyed by fire.

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The facts and points of the case appear by the charge of THE CHIEF JUSTICE, who addressed the jury as follows:

GENTLEMEN,—The facts of this case, and [illegible] pretensions of the parties, have been laid before you so ably and so clearly by the learned counsel engaged, that I hope a few observations on my part will suffice to draw your attention to the points in the case particularly requiring your consideration. You will not fail to bear in mind that your duty is confined to answering the questions submitted to you. In former times the verdict of the jury covered the whole case, but even then the jury were guided by the Judge as to questions of law. Indeed no principle is better established than that questions of fact are to be determined by the jurors, whilst questions of law are to be decided by the Court. You therefore will not regard the present system, which has the effect of restricting the powers of the jury to the questions prepared by the judges, as encroaching upon your powers as jurors. The first question now submitted for your consideration is this:—"Was the property insured, or any portion thereof, accidentally destroyed by fire and when; and did the plaintiff sustain any and what loss thereby?" This question involves a point of great importance, and the one which I believe first caused difficulty between the parties. The pretension of the plaintiff is that his goods were damaged by fire to the extent of about $2000, and that, after the fire, goods were missing to the extent of $4600. The plaintiff contends that the defendants are liable for the missing goods; this the defendants deny. The rule which I think you may follow in this case is that which was laid down lately by Mr. Justice Monk, in the case of McGibbon *vs.* the Queen Insurance Company, and which afterwards received the sanction of the Superior Court of Montreal, namely: That the value of goods which, without any fault on the part of the insured, are lost or stolen during the confusion caused by a fire, or whilst being removed from the burning premises, ought to be bo[illegible]y the insurers. I feel that in laying down the rule in this way, I go as far as I can in favour of the plaintiff, but I doubt whether the laying down of a more stringent rule would be consistent with justice, conducive to the public good, or even for the advantage of insurance companies. If insurers are to be considered clear the instant the effects insured are beyond the reach of the flames, whether afterwards unavoidably lost to the party insured or not—then the latter might be disposed to say, whilst my effects remain in my house they are at the risk of the insurers: whereas, if put into the street, they will be at my risk; I therefore will prevent their removal until, at any rate, I can have due precautions for their preservation out of doors. Moreover, when a house is found to be on fire, strangers are let in to assist in extinguishing the flames, and in saving the goods. It is for the interest of the insurers that this should be done, and losses resulting from a proceeding adopted mainly for their benefit, ought not to fall upon the insured. I shall next advert to the objections by the learned counsel for the defendants, that the question before you refers to goods *destroyed*, whereas the claim is for goods *injured*. This objection cannot be maintained. Goods injured are partially destroyed—and for the loss resulting from [illegible] partial destruction of goods, insurers are clearly liable. Passing now to [illegible]dence adduced with reference to this question, I hold it to be quite suffi[illegible] in so

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far as regards the $1855.54 allowed by the arbitrators on the *damaged goods* and also as regards the addition of $35.25 recommended by the arbitrators. But the case, I must say, seems to me very different with respect to the charge of $4627.58 for goods missing. You are, gentlemen, as I have said, the judges of the facts, and it is not only your right, but your duty, to give to the evidence of each witness the weight to which you think it entitled; and not to attach to my observations upon the evidence any more importance than in your judgment you may think they merit. But at the same time, I deem it right to say, that the evidence offered as to the missing goods seems to me not such as might reasonably be expected by an insurance company. Every one insuring a stock of goods must know from the conditions of his policy that it is a part of his contract to furnish, in the event of a fire, a particular account of his loss. In this there is nothing unreasonable. An eminent English Judge, speaking of the certificate of character, which insurance companies stipulate they may exact has said: "It is a duty that the company owe to the public as well as to them-"selves, to take every precaution to protect them against fraud; and unless some "precaution such as the present were interposed, the office would be holding out "a premium to wicked men to set fire to their own houses." For the same reason it is the duty of insurance companies to resist any demand which they have cause to believe fraudulent or grossly exaggerated. And insurance companies doing otherwise would cease to be, what I believe they generally are, highly valuable institutions; and, in this respect, become public nuisances. Moreover, it is perfectly rea[illegible] that a particular account of the loss should be given, because the ins[illegible] liable only for the loss which the insured is proved to have sustain[illegible] general rule, there cannot be satisfactory proof of loss without a kn[illegible] of the particulars of which it is composed. The proper course to be pursued to enable a merchant to give a particular account of his loss, would seem to be, to take stock periodically, and to keep an account of his sales and purchases; then, in the event of a fire, by adding the purchases subsequent to the last inventory to the amount of that inventory, and deducting therefrom the sales also subsequent to the inventory, he would have, as nearly as possible, the stock on hand at the time of the fire. Of course if a merchant's books were lost by fire or otherwise, an account, such as I have mentioned, could not reasonably be expected, and therefore the want of it could not cast any doubt even upon the claim for loss by such evidence as the nature of the case would admit of. But where a merchant omits to take stock for a series of years, keeps no regular books of account, nor any account of his sales, and makes purchases to the extent of $700 or $800, without taking an invoice, as Mr. Baxter says the plaintiff was in the habit of doing; then I must say that an attempt on his part to render from memory a particular statement of the stock-in-trade on hand at a given time, must savour very much of guess-work. In making these observations I do not wish to be understood as saying that I think you ought wholly to discredit the evidence offered by the plaintiff in this case as to the missing goods. What I wish you to understand is simply that where a suitor does not offer such evidence as may under the circumstances reasonably be expected, the inferior evidence which he does offer ought to be

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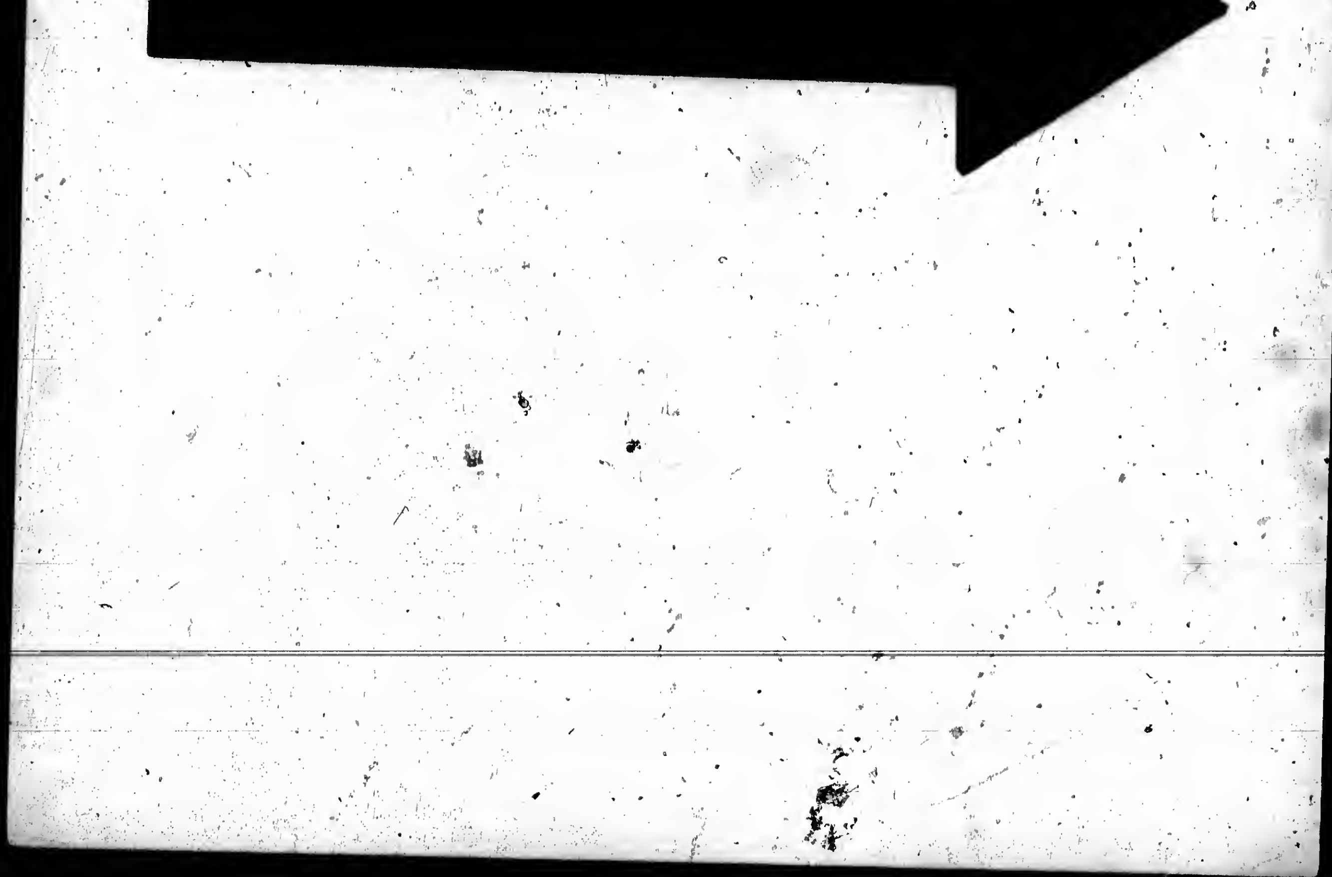
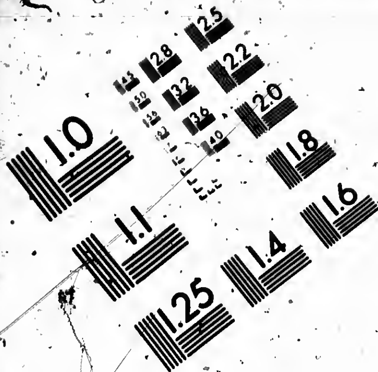
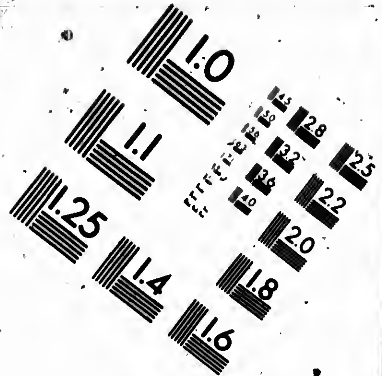
received with caution. It was said that a trader may carry on his business as he likes; and, in one sense, that statement is true. But if a merchant conducts his affairs so as not to be able to prove even his just claims, he must bear the loss and blame himself; and he cannot expect that jurors will so far forget their duty as to substitute their conjectures for the evidence of which he has been deprived by his own neglect. Coming then to the claims for goods [illegible] supported mainly by the evidence of Messrs. Baxter and O'R[illegible] one first is that the claim for damage is only about $2000, w[illegible] goods are said to amount to $1600. In the present case no at[illegible] during the fire to remove the goods; and, therefore, if the go[illegible] missing were upon the premises when the fire broke out, and w[illegible] when the fire was extinguished, they must, I think, have been either b[illegible] stolen. The evidence offered by the plaintiff to account for the missing [illegible] by their having been burned, is, I must say, very weak. Mr. O'Donohue, it is true, says that at one time the whole of the plaintiff's shop was on fire; but this evidence is not supported by the other witnesses, and cannot be reconciled with the state of the premises after the fire. I therefore think that Mr. O'Donohue must have mistaken the light thrown into the shop from other parts of the building for flames proceeding from the shop itself. Mr. Baxter says he saw goods in the shop in a burned condition; and also that he saw some clocks, the cases of which were burned, so that nothing but the movements remained. He has not, however, said what amount of goods, or what number of clocks, were so burned; and if you will look at the list of damaged goods, in addition to eighty-four clocks and fifteen time-pieces, set down as missing, you find among the damaged goods twelve clocks allowed as a total loss, eighteen allowed as damaged to the extent of seventy-five per cent. upon their value, and sixty allowed as damaged to the extent of fifty per cent. You therefore, perhaps, will think that a fair allowance has been made under the head of damaged goods for the clocks spoken of by Baxter as burned. But when you turn to the evidence of the defendants, it will be found very strong indeed against the theory of any considerable part of the goods missing having been burned; you will recollect that the fire originated in Mrs. O'Brien's part of the house, to the left of the entrance to the plaintiff's shop. Mr. Hearn says that on the left side, that is Mrs. O'Brien's side, clocks were piled up nearly to the ceiling, and that these clocks were not consumed, but scorched and blistered. O'Rourke said that the clocks near the door in the same partition were blistered. Pouliot says these clocks were "*pas mal chauffées et brulées, et le vernis devant coulait.*" At another place he says the backs of some of these clocks were burned; and as to the right-hand of the shop, he says there was nothing actually burned there, and that the ceiling was blackened by smoke. This evidence supports the claim for goods damaged but not the claim for goods missing. We also know from the statement of Baxter and others, that there were glass cases on both sides of the shop, one against the partition at the end of the shop, and others on the counter and on the top of the safes; but no attempt even has been made to prove that the wood work of those glass cases was destroyed by combustion. And yet the importance of such proof, could it have been adduced, is self-evident. Moreover, in the list of



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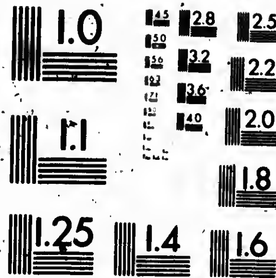
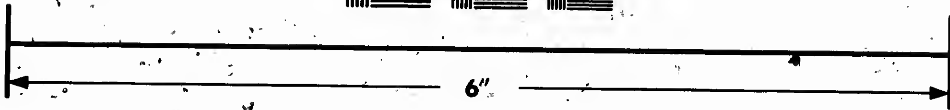
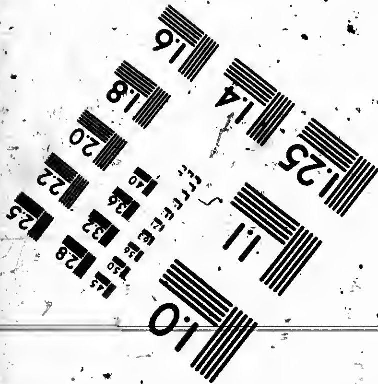
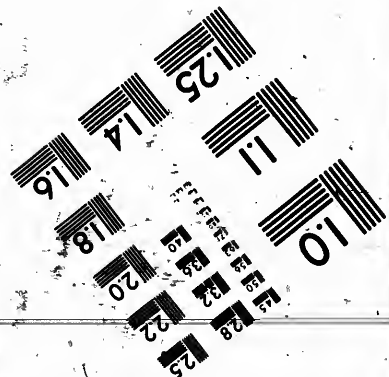

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things missing, which covers several pages, I find many articles, the total disappearance of which cannot be accounted for by the action of a fire such as that in question; for instance, among many others, the eighty-four clocks and fifteen time-pieces, eighteen dozen steel spectacles, twenty-six brass compasses, twelve dozen clock springs, eighteen dozen of keys, eight dozen of steel brooches, and four gross of common watch keys. Your own common sense will tell you, gentlemen, that if these things had been destroyed by fire, some vestiges of them would have remained. Then, if you reject the theory that a large part of the goods missing were burned, you will have to consider the theory that they were stolen during the fire. Now the objections to this supposition seem to me quite as strong as those to the supposition of the things having been burned. You will, with reference to this part of the case, look at the list of things missing, and bear in mind that the plaintiff and insurance agent arrived very soon after the fire was discovered, and that the police appear to have been in considerable numbers on the spot, before the door of Mr. Harris' shop was opened. Under these circumstances it does not appear that there was much opportunity for thieving; and yet, if these things were stolen, the stealing must have been, to say the least, on a most extraordinary scale. You will recollect the number of clocks and time-pieces included in the list of goods missing. They are set down as being of the value of about $100, so that there remains more than $4,000 for the value of the other goods alleged to have been missing. It appears that in consequence of the night being exceedingly cold, the number of persons present was small. Some of the witnesses say about one hundred; but we will suppose there were two hundred, and that three-fourths of these people were not thieves, which I trust I may assume; then, if the missing goods were stolen, each of the fifty thieves, upon an average besides carrying off two clocks or time-pieces, must have also carried away other goods of the value of more than £20. It would be sufficiently strange if such an attempt had been made, but it would be still more extraordinary if it could have been successful without any of the honest spectators having known anything about it. And yet there is no pooof of a single act of pilfering or of any stolen goods having afterwards been discovered. Having said this much, I need hardly add that the plaintiff has not satisfied my mind that this part of his claim is well founded, and if your minds are in the same state you will have to reject his claim for the goods missing as not proved. You were, however, told that you could not reject the plaintiff's demand without in effect accusing him of fraud; but such is not the case. The plaintiff may have failed to prove his claim, and yet be incapable of dishonesty. It was also said that you ought to deal with this matter as arbitrators, and upon principles of liberality—although it was not, I am sure, so intended, this statement has a tendency to mislead you. In your own offices, and at your own expense, you may be as liberal as you please; but here, as jurors, you must be just, and justice demands that your verdict should be in accordance with the evidence, of which, however, I repeat you are the judges. I now pass to the second question. The admission given by the defendants will enable you, without difficulty, to answer the first part of this question in favour of the plaintiff; and as to the second branch of the question, I do not think

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there is evidence which would justify you in saying that the plaintiff has been guilty of a wilful attempt to defraud the company. The plaintiff has been spoken of as a man of large means, long resident in this city. The fire, which, so far as we know, was purely accidental, did not originate in his premises; and I see no reason for supposing that the plaintiff was over-insured, or that he did not regret the occurrence of the fire, as every honest man must do, whose premises are burned. It is true that, according to my view, he over-estimated his property. But this is a mistake very commonly made; and in the course of my own experience I have known most egregious errors of this kind to have been made by very worthy men. Nor do I wish to be understood as saying that the clerks who prepared the list of missing goods, wished to perpetrate a fraud; but it certainly does seem to me that their zeal and sympathy for an employer, in whose service they had so long been, prevented them when making the inventory from distinguishing accurately between their memory and their imagination. The third question is as follows: "At the time of the destruction of the property insured had the plaintiff effected any insurance or insurances on the same with any other insurance company or companies, and to what amount or amounts, and when?" The pretension of the plaintiff is that the insurances which he effected with the other offices were upon separate and distinct stocks of goods from those insured by the defendants. This would be quite true, if we could consider the insurances in favour of the plaintiff with reference to the time when they were first granted; but, unfortunately for him, they must be viewed with reference to the time of the fire. With respect to this question, it is hardly necessary for me to tell you that the insurance granted to the plaintiff by the policy sued on, was not confined to the goods actually in his store when the policy was granted. No; the insurance was on the plaintiff's stock-in-trade. It was perfectly understood by both parties that the plaintiff would sell off his goods as fast as he could with advantage, and then replace the goods sold with other goods of the same kind. And it is plain that any goods of the description mentioned in the policy, brought upon the premises therein mentioned, so as to form part of the plaintiff's stock described in the policy, were at once covered by the insurance thereby granted. If this be true, then it follows that when the plaintiff in February, 1865, brought to his store in St. Peter street his "stock-in-trade as jeweller and clockmaker," which he previously had, in Notre Dame street, insured by a policy from the Liverpool and London office, the Notre Dame street stock, if I may so speak of it, became at once a part of the stock-in-trade insured by the defendants. And when, on the 6th June, 1865, the plaintiff renewed his policy on his Notre Dame street stock, which had become part of his stock-in-trade in his store in St. Peter street, it was then covered by two insurances; that is to say by the defendant's policy as the stock insured in St. Peter street, and by the Liverpool and London Office under the renewal of the policy of the 6th June, 1863. Any difficulty as to this point is removed by the declaration in the Quebec policy. "The sum of £1000 is insured in the Lancashire, and that of £650 in the Liverpool." Here we have proof of the existence of three insurances upon the same stock-in-trade at the same time. And as the policy granted by the defendants bears date in 1864, whereas the Quebec policy

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bears date in 1865, it is only too clear that at the time of the destruction of the property insured, the plaintiff "had effected insurance on the same" with two other companies, namely, the London & Liverpool and the Quebec. If further evidence as to this point could be required, it would be found in the pregnant fact that the Quebec Company have already paid their portion of the loss, for a portion of which the defendants are now sought to be made liable; and it would be difficult to explain how two companies could be made liable for the same loss, without their having been at the same time insurers of the same property. I am aware, and it is proved by Mr. Riverin, that when the plaintiff got new policy from the Quebec Office, it was his intention to renew the old insurance; but it is not the making out of the new paper that causes the difficulty—it is the existence of the second insurance, without notice to the first insurer; and the fact in this respect would have been the same, had the old policy been continued by an endorsement sanctioning the change of premises. Upon this point I cannot say I have any doubt; but as the question is one of great importance, it would, I think, be well to embody all the facts respecting the double insurance in your answer; and in this way, if I am wrong, the Court will be able to afford redress without the cost of a new trial. As it has been proved that the Quebec Company have already paid their proportion of the loss now claimed, it may be proper to observe that in one respect the two companies were not in the same position. The Quebec Company had notice of the second insurance, whereas the defendants had not. I know, gentlemen, that it is often said, but I trust without reason, that it is a difficult thing for an insurance company to get a verdict in their favour, it being thought better that a loss by fire should be supported by a corporation having ample means than by a private individual. I am quite sure that you will not, in the discharge of your important duties, be influenced by any feeling of this kind. It would be most dangerous to society if contracts were to be interpreted by suppos[illegible]inciples of liberality, instead of by the rules which the parties have laid do[illegible]hemselves. Gentlemen, in closing these observations, as I now do, it is most gratifying to me to leave this case in the hands of a jury so perfectly competent in all respects to adjudicate upon it; and I feel convinced that your verdict will do justice between the parties, and be deserving of the respect of the community.

The jury same evening, after six hours' deliberation, returned a verdict for the plaintiff for $756 31c., the company's proportion of the loss for damaged goods. The jury disallowed the claim for missing goods altogether, and found that the claim therefor was exaggerated; but they unanimously declared there was no fraudulent intent on the part of the plaintiff. The jury also found that the plaintiff had insured in other offices without giving notice, but that the omission to do so was an oversight. The effect of the verdict is to give the plaintiff $756. instead of the $2877 he sued for; and even this finding is subject to the opinion of the Court on the question of law as to the effect of the double insurance.

Verdict for plaintiff (*in part*).

Andrews & Parkin, for plaintiff.
Holt & Irvine, for defendant.
(S. B)

MONTREAL, 30TH MAY, 1866.

Coram BADGLEY, J.

No. 623.

In the matter of the Mayor, Aldermen and Citizens of the City of Montreal,

Petitioners in Expropriation.

AND

SARAH HEALEY,

Petitioner.

HELD:—That the proceedings in expropriation, if irregular, will be set aside; at the instance of any of the parties aggrieved; with respect to such parties only as have complained.

A report having been made by certain commissioners named and appointed by the Superior Court with a view to the expropriation of certain immoveable property for the purpose of erecting a drill shed in the city of Montreal, and the confirmation and homologation of said report having been prayed for, the petitioner, Sarah Healey, opposed the confirmation thereof by her petition fyled on the 25th April, 1866, and for amongst other reasons therein set forth the following:

Firstly.—Because The Mayor, Aldermen and Citizens of the city of Montreal have not complied with the formalities prescribed by law relating to the expropriation of property, inasmuch as the provisions of law in that behalf render it necessary that the proceedings to be taken where the immoveable property appears in the last assessment roll to be separately assessed as belonging to different proprietors should be separate and distinct, and the commissioners should make a separate and distinct report.

Secondly.—Because there is no evidence before this Honorable Court, of the facts material to the validity of the proceedings in expropriation, namely, in whose name the property mentioned and described in the special and public notices was assessed in the last assessment roll.

Thirdly.—Because the special notice required by law, was not made or given as the law directs—the special notices produced not being signed by the attorneys of the Mayor, Aldermen and Citizens of the city of Montreal. No notice whatever having been addressed through the post-office to your petitioner at her actual domicile, and there being no evidence whatever before this Honorable Court that these essential formalities were strictly complied with.

Fourthly.—Because no public notice signed by the attorneys aforesaid was affixed upon the property therein described.

Fifthly.—Because there is no evidence before this Honorable Court that the commissioners were duly sworn, or if sworn before whom, and when, so that this Honorable Court could determine by the record whether the formalities of law have been complied with.

Sixthly.—Because the commissioners did not proceed in the manner prescribed by law—and did not give the notices which the law prescribes, and there is no evidence of record that these requirements have been complied with by the commissioners.

The Mayor, Aldermen and Citizens of the City of Montreal and Sarah Healey.

Seventhly.—Because the said commissioners have exceeded their authority and power inasmuch as in and by their report they have appraised in that portion thereof relating to your petitioner a larger extent of ground and property than that mentioned and described in the printed forms of special and public notices; it appearing by the said report that the ground appraised by them extends $193\frac{45}{100}$ feet along the line of St. Constant Street, and $52\frac{7}{10}$ feet along the line of Craig street thereby including a lot of ground having its frontage on Craig street, and extending as far as the rear line of the adjoining lot belonging to the estate DeBeaujeu; and which rear line is made the boundary of the extent of ground described in the said notices as follows: "and on the south-"east in part by the property of the Corporation of Montreal, and in part by "the property of the estate Honorable G. R. S. DeBeaujeu."

Eighthly.—Because assuming that the petitioners in expropriation intended by their proceedings to obtain the expropriation of the whole extent of ground so included in the said report, the special and public notices provided by them clearly establish that they have not given an accurate description of the property referred to by giving the boundaries (*tenants et aboutissants;*) as in no part of the description given in said notices is Craig street mentioned as one of the boundaries; and the said notices are insufficient, informal and null and void.

In her affidavit in support of her petition, the said Sarah Healey set forth the following facts: "That deponent, in addition to the property owned by her in St. Constant street, in this city, is also the proprietor of a lot forming the corner of St. Constant street and Craig street, adjoining a lot belonging to the estate of the Honorable Mr. DeBeaujeu, and extending from Craig street to another lot belonging to deponent on St. Constant street as far back as the rear line of the lot belonging to the said estate DeBeaujeu.

That in and by the said report, the said Commissioners have included the whole extent of land belonging to her including that portion of it, forming the corner of Craig and St. Constant streets, whereas in the notices produced and fyled, as also in the petition of the Mayor, Aldermen and Citizens of the city of Montreal, Craig street is not mentioned as forming the boundary of any portion of the land intended to be expropriated.

That the property owned by her on Craig street and St. Constant street have been and are assessed separately, and as four distinct properties, as will appear by the account hereto annexed to form part of these presents.

The Court having heard the parties, rendered judgment as follows:

The Court, having seen and examined the petition of the said the Mayor, Aldermen and Citizens of the city of Montreal presented on the 22nd day of March last past, setting forth that by a resolution of the council of the said city of Montreal, passed on the ninth day of February, one thousand eight hundred and sixty-six, it was decided to require certain lots or pieces of ground described in the said petition under the numbers 1, 2, 3 and 4, for the purpose of erecting a drill shed and armory thereon, and praying that three persons be named as commissioners to fix and determine the price or compensation to be allowed for the said lots or pieces of ground, under and in virtue of the provisions of the provincial statute 27 and 28 Victoria, chapter 60; having also seen and examined

The Mayor, Aldermen and Citizens of the City of Montreal and Sarah Healey.

the judgment or order of one of the Honorable Judges of the said Superior Court of the 22nd day of March, 1866, naming and appointing William Workman, Esq., François Leclaire, Esq., and Archibald Ferguson, all of the city of Montreal, as the commissioners under the said provincial statute to fix and determine the price or compensation to be allowed for the said lots or pieces of ground, and each of them: having also seen and examined the report and award of the said commissioners William Workman, François Leclaire and Archibald Ferguson made in this matter bearing date the 16th of April, 1866, and also the supplementary award made by the said commissioners modifying in part their original report and award, the said supplementary award bearing date the said 16th day of April, 1866, and both fyled in the office of the Prothonotary of this Court, on the 17th day of April last past; and the Court having also seen and examined the petition of the said Sarah Healey, widow of the late James Megorian, praying that the proceedings had and taken in this matter by the said the Mayor, Aldermen and Citizens of the city of Montreal, and by the said commissioners, as also the report of the commissioners in this matter, made and fyled, be, in so far as the same relate to the real estate and property described as number two, in the said report, and in so far as the petitioner, the said Sarah Healey, is concerned, be declared illegal, informal, and null and void, and set aside, and quashed, with costs; and the Court having heard the parties by their respective counsel, as well upon the said petition of the said Sarah Healey, as upon the motion of the said the Mayor, Aldermen and Citizens of the city of Montreal, that the said report of the said commissioners be homologated and confirmed, and after having examined the proceedings in this matter, and the documents and papers fyled of record, and duly deliberated:

The Court doth maintain the petition of the said Sarah Healey as well established, and *doth reject that part of the said report* which establishes the value and price and indemnity to be paid for the property of the said Sarah Healey, to wit: Mrs. Sarah Megorian, the said property described in the said report, under the number two ("No. 2"), with costs, in favor of the said petitioner, Sarah Healey, against the said Mayor, Aldermen and Citizens of the city of Montreal; and the Court, considering that, as respects the other properties and real estate mentioned in the said report, and described under the numbers one (1st), three (3rd), and four (4th), due proof hath been adduced by the said petitioners, the Mayor, Aldermen and Citizens of the City of Montreal, of the observance of all and every the formalities and proceedings required by the said Provincial statute, 27 and 28 Victoria, chapter 60:

The Court doth homologate and confirm the said report, as respects the expropriation of the said properties or real estate, mentioned and described in the said report under the said numbers one, three and four (1st, 3rd and 4th), and doth, in consequence, declare the sum of $1776 $\frac{88}{100}$, current money of this Province of Canada, to be the price or compensation to be allowed for the piece of land in the said report and awards, firstly described under the number one (1st), as belonging to the estate of the Honorable G. R. S. DeBeaujeu; and doth declare the sum of $5435 [illegible], said current money to be the price or compensation to be allowed for the piece of land in the said report and awards thirdly described

under the number three (3rd), as belonging to William Christie, Esquire; and lastly, doth declare the sum of $8161 $\frac{1}{25}$, said current money to be the price or compensation to be allowed for the piece of land in the said report and awards fourthly described under the number four (4th), as belonging to D. C. Brosseau; and the Court doth also homologate and confirm that part of the said report whereby the sum of $420, said currency, is awarded to Thomas Dufresne, the tenant of the said D. C. Brosseau, for damages in giving up the premises; and the sum of $380, said currency, is awarded to James A. O'Kane, also a tenant, for damages in giving up the premises.

Report set aside with regard to the contesting party, and confirmed for the remainder.

Rouer Roy, attorney for the Corporation.

Abbott & Carter, attorneys for S. Healey.

(P. R. L.)

MONTREAL, 30 NOVEMBRE, 1866.

Coram BERTHELOT, J.

No. 689.

BEAUDRY,

DEMANDEUR EN FAUX;

LE MAIRE, LES ECHEVINS ET LES CITOYENS DE LA CITÉ DE MONTRÉAL,

DEFENDEURS EN FAUX.

JUGE:—1o. Que dans l'espèce actuelle, le demandeur en faux est sans intérêt à poursuivre son inscription en faux tant que la pièce produite n'est pas attaquée de faux quant à son authenticité.

2o. Que sous ces circonstances, l'inscription en faux est renvoyée sur une défense en droit.

Le 17 Mai, 1866, le demandeur fit motion pour s'inscrire en faux contre un certain certificat produit en cette cause le 10 avril, 1866, par les défendeurs comme leur exhibit numéro neuf portant la date du 9 février, 1865.

Le 23 Novembre, 1866, le demandeur produisit des moyens de faux et dans lesquels il allègue les moyens de faux suivants: 1o. Parcequ'il a été et est faussement allégué et certifié, dans et par le dit *Certificat* que les défendeurs ont, le neuvième jour du mois de février de l'an mil huit cent soixante et cinq, *déposé* et consigné, au Bureau du Protonotaire de cette Cour, dans le dit district conformément à la loi, la somme de deux mille sept cent trente piastres, courant ($2730) montant des prix, évaluation, compensation et dommages, fixés et accordés, pour cette portion, de la propriété immobilière et de ces dépendances, désignées au dit certificat, comme appartenant au dit demandeur en *faux*, et dont les défendeurs prétendent avoir obtenu l'expropriation, le dit demandeur en faux, mettant en fait qu'en *réalité* jamais la susdite somme, ni aucune partie d'icelle n'a été ainsi déposée et consignée; 2o. Parceque la seule chose qui ait jamais été déposée, au dit Bureau du dit Prothonotaire, au Greffe de la dite cour, dans le dit district, comme étant le dit prix ou compensation fut un *billet promissoire* induement signé par Edouard Demers, alors trésorier de la dite Corporation de Montréal, pour tenir lieu, de la somme qui devrait être, en réalite, déposée en bonnes espèces, valeurs, ou deniers ayant cours légal en cette province. 3o. Parceque le dépôt, prescrit par la loi en pareil cas, pour rendre les défendeurs en faux propriétaires du dit immeuble qui a fait l'objet de la dite expropriation, n'a

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jamais été duement fait, en aucune manière. 4o. Parceque enfin le dit certificat est entièrement faux.

Le 23 novembre 1866, les défendeurs en faux produisirent une défense au fond en droit, *demurrer*, contenant les raisons suivantes :

1o. That the reasons contain no sufficient ground for such inscription :

2o. Because the reasons are generally vague, uncertain and impertinent.

3o. Because the certificate of the prothonotary that the deposit of two thousand seven hundred and thirty dollars, amount of the indemnity awarded, cannot be traversed by an inquiry as to the sufficiency of the funds so deposited.

4o. That the plaintiff *en faux* has shewn no interest which could justify the statements in his inscription contained.

5o. Because the law, by making the prothonotary the custodiers, affords to the plaintiff, by the certificate of deposit, all the security which he is entitled to demand.

6o. Because the law provides no place of deposit for any funds placed in their hands, but renders them liable for such, and for the repayment thereof by lawful means and by their securities and even by *contrainte par corps*.

7o. That the inscription and moyens in support thereof are not intended to preserve any right or interest, but on the contrary are vexatious, irrelevant and impertinent.

Par cette défense, les défendeurs concluaient au renvoi de l'inscription en faux et des moyens de faux.

La cause fut inscrite pour audition sur cette défense au fond en droit, *demurrer*.

Le 26 novembre 1866, les parties ayant été entendues sur cette défense, la cour a motivé son jugement comme suit:

La Cour, après avoir entendu les parties par leurs avocats sur la défense faite et produite par les défendeurs à l'encontre de l'inscription *de faux* du demandeur en cette cause, avoir examiné la procédure et pièces et avoir délibéré, considérant que l'inscription *de faux* et les moyens *de faux* par le dit demandeur à l'encontre de la pièce ou exhibit des défendeurs numéro neuf par lui impugnée de faux, sont insuffisants et mal fondés en loi et en droit pour donner suite à la dite inscriptien *de faux*.

Considérant que le dit demandeur en faux n'allègue aucun moyen *de faux* réel et suffisant pour attaquer et détruire l'authenticité du certificat du Protonotaire de cette cour, étant la dite pièce ou exhibit no. 9 des exhibits des défendeurs.

Considérant que le dit demandeur *en faux* est sans intérêt à poursuivre la dite inscription *de faux*, tant que le dit Certificat du protonotaire, exhibit numéro neuf des défendeurs, n'est pas attaqué de faux quant à son authenticité, la Cour a maintenu la dite réponse ou défense et a renvoyé la dite inscription de faux, avec dépens.

Inscription en faux renvoyée.

C. A. Leblanc, avocat du demandeur en faux.

Henry Stuart, avocat des défendeurs en faux.

(P. R. L.)

COURT OF QUEEN'S BENCH (CROWN SIDE.)

IN CHAMBERS.

Coram DRUMMOND, J.

MONTREAL, 28TH AUGUST, 1866.

Ex Parte Ernest Sureau Lamirande.

For a Writ of *Habeas Corpus*.

HELD:—1st. That under the Imperial statute 6 and 7 Vict., ch. 75, enacted to give effect to a Treaty of extradition agreed upon between Great Britain and France, in 1843, the Consul General of France is not competent for asking the extradition of a fugitive criminal, such Consul not being an accredited diplomatic agent of the French Government.

2nd. That an informal translation of an *acte de renvoi* is not a judicial document equivalent to the warrant of arrest of which the party, applying for the extradition, is required to be the bearer, according to the same statute.

3rd. That the evidence of criminality to support the demand for extradition must be sufficient to commit for trial, according to the laws of the place, where the fugitive is arrested and not according to the laws of the place where the offense is alleged to have been committed.

4th. That *making false entries in the books of a bank* does not constitute the crime of forgery according to the laws of England or of Canada.

On the 26th of July, 1866, His Excellency the Governor General of Canada, at the request of the Consul General of France, in the British North American possessions, issued his warrant requiring the Justices of the Peace or other Magistrates to aid in apprehending Ernest Sureau Lamirande, claimed by France, as a fugitive criminal, under the charge of having "made false entries in the books" of the Branch of the Bank of France at Poitiers, thereby defrauding the said bank of the sum of 700,000 francs.

On the 1st of August, 1866, the said E. S. Lamirande was arrested and brought, the following day, before Wm. H. Brehaut, Esq., Police Magistrate, at Montreal.

On the 22nd of same month, late in the evening, the prisoner was fully committed for extradition. On the 23rd, notice was served upon T. K. Ramsay, Esq., attorney representing the Crown, that a petition asking the issue of a writ of *Habeas Corpus*, for the release of the prisoner, would be presented to the judges of the Court of Queen's Bench, in Chambers, on the following day, 24th of August, at one o'clock P.M.

At the appointed hour, on the 24th of August, the petition was presented to the Hon. L. S. Drummond, by J. Doutre, Esq., Q.C., in the presence of T. K. Ramsay, Esq., for the Crown, and of F. P. Pominville, Esq., of the firm of Cartier, Pominville and Betournay, for the French Government.

After some objections raised by the attorneys representing the Crown and the French Government, against the sufficiency of the notice, objections overruled by the judge, the grounds of the petition were argued as follows:

J. Doutre, Q.C., for the prisoner, argued:

1. That according to the terms of the treaty between England and France, organized by the 6 and 7 Vic., chap. 75 (Imperial,) no demand for the extradition of a fugitive criminal could be received or entertained unless it was made by France through the medium of a diplomatic agent; that in the absence of evidence, showing by whom the extradition was demanded, it might be alleged

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with some reason that the issuing of the Governor General's warrant should be presumed to have taken place on the demand of the proper official,—but that this presumption, like all other presumptions, was susceptible of being destroyed by the proof of the contrary,—which was the case, the French Consul having proved, before the Police Magistrate, that he had none of the characters of the diplomatic agent. If it is pretended that the Governor General is to judge of the character of the party asking the extradition, it is true to the extent of protecting his own dignity, but not to the extent of binding any of the officers of justice who had to deal with the facts of the case, and see if the conditions of the treaty and of the organic law had been fulfilled. If it is pretended that the manner of asking for the extradition is not to be observed, the same argument would apply to the whole of the treaty and of the law with equal force, and then we would make away with the whole of that international compact, and return to the long abandoned and condemned idea, that nations require no treaty to destroy the freedom of their soil, the right of asylum, and the respect of their flag. Having then before us the proof that no diplomatic agent of France has demanded the extradition of the prisoner, the plaintiff here is not the sovereign of France, and, whoever he is, he should have been non-suited *in limine*.

2nd. The 3rd section of the statute contains the following: "Provided always, that no justice of the peace or other person shall issue his warrant for the apprehension of any such supposed offender until it shall have been proved to him, upon oath or by affidavit, that the party applying for such warrant is the bearer of a warrant of arrest or other equivalent judicial document, issued by a Judge or competent Magistrate in France, authenticated in such manner as would justify the arrest of the supposed offender in France, upon the same charge, or unless it shall appear to him that the acts charged against the supposed offender are clearly set forth in such warrant of arrest or other equivalent judicial document."

It is now ascertained that the prisoner has been arrested in direct violation of the law. He has been in jail since the 1st of this month, when no one had the right to order his apprehension, inasmuch as none of the formalities mentioned in this *proviso* have been fulfilled. At this very hour, the party demanding the extradition of the prisoner, is not the bearer of a warrant issued in France. It appears that in New York, when the extradition of the prisoner was sued for, on a charge of embezzlement, a document called an *arret de renvoi*, which is something like our bill of indictment, was filed before Mr. Commissioner Betts, and as that document contained an accusation of forgery, and an order for the arrest of the prisoner, it is pretended that it would be equivalent to a warrant of arrest, if it could be produced—that the original document, which was written in French, having disappeared, our Courts must accept, as second best evidence, a translation made by a gentleman who was the attorney prosecuting the prisoner in New York, having no judicial character to give any value to his translation or certificate. The translating witness might put anything in this pretended translation; he might accuse the prisoner of murder as well as of forgery; he was not a citizen of this country, neither of France; he came here for the sole purpose of putting on the files a document which, according to law, should be the corner

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stone of this prosecution; no one could indict him for perjury, neither here, nor in France, and upon the testimony of that irresponsible and interested witness, a man who has come here, on the supposition that we were a civilized nation, would be forcibly driven out and carried away to another hemisphere? It is calumniating this country to suppose that such a thing could be done. A man could not be condemned to pay half a dollar to another man in a civil court, upon such a proof, and the liberty and even the life of a citizen could be put at the mercy of such testimony! We have had a celebrated case of an attempt to kidnap lately; it was very wickedly designed, but never so much so as the attempt of kidnapping this prisoner with the exterior decency of the law and the apparent but surprised complicity of the head of the government and the aid of our judiciary. When the law spoke of a warrant of arrest or an *equivalent judicial document*, it did not mean that any one would have the right of manufacturing an equivalent, its object being simply to avoid controversy about the different names that might be given to a warrant of arrest, either in France or England or in their respective colonies; but in substance it must be a warrant of arrest issued from a Judge or some competent authority in France, and not a translation, issuing from the pocket of a wandering witness. Let us suppose that the French detective in crossing the Atlantic would have dropped in the sea the warrant issued from France—he would have as much right to produce an informal copy, made from memory by himself. The inconvenience of having no warrant may be very great; but no one here is responsible for the want of it, except those who claim the extradition. The authors of the treaty as well as of the law were determined to leave no room to doubt or quibble on the subject, and they have said that the warrant should be authenticated in such a manner as to justify the arrest of the prisoner in France. Well, any police agent in France would consider it a very coarse joke, if he was requested to arrest the prisoner on the English translation, bearing the signature of no Judge or official, left here by the gentleman from New York. The necessity of being possessed of such a warrant on the part of those asking for the extradition is obvious. Some one must take the prisoner in charge, if his extradition is granted, and then that person must have some authority for keeping him in charge. Will it be pretended that the English uncertified translation of the copy of a warrant, would justify a police agent to detain the prisoner in any part of Her Majesty's dominions, or in France? Assuredly not.

3. To commit the prisoner, in contemplation of his extradition, the Magistrate must have received sufficient evidence to commit him, if the offence had been committed in Canada. If the prisoner was charged with having committed forgery in Canada, there would be only one kind of evidence admissible, that of witnesses cognisant of the facts of the case, in support of the documentary evidence. The forged document, *corpus delicti*, would be essential, and the witnesses would have to come personally before the magistrate. In matters of extradition, it was necessary to modify the exigencies of the law, as it would be impossible to follow the track of a fugitive criminal, with witnesses or to bring witnesses across the globe. The second section of the Imperial Statute provides as follows: "Provided always that in every such case copies of the depositions upon which

the original warrant was granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended."

Thus in addition to the ordinary mode of proving a charge, in a sufficient manner to justify the committal of a foreign offender, depositions taken abroad may be received in evidence, but on two conditions, that they be certified by the judge issuing the warrant of arrest in France, and attested to be true copies by the person producing them.

We have no such a thing here. In the first place there is no *corpus delicti*, no piece of paper alleged to have been forged,—nothing even to explain why it is not here. Besides the informal translation of the *arret de renvoi* there are only two papers in the record,— one is a *proces verbal* of seizure of the pretended forged document,—but not the document itself and not a word to explain its absence,—moreover that *proces verbal* is not even made under oath. The next paper is a copy of a report made by one of the officers of the Bank of France on the defalcation suffered by the branch at Poitiers. That report is not made under oath, at least it bears no evidence that it was. Some one, a very different hand from the one that wrote the report, has written a preamble to the report, so as to give the form of an attestation under oath, but neither that preamble nor any portion of the report bears even the copy of the signature of its author. A Mr. Jolly says it was signed and sworn, but there is no signature or copy of signature or attestation of oath anywhere. The signatures contained in that document are not legalized, and the witnesses examined to supply legalisation could say no more than that they had frequently seen the signatures of the same parties, but none of the witnesses have ever seen any of the signers sign their names. But let us suppose that these two documents are regularly signed, sworn and legalised; they are none of those indicated by the law as admissible in evidence. The law says that the copies of the depositions taken in France must be certified by the Judge signing the warrant of arrest. We have no warrant to start with, and if we had the document of which the paper produced by the New York lawyer is said to be a correct translation, it would appear that that document was not an original paper, but a copy; it would appear moreover that the name of the judge who signed the warrant is not to be found on either of the two papers produced, as supplying the ordinary evidence. We must then conclude that there is not a particle of that evidence which would justify the committal of a prisoner under the statute in question.

4. Let us now suppose that all the formalities contained in the law have been observed. Could, in this country, a charge of forgery result from the facts of the case? It is in regard to this question that the extradition of the prisoner may truthfully be qualified as an attempt to kidnap the prisoner, under a colourable, but very coarse simulation of legal procedure. For those who know something of the law on forgery, it would be almost as justifiable to accuse the prisoner of murder, as of forgery. The reasoning of the prosecution, as far as it can be understood, amounts to this: On the 12th of March, 1866, the prisoner being the cashier of the Bank in question, delivered to his superior officer a statement of affairs or

balance sheet, by which it appeared that the cash then in the Bank, in bullion, gold and silver coin, and in paper amounted to 11,443,856 francs 84 centimes; when in reality a sum of 704,275 francs, 94 centimes was wanting in the vaults to make up that amount. No one pretends that the statement furnished by the prisoner is not in conformity with the exact state of affairs,—but by stretching the art of reasoning to the most glaring paradox, it is pretended that this declaration or statement contained a forgery, inasmuch as the funds then in the bank did not reach the figure of the balance sheet. To show the fallacy of this extraordinary construction, let us suppose that the 704,275 francs abstracted had been taken away from the vaults by another party, would the statement of the cashier contain an inaccuracy? Not the slightest. The inaccuracy lies in the vaults, not in the statement. In another shape, would the balance sheet of the Cashier be false if there had been no embezzlement? In fact the proposition is so preposterous, that there is a kind of humiliation in condescending to discuss it. There might be another fallacy under which the pretension of seeing a forgery in the facts of the case could be attempted,—it is that these facts should be viewed according to the laws of France. If the statute was not so positive in declaring that the law of the place where the supposed offender is found shall prevail, there would be an occasion to investigate the state of the law in France. Although the authors of the Treaty and of the organic statute have left no room for doubt on the matter, there is no lawyer, or any man who knows anything of the law, who would have such a poor opinion of French legislation as to suppose that French law would see a forgery in these facts. It has been said that Legislative bodies may do anything except turn a man into a woman. As trivial as it is, that *dictum* means that there are things above the omnipotence of Legislative bodies; it means that Parliament cannot, with the clause of a statute, reverse the common and universal sense of mankind, and convey the idea that a stick might only have one end—that murder is rape, robbery or embezzlement a forgery. It means, also, that because a judge or seven judges of France would have so little respect for themselves as to attempt a manifest perversion of their own laws, with the object of obtaining an extradition under false pretences, English judges should forfeit their reputation by participating in the prostitution of a clear and beneficial treaty. When we read history, we see that about the times when European civilization was trying to emerge from barbarous notions, it was a question whether it was not an international duty to surrender fugitive criminals. International treaties, under the shapes they have assumed in modern times, were then almost unknown, and nations had no defined or fixed notions of settling other questions but war and peace. In these times those pretended international duties had their advocates, but these times are far behind us. Wheaton, International Law, part II. ch. II. s. 13, after summing up those antiquated notions, says: "Mittermeyer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated States, such as the Germanic Confederation andthe North American Union, this obligation is limited to the cases and con-

ditions mentioned in the Federal compacts." Wheaton could have given a stronger proof of the international sense: it consists in the fact that almost all extradition treaties contain a positive provision to prevent them from being applied to crimes committed previous to the date of these treaties. The 3rd section of the Anglo-French treaty has a clause to that effect. A stronger proof even than that stipulated lies in the fact that according to the common law, both of England and of France, laws or statutes have no retroactive effect, unless they are positively and clearly enacted so as to have it. The intention of the makers of the treaty was so manifest and determined that they seem not to trust respectively to their common law, and they have made it a condition of the compact that it should not act retrospectively.

To show that both in England and in the United States extradition treaties have been interpreted according to their spirit and letter, an authority from each country will be sufficient if they fairly cover the point in discussion. Lawrence on Wheaton's International Law, p. 234, in the note: "Neither *larceny* nor *constructive larceny* consisting of embezzlement of money by a bank officer, is within the provisions of the treaty of 1842. (Between England and the United States.) It is the established rule of the United States neither to grant nor ask for extradition of criminals, unless in cases for which stipulation is made by express convention."

The English authority is not a simple matter of opinion; it consists in a solemn and unanimous decision of three Judges of the highest Court of England. It is reported in 10 Cox, Criminal cases, Queen's Bench, p. 118, 12 Law Times Report p. 307, and 11 Jurist, New Series, p. 807. *Ex parte* Windsor, on application for a release under a writ of *Habeas Corpus*, before Chief Justice Cockburn and Justices Blackburn and Shee, 27th April, 1865. The facts were these: Charles Windsor had been a clerk in "the Mercantile Bank of New York." He was accused of having made false entries in the bank books to conceal certain embezzlements. By the law of the State of New York, this is declared to be a forgery in the third degree, in the following terms: Every person who, with intent to defraud shall make any false entry, or shall falsely enter or falsely alter any entry made in any book of accounts kept by any moneyed Corporation within the State, or any book of accounts kept by any such corporation or its officers, and delivered or intended to be delivered to any person dealing with such corporation, by which any pecuniary claim, obligation, or credit shall be or purport to be discharged, diminished, created or in any manner effected, shall on conviction, be adjudged of forgery in the third degree."

COCKBURN, C. J., said: "The question we have to determine is, whether the offence in question not being an offence according to the law of England, nor, I take it, the common law of the U. S. of America, and the fact that the local legislation of the State of N. Y. has constituted this particular offence to be forgery, is sufficient to bring the case within the Statute, and to call upon the Government of this country to deliver up this American citizen to the American States? I am of opinion that it is not. I think that the only true construction to put upon this Statute is that the terms used in the treaty specifying the offences in respect of which criminals are to be surrendered by their respective states, must be taken to imply offences

that have *common* elements in the legislation of the *two* countries and that where one of two nations thinks proper to make that an offence which does not fall within the definition of an offence as known to the general law of either, it will not be sufficient to bring the case within the Statute. Here, by what I have more than once ventured to call a piece of artificial legislation, a matter which would not amount to forgery according to the general law of this country, or of the United States, is made to assume that character. I think we ought to interpret the Statute according to what may fairly be taken to have been the intentions of both parties. I think it would be going a great deal too far to assume that in passing this Statute, as to the effect of the treaty, the legislature of this country went into an elaborate inquiry into what might happen to be the local law of any one of the States, composing the United States, or whether they have made this treaty and passed this Statute intending to embrace the whole. I do not believe that it was in point of fact done. I think it would be a very monstrous assumption, if we were to take it for granted that it was."

BLACKBURN, J.—"Forgery is the false making of an instrument purporting to be that which it is *not*. It is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery because it is reduced into writing."

SHEE, J.—"Every word designating the crime in the treaty itself must be taken to be the language of *both* the contracting parties, and *to be used by both of them in the same sense*. As to forgery, one of the crimes which in this treaty of extradition is stipulated for, it is the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another. The false document, which in this case is alleged to have been a forgery, was not made or altered so as to make it appear the document of another. It appeared to be, as it was, the document of Charles Windsor, not of any one else, and therefore it is not a forgery."

Mr. *Doutre* then argued that the only difference, between the case of Windsor and the present one, is that there was some written lie in the books kept by Windsor, and that the balance sheet furnished by the prisoner was an exact statement of the cash which the vaults of the bank should contain. If, then, it was illegal to arrest Windsor in England, it was worse to apprehend the prisoner in this country.

T. K. Ramsay, Esq., as representing the Crown:

1. On the first point he thought no one had the right to enquire on whose requisition the Governor General's warrant was issued. His Excellency was the only supreme Judge of the expediency of issuing his warrant. Moreover the Statute does not say that the ambassador is the only person that might demand the extradition of a fugitive criminal, it says *or diplomatic* agent. It may be that the Consul General is not, properly speaking, a diplomatic agent, but *quoad* this matter, we have the word of the Governor General that he was, and that is sufficient.

2. As to the second point, the necessity of having a warrant from France, we have a translation accepted as regular in every respect by Commissioner Betts in New York, and the original of that paper could not be produced, having disap-

peared by the fact of the prisoner's lawyer in New York. The prisoner has no right to be benefited by his own deeds. The contents of the *arret de renvoi* have been proved, and under the circumstance no more could be done, and it was sufficient.

3. As to the evidence of criminality it consists of the testimony of detective Melin before whom the prisoner confessed his guilt and of the deposition taken in France. If the prisoner was here on his trial this evidence would certainly be insufficient; but the question was whether there was sufficient *primâ facie* evidence to commit the prisoner. As to that, there is no doubt. The prisoner has never denied having taken the money from the bank, the only question is as to the character of the offence.

4. Do the facts of the case constitute a forgery? I have no hesitation in saying that in England or in this country they do not. But I maintain that we must not look to our law on forgery, but to the law of France on the crime qualified there under the word used in the treaty as *faux*. The judges of France have qualified the offence committed by the prisoner as a *faux*, and we must take their word that it is a *faux*. It has been said that the extradition is sought for under the denomination of forgery, with the knowledge that there is no forgery, neither here nor in France, and with the object of trying the prisoner for some other crime in France. The Lord Chancellor of England had lately to combat that prejudice in the House of Lords, and he showed that there was a law in France which would prevent such a thing, and he cited the case of a man who had been brought into France from Belgium, and who, being acquitted of the crime for which he was extradited, was allowed to go out of France without molestation.

J. Doutre, Q. C., in reply, said that on the admission made by the learned counsel, that the charge brought against the prisoner did not constitute a forgery in this country, the prisoner should be immediately discharged, inasmuch as the treaty and the statute were very positive in enacting that no prisoner should be committed unless it be done *upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused, if the crime of which he or she shall be so accused, had been there committed.*

As to the law said to exist in France to prevent the trial of an extradited prisoner for other crimes than the one for which extradition was obtained, it may exist, but there is a case very well known which establishes the sincerity with which such a law is carried out. In 1855, Carpentier, Grelet and Parot were obtained from the United States for a particular crime; none of them was ever tried in France for that crime; two were found guilty of another crime, one died in jail, and the other is still there undergoing his sentence. It is probable that the United States would have got them restored to their territory if they had been applied to,—but they did not deem that they should volunteer their services, and they were right.

At the close of his argument, the prisoner's counsel stated that, although he could not show cause, by affidavit, for the necessity of a speedy decision, he felt bound to express the intense fear entertained by the prisoner, that he would not

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be fairly dealt with. He had been threatened from the beginning, that law or no law, he would be brought back to France. Attempts had been made, at the time of his arrest, at bribing his captors to bring him over to the United States, where the international treaties of extradition, with France, included embezzlement, and the prisoner felt oppressed by threats, proceeding from parties representing such a powerful corporation as the Bank of France, especially when the French detective Melin had boasted, even in his deposition before the Magistrate, that he had an unlimited control of the funds of the bank to accomplish his mission.

Mr. Ramsay protested against insinuations tending to disparage the institutions of the country, when the prisoner was fully protected by the fact that he could not be extradited, except on the warrant of the Governor General.

The sequel of the facts of the case appears in the remarks of the judge, who rendered judgment on the 28th August, 1866.

His Honour Judge Drummond, said,—On Saturday last I proposed to give my reasons in writing for the decision which I arrived at then with reference to the application which had been made in the case of Ernest Sureau Lamirande the previous morning. Upon reflection I thought that in a matter not only so important for the prisoner, but so important for all Her Majesty's subjects in this Province; so important for all those foreigners who choose to travel hitherward in the expectation that their rights and liberties will be sacred under the British flag, I say that in a case of so much importance I thought it would be well to consult my colleagues, and therefore I postponed the delivery of my reasons in writing till this morning. I now come forward to read those reasons with the satisfaction of knowing that all the judges of the Court of Queen's Bench agree with my opinion, agree with me on every point, agree with me in thinking that no lawyer can doubt the utter illegality of the proceedings which have been taken to carry off the Petitioner.

His Honour then read his written judgment as follows:—

On the 26th July last a document under the signature of His Excellency the Governor General, purporting to be a warrant for the extradition of the petitioner, issued under the authority vested in his Excellency by the provisions of the statute passed by the Legislature of the United Kingdom of Great Britain and Ireland, in the sixth and seven years of Her Majesty's reign, intituled "An act to give effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders," setting forth that the said petitioner stood accused of the crime of "*forgery by having in his capacity of* "*cashier of the Bank of France at Poitiers, made false entries in the books of* "*the said bank, and thereby defrauded the said bank of the sum of seven hundred* "*thousand francs;* that a requisition had been made to His Excellency by the Consul-General of France in the Province of British North America, to issue his warrant for the arrest of the said prisoner, and requiring all the justices of the peace and other magistrates and officers of justice within their several jurisdictions, to aid in apprehending the petitioner and committing him to jail.

Under this document the prisoner was arrested, and after examination before William H. Brehaut, Esq., police magistrate and justice of the peace, was fully

committed to the common jail of this district on the 22nd day of the current month of August.

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On the following day, between the hours of 11 and 12 o'clock in the forenoon, notice was given in due form by the prisoner's counsel to the counsel charged with the criminal prosecutions in this district, that he (the counsel for the prisoner) would present a petition to any one of the Judges of the Court of Queen's Bench who might be present in Chambers at one o'clock in the afternoon of the following day, (the 24th,) praying for a writ of *Habeas Corpus* and the discharge of the prisoner.

At the time appointed, this petition was submitted to me.

Mr. J. Doutre appeared for the petitioner, Mr. T. K. Ramsay for the Crown, and Mr. Pominville for the private prosecutor.

A preliminary objection, raised on the ground of insufficient notice, was overruled. Mr. Doutre then set forth his client's case in a manner so lucid, that I soon convinced myself, after perusing the statute cited in the warrant of extradition, that the warrant itself—the pretended warrant of arrest alleged to have been issued in France—*arret de renvoi*—and all the proceedings taken with a view to obtain the extradition of the petitioner, were unauthorized by the above cited statute, illegal, null and void, and that the petitioner was, therefore, entitled to his discharge from imprisonment.

But as Mr. Pominville, whom I supposed to be acting as counsel for the Bank of France, wished to be heard, I adjourned the discussion of the case until the following morning. I would have issued the writ before adjourning, had the counsel for the prisoner insisted upon it. But that gentleman was no doubt lulled into a sense of false security, by the indignation displayed by the counsel for the Crown, when Mr. Doutre signified to me his apprehension that a *coup de main* was in contemplation to carry off the petitioner before his case had been decided.

On the following morning, Saturday, the 25th of this month, I ordered the issuing a writ of *habeas corpus* to bring the petitioner before me with a view to his immediate discharge.

My determination to discharge him was founded upon the reasons following.

1st. Because it is provided by the first section of the Act of the British Parliament to give effect to a Convention between Her Majesty and the King of the French for the apprehension of certain offenders (6 and 7 Vic., ch. 75), that every requisition to deliver up to justice any fugitive accused of any of the crimes enumerated in the said Act, shall be made by an *ambassador of the Government of France or by an accredited diplomatic agent*; whereas the requisition, made to deliver up the petitioner to justice, has been made by Abel Frederic Gautier, Consul General of France in the Provinces of British North America, who is neither an ambassador of the Government of France nor an accredited diplomatic agent of that Government, according to his own avowal upon oath.

2ndly. Because, by the 3rd section of the said statute, it is provided that no Justice of the Peace, or any other person, shall issue his warrant, for any such supposed offender, until it shall have been proved to him, upon oath or affidavit that the person applying for such warrant is the bearer of a warrant of arrest or

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other equivalent judicial document, issued by a judge or competent magistrate in France, authenticated in such manner as would justify the arrest of the supposed offender in France upon the same charge, or unless it shall appear to him that the act charged against the supposed offender is clearly set forth in such warrant of arrest or other judicial document; whereas the Justice of the Peace who issued his warrant against the petitioner, issued the same without having any such proof before him, the only document produced before him, as well as before me, in lieu of such warrant of arrest or other equivalent judicial documents, being a paper writing alleged to be a translation into English of a French document made by some unknown and unauthorized person in the office of the counsel for the prosecutor at New York, and bearing no authenticity whatever.

3rd. Because, supposing the said document purporting to be a translation of an *acte d'accusation* or indictment accompanied by a pretended warrant for arrest, designated as an *arret de renvoi*, to be authentic, it does not contain the designation of any crime comprised in the number of the various crimes for, or by reason of the alleged commission of which any fugitive can be extradited under the said statute.

4th. Because by the first section of the said act it is provided that no Justice of the Peace shall commit any person accused of any of the crimes mentioned in the said act (*to wit: murder, attempt to commit murder, forgery and fraudulent bankruptcy*) unless upon such evidence as according to the laws of that part of Her Majesty's dominions in which the supposed offender shall be found would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be accused had been there committed;

Whereas the evidence produced against the petitioner upon the accusation of forgery, brought against him before the committing magistrate, would not have justified him in apprehending or committing the petitioner for the crime of forgery had the acts, charged against him, been committed in that part of Her Majesty's dominions where the petitioner was found, to wit, in Lower Canada.

5th. Because the said warrant for the extradition of the petitioner, as well as the warrant for his apprehension, does not charge him with the commission of any one of the crimes for which a warrant of extradition can be issued under the said statute; inasmuch as in both of the said warrants the alleged offence is charged against the petitioner as "*forgery by having in the capacity of Cashier of the "branch of the Bank of France at Poitiers made false entries in the books of the "Bank, and thereby defrauded the said bank of the sum of seven hundred thou- "sand francs;*"

Whereas the said offence, as thus designated, does not constitute the crime of forgery according to the laws of England and Lower Canada, for, to use the words of Judge Blackburn, when he pronounced judgment concurrently with C. J. Cockburn and Judge Shee, in a case analogous to this: (Ex. parte, Charles Windsor, C. of Q. B., May, 1865.) "Forgery is the false making of an instru- "ment purporting to be that which it is not; it is not the making of an instru- "ment purporting to be that which it is; it is not the making of an instrumen "which purports to be what it really is, but which contains false statements. "Telling a lie does not become a forgery because it is reduced to writing."

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The Jailor's return to this writ of *Habeas Corpus* was, that he had delivered over the prisoner to Edme Justin Melin, *Inspecteur Principal de Police de Paris*, on the night of the twenty-fourth instant, at twelve o'clock, by virtue of an order signed by M. H. Sanborn, Duputy Sheriff, grounded upon an instrument signed by His Excellency the Governor General.

It appears that the petitioner, thus delivered up to this French policeman, is now on his way to France, although his extradition was illegally demanded, and although he was accused of no crime under which he could have been legally extradited; and although, as I am credibly informed, His Excellency the Governor General had promised, as he was bound, in honour and justice, to grant him an opportunity of having his case decided by the first tribunal of the land before ordering his extradition.

It is evident that His Excellency has been taken by surprise, for the document signed by him is a false record, purporting to have been signed on the twenty-third instant, at Ottawa, while His Excellency was at Quebec, and falsely certified to have been recorded at Ottawa before it had been signed by the Governor General.

In so far as the petitioner is concerned, I have no further order to make, for he, whom I was called upon to bring before me, is now probably on the high seas, swept away by one of the most audacious and hitherto successful attempts to frustrate the ends of justice, which has yet been heard of in Canada.

The only action I can take, in so far as he is concerned, is to order that a copy of this judgment be transmitted by the Clerk of the Crown to the Governor General, for the adoption of such measures as His Excellency may be advised to take to maintain that respect which is due to the Courts of Canada and to the laws of England.

As to the public officers who have been connected with this matter, if any proceedings are to be adopted against them they will be informed thereof on Monday the 24th day of September next, in the Court of Queen's Bench, holding criminal jurisdiction, to which day I adjourn this case for further consideration.

His Honour also made some additional remarks, noticing particularly the point as to the Consul being only a commercial agent, and not a diplomatic representative, whilst the law distinctly required that the demand for extradition should be made by a duly accredited Diplomatic Agent. The Consul here pretended to be nothing more than a commercial agent. On the point as to the writing of a lie being a forgery, he observed that, to say a man had committed forgery by making false entries, would be like saying that a man had committed murder, to wit, in that he killed a sheep. The responsibility of this case must rest elsewhere. He could not take the initiative. His Excellency must have been taken by surprise, for he had given his word that there should be ample time allowed. In fact, some persons engaged in the prosecution of this man for forgery have themselves been instrumental in a falsification of one of the most solemn documents that can be issued by the Governor General. It appears that the original of this warrant was registered at Ottawa, before it had received the signature of the Governor General, and it is dated at Ottawa though at the time His Excellency

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was at Quebec. The fact of this warrant having been registered by the Registrar of the Province at Ottawa, before the Governor General's signature had been affixed thereto, is a mendacious and corrupt act of falsification.

J. Doutre, Q.C., for the prisoner.

T. K. Ramsay, for the Crown.

Pominville & Bétournay, for the French Government.

(J. D.)

MONTREAL, 1st OCTOBER, 1866.

Coram DRUMMOND, J.

Regina vs. Vonhoff and another, on indictment for larceny.

HELD:—1st. That an alien indicted for a felony has the right of being tried by Jury *de medietate linguæ*.

2nd. That such a right has not been set aside by our Provincial statutes.

3rd. That in such cases, a writ of *venire facias ad triandum* must be issued summoning thirty-six aliens.

DRUMMOND, J.—The prisoner, Frederick Vonhoff, a subject of His Majesty the King of Prussia, speaking the German language, and unskilled in English and French, has moved that the jury, to try and determine the issue in this case, in so far as he is concerned, be composed of one-half denizens, speaking the English language, and one-half aliens, speaking the German language.

This motion, which was discussed as if confined solely to the demand of an alien moiety,—the remaining portion of the prayer, being evidently inadmissible,—was opposed by the counsel for the Crown. The prisoner's counsel contended that his application was founded upon a common-law right confirmed by several English statutes passed before the Cession, and acknowledged as existing here by our own Provincial laws.

The counsel for the Crown affirmed that this right, the existence of which in England he did not deny, had been legislated away by implication (to use his own words) through several statutes respecting the organization of juries in Lower Canada; and that, by certain provisions of these statutes, the Sheriff was inhibited from summoning any such jury.

The privilege claimed by the prisoner, the honour of having granted which Englishmen boasted of with reason, as being one (to use the words of Blackstone) "indulged to strangers in no other country," is as ancient as the time of King Ethelred, in whose statute *de Monticolis Wallei* (then aliens to the crown of England) it is ordained that "*duodeni legales homines quorum sex* "*Wallei et sex Angli erunt, Anglis et Wallis jus dicunto.*"

The statute 28 Edward III, cap. 13, §2, enacts:—

"That all manner of inquests and proofs which be to be taken or made "amongst aliens and denizens, be they merchants or others, as well before the "Mayor of the Staple, as before any other Justices or Ministers, although the "King be party, the one-half of the inquests or proofs shall be denizens, and the "other half aliens, if so many aliens and foreigners be in the town or place

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" where such inquest or proof is to be taken, that be not parties, nor with the " parties in contracts, pleas, or other quarrels, whereof such inquests or proofs " ought to be taken; and if there be not so many aliens, then shall there be " put in such inquests or proofs as many aliens as shall be found in the same " towns or places which be not thereto parties, nor with the parties, as afore-" said; and the remnant of denizens, which be good men, and not suspicious to " the one party, nor to the other."

This enactment, enforced by the statute 8 Henry VI., cap. 29, and sanctioned by the jurisprudence of the British Courts during upwards of four centuries, formed part of the body of English Criminal Law introduced into this country, when it was ceded to the arms of England by the King of France, as acknowledged by the Imperial statute 34 George III, which, *in that respect*, was merely declaratory.

I now come to enquire whether this important privilege has been specially and positively "legislated away." For I deny that it could be abrogated by implication.

No man can be deprived of any right or privilege under any statutory enactment by mere inference, or by any reasons founded solely upon convenience or inconvenience.

Statutes are to be construed in reference to the principles of the Common Law, or of the Law in existence, at the time of their enactment.

For it is not to be presumed that the Legislature intended to make any innovation upon the common or then existent law, further than the case absolutely required; and Judges must not put upon the provisions of a statute a construction not supported by the words.—(See Dwarris on Statutes, p. 703.)

All the statutory law in existence in 1860, respecting the selection and summoning of jurors in Lower Canada, was embodied in the 84th chapter of the Revised Statutes of that part of the Province; and this chapter was wholly repealed by the 27th—28th Vic., cap. 41, the only Provincial statute we have now to guide us in this matter; all reference to preceding statutes which have ceased to exist being wholly inapplicable.

Now, this statute, instead of annihilating the privilege claimed by the prisoner, has expressly recognized its existence as a part of our law, by excepting from the list of aliens disqualified from being jurors those who may be required for a jury *de medietate linguæ*.—(See section 3, p. 2.)

The section 7, p. 6, invoked by the counsel for the Crown in support of his pretensions, was evidently enacted in special reference to the ordinary jury *de medietate linguæ*, as between British subjects, "denizens," skilled in the English and French languages, and cannot be construed so as to hamper the Courts in any order they may make to give effect to an important privilege secured to aliens accused before them. Where the law confers a right, Courts of Justice should provide means to secure it.

This privilege has never been refused in any of our Courts. The only case I find reported as having occurred in this district, was "Regina *vs.* Miller," 8 Lower Canada Jurist, p. 280, where [illegible]s granted by His Honour Mr. Justice Aylwin under similar circumstances.

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But in Quebec, where there is, during the season of navigation, a greater affluence, than in this city, of aliens unskilled in the English and French languages, the issuing of such a *venire*, as now prayed for, is a matter of not unfrequent occurrence.

The Court, therefore, having seen the affidavit and certificates produced therewith, doth grant the motion of the prisoner, except in so far as the selection of six jurors speaking the English language is concerned; and doth therefore order that a writ of *venire facias ad triandum* do issue to summon *thirty-six* aliens speaking the German language, if so many can be found in this district; and if not, all such who may be found therein, from whom shall be selected six good men, and true, to try the issue in this cause (in so far as the said Frederick Vonhoff is concerned,) with six of the jurors already summoned; the said writ of *Venire facias* to be returnable into this Court on Thursday, the fourth instant, at ten of the clock in the forenoon.

After having read this judgment, Mr. Justice Drummond said, in substance, that although he was disposed to grant the prisoner's motion *in limine*, he did not regret that it had been opposed by the counsel for the Crown, because the discussion had given him an opportunity of pointing out the origin and long observance of a rule of law which spoke so highly of the liberality of English legislators in the olden times, when prejudices against foreigners existed to an extent almost incredible in these days of universal intercourse amongst nations; and also, in a more practical point of view, because it enabled him to lay down a precedent, which, being in accordance with the course adopted in Quebec for giving effect to this privilege, he hoped would be followed in future, as well here as in the other Judicial Districts of Lower Canada.

The number of jurors to be summoned is to be determined by the discretion of the Court in this country, as well as in England, where the words used in the Imperial statute 6 Geo. IV. cap. 30, sec. 47, are "a competent number." In the case of Regina *vs.* Miller, above cited, the number of jurors summoned was only twelve. That number would be sufficient in ordinary cases. But, if the accused should have an interest to postpone his trial, he might direct his challenges against all the aliens; then he would be entitled to obtain a further delay for the summons of another jury *de medietate*, and thus he might postpone his trial from term to term *ad infinitum*. Twenty-four would be subject, in a less degree, to the same objection. The Quebec practice of summoning thirty-six aliens appears to be expedient, wise,—open to no objection; and its adoption in this case, subject to the power invested in the Sheriff of summoning a smaller number, if so many cannot be found within the jurisdiction, would, His Honour trusted, tend to establish a uniform and permanent practice in all the Courts of Lower Canada with reference to this important matter.

The prisoner was found guilty, and sentenced according to law.

T. K. Ramsay, prosecuting for the Crown.

Houghton, of counsel for Vonhoff.

(P.R.L.)

APPEAL SIDE.

MONTREAL, 7TH DECEMBER, 1866.

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, A. J.

No. 75.

LES PRÉSIDENT ET SYNDICS DE LA COMMUNE DE LA SEIGNEURIE DE LA BAIE ST. ANTOINE COMMUNÉMENT APPELÉE BAIE DU FEBVRE.

APPELANTS;

vs.

DAME MARIE JOSEPHTE EMILIE LOZEAU ET VIR.

INTIMÉS.

HELD:—That the seigniors may have in this country a continuous and uninterrupted right and property as well as possession of a certain *usage de bois* in a *lisière de bois*, irrespective of the right and property of the commoners in the communal lands including the land in which this *lisière de bois* is standing.

The judgment appealed from by the appellants had been rendered at Sorel, on the 19th October, 1861, by the Superior Court, Bruneau, J., as follows:

"La Cour après avoir entendu les parties par leurs avocats respectifs, examiné "la procédure et la preuve tant celle écrite que verbale, et avoir sur le tout "murement délibéré;

"Considérant: que les défendeurs ont failli d'établir les allégués de l'excep- "tion péremptoire en droit par eux plaidée à l'encontre de la demande des de- "mandeurs, et nommément, que la lisière de bois mentionnée en la déclaration "des demandeurs, a toujours fait partie de la commune de la seigneurie de la "Baie du Febvre; ainsi et de la manière alléguée par les dits défendeurs et que "les dits défendeurs et tous les autres communistes de la dite commune ont de- "puis plus de trente ans, franchement, paisiblement et publiquement, coupé, abat- "tu, et enlevé les bois à eux nécessaires dans la dite commune;

"Considérant: que l'acte du douze Août mil huit cent vingt quatre invoqué "par la demanderesse, non seulement lui a conféré, à elle et à ses auteurs, les "droits par elle réclamés par sa présente action, mais que le dit acte lui a de "plus, reconnu et confirmé, l'existence d'iceux, bien avant la date du dit acte à "l'exécution duquel les président et syndics agissant en icelui, pour et au nom "de la corporation qu'ils représentaient alors, et actuellement représentée par "les défendeurs, leurs successeurs en office, étaient bien et duement autorisés à "ce faire en vertu de deux actes du ci-devant Parlement Provincial du Bas- "Canada, le premier, de la 2ème George IV, chapitre 10, et le second, de la "4ème George IV, chapitre 26;

"Considérant: que la demanderesse n'était pas tenue de faire statuer par le "Tribunal indiqué dans la dite *Exception Péremptoire* des défendeurs, sur la "validité de ses droits dans la dite commune, lesquels n'était pas du ressort du "dit Tribunal et que le jugement, si aucun a été prononcé par icelui, n'a pu les "affecter en aucune manière, a débouté et déboute, la dite exception péremptoire "en droit et ce avec dépens;

"Considérant: que la demanderesse a établi les principaux allégués de sa "déclaration et nommément, que depuis plus d'un an passé et écoulé avant le "dix décembre mil huit cent cinquante huit, elle était en possession comme pro-

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"[illegible]priétaire d'un droit d'usage de tous les arbres et bois de Haute Futaie seulement, qui se trouvent dans l'endroit communément appelé *la lisière de bois*, "suivant les sinuosités depuis les terres ci-devant et anciennement acquises par "feu Sieur Lefebvre de Sieur de Courval, à aller à la seigneurie Lussandière "alias Labussandière, le dit bois consistant en plaines, érables et autres bois, "formant les sucreries, c'est-à-dire: savoir, dans cette partie de la dite lisière de "bois appartenant à la Demanderesse, laquelle partie est comme suit: cette "partie de la dite seigneurie qui se trouve de front à prendre d'un côté au nord-"est à la part de la dite seigneurie du Sieur Louis Manseau à aller aboutir au "sud ouest à la dite seigneurie Labussandière, la dite portion de lisière de bois "se trouvant bornée par devant par Moïse Gouin et autres, et en profondeur par "le Lac St. Pierre;" et que depuis plus de quarante ans, les seigneurs, de la "dite seigneurie de la Baie (représentés par la demanderesse, quant à la partie "de la dite seigneurie sus-décrite) ont toujours été propriétaires et en possession "de la dite *lisière de bois*.

"Considérant: que par l'acte de transaction du douze Août mil huit cent "vingt quatre sus-mentionné devant Leblanc & confrère, Notaires, fait en vertu "des deux actes du ci-devant Parlement Provincial du Bas-Canada plus haut "cités (et lequel acte de transaction, est déclaré par le présent jugement, légalement fait, valide, et obligatoire à toute fin que de droit,) il a été entr'autres "choses convenu et stipulé que les dits seigneurs ès-noms et qualités, dont la "demanderesse était l'un d'eux, étant alors représentée par son Tuteur, se réservaient très expressément tous les bois et arbres de haute futaie, seulement dans "*la dite lisière de bois*, mais que le terrain ou fonds où se trouvent le dit bois et "arbres réservés, *appartiendra* à la dite commune et que par icelle stipulation "et convention la demanderesse et ses co-propriétaires, n'ont fait que se réserver "un droit déjà existant, tandis que les communistes représentés par les défendeurs, n'ont vraiment acquis qu'un droit nouveau, qu'ils ne possédaient pas auparavant;

"Considérant que par l'acte d'échange du vinge-quatre Décembre mil huit "cent trente-neuf, la demanderesse, est aux droits de ses ci-devant co-propriétaires.

"Considérant enfin, que les défendeurs, ès-noms et qualités, connaissant bien "tout ce que dessus ont sans aucun droit quelconque, mais par voie de fait "depuis le dix Décembre mil huit cent cinquante-[illegible] Mars suivant, "buché et fait bucher, dans la dite *lisière de bois* [illegible] propriété et en "la possession de la demanderesse comme susdit, une quantité d'arbres et de "bois de haute futaie, qu'ils ont enlevé et fait enlever et converti à leur usage "au dommage de la demanderesse de la somme de cinq livres du cours actuel "que les défendeurs sont condamnés à payer à la demanderesse ainsi que tous "les frais et dépens de la dite action."

The appellants in their factum stated their case in substance as follows:

Avant de procéder à discuter la validité du jugement dont est appel, il faut se rappeler et ne pas oublier que la demanderesse a elle-même allégué, dans le 2ème paragraphe de sa déclaration: "*que la lisière de bois* (dont il est question en la cause) *se trouvait anciennement dans la commune* de la dite Paroisse de la

Baie du Febvre, mais qui maintenant (c'est-à-dire lors de l'action) *n'en forme plus partie*, tel qu'il appert aux actes ci-après en la déclaration allégués, c'est-à-dire spécialement l'acte de transaction du 12 Août 1824.

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C'est parce qu'elle a perdu de vue cet allégué important de la déclaration, que la cour Inférieure, dans son jugement, a émis une supposition de faits contraires à ceux allégués par la demanderesse elle-même en sa demande; supposition de faits de la part de la dite cour qui ne peut pas et ne pouvait pas s'étayer sur la réponse spéciale de la demanderesse; car il ne pouvait pas être permis à la demanderesse de contredire, dans sa réponse, un fait par elle allégué en sa déclaration.

Ainsi en examinant cette cause, nous restons avec le fait acquis (tel qu'admis par la demanderesse) que *la lisière de bois* se trouvait *anciennement dans la commune de la Baie du Febvre.*

Or cette *lisière de bois* a-t-elle jamais cessé de faire partie de la dite commune?

Les appelants maintiennent la négative de cette proposition, et prétendent: que l'acte de transaction du 12 Août 1824, sur lequel la demanderesse se fonde pour affirmer que la dite lisière de bois a cessé de faire partie de la commune, est nul, et que les "Président et Syndics" qui prétendaient représenter les communistes lors de la dite transaction, n'avaient pas le pouvoir de consentir et d'établir *un prétendu droit d'usage* sur aucune partie des bois de la dite commune.

Si cette prétention des appelants est bien fondée, il est évident qu'ils ne pouvaient pas être condamnés, tels qu'ils l'ont été par le jugement de la cour Inférieure, et que cette sentence doit être infirmée.

Il faut donc rechercher si les "Président et Syndics" avaient réellement le pouvoir de consentir un tel *droit d'usage* dans la commune.

Mais avant de procéder ultérieurement, il serait utile de noter brièvement certains faits qui ressortent du dossier de cette cause, ainsi que certains principes de droit qui s'appliquent à la présente discussion, et qui sont appuyés par les autorités citées ci-après par les appelants, savoir:

1° Que la demanderesse admet dans sa déclaration que la *lisière de bois* se trouvait anciennement dans la commune, et que c'est par l'acte de transaction du 12 Août 1824 qu'elle a cessé d'en faire partie;

2° Que par les contrats de concession produits par la demanderesse et par les défendeurs, le *droit de* commune concédé aux censitaires, l'avait été moyennant une *redevance annuelle;*

3° Que le *droit de commune* (lorsqu'il n'est pas limité par le contrat de concession; et il ne l'est pas dans les contrats produits, et d'ailleurs la demanderesse n'a produit aucun titre de concession démontrant que ce droit fût limité) donne au censitaire droit non-seulement dans les paturages et herbages de la commune, mais aussi dans les bois de la commune;

4° Que les communes ne pouvaient pas aliéner en aucune façon, ni transiger leurs droits sans une permission du Roi et un décret de justice.

Après avoir ainsi posé ces faits et ces principes, nous allons maintenant examiner la question: "si les Syndics de la commune de la Baie, avaient le pouvoir de réserver en faveur des Seigneurs de la Baie, les *arbres et bois de haute futaie*, comme la demanderesse prétend qu'ils l'ont fait par l'acte de transaction du 12 Août 1824."

Par l'acte incorporant la commune de la Baie (2. Geor. 4. chap. 10) la Corporation est établie "*pour le règlement de la Commune,*" et les pouvoirs des Syndics sont restreints à la charge à eux commise... ..de plus la corporation a le pouvoir de constater et déterminer les bornes et limites convenables, et de poursuivre ceux qui auraient empiété sur la commune......

Par un autre statut (4 Geor. 4. chap. 26, Préamb. et 1ère Sec.) la corporation est autorisée......" à transiger, contracter, traiter et conclure aux termes et " conditions dont les parties intéressées conviendront entre elles, avec toutes per" sonnes qui seront propriétaires ou Seigneurs d'aucune terre ou terres touchant " ou avoisinant la dite commune, ou empiétant sur icelle, aux fins de terminer " toutes disputes concernant leurs limites respectives sur la dite commune, et de " régler les limites de la dite commune, et de confirmer si besoin est, tout empié" tement qui pourra avoir été fait de bonne foi sur la dite commune par quelque " personne ou personnes que ce soit."

Ainsi par les termes mêmes de ce statut, il est évident que la corporation ou les " Président et Syndics" n'étaient autorisés qu'à procéder au bornage territorial de la commune, avec les propriétaires (soit roturiers, soit seigneurs), " *ces derniers étant les seigneurs de la seigneurie de La Bussandière qui est contigue à la commune de la Baie*" de terres avoisinant la commune : les mots *termes et conditions* qui se trouvent dans le statut doivent s'interprêter *subjectâ materiâ* c'est-à-dire, concernant le bornage territorial avec des propriétaires de terres voisines ; ainsi que le mot *empiétement*, qui évidemment ne peut signifier *qu'un empiétement territorial.*

Or il n'est aucunement établi, et dans l'acte de transaction du 12 Août 1824, les seigneurs de la Baie ne prétendent pas qu'ils ont des terres avoisinant la commune ; mais au contraire, l'on voit que la commune doit être borné par des terres concédées appartenant à des propriétaires roturiers, par le Lac St. Pierre et par la ligne de la seigneurie de La Hussaudière. Les seigneurs de la Baie ne comparaissent à cette transaction que pour stipuler en leur faveur *une réserve des arbres et bois de haute futaie* qui se trouvaient sur le territoire de la commune.

Evidemment une transaction de cette nature n'était pas celle que le statut avait en vue et qu'il avait permise aux Syndics de la commune. De plus le statut n'autorisait les Syndics à confirmer qu'un empiétement qui aurait pu être fait de *bonne foi.* Les seigneurs de la Baie ne pouvaient pas être lors de la transaction, et n'ont jamais pû être possesseurs de bonne foi de la lisière de bois, qu'ils allèguent eux-mêmes dans la déclaration s'être trouvée anciennement dans la commune, et qu'ils disent n'avoir cessé d'en faire partie qu'en vertu de la dite transaction. Ils n'auraient pu même, par aucun laps de temps, prescrire contre les communistes, leurs censitaires, et qui leur payaient une redevance annuelle, aucune partie du territoire de la dite commune. Une telle prescription de la part du seigneur était prohibée par les lois françaises qui régissaient les droits entre seigneur et vassal. Et même n'y eut-il aucunes lois spéciales à cet égard, que d'après les principes généraux du droit, il ne le pourrait pas non plus ; car il faudrait dire qu'il aurait droit de recevoir la redevance établie en sa faveur pour permettre la jouissance d'un terrain dont il jouirait lui-même.

En conséquence les appelants maintiennent humblement que les Syndics n'é-

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taient pas autorisés par les deux statuts cités, à consentir une telle *réserve* en faveur des seigneurs de la Baie; qu'ils ne l'étaient pas non plus par les lois antérieures; et même que les seigneurs de la Baie ne pouvaient pas légalement accepter une telle réserve. Car la concession de la commune ayant été faite à *titre onéreux*, et moyennant une *redevance annuelle*, le seigneur ne pouvait pas exiger aucun *triage* ou *réserve* des bois de la commune, la loi le lui prohibant formellement.

Les appelants prétendent de plus que cet acte de transaction est nul à sa face même, en autant qu'il n'appert pas que les "Président et Syndics" eussent jamais été autorisés à faire la dite transaction par un vote des membres de la corporation de la commune de la seigneurie de la Baie St. Antoine communément appelée Baie du Febvre.

Maintenant, en supposant pour l'argument, que les Président et Syndics auraient eu le pouvoir de stipuler une telle *réserve* en faveur des seigneurs de la Baie, quel en est le sens, et quelle en est la portée? Cette réserve a-t-elle créé en faveur des seigneurs un *droit d'usage*, tel que le prétend la demanderesse?

La prétendue *réserve* est établie comme suit:

"Dans laquelle étendue de terrain formant la dite commune, les dits seigneurs "ès noms et qualités qu'ils agissent respectivement se réservent très-expressé- "ment *tous les arbres et bois de haute futaie seulement* qui se trouveront dans "l'endroit communément appelé *la lisière de bois*, suivant ses sinuosités depuis "les terres, etc,..................le dit bois consistant en plaines, érables et autres "bois formant les sucreries pour en jouir suivant leurs droits respectivement, "comme bon leur semblera, excepté les arbres et bois qui se trouveront dans le "quart de la dite commune que les Président et Syndics concéderont, ainsi qu'ils "y sont autorisés: bien entendu toujours que le terrain ou fonds où se trouvent "le dit bois et arbres sus-réservés appartiendra à la dite commune."..........

D'après les termes et le contexte de cette stipulation, il paraît évident que la *réserve* n'était que des *grands* et *vieux* arbres des espèces mentionnées, qui existaient lors de la transaction, et non des jeunes arbres qui y étaient alors ou qui y croîtraient plus tard.

Les mots *haute futaie* ne peuvent dans le cas actuel qu'exprimer l'âge des arbes, c'est-à-dire de *grands* et *vieux* arbres, et non l'espèce; car l'espèce est dite en termes exprès, savoir les *plaines*, *érables* et *autres arbres* formant les sucreries.

Quant à la question si la *réserve* devait s'étendre aux arbres qui croîtraient à l'avenir, les appelants soutiennent qu'elle doit être résolue dans la négative, pour les raisons suivantes:

1°. Parce qu'il n'est pas dit que la *réserve* s'applique aux arbres futurs; et que si telle était l'intention de ceux qui stipulaient cette *réserve* en leur faveur, tout doute doit s'interprêter contre celui qui stipule à son avantage; règle d'ailleurs qui doit être appliquée rigoureusement dans le cas actuel.

2°. Parce qu'il est difficile de croire que les Syndics auraient voulu créer une servitude perpétuelle sur le territoire de la commune pour la jouissance duquel les communistes payent une redevance annuelle.

3°. Parce que toute servitude doit s'interprêter rigoureusement, et qu'il faut, dans l'interprétation des termes qui la constituent, restreindre plutôt qu'étendre eur sens.

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4°. Parce que, dans le doute, il faut présumer pour la libération, c'est-à-dire contre la servitude.

Il faut donc dire, en supposant toujours que cette *réserve* aurait pû être stipulée légalement, ce que les appelants dénient) il faut dire que cette *réserve* n'était que *mobilière;* qu'elle ne s'étendait qu'aux *arbres* et *bois*, abstraction faite du sol qui devait continuer à appartenir à la commune; et que de fait elle était limitée au droit d'enlever ces arbres, pour en jouir comme bon semblerait à la demanderesse.

Les appelants croyent devoir ici incidemment supplier cette cour d'appliquer cette interprétation dans l'examen de la preuve faite en cette cause, afin de corriger l'erreur dans laquelle est tombée la cour inférieure; c'est-à-dire: que la Cour Inférieure, malgré, que par la preuve il parût que les arbres coupés étaient d'une autre espèce (des frênes) que ceux réservés, crut devoir accorder des dommages pour leur enlèvement, sous le prétexte que ces frênes pourrait être utiles à l'exercice du *droit d'usage* de la demanderesse; et malgré qu'il ne fût pas établi que les arbres coupés existaient lors de la transaction.

Mais, avant de clore, les appelants croyent devoir, sans entrer dans des détails, faire quelques remarques générales sur la preuve qui existe dans le dossier de cette cause, et qui pourraient être utiles dans l'appréciation à faire de cette preuve.

Si les appelants ont réussi à démontrer que l'acte de transaction du 12 Août 1824 est nul et illégal, il doit s'en suivre que toute possession de la *lisière* de bois, qu'aurait pu prouver la demanderesse, ne serait qu'une usurpation que les lois prohibent, et qu'une cour de Justice ne saurait sanctionner.

Mais si cette cour déclarait que cette transaction est légale et valide, il faudrait toujours dire: que la *réserve* n'étant que des *arbres et bois* de haute futaie, purement et simplement, et abstraction faite du sol, n'est qu'une réserve *mobilière*. Et ainsi la preuve qu'aurait pu tenter de faire la demanderesse d'un *droit d'usage* d'arbres tenant au sol et debout, serait celle de l'exercice d'un droit réel, d'une espèce de servitude; preuve qui ne saurait lui être permise, car elle tendrait à contredire le titre même que la demanderesse invoque. De plus la demanderesse ne saurait prétendre qu'elle a pu amplier son titre, parce que: 1° s'agissant d'une servitude, elle ne peut être acquise sans titre, pas même par prescription; or pour pouvoir étendre et amplier son titre, il faut que ce soit dans un cas que la prescription acquisitive est permise; 2° parce que même si l'on voulait prétendre que la prescription est permise dans le cas actuel, la demanderesse ne pourrait invoquer celle de 40 ans, seule prescription qu'elle pourrait opposer aux défendeurs; vu que ce laps de temps n'était pas expiré lors de l'institution de cette action, en remontant au 12 Août 1824, date de la transaction.

AUTORITES CITEES PAR LES APPELANTS A L'APPUI DES PROPOSITIONS SUIVANTES:

1°. Que lorsque la concession du droit de commune est à *titre onéreux* et moyennant *redevance* annuelle, le seigneur ne peut avoir aucun droit à une *réserve* ou *triage* des bois de la commune.

DICTIONNAIRE DES EAUX ET FORETS, par Chailland, vol. 1, page 150.

" Les arbres épars qui se trouvent sur les communes appartiennent à la com-"munauté et non au Seigneur." Il cite un arrêt de 1738, qui condamna le sieur......... pour avoir *fait abattre*, comme seigneur, 8 à 9 arbres sur les communes de St. Etienne de Montluc.

Il dit encore à la même page 150.

" Lorsque les communes sont de la concession gratuite des seigneurs, sans charges, redevances, etc., le tiers en peut être distrait et séparé à leur profit...... s'ils le demandent et que les deux autres tiers suffisent pour la commune......... sinon le partage n'a lieu, et alors les seigneurs n'ont droit d'usage que comme premiers habitants."

Et il ajoute à la page 151 :

" La concession ne peut être réputée gratuite de la part des seigneurs, si les " habitants ne sont exempts de toutes charges et redevances ; et s'ils payent " quelque chose en argent...... la concession doit passer pour onéreuse, quoique " les habitants n'en rapportent point le titre......"

La même chose est répétée par Livonnière, Traité des Fiefs, page 636 ; et aussi par Fréminville, Pratique des Terriers, vol. 2, pages 328 et suivantes, et 345, de l'Edition de 1753.

Voir aussi Proudhon, Traité de l'Usufruit, vol. 8, No. 775.

" L'utilité de cette jouissance consiste dans la nourriture des bestiaux envoyés " au paturage sur les communaux, et dans le produit des bois......"

No. 776. " Ce droit de jouissance est bien certainement un droit de servitude " puisqu'il s'exerce sur la propriété d'autrui."

No. 777, à la fin de l'avant dernier aliéna, il ajoute : " C'est ce qui a fait dire " à un savant magistrat, que les habitans ont sur leurs communes, à quelques " modifications près, *tous les droits que donne la propriété*." Et il cite Henrion de Pansey.

2o. Qu'il était défendu au seignéur d'exercer aucune *réserve* de bois, ou *triage* lorsque la concession du droit de commune était à titre onéreux.

Chailland, Livonnière, Fréminville, *locis citatis*.

3o. Que les communes ne pouvaient pas aliéner en aucune façon ni transiger leurs droits, *sans une permission du Roi et un décret de justice*.

Merlin : Quest. de Droit, verbo " Fait du Souverain," Ed. Quarto, page 126, 3ème colonne, 2ème aliéna, et pages 127, 128, 129.

4o. Que le seigneur qui recevait redevance ne pouvait prescrire contre le communiste.

Troplong, Prescription, No. 534, 1er et 3ème aliéna, où il cite Dunod et d'autres auteurs de l'ancien droit.

Il critique, il est vrai, l'argument de Dunod, mais il en vient à la même conclusion, dans le 3ème aliéna, quant à la non-prescription du *droit d'usage*.

5o. Réserve de bois, abstraction faite du sol, est *mobilière*.

Proudhon, Traité du Domaine de Propriété, No. 96 *in fine*, où il dit :

" Mais lorsqu'il n'est question que des bois, abstraction faite du sol, alors ils " n'ont plus que la nature de meubles."

Et au No. 97, il applique la même règle à la vente d'une coupe de bois.

6o. Prescription de 40 ans contre les communes.

Pothier, Prescrip. No. 191. Troplong, No. 184, 6ème aliéna.

6o. Arbres de haute-futaie.

Proudhon, Usufruit, vol. 3, No. 1162.

The respondents submitted their pretensions in their factum as follows:

Il ne s'agit pas ici du triage qui est " le droit du seigneur de reprendre le tiers de ce qu'il a donné."

Dalloz, Jurisp: Genle. vo. Communes p. 94.

Il ne s'agit pas non plus du Cantonnement dont "l'opération," suivant Henrion de Pansey, Biens Comm; " consiste à convertir un droit d'usage " sur un Canton dont l'étendue excède les besoins de l'usager en un droit de pro- " priété sur une partie de ce Canton proportionné à ces mêmes besoins."

Fréminville 3 vol. Pratique des Terriers p. 277. Question 10. Ed: 1782.

1 vol. Bost, org: des corps mun: p. 35.

" Avant l'abolition des droits féodaux," dit Bost, org. des corps mun: p. 26; " les biens vacants, les deshérences......appartenaient au seigneur haut justicier."

" Il était encore de principe à cette époque, qu'il ne pouvait y avoir de *terre* " *sans seigneur*, et en conséquence, que les terres *vaines* et *vagues*, sur lesquel- " les des particuliers ou des communes ne pourraient justifier d'un droit acquis, " appartenaient de droit aux seigneurs dans le territoire desquels elles se trou- " vaient."

Les communes n'ont été déclarées propriétaires que par la loi du 28 Août 1792.

Cette *réintégration* permise aux communes a été la cause d'un nombre considérable de procès devant les tribunaux en France.

Vide, Dalloz, Jurisp. Genle. vo. Communes.

Ce fut une loi politique comportant une réaction contre les seigneurs et elle inaugura le système communal et municipal de la France; bien différent de celui qui existe en Bas-Canada.

" M. de Fréminville" dit Chailland, Dict: des eaux et forêts, vol. 1, p. 150, vo. communes, " dans sa pratique universelle des droits seigneuriaux, remarque " que toutes les ordonnances ont tendu à favoriser les communautés parce qu'el- " les seules portent les charges publiques et que si on leur ôte leurs communes, " elles ne seront plus en état d'y suffire."

Comme les forêts, les arbres et les bois de haute-futaie avaient toujours appartenu aux seigneurs; cette loi de 1792 qui a eu pour effet de *réintégrer* les communes dans leurs propriétés primitives qu'en France les seigneurs avaient usurpées, n'a pas dépouillé les seigneurs de leurs forêts, arbres et bois de haute-futaie.

Il fut décidé qu'une transaction ancienne au sujet d'un bois déclaré *litigieux* entre une commune et son seigneur était valable, et de plus la commune devait justifier, qu'avant la transaction la propriété lui appartenait *en entier*.

Vide, Dalloz, Jurisp. Genle. vo. Communes, 3ème section, p. 25, 57 et 58.

Arrêt Damas et Ste. Maure. Merlin Quest. vo. usage; sur cet arrêt, parg. 2, prétend que le seigneur pouvait et devait même se fonder sur sa *possession*.

Le seigneur peut être propriétaire d'une *futaie* dans la commune.

Dalloz, Jurisp. Genle. p. 60.

Merlin, Quest. vo. Communaux, parg. 7.

Vide l'arrêt de la Commune de Bourogne.

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Quant aux bois appartenant aux seigneurs.

Dalloz, Jurisp. Genle. p. 81.

La reconnaissance du seigneur ne donne pas à la commune plus de droit qu'elle n'en avait auparavant.

Dalloz, Jurisp. Genle. p. 52 et 53.

Merlin, Quest. vo. Communaux, section 1ère.

Le même, vo. Cantonnement.

Il fallait sous l'empire des lois françaises, que les communes justifiassent qu'elles étaient *propriétaires des bois dans les communes.*

Dalloz, Jurisp. Genle. vo. Communes, p. 53. Arrêt de la commune de la Chassaigne, p. 54.

"Et il est étrange de soutenir qu'il y a présomption que la commune est propriétaire de tous les bois *situés dans son enclave;* à moins d'un titre de la part "du seigneur."

Dalloz, Jurisp. Genle. p. 60.

Arrêt de la Commune de Mesnil-Latour.

Merlin, Quest. Communaux, parg. 7.

Arrêt quant à la Commune de Vaux.

Dalloz, Jurisp. Genle. p. 76.

Proudhon qui a écrit sous le nouveau régime communal de la France dans son traité de l'usufruit, 8e vol. p. 73, No. 3434, dit:

"Il résulte de tout cela que les habitants des communes peuvent, sans commettre aucun délit ni se rendre passibles d'amendes, *amasser* et emporter les "*bois secs* et *gisants* par terre qu'ils peuvent trouver dans les *forêts* de *leur commune.*"

En sorte que même sous ce nouveau système, les bois de *haute-futaie* sont conservés.

Denisart, au mot *usage*, depuis le No. 5, jusqu'au No. 9, fait voir que par le *droit commun*, les bois ont toujours appartenu aux seigneurs, et qu'eux seuls donnaient le droit aux censitaires de s'en servir.

En Canada, toutes les communes viennent des seigneurs et les concessions en font foi, tandis qu'en France, l'on voit que les seigneurs se sont approprié ces communes par la crainte qu'ils inspiraient aux habitants.

1 Bost, p. 37, et Henrion de Pansey y cité.

Dans la présente cause la commune n'a pas été dépouillée par l'effet de la puissance féodale.

Il n'en a été prouvé aucune. C'est en vertu d'une loi statutaire que la transaction du 12 Août 1824 a été passée; la loi a été exécutée d'une manière franche et équitable, et les deux parties étaient également habiles à contracter sous l'empire du statut.

Vide 1 Bost, p. 36.

Par cet acte du 12 Août 1824, les seigneurs se *réservent tous les arbres*, etc., et les communistes voulaient concéder une partie du *fonds* de la commune, or comme ce fonds ne leur appartenait pas et qu'ils n'en avaient qu'un droit d'usage pour y faire pacager leurs animaux, ils ont acquis le *fonds* aux termes du statut et par là ils ont fait cesser les disputes qui existaient entr'eux et les seigneurs.

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La transaction ne dit pas; que les seigneurs *auront* les arbres, mais qu'ils se les *réservent*, et enfin que le fonds *appartiendra* à la commune.

1 vol. Pardessus. Servitudes, p 112; 2 vol. p. 114.

Aulanier, domaine congéable, 377.

Les communistes étaient tenus en loi, de produire un contrat de concession quant à la propriété des bois de haute-futaie.

Dalloz, loc: cit:

Les seigneurs n'y sont pas tenus, il leur suffit de s'appuyer sur le droit féodal et *leur possession*.

Dalloz, loc: cit:

L'ordonnance de M. Réné Godefroy, prouve que cette commune a été accordée par le seigneur du temps à ses censitaires pour y faire *pacager* leurs animaux, vû la rareté des pacages de ce temps-là.

Quant à la validité des copies de cette ordonnance.

Voyez Pothier, Obligations, No. 771, et ch. 3, sec. 4, Statuts Refondus du Bas-Canada.

Les contrats de concession ne parlent que d'un *droit de commune;* purement et simplement.

De plus, plusieurs contrats de concessions produits ne stipulent aucune charge, ni aucune rente pour ce droit de commune, en sorte qu'il a été concédé gratuitement.

Tous les témoins s'accordent à dire que ce droit de commune se borne à un droit de pacage et pâturage, et le statut 2 Geo. 4, chap. 10, section 9, ne parle que du *pâturage et de l'ouverture et de la fermeture* de la commune pour cette fin.

Dans la transaction passée sous le SCEAU de la *corporation* de la commune, il est dit que les seigneurs des *différentes portions* de la seigneurie, se réservent:

1ère. Les arbres.

2ème. Les bois de haute-futaie, le dit bois consistant en plaines, érables et *autres bois* formant les sucreries—(qui y existaient et y étaient alors ainsi exploitées pour y faire du feu et des auges.)

Cette transaction a été confirmée et *ratifiée* par les Procès-Verbaux de bornage, etc., qui sont *signés* par le président de la commune.

Voyez l'opération de la journée du 16 Février 1842.

La résolution de la commune de faire couper 500 cordes de bois, nonobstant les défenses des seigneurs est produite.

Ainsi, ce ne sont pas les communistes qui ont pris du bois pour leur *usage;* mais c'est la corporation de la commune qui a fait couper le bois pour le *vendre*.

Joseph Grenier dit que c'est en décembre 1858.

Louis Benoit a déposé, le 17 Février 1860, et dit qu'il y a eu un an l'automne dernier, savoir: en l'automne 1858; donc, avant le 21 décembre 1858.

Joseph Villebrun, dit que c'était en décembre 1858.

Joseph Desfossés a déposé le 14 Mai 1860, et dit qu'il y a eu un an l'automne dernier.

Il est stipulé dans cette transaction qui n'est qu'une *reconnaissance* des anciens droits des seigneurs sur les forêts et les arbres de haute-futaie, que les lods et ventes seraient payables aux seigneurs sur les concessions par la commune.

Les statuts de 1822 et 1824, savoir: 2e Geo. 4, ch. 10 et 4 Geo. 4, ch. 26, déterminent les droits et obligations de la commune de la Baie du Febvre.

La section 7 ne parle que de pâturage.

La section 13 n'affecte pas les droits des seigneurs.

Le statut 4 Geo. 4, ch. 26, permet aux communistes de transiger, contracter, et conclure aux termes et conditions, etc., etc., aux fins de terminer toutes disputes, etc., etc., de concéder partie de la commune.

Par la teneur de ces statuts, la preuve résulte que les communistes ont plus d'étendue de terrain qu'il ne leur en faut pour leurs besoins.

Pour la concession (section 2) il faut le *consentement* de la majorité.

Quant à la transaction, le pouvoir est donné *de suite* par le statut.

Le jugement rendu aux Trois-Rivières en date du 7 Janvier 1857, n'a aucunement affecté les droits des seigneurs. *Vide* les statuts 16 Vic., ch. 61 et ch. 150, passés en 1853.

BADGLEY, J.—The Sieur Lefebvre, a former proprietor of the seigniory of St. Antoine, commonly called La Baie du Fèbvre, made a grant to his tenants sometime before 1724, of a tract of land, along the shore of lake St. Peter, for their common of pasturage, and after his decease, whilst his widow was in possession of the seigniory, disputes arose between herself and the commoners as to its extent.

These disputes were terminated in 1724, and the extent of the common was settled as being "tout le front qui se trouvera depuis les terres que le feu sieur "Lefebvre a acquis ci-devant du sieur Coursol jusqu'à la Hussaudière ensemble "le terrain étant depuis les concessions jusqu'au bord du Lac St. Pierre," including "la lisière de bois qui règne le long du Lac St. Pierre." From that time the record presents nothing to notice with reference to the common until the year 1822, and during that long interval the commoners used their common, whilst the seigniors enjoyed without interruption the *usage de bois* in the *lisière* above referred to. In 1822 the commoners, tenants of the seigniory, petitioned the Legislature for their incorporation for the purpose of administering and managing the communal property, and they were in consequence erected into a corporation by the L. C. Act. 2, G. 4, ch. 10, which provided for the nomination of a chairman and trustees from amongst themselves, who were to regulate the affairs of the common, fix its boundaries, settle the number and description of cattle to be put to graze thereon, and the time for grazing, and which assured a right of common to each tenant. In 1824, an additional act. 4, G. 4, was passed, which amended the previous one, and received the royal assent in May of that year. The powers of the chairman and trustees were thereby enlarged; they were authorized to fix the boundaries of the common absolutely, to contract, transact and conclude with all owners of land adjacent to or encroaching on the common, whether owners or seigniors, upon terms to be mutually agreed upon for the terminating of all disputes respecting boundaries, to settle and fix limits, &c.

Both acts contained a special saving clause whereby the rights of the sovereign and of all persons were preserved, such only excepted as were particularly mentioned in the acts. These special acts had only reference to the common and commoners particularly, and to the purposes for which they were enacted; the

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regulation, management and use of the communal property and the final settlement and definition of its limits, but neither in any way interfered with the acquired or vested rights of the seigniors in the *usage de bois* in the *lisière de bois* above referred to independently of the rights of the commoners in the *commune* itself.

When the latter act was passed in 1824, the seigniory was subdivided amongst *several* proprietors, purchasers of separate portions of it whereof the largest part belonged to the Demoiselles Lozeau, then minors and *en Tutelle* of their uncle Lozeau.

Whilst this subdivision existed, a deed of transaction, dated the 12th August, 1824, within three months after the coming into operation of the second act of Parliament, was executed between those several co-proprietors and co-seigniors of the one part, and the chairman and trustees representing the corporation of the other part; wherein after a statement that the old titles of the common were lost, the parties transacted and contracted together; they settled the extent and bounds of the common as detailed in the deed almost *in totidem verbis* the same as those given above as of 1724, and which detail was followed by the following express reservation. *Que les dits seigneurs ès noms et qualités qu'ils y agissaient respecti-* "*vement, se réservèrent très expressément tous les arbres et bois de haute futaie* "*seulement qui se trouveront dans l'endroit communément appelée la lisière de* "*bois* suivant ses sinuosités depuis les terres ci-devant et anciennement acquises "par le dit feu sieur Lefebvre du dit sieur de Courval, à aller à la dite seigneurie "de Labussaudière; le dit bois consistant en plaines, érables, et autres bois *for-* "*mant les sucreries*, pour en jouir suivant leurs droits respectivement comme bon "leur semblera, excepté les arbres et bois qui se trouveront dans le quart de la dite "commune que les dits Président et Syndics concèderont ainsi qu'ils y sont autorisés; *bien entendu toujours que le terrain ou fonds où se trouve le dit bois et* "*arbres sus-réservés appartiendra à la dite commune.*"

By the deed of transaction, the parties thereto were severally maintained in their respective rights, the tenants retaining the property of the communal land, and the seigniors their reserved right and property in the *usage du bois*, and of the trees growing in the *lisière* within the common. Clearly the terms of this deed of transaction were not *ultra vires* of the chairman and trustees, but plainly within their statutory powers, to transact and conclude with the seigniors, and their declaration of the seigniors, reserved right of their *usage du bois*, in the *lisière*, which could not be withheld from them, was not a special *stipulation contractuelle* or contract entered into by the chairman and trustees exorbitant of their powers. The joint seigniors subsequently executed a deed of partition amongst themselves, dated 20th June, 1826, for the division amongst them of the seigniory according to their respective rights and properties therein, and amongst the divisions thereby established, four were apportioned to the Misses Lozeau, whereof the first was at the N. E. extremity of the common line, and the fourth at the S. E. extremity adjoining to the dividing line of St. Antoine and La Hussaudière; their two other portions and those of the other proprietors lying promiscuously between the first and fourth portions. Their fourth lot is described as follows, " toute le partie de la dite seigneurie, qui se trouvera de front, à pren-

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"dre d'un côté au nord-est à la part de seigneurie du dit sieur Louis Manseau, "à aller aboutir au sud-ouest à la seigneurie de Labussaudière, avec aussi la part "dans la lisière de bois qui est et se trouve au devant et vis-à-vis la dite partie "de seigneurie."

It is proper to state here that in the partition deed to each particular division is appended as to this fourth one the same or an equivalent *partage*, portion of the *lisière de bois* as above.

It is upon this fourth allotment that the trespass is alleged to have been committed and the damage complained of done.

In order to complete this partition, the several proprietors resolved to have their respective boundaries defined and laid down by an *arpentage* and survey, which was performed by a provincial-surveyor who drew not only the several division lines of the respective properties, from each other, but also the front lines between them and the common, including the respective portions of the *lisière* in front of each property. These operations are shewn in the surveys and *arpentages* for each individual property and in the general map of the whole, and also in the surveyor's *procès-verbaux*, all filed of record in this case. The proprietors assented to the operation by affixing their signatures to the several documents of the operations, and the corporation also acquiesced in them, their chairmen and trustees also subscribing the same documents. These operations were completed in 1842.

The female plaintiff, by transactions and exchanges with her sister, became the sole owner of their joint allotments as specified in the partition deed of 1826; she intermarried with the male plaintiff, but with stipulation of contractual *séparation de biens*.

From the record it appears that frequent depredations by individuals had been committed upon the trees growing and standing upon the *lisière de bois* in the plaintiff's allotments which she did her utmost to prevent and stop by public notifications at the church door to the tenants generally; but these depredations were made to assume unusual proportions at last by an assembly of the tenants specially holden the 29th November, 1858, and called for the express purpose at which it was resolved by a majority as follows, "que la corporation est autorisée "à faire bucher 300 ou 400 cordes de bois plus ou moins dans les limites de la "dite commune, durant le présent hiver qui seront vendues par la dite corporation "pour le bien général de tous les propriétaires de droit, dans la dite commune," and it was further resolved to contest "toutes oppositions qui pourraient être placées "devant eux par les seigneurs et autres à cet effet."

The chairman of the corporation, Mr. Gouin, immediately set to work to carry out the resolutions of the *habitants* and put men to cut down trees on the *lisière de bois*, and particularly a considerable number upon the plaintiff's fourth allotment above described, the wood of which was by the chairman's directions removed and converted to the *bien général des propriétaires*, in the common, whereupon she instituted the present action against the corporation for £125, of damages for the wood cut and carried away, &c.

The declaration sets out her possession for more than a year and a day before this trespass, of the *droit d'usage de tous les arbres et bois de haute-futaie*, in the said *lisière*, the possession of the said *lisière de bois*, by the seigniors for more

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than forty years; the terms and agreement of the deed of transaction of 12th August, 1824, between the seigniors and the corporation, the special reservation therein of their right in all the trees in the *lisière*, the terms and effect of the said deed of partition, by the joint seigniors, the plaintiff's particular allotments of the seigniory and specially the fourth above described, with the portion of the *lisière* in front of it, her possession of that part of the *lisière* by herself and *auteurs* for more than forty years last past, and her present sole title thereto, she then charges the defendants with maliciously and knowingly committing the injury and damage complained of with intent to damnify her, and her actual damage of £125, for which she prays their condemnation with costs.

The defendants have pleaded by peremptory exception, that neither plaintiff, nor her *auteurs* ever had or could have any right of *usage* in the *lisière de bois*, which has always formed part of the common, and that neither she nor they possessed the *lisière* freely, peaceably and publicly: that the commoners have cut and carried away from the common, for more than thirty years, *le bois à eux nécessaires;* that the deed of transaction of the 12th August, 1824, was *ultra vires* of the corporation, and did not nor could confer upon plaintiff and her *auteurs* any *usage de bois* or servitude in the trees and wood; that plaintiff never indicated her proprietary rights before the commissioner appointed under the statute to settle the rights of the commoners in the common, *ergo actio non* and annulment of deed of transaction.

Two special pleadings follow, one by each party, plaintiff and defendant. The plaintiff, in reply to the defendants' plea, specially alleges the feodal and seigniorial rights of herself and *auteurs* over the common, that the said commissioner had no statutory authority over her or her *auteurs* and that any judgment, rendered by him as against her or them would be of no effect, and then denying finally the allegations of the peremptory exception in general, she concludes that as to her, if it would be necessary, the commissioner's judgment should be set aside, and her action maintained.

The defendants on their part specially reply to her special answer by demurring to the allegation of feodal rights set up by law, over the common which they allege was an onerous not gratuitous grant; whereupon dismissal of her action. Both of these special pleadings are illegal, and except as to her general denegation of the defendants' peremptory exception should have been dismissed.

A mass of oral testimony followed the pleadings; which may be summed up as follows: that plaintiffs and her *auteurs* constantly, publicly and freely enjoyed the right of property and *usage de bois* over all the trees in the *lisière;* that depredations by individuals, some of whom were commoners, some not, were committed upon the trees and wood in contravention of her repeated and annual notifications against such *maraudage*, that the sugaries were *exploités* by the plaintiff or for her use and advantage, that the depredations were the acts of individuals, few in number, out of the entire body of the *habitants intéressés*, and never by the latter in general or as a body of commoners; that even these depredations were neither continuous nor public, and that neither as an unincorporated body nor as a corporation the defendants had no rights in the *lisière de bois* and been interfered with by them previous to the date of the resolution to that effect of 29th November,

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1858; under which her wood was cut down and converted to the use of the corporation: that upwards of 50 *cordes* of wood were so taken to her damage of upwards of £50. This oral testimony is accompanied by several documents filed in support of the plaintiff's pretensions, some whereof have been already adverted to, and amongst them she has produced copy of an ancient document dated in 1724, by which the disputes between the *censitaires* and the then holder of the seigniory appear to have been settled between them. It has not been filed or declared upon as a title of property, nor is it necessary to consider it in that character, but it is available for the plaintiff as documentary evidence; it is the judgment of 1724, rendered by the deputy of the intendant of justice, and established the extent and boundaries of the common precisely as they have since continued, for the purpose of the commoner's pasturage; and after making certain reservations of lesser importance to the seigniors, concludes with this special reservation, "lui réservons en outre tous les arbres étant en la susdite lisière "de bois pour en disposer par elle ainsi qu'elle en jugera à propos." From that time the commoners' rights in the common, and the seigniors' right in the *lisière de bois* have been coincident and co-extensive, and it may not improperly be said, upon a fair examination of the whole case, that the plaintiff has *from that time* shewn a continuous and uninterrupted right and property, as well as possession of her *usage de bois*, down to the institution of her action with the full and perfect acquiescence of the commoners in that right, through the deed of transaction of 1824, and the *arpentage* of 1842, in connection with the deed of partition of 1826, until the date of their adverse resolution of 1858, in which they impliedly admit the plaintiff's right by deciding to contest it, and this for the first time.

This continuity of right and of possession of itself constitutes in law a *véritable droit*, because the *droit d'usage de bois* is not a servitude; it is a proprietary right like a usufruct: the authors characterize it as a *droit immobilier, un démembrement* of the real property.

C'est une séparation perpétuelle du droit de jouissance dans les arbres de celui de la propriété and rests upon a proprietary right acquiesced in and acknowledged by the corporation since its existence as such in 1822, and sustained by an uninterrupted possession *non désertée ou abandonnée* by the plaintiff or her *auteurs* during the interval from that year.

The rights and property of the defendants in the communal lands, including the land in which the *lisière de bois* is standing, are not questioned by the plaintiff, but they have shown no title to those trees in question, and the trespasses and depredations committed by a few marauders upon the wood in the *lisière* upon the date of the resolution of 1858, cannot acquire to the corporation a right over the plaintiff's property which the corporation had not previously had, nor justify their claim to prescription, exclusive of the plaintiff from her *usage de bois*. The defendants have shown none of the legal ingredients required to establish prescriptions in their own favour, or to divert the plaintiff. Having then no title in themselves and no possessory or prescriptive right, the act of the defendants, complained of by the plaintiff, was unjustifiable, and their peremp-

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tory exception was therefore properly dismissed by the judgment of the court below, which also properly maintained the plaintiff's action: This court confirms that judgment with costs, and would have been disposed to have extended the amount of the damage thereby awarded by giving exemplary damages to put a stop to such outrageous proceedings; but taking into consideration that the costs will be heavy, the original judgment will stand unchanged, and we therefore confirm the judgment as it is with costs against defendants.

Judgment confirmed.

Olivier & Armstrong, attorneys for appellants.
A. A. Dorion, counsel.
LaFrenaye & Bruneau, attorneys for respondents.
(P. R. L.)

MONTREAL, 9TH JUNE, 1866.

CASE RESERVED.

Coram DUVAL, C. J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

Regina vs. *Edmund Pickup*.

HELD:—That proof that the defendant had procured from the private prosecutor a promissory note by a promise to give the prosecutor $600 on what he owed him out of the proceeds of the note when discounted, is not sufficient to sustain a conviction on an indictment for obtaining the signature of the prosecutor to a promissory note with intent to defraud.

The defendant, at Montreal, in March, 1866, in the Court of Queen's Bench, Crown side, was convicted of obtaining a signature to a promissory note with intent to defraud.

The indictment was in the following words: "The Jurors for our lady the Queen, upon their oath, present that *Edmund Pickup*, late of the city of Montreal, in the District of Montreal, trader, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and sixty-five, at the city of Montreal aforesaid, in the district aforesaid, unlawfully, fraudulently and knowingly by false pretences did obtain the signature of one Robert Graham to a certain promissory note for a sum of one thousand eight hundred and twenty-five dollars, with intent to defraud, against the form of the Statute in such case made and provided, and against the peace of our lady the Queen, Her Crown and dignity."

MONDELET, A. J., who presided at the trial, reserved the case for the Court. The evidence given to the jury was as follows:

Robert Graham, wood merchant: On 26th September last, defendant's son, Edmund James brought a note dated 14th September, 1865, for $1125. "There was another paper with it." It purported that out of those $1125, "when the note was discounted, defendant would return $550." I did not sign the note at that time; I went off to defendant's place of business; defendant was in my debt then. He agreed, when the note would have been discounted, to give $600 on the proceeds of the note, on what he owed me. I signed the note then. On 29th of September, defendant's son returned with the old note, dated 14th September, 1865, and told me the other note had been sent in too late, and left among

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old papers, and destroyed, and then I signed the note: I now produce it. This was at 4 months on the Ontario Bank, when I signed this last note, it bore the date of 4 months. He said there would be no difficulty, that the date had been altered from 4th to 14th September, endorsed "Edmund Pickup."

(Note read to the jury and handed over to them.)

On 30th September, he told me that it could not be discounted at the Ontario Bank, but as a compliment at 7 per cent; but at Brown's a broker, he could get it discounted without favour, at 8 per cent; and on my informing him I required the $600, "for the Tuesday, having to pay that sum, on a purchase I had made, he told me it would be all right. On the 4th of October, I went to defendant's office and spoke to his said son, who told me his father was not in; I then did not know that defendant had absconded, I told the son I required the $600 in the afternoon, as I had to send them to Upper Canada. Before I left the store another young boy informed me that Mr. Pickup had left the city; I paid the note which I had signed in the Ontario Bank where I saw it. He was absent, 2 months I believe. I did not see him during that time; I have never got the $600 nor any part thereof. At the time of that transaction, my book shewed,

	4790.99½
	3856.33
	$934.66½
For wood	407.75
Total	$1342.51½
Less commission on coals allowed about	80.00
	$1202.41½

Pickup is an insolvent; he never has paid me the balance.

Cross-examined.

There have been between defendant and myself transactions, during 2 years with me alone. The transactions with defendant amounted to a high figure; I had signed before a note and endorsed another for defendant, and in May, 1864, he signed a note for me, and subsequently gave me another note. If defendant had paid me the $600, I would have been perfectly satisfied.

Henry Starnes, Esq., Mayor, manager of the Ontario Bank.

I myself discounted for defendant, who himself presented it, the note held in my hand, bearing date 14th September, 1865, at 4 months, endorsed by defendant, and he got the proceeds. Graham came to the Bank, and I told him all about it.

Cross-examined.

Defendant kept an account with our Bank. I always have considered him to be a respectable man. He had an account at our Bank, for many years. Mr. Pickup had the reputation of being owner of property in Sherbrooke Street.

From circumstances that have transpired *v. g.* his absconding, I have not now the confidence in defendant I had before. I don't know where Mr. Pickup went, I merely know he left the country; he came back sometime afterwards.

Frederick Nash, ledger keeper, Ontario Bank: On 29th September last, the proceeds of the note in question were carried to the credit of defendant; the proceeds were of $1101.26; it was due 14th or 17th of January, 1866.

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Mr. Graham paid and retired the note; the private mark of the Bank is on the note.

No *cross-examination.*

Andrew Buchanan Stewart, assignee of the estate of defendant: The books of the estate are in my possession.

Case of the Crown closed.

Graham: The outstanding accounts for wood, were, at a meeting of the creditors, handed over to me and these debts were due anterior to the transaction now in question.

Cross-examined.

The accounts handed me over by the creditors would not wipe off the debt due me by Pickup upon the note.

Carter addressed the Jury for the defence, and *Ramsay* for the Crown.

The Judge charged the jury who returned a verdict of "guilty," but recommended the defendant to the mercy of the Court.

The case reserved on points submitted by Mr. Carter.

The defendant gave bail to appear before the Court of Appeal, on 1st June next, after which the Court adjourned.

At the trial the following points were urged by Mr. Carter, Q. C., the defendant's counsel, and reserved by the Judge.

1. That the indictment did not set forth any offence, as it omitted to specify the false pretences by which the signature of the prosecutor was obtained, and that the clause 35 of Ch. 99 Cons. Stat. Ca., dispensing with the necessity for averring the false pretences, did not apply to this new offence subsequently created.

2. That the indictment moreover did not specify the name of any person or persons intended to be defrauded, such allegation being necessary, as this new offence was not mentioned in the clause 29 of ch. 99 Cons. Stat. Ca.

3. That the indictment did not specify with precision the date of the note, in whose favour it was made or when and where payable, and did not describe it to be a note for the payment of money.

4. That the evidence did not establish that the defendant made use of any false pretence of an existing fact, or such a false pretence as by law was necessary to sustain the charge.

5. That at most a promise for future conduct was proved viz., to pay the prosecutor on account of an alleged indebtedness. A certain portion of the amount defendant would receive when the note was discounted.

DUVAL, C. J.—In this case we do not think there was such a misrepresentation on the part of the defendant as to justify the verdict, and in fact the judge who presided at the trial thinks the verdict should not have been against him. If this verdict could be maintained, it would follow that every man who purchased goods, stating that he would pay for them next week, and who failed to pay for them could be prosecuted criminally, instead of being sued. We are bound by the evidence as it comes before us, and we are all of opinion that the evidence is insufficient. The defendant is therefore discharged.

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MONDELET, J.—At the trial I charged the jury for an acquittal, but the jury thought fit to return a verdict of guilty. I then reserved the case for the consideration of the full bench as to the sufficiency of the evidence, and I entirely concur in the opinion that the evidence is insufficient. There is another consideration that weighs in favour of the defendant. He and Mr. Graham had had previous transactions and accounts together; and the fact of Mr. Pickup's absenting himself from town a few days subsequent to the particular transaction on which the prosecution was based, could not be adduced to justify the presumption of fraud. I instructed the jury at the time that they must consider the transaction apart from any subsequent act.

The judgment was recorded in the following words:

"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 Montreal, 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 evidence adduced on the part of our sovereign Lady the Queen is insufficient in law to justify the verdict rendered, that the judgment be arrested on the said verdict which is hereby quashed, and that the said Edmund Pickup be discharged from custody.

Conviction quashed.

T. K. Ramsay, for the Crown.
E. Carter, Q.C., for the defendant.
(F. W. T.)

(APPEAL SIDE.)

QUEBEC, DECEMBER TERM, 1866.

Coram DUVAL, C. J., AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, A. J.

JEAN BTE. CRESSÉ,

(*Plaintiff in the Court below,*)
APPELLANT;

VS.

THE HONORABLE FRANÇOIS BABY,

(*Defendant in the Court below,*)

AND

WILLIAM FRANÇOIS BABY,

RESPONDENT,
(*Reprenant l'instance.*)

HELD:—That a person coming to any place in Lower Canada with the intention of residing there immediately, acquires a domicile, and the intention may be proved by his subsequent acts.

This was an appeal from a judgment rendered on the 8th of July, 1864, by the Superior Court at Quebec, sitting the Hon. Mr. Justice J. T. Taschereau, by which the plaintiff's action *en première instance* was dismissed.

In February, 1862, the appellant instituted in the Superior Court at Quebec, an action to recover from the late Hon. François Baby £1,620, which he alleged

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was due to him under a deed of sale, executed by the father of the appellant at Three Rivers, on the 9th of January, 1819, by which he sold to the Hon. F. Baby two-thirds of the seigniory of Nicolet with certain rights and dependencies in consideration of the sum of £12,000, whereof £1,000 was to be paid in principal within a certain short delay, and the remaining £11,000 were to form a constituted rent (*non rachetable*) of £660 per annum, payable half-yearly. Shortly after this sale, P. M. Cressé, the vendor, died, leaving by will a certain proportion of his property, and more especially of this constituted rent, to the plaintiff in this cause, which proportion was afterwards increased by the death of some of the other heirs.

The plaintiff set forth the above facts in his declaration, and concluded that the defendant should be condemned to pay him £1620, for the arrears of the said constituted ground rent due on the 1st Nov., 1861, upon his part of £1,000 in the estate of his father, the whole with costs.

To the merits of this demand Mr. Baby pleaded by a *defense au fond en fait* and a perpetual peremptory exception in law.

By the first head of this latter pleading it was alleged that the seigniory of Nicolet and the *domaine*, sold to the defendant by the deed of sale cited in the declaration, were sold under execution in 1820, in a certain cause in which J. E. Dumoulin, in his quality of executor to the will of the said P. M. Cressé, was plaintiff, and F. Baby, the present defendant, was defendant, and that by the judgment of distribution, the heirs Cressé had received on account of the price of the sale, the sum of £3,998 9s. 9d. and £648 as arrears of interest.

That afterwards, (and herein lay the pith of the defence) on the 20th February, 1844, at the city of Quebec, the said François Baby had become bankrupt, and in virtue of and conformably to the bankrupt act then in force (7 Vic. c. 10[illegible] had been declared a bankrupt, and on the 22nd February, 1844, in the city of Quebec, a commission of Bankruptcy was issued by Robert Hunter Gairdner, commissioner of bankrupts in the district of Quebec, against the estate of F. Baby, who thereupon made a cession of his property real and personal to the assignee appointed by the creditors, and that all the formalities required by the law had been observed.

That W. A. R. Gilmor, acting in that behalf as the testamentary executor of the said P. M. Cressé, had become a claimant upon the estate of the defendant for a certain sum as the balance of the price of the sale consummated by the deed of sale mentioned in the plaintiff's declaration and for the arrears of interest. That the said W. A. R. Gilmor acted in that behalf for the plaintiff and the other legatees, and received dividends out of the said estate.

That the defendant F. Baby having conformed to all the requirements of the Bankruptcy act, obtained on the 13th of April, 1844, his certificate of discharge, which was granted to him by Wm. King McCord, one of the judges of the Circuit Court and commissioner of bankrupts for the district of Quebec. By this certificate he was discharged from all debts proveable against the estate under the commission, and it was afterwards confirmed, on the 18th September following by a judgment of the Court of Queen's Bench having civil jurisdiction in the district of Quebec.

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Under the second head of this plea, the defendant, after again setting forth the commission of bankruptcy, the certificate of discharge, and its confirmation by the Court of Queen's Bench, alleged that the debt for which he was sued, even if it had been exigible at the time of the emanation of the commission, had been entirely extinguished by the certificate of discharge.

By the third head of this pleading the defendant pleaded in bar the prescription of thirty years.

To this exception the plaintiff replied generally that the facts were untrue, and by special answer, by which he prayed that the commission of bankruptcy of the defendant and the proceedings had thereupon might be declared null and void and be set aside.

As the principal points in contestation are raised by this special answer it may be well to reproduce its more important portions here.

"Le demandeur demande le renvoi de l'exception du défendeur pour les causes suivantes, savoir :

"Parceque la commission a été émanée à l'instance du défendeur, au moyen de "la déclaration suivante, filée en Cour de Banqueroute, le vingt Février, mil huit "cent quarante quatre : "Je, soussigné, François Baby, de la cité de Québec, "marchand, déclare par le présent que je suis incapable de rencontrer mes en-"gagements. Daté ce vingtième jour de Février, mil huit cent quarante quatre. "Signé, F. Baby."

"Parceque dans la dite déclaration en vertu de laquelle la dite commission de "banqueroute a été émané, le dit défendeur s'est désigné frauduleusement, "comme domicilié en la cité de Québec, tandis qu'à telle époque, longtemps "auparavant et longtemps après, le dit défendeur n'avait aucun domicile dans le "Bas-Canada, et notamment dans la cité de Québec et le district de Québec.

"Parcequ'à la dite époque et près de dix ans auparavant le dit défendeur "avait son domicile en la ville d'Albany, dans l'état de New York, un des Etats-"Unis de l'Amérique du Nord, où il résidait avec sa famille.

"Parceque lorsque le dit défendeur, qui avait fait en la dite ville d'Albany "une banqueroute frauduleuse, est venu en la cité de Québec ; il avait laissé sa "femme et ses enfants en la dite ville d'Albany, où était encore son domicile, et "que ce n'est que lorsqu'il eût obtenu frauduleusement son certificat de décharge "qu'il a fait venir sa famille en Canada, et qu'alors il a établi son domicile en "la paroisse de St. Pierre les Bécquets dans le district des Trois Rivières, où il "a toujours residé depuis à venir vers l'année mil huit cent cinquante quatre.

"Parceque le seul acte de banqueroute en vertu duquel la dite commission a "été émanée, étant la déclaration susdite faite en vertu de la clause quinzième de "l'acte de la Législature, passé en la septième année du Règne de Sa Majesté, "chapitre dix, laquelle déclaration devait être présentée au juge ou commissaire "du district où résidait le défendeur, ou dans lequel se trouvait le lieu ordinaire "de ses affaires, et que partant la dite déclaration étant fausse et frauduleuse, "tous les procédés subséquents à icelle sont nuls et de nulle valeur, et doivent "être annullés et mis de côté comme tels.

"Parceque le dit défendeur n'avait jamais fait aucun commerce en la cité ou

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"le district de Québec, avant l'époque de la dite déclaration, et que par suite il "n'avait point dans le dit district aucun lieu ordinaire de ses affaires."

* * * * * * * * * *

To a portion of this special answer the defendant demurred and assigned the following reasons:—

1st. Because the certificate of discharge pleaded by the defendant, having been granted by a Court of competent jurisdiction, cannot be attacked or its force impaired by the Court now here.

2nd. Because the said certificate was duly confirmed by the Court of Queen's Bench, holding civil pleas in and for the district of Quebec, and such confirmation precludes the plaintiff and all other persons from disputing the validity and effect of the said certificate.

3rd. Because the plaintiff cannot in this Court invoke the want of jurisdiction of the Court of Bankruptcy, in respect of the issuing of the said commission.

4th. Because the plaintiff cannot in this action, by means of a special answer, obtain any judgment or order superseding the said commission.

5th. Because the determination of the Court of Bankruptcy, in respect of the issuing of the commission, was and is conclusive.

6th. Because it is no answer to the defendant's exception, that he committed a fraudulent act of bankruptcy in the town of Albany.

On the 5th February, 1863, the Superior Court rendered a judgment on the demurrer, by which the plaintiff was allowed to test the validity of the discharge in bankruptcy, admitting that if the defendant were not a resident of the district of Quebec at the time he became bankrupt, the discharge obtained would be inoperative and void.

There were thus now raised three principal issues: 1st. Had Mr. Baby at the time of the issuing of the commission of bankruptcy a residence at Quebec. 2nd. Whether a discharge in bankruptcy can be defeated by proof that the bankrupt was not a resident of the district within which he obtained his discharge. 3rd. Whether a prescription of thirty years is interrupted by absence, or by a judgment of distribution in bankruptcy.

The facts in Mr. Baby's life, as proved in the case, upon which was based the counsel's argument, are as follows:—

He was born at Quebec. Before 1819 he left home to establish himself at St. Pierre les Becquets, in the district of Three Rivers, where in the same year, he made the purchase of the seigniory of Nicolet, which is set forth in the plaintiff's declaration. In 1829 or 1830 Mr. Baby was married at the parish of St. Philippe, in the district of Montreal, where he remained till 1837, when he went to Albany, in the State of New York, at which place he resided with his family until about the month of February, 1844. Towards the end of January of that year, hearing that his mother was dying, he hastened to Quebec, where he arrived on the 3rd of February.

On the 20th of the same month he made his declaration in the Court of Bankruptcy that he was unable to meet his liabilities, and the commission of bank-

ruptcy bears date the same day. He was thus just seventeen days in Quebec before he went into the Bankruptcy Court. The question is, had he in that time acquired a domicile?

The Court held that he had.

MONDELET, J.—With regard to Baby's domicile, I am of opinion that upon his return from Albany, he immediately re-assumed the paternal domicile, and this was confirmed by his subsequent residence at Quebec.

DUVAL, C. J.—The question which we are now called upon to decide is "whether the commissioner of Bankruptcy had jurisdiction in the premises?" For this it was necessary that Baby should have had a domicile in Quebec. This I think he had, for one day is sufficient to obtain a domicile when accompanied with the proper intent. This principle was not lightly adopted in France, (v. Toullier's Commentary on Art. 9. C. N.) and it will be found to be confirmed by many judgments since rendered in France. I may also incidentally state a case which I remember was decided in Scotland in which a residence of 42 days was considered sufficient to establish a domicile. The question then, is, had Baby when he made his declaration, the intention of fixing his residence at Quebec? This is clearly established by his subseqent conduct. [In support of this opinion the learned judge here cited Locré, and Demolombe No. 345, vo. domicile.] This then satisfies me that the commissioner had jurisdiction. It is true that it appears a hard case that only the few privileged creditors, who happened to be in the district at the time when the declaration was made, should be paid; but this is the fault of the Court of Bankruptcy, which, having it in its power to do so, should have ordered notice to have been given in the other districts of Lower Canada; and though the commissioner did not perhaps use a proper discretion, still he had jurisdiction, and therefore the right to give the discharge, which was afterwards confirmed in the Court of Queen's Bench. The judgment of the Superior Court is therefore confirmed with costs.

Fournier & Gleason, for appellant.

F. C. Vannovous, for respondent.

(J. T. W.)

(APPEAL SIDE).

QUEBEC, DECEMBER TERM, 1866.

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, A. J.

THE CORPORATION OF QUEBEC,

(*Defendants in the Court below,*)

APPELLANTS;

AND

THE HON. RÉNÉ CARON,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—That an action *condictio indebiti* lies to recover back money which has been paid, but under protest, in satisfaction of a prescribed debt, when illegal coercion has been employed to obtain the payment.

Appeal from a judgment of the Superior Court at Quebec, given the 5th of May, 1866.

The Corporation of Quebec and The Honorable René Caron.

Original action *condictio indebiti* to recover back money paid under the following circumstances, as stated in the declaration:—The respondent let certain premises in Quebec to one Benjamin for five years, who, by the terms of the lease, was bound to pay the municipal water rates continually in advance. Benjamin occupied for three years, up to the 30th April, 1862, when the lease, though having still two years to run, was cancelled by the parties, but Benjamin had failed to pay any part of the water rate, which then amounted to $532. The premises were from that time let to Messrs. Glover & Fry. By the amended Corporation Act, 29 Vic. c. 57, s. 24, §11, which came into operation on the 15th September, 1865, the right of action of the Corporation for the recovery of past and future assessments, taxes, or other municipal duties, is barred by a prescription of two years. By the 22nd sub-section of the 36th section of the same Act, power is given to the Council to order the stoppage of the supply of water to any person who fails to pay his water rate within thirty days after the same is due. The Corporation has the power to recover the water rates against either the landlord or tenant of the supplied house. On the 10th December, 1865, preparations were made to cut off the supply of water from the premises occupied by Messrs. Glover & Fry, in order to enforce the payment of the water rates which had been left unpaid by Benjamin when he gave up the premises in 1862; whereupon Messrs. Glover & Fry threatened the respondent with an action of damages, if they should be deprived of their water. To avoid this, the respondent paid to the appellants the sum demanded, viz: $600.71, being the amount of water rate due, with interest and costs. This payment was made by the respondent under protest served upon the Corporation, and with express reservation of his claim for repetition. In the prosecution of this claim, the present action was brought.

Lelièvre, for the plaintiff, urged that the sum had been obtained by the Corporation by illegal means. That at the time it was threatened to shut off the water, no arrears of water rate were due, any that might have once been due being absolutely prescribed under the statute 29 Vic., c. 57, and could not be revived. In fact, that it was a clear case of *condictio indebiti*. The payment having been obtained by illegal constraint, and having been made under protest in no ways affected the already acquired prescription.

Baillairgé, for defendants:—The statute does not apply. It would be giving it a retroactive effect to make it cover the case. That the money was morally due, and that therefore, having been paid, could not be recovered back, even if there had been a prescription. That the prescription invoked by the plaintiff in his action referred only to the rights of the Corporation to bring certain actions, and that in the present case they had brought no action against the plaintiff. That the plaintiff, by paying the money, had renounced any right which he might have had to plead prescription.

The defendants pleaded to the plaintiff's declaration by a perpetual peremptory exception in law, which was formally overruled.

In Appeal:—

Badgley, J., after reciting the facts of the case as above given, continued as follows:

It must be observed that the provisions relied upon by either party are both contained in the same Act, and are contemporaneous (viz: s. 24, §11, and s. 36. §22, of the 29 Vic., c. 57); they both possess one common feature of applicability to past due rates. It is useless to attempt to deny the retroactivity of the prescriptive enactment; whatever may have been originally intended either by its framers or by the Legislature, its retroactivity is manifest; it is, moreover, an absolute prescription of the right of action in the Corporation for the arrears due in this cause. But it is urged that the payment made by the respondent was a renunciation of their acquired right of prescription, and not that the natural obligation of a just debt still subsisting, notwithstanding the prescription, the payment became valid and effective, and prevented the *demande* of repetition claimed in this cause. Now it is quite undeniable that the respondent was really and honestly a debtor for the arrears of water supplied to his premises, whilst it is equally undeniable that, without this opportune enactment of two years' prescription, he could not have been relieved from the payment of these arrears by anything less than the trentenary prescription. It is unnecessary to state authorities in support of legal principles so well known and so elementary as the following:—First. That all prescriptions are only *fins de non recevoir* against actions brought, and that their legal effect is simply to prevent or bar the institution of an action for the recovery of a civil debt; in other words, they bar the remedy, leaving the natural obligation in existence; and secondly, that a debtor may renounce his acquired prescription, and pay his debt, though prescribed, the natural obligation being a sufficient consideration for the payment; and in this case a legal objection may be urged against the demand for repetition, because in each case the payment cannot be said to be *condictio sine causâ* or *indebiti*. But it is also laid down that to take away the effect of acquired prescription, the payment must have been voluntary; it is not to be supposed that the effect of the prescriptive enactment of the statute was to destroy the debt altogether, it was simply making the statutory two years, prescription as absolute in effect as the trentenary, and no more; and yet Pothier and other eminent legists hold that the effect of the trentenary prescription is not to destroy or extinguish the natural obligation, but simply to take away its civil enforcement, and the validity of its payment rested entirely upon the voluntary act of the payer; if, knowing all the circumstances of fact and law in connection with it, a debtor voluntarily paid his debt which had been prescribed, his voluntary act could not be recalled, because the payment was for a valid consideration. And here it is precisely this simple point of the voluntary character of the payment which is the only real issue in this case. It was a payment made *sciemment*, not by error; but the respondent says that it was forced upon him by the act of the Corporation, and that their protest is their justification in this respect.

It is true that there was no physical force employed to compel the payment; but there was a moral force employed, which compelled to the respondent to choose one of two evils, either to pay a debt which he could not by law be forced to pay, or to pay damages which he desired to avoid; in neither case could the payment have been voluntary; it was the effect of moral pressure, and would not have been

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made without it. It was an influence which took away the voluntary character from the payment, and yet which could not be ranked with *crainte et violence.* Under these circumstances, this payment not being voluntary, but made under pressure, the plaintiff's action must stand, and the appeal be dismissed.

MONDELET, J.—Le jugement de la Cour Supérieure fait voir ce qui en est: Le voici:

"Considering that no right of action existed in the defendants in the month "of December, one thousand eight hundred and sixty-five, against the plaintiff "to enforce the payment of the sum of six hundred dollars and seventy-one cents, "or any part thereof, and yet that the defendants acting as if they had a right to "enforce payment thereof, did illegally order the stoppage of the supply of water "to the plaintiff's house, and that the plaintiff, in order to prevent damage to "his tenants, did pay to the defendants the said sum of six hundred dollars and "seventy-one cents under protest, and with the express reservation of his right "to recover the same back;

"Considering that the defendants cannot, out of their illegal act in stopping "the supply of water to the plaintiff's house, make out a legal right to retain the "said sum of six hundred dollars and seventy-one cents, which would not other- "wise have been paid to them, the Court doth adjudge and condemn the said "defendants to pay back to the said plaintiff the said sum of six hundred "dollars and seventy-one cents, with interest thereon, from the twenty-second "day of December, one thousand eight hundred and sixty-five, and costs of "suit."

La loi est formelle, et comprend le passé comme le futur.

Je trouve le jugement en première instance bien fondé, et je pense qu'il doit être confirmé.

La théorie de Pothier (Condictio Indebiti, §174) repose sur ce qu'il appelle *l'insinuation* de Marcellus quant à la distinction entre la dette due *moralement*, quoique non pas *légalement*, et Pothier fonde sur cette distinction insinuée par Marcellus, l'exception qu'il apporte au principe qu'il a énoncé, viz. V. 3e cas, art. 144):—"Je suis censé avoir payé ce qui n'est pas dû, quoique selon le "subtilité du droit, je puisse paraître en être débiteur, lorsque j'avais une excep- "tion péremptoire pour m'en défendre."

Appeal dismissed.

L. G. Baillargé, for appellants.
Lelièvre & Caron, for respondent.
(J. T. W.)

COUR SUPERIEURE.

MONTREAL, 1er AVRIL 1864.

Coram SMITH, J.

No. 1333.

Lalonde vs. *Rolland.*

JUGÉ :—1o. Qu'en matière de commerce, le créancier d'une obligation et d'un compte courant postérieur à la date de l'obligation, devrait être admis à faire preuve par témoins d'une convention verbale par laquelle il avait été stipulé que les paiements à être faits seraient d'abord imputés sur le compte courant ;

2o. Que bien qu'une obligation fut consentie pour £53 6s., défaut de considération pour partie de l'obligation doit être inféré du fait que les livres et comptes du créancier ne comportaient, lors de la passation de l'obligation, qu'une balance en sa faveur de £34 18s, 9d. et qu'il n'avait pas prouvé avoir vendu d'autres marchandises au débiteur pour compléter le montant de la dite obligation et qu'en conséquence il devrait être condamné à donner quittance au débiteur s'il était prouvé que le montant de cette obligation avait été payé jusqu'à concurrence de cette somme de £34 18s. 9d.

Le demandeur poursuivait le défendeur pour le faire condamner à lui passer quittance d'une obligation de £53, 6s. courant, consentie par lui en faveur du défendeur, le 1er août 1855, et pour faire radier une hypothèque résultant de l'enregistrement de cette obligation. Il prétendait avoir plus que payé cette obligation et produisait des reçus pour un montant d'au-delà de £100 courant, ainsi qu'un protêt par lequel le défendeur avait été sommé de signer quittance.

Le défendeur répondit à cette action qu'il lui restait dû, sur le montant de cette obligation, une balance de £27, 6s. courant, et était ainsi bien fondé à refuser d'en donner quittance. Que les diverses sommes aux moyens desquelles le défendeur prétendait avoir achevé d'éteindre la dite obligation, avaient été données en paiement d'un compte courant de marchandises vendues par lui au demandeur subséquemment à la passation de cette obligation. Que, *en vertu d'une conventien verbale* intervenue entre les parties, les paiements subséquents à la date de l'obligation avaient été imputés sur ce compte courant, et ne pouvaient être portés en déduction de l'obligation qu'après extinction complète du compte courant.

Les reçus n'énonçaient aucune imputation particulière, étant conçus en termes généraux : " Reçu accompte," à l'exception d'une quittance notariée en date du 7 février 1861, pour une somme de £50, qui aurait été payée sur les intérêts et le principal de la dite obligation, par le demandeur.

Le défendeur ayant produit à l'enquête le nommé McKercher, son ancien teneur de livres, dans le but de prouver la convention verbale ci-dessus, lui fit la question suivante : " Avez-vous eu connaissance d'aucune convention ou entente " entre les parties en cette cause, au sujet de l'imputation des paiements faits " par le demandeur, et auquel il est référé en cette cause ?"

Le demandeur s'objecta à cette question " comme étant illégale et tendant à " prouver outre et contre le contenu des reçus donnés par le défendeur au de- " mandeur et à établir une imputation de paiements déjà faite au moyen des " dits reçus et par l'opération de la loi."

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Cette objection ayant été rejetée par le juge président à l'enquête, le demandeur fit motion le 26 octobre 1863, devant la Cour Supérieure présidée par Son Honneur le juge Berthelot, " que la décision rendue à l'enquête et rejetant l'ob-" jection ci-dessus, fût revisée et modifiée de manière à maintenir la dite objec-" tion."

Cette motion fut rejetée, par jugement interlocutoire rendu sur icelle le 31 octobre 1863.

Le demandeur produisit une exception à ce jugement, et l'enquête fut continuée. Il fut prouvé que lors de la passation de l'obligation en question et subséquemment à cette date, le défendeur était formellement convenu avec le demandeur de lui faire de nouvelles avances en marchandises, avec la condition expresse que tous les paiements qui seraient faits seraient d'abord imputés en paiement des nouvelles avances, et mis à compte de l'obligation qu'après extinction complète du compte courant.

Lors de l'audition finale, le demandeur contesta de nouveau la valeur de la preuve permise à l'enquête.

Bélanger pour le demandeur.—L'action du demandeur est à l'effet d'obtenir quittance complète de son obligation du 1er août 1855, et radiation de l'hypothèque créée par cette obligation. Nous avons prouvé, tant par les admissions du défendeur que par des reçus que plus de £100 ont été payés par le demandeur depuis que cette obligation est devenue due, somme qui, dans tous les cas, est plus que suffisante pour l'éteindre complétement tant en capital qu'intérêts.

Le défendeur a fait preuve d'une convention verbale intervenue entre les parties, en vertu de laquelle il prétend affecter ces paiements à l'extinction d'un compte courant de marchandises vendues depuis la date de l'obligation. Cette preuve doit être rejetée du dossier en autant quelle est contraire à la loi. Elle ne tend à rien moins qu'à prouver *outre* et *contre* le contenu des reçus donnés par le défendeur au demandeur.

1o. Elle prouve outre le contenu des reçus en ce qu'elle tend à établir que ces sommes ont été données à-compto d'un compte courant, ce dont les reçus ne font pas mention ;

2o. Elle prouve *contre* le contenu de ces reçus et tend à les contredire : Il n'y est fait aucune mention de la créance sur laquelle ces sommes sont imputées. Or, en l'absence de telle imputation formellement exprimée, la loi est là pour opérer l'imputation et déclarer que cette imputation se trouve faite de plein droit sur la créance la plus ancienne, la plus onéreuse, laquelle, dans le cas actuel, se trouve être l'obligation. Les règles concernant l'imputation des paiements sont tellement claires, les opinions des auteurs qui ont écrit sur la matière sont tellement uniformes sur ce point, qu'il ne peut y avoir de doute à ce sujet.

Or, la loi ayant imputé de plein droit, à-compte de l'obligation, les paiements constatés par les reçus en question, c'est donc prouver contrairement à ces reçus que de prouver une imputation de ces paiements sur une autre créance.

D'ailleurs, l'admission d'une preuve testimoniale dans un cas semblable est évidemment contraire à notre droit et spécialement aux dispositions du statut des fraudes qui régit la preuve de semblables conventions en matière de commerce.

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En second lieu, il résulte d'un état de compte produit par le défendeur lui-même, au soutien de son action, que c'est par erreur que l'obligation a été consentie pour £53 6s. et qu'elle n'aurait dû être que pour £34 18s. 9d. Aussi, y est-il stipulé qu'elle devra être réduite, s'il y a lieu. Il appert aussi à cet état de compte que les paiements faits par le demandeur sont suffisants pour éteindre à la fois, et l'obligation réduite comme dit ci-dessus, et le compte courant, en sorte que, quoiqu'il en puisse être de la question d'imputation, le demandeur doit, dans tous les cas, obtenir les conclusions de son action, le montant de £34. 18s. 9d courant et intérêts se trouvant éteint par le seul paiement du 7 février 1861, dont l'imputation est faite par la quittance sur l'obligation.

Trudel pour le défendeur.—De ce que les livres du défendeur ne comportaient lors de la passation de l'obligation, qu'une balance de £34. 18s. 9d. courant en sa faveur, il ne s'ensuit nullement que l'obligation doive être réduite à cette somme, vu que le montant a dû en être complété lors de la passation de l'obligation. La preuve établit qu'il est de coutume dans le commerce de passer une obligation pour un montant convenu, lequel est ensuite complété par une vente de marchandises, si l'ancien compte ne se monte pas à la somme stipulée en l'obligation. Cette vente, censée payée par l'obligation est en conséquence réputée faite argent comptant et entrée comme telle dans les livres, sans qu'il en soit fait mention au compte du débiteur. C'est l'explication qu'on donne le défendeur interrogé comme témoin. Il est vrai que l'obligation porte : " Sauf à déduire," mais seulement " si le débiteur produit des reçus." Or, il faut prendre cette clause telle qu'elle est. C'est la loi que les parties ont établie entre eux, et par laquelle ils doivent être régis. Or, le demandeur ne produit pas de reçu pour faire diminuer l'obligation. D'un autre côté, rien ne prouve qu'il y ait eu défaut de considération, rien, si ce n'est que les livres ne montraient lors de sa passation, qu'une balance de £34. 18s 9d. Tous les témoins jurent, d'ailleurs, que le demandeur a reçu pleine considération pour tout le montant et expliquent comment. C'était au demandeur à faire la preuve formelle du défaut de considération, preuve nécessaire au soutien de ses prétentions et qu'il n'a pas faite.

En second lieu, il s'agit d'apprécier à leur juste valeur les objections que le demandeur oppose à l'admission de la preuve testimoniale faite par le défendeur de l'imputation des paiements sur le compte courant. Il prétend que l'imputation se trouvant faite par les reçus sur l'obligation, ce serait contredire les reçus que de prouver une imputation sur une autre créance. Cette prétention est mal fondée ; et le défendeur maintient qu'au contraire, si d'après la teneur des reçus, il y a imputation, elle est faite sur le compte courant. Les reçus étant conçus d'une manière générale et en termes vagues, on ne peut attacher à ces mots : " Reçu accompte " que la signification qu'ils ont communément et qu'on leur donne dans le langage du commerce. Or, quelle est leur signification dans les affaires et suivant les usages et coutumes établies ? Il est établi par les témoins Chs. McKercher et L. J. Beliveau, hommes d'une grande expérience dans ces matières, que ces mots : " Reçu a/c " sans désignation d'aucun titre de créance, signifient invariablement, dans le commerce, à-compte d'un compte courant. Or, la preuve de cet usage doit être reçue par les tribunaux :

..............................." Proof of usage is admitted, either to interpret the

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" meaning of the language of the contract, or to ascertain the nature and extent of
" the contract, in the absence of express stipulations, and when the meaning is
" equivocal and obscure."

1 Greenleaf on Ev. § 292, p. 389.

Ce qui est coutume générale dans le commerce tel qu'expliqué ci-dessus est au reste, confirmé par un principe de droit soutenu par des auteurs dont l'opinion fait autorité, et qui établissent qu'en matière de compte courant, les règles ordinaires concernant les imputations cessent d'être appliquables.

2 Gouget et Merger, Nos. 28 et 29, p. 300.

Après avoir énoncé les règles ordinaires sur l'imputation sur lesquelles le demandeur base ses prétentions, Massé ajoute :............" Les règles qui précèdent,
" sur l'imputation légale, ne sont pas appliquables en matière de compte courant,
" notamment celle d'après laquelle les paiements s'imputent sur la dette la plus
" onéreuse et la plus ancienne............Cette différence entre les dettes résultant
" d'un compte courant et les dettes ordinaires, proviennent de ce que les remises
" réciproquement faites par compte courant ne sont pas des paiements...........
" mais une sorte de contrats de prêts réciproques."

3 Massé, Droit Commercial, No. 350.
5 Idem, No 267.
3 Gouget et Merger, Vo. Imputation, p. 453-54.
2 Idem, Vo. Compte Courant, p. 300.
E. Cadrès, Code Civil mis en harmonie avec le Droit Commercial, p. 108.

Ces opinions ne sont inspirées par aucune nouvelle disposition du droit nouveau français, vu que le code n'a nullement innové en cette matière. Elles doivent donc être prises comme l'interprétation de l'ancien droit sur ce sujet.

Ainsi, s'il y a eu imputation, elle se trouve faite sur le compte courant.

Les prétentions du demandeur sont-elles mieux fondées dans le cas où il admettrait qu'il n'y a pas imputation faite d'après les reçus ?

Les reçus sont conçus comme suit : " Reçu &c" sans définir sur quelle créance. Or, dit le demandeur, la loi vient compléter la teneur des reçus en déclarant que la créance n'étant pas spécifiée, l'imputation se trouve faite sur l'obligation.

D'abord, la loi ne fait l'imputation que si les parties ne l'ont pas faite. Si au contraire, les parties ont fait l'imputation sur le compte courant, que ce soit par convention verbale ou autrement, l'effet de la loi se trouve arrêté par là.

Or, ce qu'a voulu prouver le défendeur, c'est que l'imputation a été faite par convention des parties. S'il a réussi dans cette preuve, il a établi que la loi n'avait pas fait l'imputation sur l'obligation. La seule objection raisonnable qui pourrait être faite à la production de telle preuve, n'est donc pas qu'elle tend à prouver contrairement aux reçus, mais seulement qu'elle tend à prouver par témoins une convention qui ne serait susceptible d'être établie par preuve testimoniale.

Les seules questions qui puissent se présenter sont donc :

1o. De savoir si, en matière de commerce, l'on peut prouver une convention verbale effectuant une imputation de paiements qui n'est pas faite par les reçus.

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2o. Si, (ce qui n'est qu'un développement de la question ci-dessus), l'on peut être admis à ajouter, par preuve testimoniale, aux reçus en question, de manière à leur faire comporter une imputation sur une créance spécifiée ; et si l'on peut prouver outre le contenu de ces reçus et expliquer, par preuve testimoniale, la portée des mots incomplets ou ambigus qui s'y trouvent.

Pour arriver à la solution de la première de ces questions dans le sens des prétentions du défendeur, il suffit de remarquer qu'il s'agit, dans le cas actuel, d'une convention en matière commerciale, que ne peut atteindre le Statut des Fraudes que le demandeur a invoqué en sa faveur, vu qu'elle n'entre pas dans la série des cas auquel il s'applique : Voir Stat. Imp. 29e Charles II, chap 3, lequel ne régit que les contrats qui y sont spécialement énumérés et nul autre.

2 Philipps on Ev., p. 364-65.
McKay *vs.* Rutherford, 13 Jurist Anglais, part 1, p. 21 à 23.
2 Kent Comment., note 2, p. 673.
2 Stephens Comment., p. 110.
3 Saunders, p. 581.

Le cas actuel ne se trouvant pas excepté par le Statut des Fraudes, tombe sous les dispositions générales de notre loi statutaire qui admet les règles du droit commun Anglais relativement à la preuve en matières commerciales, règles qui au reste sont, quant à l'admissibilité de la preuve testimoniale, conformes à l'ancien et au nouveau droit commercial Français.

Voir 9 Toullier, Nos. 231, 232, 233.
Voir Pardessus, Droit Com., No. 262.
1 Greenleaf on Ev., Nos, 284-85.
2 Philipps on Ev., p. 364-65.

Quant à la deuxième question, qui est de savoir si l'on peut être admis à ajouter aux reçus en question et à en expliquer les termes incomplets ou ambigus par preuve testimoniale, et à prouver outre le contenu de ces reçus, les meilleurs auteurs Anglais sur la preuve et la Jurisprudence tant Anglaise que Canadienne l'ont résolue dans l'affirmative.

Ainsi, la preuve testimoniale est toujours admise :

1o. Pour prouver les paro lesambigues d'un contrat.

1 Greenleaf on Ev., § 297 et 298.

2o. Pour expliquer un document conçu en termes courts et incomplets.

Idem, § 282.
Garth *vs.* Woodbury et al, 1 L. C. Jurist, p. 43.
Evans *vs.* Pratt, 3 Manning et Granger, p. 759.
Sweet *vs.* Lee, Manning et Granger, p. 452.

Il a même été établi que dans le cas même où il résulterait une forte présomption en un sens, d'après la nature d'un écrit, cette prétention peut être détruite par la preuve testimoniale de l'intention contraire des parties.

2 Pothier annoté par Evans, p. 181.
1 Greenleaf on Evidence, § 296.

Plusieurs auteurs et de nombreuses décisions, soutiennent qu'il peut être fait preuve par témoins d'une convention verbale modifiant un contrat écrit, ou ajoutant aux obligations contractées par ce contrat.

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2 Philipps on Evidence, p. 364–65
Allen *vs.* Pink, 4 Meeson et Welsby R., p. 143–44
Cove *vs.* Coleman, 4 Manning et Ryland, p. 2.
Powell *vs.* Harton, Bingham's R., p. 668.
McKay *vs.* Rutherford, 13 Jurist Anglais, déja cité.
Ellice *vs.* Thompson, 2 Meeson et Welsby, p. 445.

Le demandeur est donc mal-fondé à alléguer l'illégalité de la preuve du défendeur; et l'imputation doit être faite suivant les conventions alléguées dans l'exception péremptoire du défendeur, lesquelles ont été abondamment prouvées à l'enquête.

Par son jugement, la cour a maintenu les prétentions du défendeur quant à la légalité de la preuve faite de la convention verbale relative à l'imputation des paiements et a, en conséquence, imputé d'abord les paiements faits par le défendeur, subséquemment à la passion de l'obligation du 1er août 1855, sur le compte courant; et ne les a comptés en déduction de la dite obligation qu'après complète extinction du compte. Mais elle a en même temps décidé que, vu qu'il apparaissait par les livres et comptes mêmes du défendeur, qu'à l'époque de la passation de la dite obligation il n'était dû que £34. 18s. 9d, le montant de l'obligation était réduit à cette somme et intérêts. En conséquence de cette diminution, toutes créances du défendeur contre le demandeur, tant celle résultant du compte courant que celle créée par l'obligation, se trouvant complétement payées et éteintes, l'action du demandeur a été maintenue avec dépens.

Le jugement de la cour est motivé comme suit:

La cour, après avoir entendu les parties par leurs avocats sur le mérite de cette cause, examiné la procédure, pièces produites et preuve et sur le tout mûrement délibéré:

Considérant que le demandeur a établi, par preuve légale et suffisante, qu'au temps de la passation de l'obligation du 1er août 1855, mentionnée en la déclaration en cette cause, il ne devait pas plus que la somme de £34. 18s. 9d, pour prix de marchandises et effets à lui vendus et livrés par le dit défendeur créancier de la dite obligation et que la dite obligation a été consentie par erreur pour le montant de £53. 6s. 0d. etc., etc., condamne le défendeur à signer et consentir au dit demandeur, sous 15 jours de la signification à lui faite du présent jugement une quittance et décharge en bonne et due forme authentique devant notaires du montant en capital et intérêts de la dite obligation du 1er août 1855, avec consentement de la part du dit défendeur à la radiation de l'hypothèque résultant de l'enrégistrement de la dite obligation, et *à défaut* par le dit défendeur de signer et consentir telle quittance dans le délai susdit, la cour déclare que la dite somme de £34. 18s. 6d, et tous les intérêts accrus sur icelle ont été plus que payés et compensés avant l'institution de cette action et le présent jugement tiendra lieu au dit demandeur de telle quittance et décharge de la dite obligation et hypothèque et la cour condamne le défendeur aux dépens.

Bélanger et Desnoyers, avocats du demandeur.

Denis, avocat du défendeur.

F. X. A. Trudel, conseil.

(F. X. A. T.)

En Revision.

MONTREAL, 29 SEPTEMBRE 1866.

Coram Badgley, J., Berthelot, J., Monk, J.

No. 1200

Dorion vs. *Hydè and vir.*

Jugé :—Que l'acquéreur de biens immeubles qui a de fortes raisons de craindre qu'il sera troublé par quelque action hypothécaire en revendication, a droit de retenir les *interets* de son prix de vente, de même que le capital.*

Dans son factum en révision le demandeur exposait ses prétentions comme suit :

Dans la présente cause dont le demandeur demande la révision, s'élèvent deux questions ; la première est de savoir si un vendeur peut poursuivre efficacement un acheteur pour le prix d'acquisition et l'obliger de payer même quand il y a des hypothèques sur la propriété vendue en lui donnant un cautionnement pur et simple ou sans caution.

La seconde question découle de la première ; en supposant que le vendeur ne peut forcer l'acheteur à lui payer le prix d'acquisition, peut-il au moins le forcer à payer les intérêts quand il a été stipulé que l'acheteur paierait des intérêts au vendeur.

Quant à la première question, le demandeur poursuit les défendeurs pour le paiement qu'ils ont promis de payer en vertu d'un certain acte de vente du six mars mil huit cent soixante et un, entre le demandeur et les défendeurs.

Les défendeurs après avoir fait plusieurs paiements refusent de continuer les autres paiements, parcequ'ils disent qu'il y a des hypothèques sur la propriété qui ne sont pas rayées au Bureau d'Enrégistrement. Le demandeur prétend que les défendeurs ont tort de se plaindre qu'il existe des hypothèques, parceque par le certificat du Bureau d'Enrégistrement produit par les défendeurs il appert que le demandeur a acheté la propriété en question il y a audelà de vingt années faisant disparaître par là toute raison de se plaindre de la part des défendeurs qui représentent le demandeur ; parceque quant aux hypothèques qui peuvent exister et être un sujet de trouble, le demandeur a produit une quittance et un cautionnement personnel suffisant pour garantir les défendeurs du trouble que les défendeurs peuvent redouter par suite des hypothèques mentionnées dan le dit cautionnement.

Le demandeur, convaincu que les défendeurs accepteraient une caution solvable, de plus une quittance avec la garantie que leur assurait la prescription de vingt ans, a pensé que les défendeurs n'invoqueraient pas la subtilité du droit à la demande du demandeur.

Le demandeur néamoins prétend humblement qu'il aurait dû être mis en demeure régulièrement de faire disparaître les hypothèques mentionnées au certificat, sans quoi les défendeurs s'exposaient à payer des frais, s'étant exposés par bon acte de vente à payer à une époque fixe, car ils ne peuvent manquer à leur engagement sans s'exposer aux frais, à moins qu'ils ne mettent le demandeur en demeure de remplir les soins auxquels il s'est obligé tacitement, n'ayant pas fait de clause spéciale dérogeant à la loi.

* Vide, Status Refondus, B. C., ch. 36, sec. 31.

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Le demandeur passera à la seconde question, celle de savoir :

Le demandeur réclame par son action, non seulement le montant en capital du prix de vente, mais encore il demande le paiement des intérêts que les défendeurs se sont obligés de payer par le dit acte de vente.

En outre le demandeur prétend qu'il a droit d'avoir les intérêts du prix de vente, parce que la loi commune comme la loi statutaire est positive et établit uniformement que l'acheteur ne peut jouir de la propriété et des intérêts du prix de vente, quand il a été stipulé que l'acheteur paierait des intérêts.

Dans la présente cause les défendeurs ont promis des intérêts dont le montant échu s'élevait à la somme de cinquante-trois piastres lors de l'institution de la présente action, et dont le montant annuel des intérêts se monte à la somme de cinquante-deux piastres sur balance du prix de vente que les défendeurs redoivent encore au demandeur.

En supposant que les défendeurs seraient en droit justifiables à retenir ces intérêts et à jouir de la propriété pour les raisons alléguées par les défendeurs, les défendeurs retiendraient les intérêts tant que le demandeur ne pourrait faire disparaître les hypothèques, et supposant que le demandeur ne pourrait jamais faire rayer les hypothèques au Bureau d'Enrégistrement, soit parce qu'il serait absent ou mort sans héritiers connus, les défendeurs jouiraient de la propriété et des intérêts contrairement à la loi.

Nous disons contrairement à la loi, parce que la loi veut que l'acheteur qui craint d'être troublé, puisse retenir le prix de vente, jusqu'à ce que les raisons de trouble disparaissent, afin qu'il ne soit pas exposé à payer deux fois ; on ne peut alléguer cette raison quant aux intérêts, l'acheteur ne payant les intérêts qu'à termes fixes ; au jour de l'échéance l'acheteur a déjà joui pendant tout le temps passé des revenus de la propriété qui répresentent les intérêts ; l'acheteur sera mal reçu à dire qu'il est lésé par là, parcequ'il y a des hypothèques sur la propriété ; les hypothèques n'affectent que le capital, et quelque soit le montant du capital des hypothèques dont la propriété est grevée, parceque en supposant que l'acheteur serait évincé il ne perdra que la propriété dont il a le prix entre les mains, mais quant aux frais, sera-t-il obligé de les rembourser, non, jamais ! aucune contestation là-dessus, l'acheteur a donc tort de dire qu'il en souffrira s'il paie les intérêts quand il jouit des revenus.

Cette doctrine est unanimement confirmée par tous les auteurs sans distinction, parmi lesquels nous citons les suivants :

Zachariae, vol. 16, page 534, notes marginales, 9, 10, 13.
Marcadé, sur l'art, 1652.
Pothier, traité de la vente, No. 286.
Duranton, vol. xvi. 348.
Troplong ii. 642.
Delvincourt 1, iii. page 155.
Duvergier 1, 420.

Les défendeurs en révision sur la question des intérêts ont remarqué ce qui suit : Le demandeur peut-il exiger les intérêts sous les circonstances ?

La défenderesse soumet humblement que le demandeur ne peut exiger ni capital ni intérêts, tant qu'il ne s'est pas conformé aux prescriptions de la section 31 du ch. 36 des S. R. B. C.

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Cette clause dit en effet formellement que l'acquéreur gardera *shall retain the purchase money* si le vendeur ne fait radier les hypothèques ou ne donne bonne et suffisante caution; la version anglaise sous ce rapport est beaucoup plus forte que la version française *shall retain the purchase money*, c'est-à-dire, gardera entre ses mains tout l'argent de l'acquisition; d'ailleurs, l'accessoire suit toujours le principal, à plus forte raison, a-t-il droit de garder les intérêts qui ne sont que les accessoires du capital; mais nous le répétons, la loi ne laisse même pas place à ce raisonnement et ne fait pas de distinction, elle ne parle pas du capital seulement, mais elle, dit, *purchase money*, c'est-à-dire, tout l'argent de l'acquisition.

La loi et les jugements décident formellement que l'acquéreur a le droit de retenir et le capital et les intérêts.

Voir surtout les jugements des Honorables juges Smith, Monk, Berthelot, où la question se trouve vidée dans ce sens; L. C. Jurist, vol. 6, p. 242. 7 vol. p. 32. 8 vol p. 38

Les jugements sont rendus en faveur des demandeurs, mais exécution en est sursis quant au *capital et aux intérêts*, jusqu'à radiation des hypothèques ou cautionnement donné, et c'est juste; les intérêts courent, mais ne sont pas exigibles, afin de forcer le vendeur à faire disparaître le trouble et les causes de craintes de trouble. La Cour d'Appel a d'ailleurs confirmé cette sage jurisprudence d[illegible]r Supérieure.

[illegible]eurs, il est si facile au demandeur de toucher ses intérêts, trois des hypothèques sont de son fait, que ne les fait-il radier? Suivant lui, les autres sont prescrites, pourquoi ne les fait-il pas déclarer telles?

Le jugement de la Cour Supérieure rendu à Montréal, (Smith, J.) le 30 avril 1866, et qui fut confirmé par la Cour de Révision, est motivé au long comme suit:

La cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure et pièces produites et avoir délibéré: considérant que le demandeur a établi en preuve que la défenderesse, Dame Mary Hyde, lui est endettée en une somme de deux cent cinquante trois dollars et huit centins, cours actuel de cette province, due comme suit savoir; la somme de deux cent dollars étant le terme de paiement devenu dû et exigible le premier mai mil huit cent soixante cinq par et en vertu de l'acte de vente de l'immeuble y mentionné fait et consenti par le dit demandeur à la dite défenderesse, reçu devant maître Joseph Simard et son confrère, notaires, le six mars mil huit cent soixante et un; et celle de cinquante trois dollars et huit cents pour les intérêts sur celle de six cent cinquante dollars, balance du dit prix de vente calculés au taux de huit par cent depuis le premier mai mil huit cent soixante quatre jusqu'au seizième jour de juin mil huit cent soixante et cinq, jour de l'assignation en cette cause.

Et considérant que la dite vente a été faite avec garantie de tous troubles et empêchements, généralement quelconques, et de plus qu'il paraît et qu'il est clairement établi par des actes et documents produits en cette cause par la dite défenderesse au soutien de son *exception péremptoire ou fin de non recevoir* plaidée à cette action, que le dit immeuble au temps où la dite vente en a été faite et consentie, était et est encore grévé, chargé et hypothéqué des charges, priviléges et hypothèques suivants, savoir:

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1o Pour la somme de cinq cents louis, du cours actuel, montant du douaire préfix non encore ouvert, etc.

2o. Pour la somme de trois mille louis, dit cours, etc.

3o. Pour la rente constituée, capital, intérêts et cinq ans d'arrérages au capital de cent cinquante louis et un denier, etc.

4o. Pour la somme de deux mille louis, dit cours et intérêts, etc.

5o. Pour l'hypothèque légale et générale reconnue et admise par le demandeur dans sa première réponse à l'exception de la dite défenderesse, etc.

6. Pour l'hypothèque générale et légale de six mille louis, dit cours montant, etc.

Et la cour considérant que la dite défenderesse, en conséquence de ces dites hypothèques, charges et privilèges, a raison de craindre qu'elle sera troublée dans la jouissance et possession du dit immeuble et prémisses, et que partant et suivant le statut en tel cas pourvu, la dite défenderesse a droit de retarder le paiement de la partie du dit prix de vente et intérêts réclamés en cette cause, et de garder entre ses mains, en entier jusqu'à ce que le dit demandeur ait fait cesser les craintes de trouble de la dite défenderesse; maintient la dite *exception péremptoire, ou fin de non recevoir* plaidée par la dite défenderesse à cet égard et faisant droit sur la demande du dit demandeur, condamne la dite défenderesse à payer au dit demandeur, la dite somme de deux cent cinquante trois dollars et huit centins avec intérêt à huit par cent sur celle de deux cent dollars, à compter du seize juin mil huit cent soixante et cinq, jusqu'à parfait paiement, mais la cour ordonne qu'il soit sursis à l'exécution du présent jugement, tant pour le capital que pour les intérêts jusqu'à ce que le dit demandeur ait donné bonne et suffisante caution sous l'hypothèque de biens immeubles au Bureau du Protonotaire de cette cour, en la forme ordinaire, le cautionnement personnel par lui offert et fourni étant insuffisant, qu'elle, dite demanderesse, ne sera jamais troublée ni inquiétée dans la jouissance du dit immeuble et prémisses à elle vendues par le dit demandeur le six mars mil huit cent soixante un, devant maître Joseph Simard et son confrère, notaires, à raison des susdites charges, privilèges et hypothèques.

Et la cour considérant que le montant des hypothèques, charges et privilèges dont est grévé le dit immeuble, est de beaucoup plus élevé que le montant encore dû par la défenderesse au demandeur, et que la défenderesse a, avant que la terme de paiement réclamé en la présente action ne devint échu, dénoncé au demandeur les susdites charges, hypothèques et privilèges; considérant que le dit demandeur ni par sa déclaration en cette cause, ni par ses réponses à la dite exception de la défenderesse n'a offert de donner bonne et suffisante caution à la dite défenderesse pour la garantie de tous ces dits troubles, considérant que le dit demandeur n'a, sous les circonstances, aucun droit aux intérêts par lui réclamés dans sa deuxième réponse à la dite exception péremptoire de la défenderesse, a renvoyé et débouté les susdites deux réponses, et le condamne lui, dit demandeur, à payer les frais de la présente action tant en demandant qu'en défendant, desquels dépens, distraction est accordée à Messieurs Mousseau et David, avocats et procureurs de la dite défenderesse.

Et la cour ordonne et adjuge de plus que si d'ici à un mois le demandeur n'a

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pas fourni à la dite défenderesse le cautionnement ci-haut ordonné, son action en cette dite cause sera, à partir de ce délai, déboutée purement et simplement avec dépens comme dit est.

Jugement confirmé.

Dissentiens.—L'Honorable M. le Juge Badgley.
Kelly & Dorion, avocats du demandeur.
Mousseau & David, avocats des défendeurs.
(P. R. L.)

MONTREAL, 20 DECEMBRE 1867.

Coram BERTHELOT, J.

No 932.

Jones vs. *Martin*.

JUGE :—Que sur motion pour règle-nisi contre un gardien pour refus de livrer des effets saisis en vertu d'un bref de saisie-revendication, le gardien doit être, sur la dite motion et avant l'émanation de la règle, admis à faire preuve qu'il a livré les effets, que le demandeur en a été régulièrement mis en possession et les possède encore.

Le demandeur ayant fait saisir, par voie de saisie-revendication, une cargaison de charbon, obtint de la Cour Supérieure, sur requête à cet effet, et en donnant caution, d'être mis en possession de ce charbon lui appartenant.

Le 17 décembre 1866, il fit motion que, vu le refus par le gardien de lui livrer le charbon, il émanât une règle pour contrainte par corps contre le dit gardien.

Le dossier contient un ordre du shérif au gardien de livrer le charbon. Sur le dos de cet ordre, se trouve le retour de l'huissier qui fait rapport qu'il a sommé le gardien de livrer le charbon, " ce que ce dernier n'a pas fait, alléguant que le dit charbon était dans une cour fermée au cadenas, dont il n'avait pas la clef."

A cette motion, le gardien a fait une réponse par écrit où il allègue que bien loin de refuser de livrer le charbon, il en avait fait la livraison au demandeur qui s'en était mis en possession et en avait même enlevé une partie bien avant la signification à lui faite de l'ordre du shérif et qu'il le possédait encore ayant en mains la clef de la cour où il se trouvait ; que lors de la signification à lui faite du dit ordre, il avait de nouveau dit à l'huissier de prendre le dit charbon et de l'enlever ; et que ce dernier lui dit alors de ne pas se donner de trouble pour lui procurer la clef de la cour, l'assurant que le demandeur l'avait encore en sa possession.

Girouard, pour le demandeur.—Cette motion doit être accordée, sauf au gardien à procéder, sur la règle, à la preuve des faits par lui allégués, comme il est d'usage de le faire. Le gardien ne peut être reçu à faire cette preuve sur la motion, ce qui serait déroger à la coutume générale établie en pareil cas.

Trudel, pour le gardien.—La motion étant basée sur le fait que le gardien a refusé de livrer les effets au demandeur, et le gardien offrant de prouver qu'il les lui a livrés, que le demandeur s'en est de suite mis en possession, les possède encore et en a même enlevé une partie, il ne resterait plus, après cette preuve même un seul prétexte à alléguer en faveur de l'émanation de la règle. La position du gardien deviendrait plus désavantageuse, par le fait de l'émanation de la règle qui pourrait être déclarée absolue et même mise à exécution, si par

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quelque circonstance imprévue le gardien était empêché d'y répondre Il ne doit pas être exposé à cet inconvénient et la motion doit être rejetée, s'il est prouvé qu'elle est mal fondée dans son principe. Il ne s'agit pas dans l'espèce actuelle, pour le gardien, de donner de bonnes raisons pour se justifier de n'avoir pas livré les effets, tel que le cas se présente ordinairement, mais au contraire de prouver qu'il a fait la livraison des effets saisis au demandeur lui-même qui en a pris possession, en a disposé à son gré et les possède encore.

Per Curiam.—Bien que la coutume soit de ne procéder à la preuve que sur la règle, il est beaucoup plus logique de faire cette preuve sur la motion elle-même, et de n'accorder la règle que si la partie requérante est bien fondée à l'obtenir. Dans le cas actuel, le gardien a répondu par écrit à la motion et allégué qu'il avait livré les effets : C'était la meilleure procédure qu'il y eût à suivre, et la motion ne devra point être accordée si le gardien réussit à prouver les allégués de sa réponse.

En conséquence, la cour ordonne qu'il soit procédé à la preuve avant qu'il soit adjugé sur la dite motion.

D. Girouard, pour le demandeur.

F. X. A. Trudel, pour le gardien.

(F. X. A. T.)

MONTREAL, 20 DECEMBRE 1866.

Coram BERTHELOT, J.

No. 1204.

Doyle vs. *Clément.*

JUGÉ :—Qu'il n'est pas nécessaire dans une action sur billet promissoire d'alléguer dans la déclaration que tel billet est timbré au désir de la loi.

Le demandeur réclamait le montant d'un billet promissoire souscrit par le défendeur le 27 juin 1866, pour $215.78. Le défendeur plaida une défense au fond en droit et les raisons à l'appui de sa défense étaient celles-ci :

1o. Parce qu'il n'appert pas, par la dite déclaration filée en cette cause, que le billet promissoire sur lequel repose la présente action, est légal et a été accompagné et revêtu des formalités requises par la loi pour le rendre valable à toutes fins de droit.

2o. Parce que la déclaration du demandeur filée en cette cause, n'allègue pas et ne fait pas voir que, à l'époque où le billet promissoire sur lequel repose la présente action, a été souscrit ou en aucun temps, un timbre ou des timbres, tel que requis par la loi, a, ou ont été apposés sur le dit billet promissoire, ni que le dit timbre ou les dits timbres voulus par la loi, a, ou ont été apposés au dit billet promissoire en la manière requise par la loi, en écrivant ou en estampant sur le ou les timbres, la date à laquelle il a ou ont été apposés.

Per Curiam.—Cette question ne peut être soulevée qu'après l'enquête et lors de l'audition sur le mérite de la cause.

Défense en droit renvoyée.

Perkins, avocat du demandeur.

Grenier, avocat du défendeur.

(P. R. L.)

MONTREAL, 30 DECEMBRE 1865.

Coram BERTHELOT, J.

No. 534.

Ferguson vs. Joseph.

JUGE:—Que le propriétaire d'arbres forestiers croissant sur sa propriété; en existence depuis plus de trente ans et avoisinant son co-propriétaire; doit être maintenu dans la possession de ces arbres dans l'état dans lequel ils sont.

Le demandeur poursuivit le défendeur en dommages et par sa déclaration, il exposait ses prétentions comme suit :

That the plaintiff had been several years in possession as proprietor of a lot of land in the city of Montreal (described in his declaration) with choice plum, apple, and other fruit trees thereon, and which he also cultivated as a garden, and that he derived profits from the fruits and products thereof.

That the defendant was during the same period in possession as proprietor of a lot of land adjoining that of the plaintiff (also described in the plaintiff's declaration) with poplar and willow trees growing thereon, so close to the division line as that for several years their roots and branches had extended into, over, and upon lot of plaintiff.

That through the negligence of defendant during the last three years these roots and branches had so extended as to prevent the growth of plaintiff's fruit trees and vegetables, and damage and destroy them.

That the trunks and bodies of the willow and poplar trees of defendant had increased in size, some touching the division line and others being only within a foot or two of it.

That during the last three years, and particularly during the last year (1864), through the negligence of the defendant, caterpillars and other insects destructive to vegetation had formed and been fostered by defendant on his poplar and willow trees, and through his negligence had fallen from the overhanging branches on to plaintiff's fruit trees, and eaten and destroyed them, and their leaves and blossoms.

That plaintiff had often requested defendant to cut off and remove the branches and roots so extending over and injuring the soil and fruit trees of plaintiff, and to take proper precaution to prevent the caterpillars dropping and falling and crawling on to plaintiff's fruit trees, and particularly by protests and notices in writing; but that defendant had neglected.

That during two or three weeks in June then last (1864) plaintiff had to employ men and boys to destroy the caterpillars which so fell from defendant's negligence, and expended money in so doing.

That by reason of the premises the plaintiff had suffered damage £25 currency.

That therefore plaintiff prayed that by the judgment of Court the defendant be ordered to cut off, root up, and remove the branches and roots so spread and extended over, on, and into plaintiff's land, and to remove the willow and poplar

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trees to such a distance as that no further injury be done to plaintiff; and that failing to do so within such delay as the Court should appoint, that the said branches and roots be cut off, rooted up, and removed under the authority of the Court, and the willow and poplar trees cut down or removed to such distance as no longer to injure plaintiff's land, and that defendant be condemned to pay the plaintiff for his damages in the premises, £25 currency and costs.

Dans une exception, le défendeur invoquait par lui et ses auteurs, une possession de trente ans, *animo Domini*; il alléguait que les arbres en question ont existé depuis plus de trente ans, et que cette plantation continue et la croissance des branches pendant cet espace de temps, constituent un droit de prescription en sa faveur; que quant aux dommages prétendus avoir été causés par les chenilles et autres insectes, *l'échenillage* n'est pas obligatoire en ce pays; qu'en loi il n'est pas responsable, chaque propriétaire de verger étant, suivant une coutume immémoriale, tenu de protéger sa propriété contre ces insectes.

J. J. Day, for the plaintiff: As to the existence of the defendant's trees over thirty years. If under this plea of prescription that could be considered *a bar to the removal* of the trees, it cannot exonerate the defendant from the obligation to cut and remove their branches extending over the plaintiff's garden, and to pay the damage caused by the dropping of the caterpillars from those branches on the plaintiff's fruit trees. There is no proof that the branches have extended over on plaintiff's garden during thirty years. On the contrary, it is in evidence, *vide* deposition of William Douglas, and particularly his cross-examination, which establishes that since plaintiff's possession in 1854 he (Douglas) had, on complaint of plaintiff, cut off and removed the branches hanging over whilst he owned the property on which these willow and poplar trees are.

The plaintiff respectfully submits the following authorities in support of his case:

As to Prescription. 186th Article, Coutume de Paris. Small Commentaire par Ferrière, vol. 1, p. 403. Servitude ne s'acquiert par long jouissance, &c., p. 404. L'adjudicataire par décret d'une maison qui avait des vues sur celle de son voisin était tenu les ôter, &c.

As to damage, &c. Domat, vol. 1, p. 205, des Dommages causés, &c. Tit. 8, s. 1. Celui qui habite une maison, &c., and the several sub-sections, p. 206.

As to using property not to injure your neighbor, and the distance nearer than which injury may arise, &c., Pothier, vol. 2. Tr. Contrat de Société, No. 235, 236, quarto edition, p. 622.

Guyot, Répertoire, vol. 1, verbo Arbre, p. 561. La Coutume de Paris ne fixe pas de distance, &c. May order the party to "ébrancher" his trees annually, &c.

Ancien Desgodets, p. 109, a N. n. b., as to Racines des arbres si elles venaient de pénétrer, &c.; and p. 324 a N.; Nos. 20 and 21, and n., h., and l. as to damages from Roots and Branches of the Trees, &c., and p. 325 and 326, &c.

Le nouveau Desgodets (Lepage), vol. 1, p. 227. Une plantation ne doit pas nuire au voisin, &c, p. 228. Il n'en est pas de même des Branches, &c. Celui sur l'héritage duquel les Branches, s'avaucent n'a donc qu'une action, pour demander qu'elles soient coupées, &c.

Code Canadien, p. 392 to 395. Des Servitudes Réelles—articles 30 to 33 inclusive—vide also Nouveau Denisart, 2 vol., verbo Arbre, cited in the Code, &c., &c.

Rouër Roy, pour le défendeur.—Le défendeur ne peut manquer de réussir

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sur le moyen de droit qu'il à invoqué : la prescription ; ayant démontré que ces arbres croissaient depuis plus de trente ans près de la ligne de division des deux propriétés, qu'il avait eu cette possession d'une manière continue, ouverte, paisible et *Animo Domini*, il est bien fondé en droit à demander que la possession soit confirmée par la cour.

Voici quelques autorités incontestables à l'appui de sa proposition légale.

Guyot, vo. arbre, p. 562, C. 2.

Nouveau Denizart vo. *arbre*, p. 248, C, 2, A. 1, sec. II, et cite *Henrys Boniface*.

Nouveau Desgodets, T. I, part I, ch. 6, Art, 4, p. 367, dernier alinéa.

Fournel, voisinage, T. 1, p. 146-155, A. 4.

Toullier, T. 3, p. 376, nos. 512, 513 et 514, *in fine*, et 515.

Troplong, Prescription, T. 1, no. 346, p. 479 et no. 347.

Code Canadien, Tit. Prescription, art. 33, p. 394 et seq.

Après l'audition des parties au mérite, la cour à motivé son jugement comme suit :

" La cour, après avoir entendu les parties par leurs avocats au mérite de cette " cause, examiné la procédure, pièces produites et preuve, et avoir sur le tout " délibéré ; considérant que le demandeur n'a pas prouvé les allégués de sa décla- " ration et particulièrement que ce soit par le fait, la faute ou la négligence du " défendeur sous aucun rapport, qu'il a souffert les dommages dont il se plaint " dans et par sa déclaration ; considérant de plus que les arbres forestiers sur la " propriété du défendeur, le long de la clôture, qui avoisine le demandeur, sont " des arbres qui existent depuis plus de trente ans, et près de cinquante et " soixante ans, sans que le demandeur ou ses auteurs aient jamais élevé aucune " prétention à les faire enlever, et que le défendeur doit être maintenu dans sa " possession des dits arbres dans l'état dans lequel ils sont, ainsi qu'il en a été " lui et ses auteurs, depuis plus de trente ans, par une possession paisible, publi- " que et continue, et que d'ailleurs il n'est pas prouvé qu'il soit la cause des " dommages dont le dit demandeur se plaint, a renvoyé la dite action avec " dépens."

Day et Day, avocats du demandeur.

Roy et Joseph, avocats du défendeur.

(P. R. L.)

MONTREAL, 27TH OCTOBER, 1866.

Coram MONK, J.

No. 6939.

Torrance vs. The Richelieu Company.

HELD :—That a carrier is not liable for the loss or theft of an overcoat, carried by a passenger in a steamboat and placed by the passenger on a sofa in the eating saloon, while he was taking supper.*

The plaintiff embarked on the steamer Europa at Quebec, in the month of November, 1863, and took his passage for Three Rivers. About 20 minutes after the boat started, the bell rang for supper, and the plaintiff with two friends

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proceeded to the eating saloon, and placed his great coat which he was wearing on a sofa in the saloon, while he took supper, having first asked a waiter there if the article would be safe placed on the table close by, and being answered in the affirmative. The plaintiff returned to the sofa for his coat after supper, and found it gone. On complaining to the captain, which the plaintiff did, the latter told him if the coat were not found, the Company would pay for it.*

The action was to recover the value of the coat.

Torrance, for the plaintiff, cited the following authorities:—

Code Civil, B. C., Arts, 1672, 1815.

Journal du Palais, 1, 524.

Merlin, Rép., vo. Vol., Sect. II., § III. Dist. IV, p. 774, 5. Quarto Edn. Paris, 1828. Comm. on L. 1. § 8, D. nautæ caupones, Stabularii:—also S. 4, § 3, n. 2, p. 849.

Gamble vs. The Great Western Railway Co., decided in the Q. B., Upper Canada E. T., 1865, reported in the Upper Canada Law Journal, p. 236.

Richards vs. The London, Brighton, and South Coast Railway Co., 7 C. B., 839; Butcher vs. The London and South Western Railway Co., 16 C. B., 13; The Great Northern Railway Co. vs. Shepherd, 8 Ex. 30. Shaw vs. The Grand Trunk Railway Company, 7 U. C. C. P., 493. Stewart vs. The London and North Western Railway Co., 10 L. T. Rep. N. S., 302.

Pominville, for the defendant, cited:

Pothier, Dépot, n. 78, 9.

Bankier vs. Wilson, 5 L. C. Repts. 203.

Monk, J.—This was a case which, though involving a very small amount of money, yet presented a question of considerable importance, and his Honor felt some doubt whether the decision he was about to render was right. It appeared that the plaintiff, Mr. Torrance, with several other gentlemen, embarked at Montreal on one of the Company's steamers, for the purpose of proceeding to Three Rivers. They did not get state rooms. Soon after they got on board, the bell rang for tea. Mr. Torrance threw off his overcoat, and asked one of the waiters if it would be safe. The waiter replied that it would be safe on the table. Mr. Torrance, however, left the coat lying on the sofa and went to tea. On his return the coat was gone. An action has been brought for the value of it, and the question is, are the Company liable? The plaintiff's pretension is that they are liable as common carriers. The plea of the Company is that they were not bound to look after the plaintiff's coat, or hat, or overshoes, but, only after his baggage or valuables confided to their keeping. They admit that they were bound to carry himself and his baggage safely, but not articles of wearing apparel not specially placed in their custody. They allege that there were two state rooms for keeping clothing in. They say that if the plaintiff had consigned his coat to the care of a servant, they would have been liable. It was even admitted at the argument, that if Mr. Torrance had left the overcoat on the table, they would

* *Vide* Story—Bailments, § 466, 8, 470, 1, 2, 9, 488, 9, 490, 498, 9.

2 Sourdat—Responsabilité. Nos. 972–980. Chitty & Hulme—Carriers, p.p. 287–8. Shelford—Railways, p. 495, Edn. A.D. 1853.

Editor's note.—Lord Mackenzie—Studies in Roman Law—vo. Deposit: pp. 198–200.

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have been liable. But the coat was not left on the table, there was no special delivery to the waiter, and the case presents itself in this form: The plaintiff embarked on the boat; he did not place his overcoat specially under the charge of the waiter; he did not leave it in the place where the waiter told him it would be safe; is the Company liable? A good deal of stress had been laid on the Roman law, and also on the general law respecting carriers. No doubt the obligations of common carriers extend to the traveller himself, and to any precious articles he might give into their care, but his Honor doubted whether they went to the extent of making the Company liable for an article like an overcoat. It appeared to him that a distinction should be made between an article of wearing apparel which might be thrown off like an overcoat, and precious articles confided to the care of the carrier. A case had been cited which occurred in Upper Canada. A gentleman got on board a train with a carpet bag, which he hung up in the car, in disregard of the rule of the Company, requiring such articles to be checked. On arriving at a station, he placed the bag in his seat, as though to intimate that the seat belonged to him, and went to get his breakfast. During his absence, some fellow loafing about the car walked off with the bag. The traveller brought an action against the Company, and, notwithstanding the absence of any proof that he had conformed to the rules of the Company by checking, or attempting to check, the bag, or had made a special deposit of it in any one's care, the Court, composed of Judges Draper, Haggerty and others, condemned the Company to pay. This decision seemed to His Honor to be carrying the liability of common carriers to a great length. But in any case that decision did not apply here; for in that case it was luggage that was lost and not an overcoat or walking stick. The Court seemed to have laid stress upon the fact that it was luggage. His Honor did not think that either this or any other case cited was exactly in point. A number of French decisions had been cited, one of which was the following: A man arrives at a hotel. The hotel-keeper says I am crowded. I can only accommodate you with a room shared by another traveller. The man replies that he is not particular, and he is conducted to his room. At night he places his watch with a considerable sum of money, under his pillow, and falls asleep. In the morning he finds his fellow-traveller gone, and his watch and money also gone. He brought an action against the hotel-keeper, and, strange to say, the Court condemned the latter to pay the amount. The only explanation of this decision that could be supposed was that there was no evidence that it was the traveller's bed-fellow that carried off the watch. However, it certainly was going very far to hold the hotel-keeper liable, when there was no intimation to him, no special deposit. But His Honor found nothing in any of these decisions that went exactly to the point. The text of the Roman law might perhaps hold the Company liable. But having no authority exactly in point, by which he was bound, and being left to the consideration of the case apart from precedents, His Honor was inclined to say that the Company were not liable; and for these reasons: 1st. Because the article was not luggage, and did not come under the heading of luggage or merchandize. 2nd. The plaintiff did not take the precaution to put it in the special place set apart for clothing. 3rd. The servant told him it would be safe on the table, and he did not leave it on the table. It was true that when

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the plaintiff discovered his loss the captain told him it would be made all right, but when the Court came to weigh the force of a slang expression like this it could not lay much stress upon it. Upon the whole, then, the action of the plaintiff must be dismissed.

Action dismissed.

Torrance & Morris, for plaintiff.
Cartier, Pominville & Betournay, for defendant.
(F.W.T.)

MONTREAL, 30 NOVEMBRE 1866.

Coram BERTHELOT, J.

No. 613.

Dupuis et vir. vs. *Cédillot et Kelly, Intervenant.*

JUGÉ:—Que le tiers en faveur duquel une sommé de deniers est stipulée payable en vertu d'une donation; est recevable en loi à en poursuivre le recouvrement par action directe et même par action hypothécaire, et sa créance hypothécaire est égale à celle de bailleur de fonds sur l'immeuble donné.*

La demanderesse séparée de biens de son mari par son action rapportée le 12 mai 1856, réclamait hypothécairement du défendeur la somme de $100 avec intérêt depuis le 6 septembre 1865, en vertu d'un acte de donation consenti le 25 novembre 1858; Mtre. Brisset, N.P.; par Michel Dupuis, le père de la demanderesse, en faveur d'Amable Dupuis, son fils.

Par cette donation, le donataire s'était obligé de bailler et payer à chacune de ses sœurs et entr'autres à la demanderesse, la somme de $400 en commençant un an après le décès du donateur par la plus vieille et continuant tous les ans par la suivante, et ainsi de suite, jusqu'à la plus jeune, pour tous droits qu'elles pourraient prétendre dans la succession du donateur.

Le donateur est décédé le 6 septembre 1862.

La demanderesse se trouvant la troisième en âge des filles du donateur réclamait sa créance de $100 échue le 6 septembre 1865, avec intérêt *ex natura rei*, hypothécairement et par privilége de bailleur de fonds, du défendeur qui avait acquis du donataire le 10 mars 1861, l'immeuble donné. La donation avait été enrégistrée le 8 de janvier 1859. La déclaration ajoutait que la demanderesse avait, par la loi une hypothèque privilégiée sur l'immeuble donné pour le paiement de sa réclamation.

À cette action, le défendeur plaida le 16 mai 1876, une exception dilatoire concluant à ce que l'action fut suspendue pendant un temps que la cour jugerait suffisant pour lui permettre d'appeler ses garants pour prendre son fait et cause et le défendre, et à ce que les demandeurs cessassant toute poursuite, en la cause jusqu'à ce que le délai fut expiré.

Le 27 juin 1865, Thomas Kelly intervint en la cause comme le garant formel du défendeur et plaida à l'action principale comme suit :

That this action cannot be maintained against the defendant nor proceeded with against him nor against the *intervenant*, because he says that the land and

* Vide, Pothier, Obligations, No. 72.

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premises in respect of which this action hath been instituted against the defendant as *tiers détenteur* thereof as having purchased the same from the late Amable Dupuis and wife, and which was acquired by said Dupuis under the deed of donation declared upon in this cause and which is made the basis of this action, are not and never were affected and hypothecated by privilege of *bailleur de fonds* in favor of plaintiffs, nor of any other person or persons whatever as falsely alleged in plaintiff's declaration.

And because the land and premises in question in this cause is not and never was hypothecated by said donation or otherwise, for the payment of the amount claimed by this action, no such hypothecation being stipulated in said deed of donation and no such hypothecation or other privilege exists by law as erroneously stated in said declaration;

That by reason of the premises the plaintiffs cannot maintain this hypothecary action against the defendant as such *tiers détenteur*, and the same ought to be dismissed inasmuch as the said land and premises are not in fact nor by law affected or hypothecated by said deed of donation for payment of the amount claimed, nor for any amount whatever.

Le demandeur répondit spécialement à cette exception de l'intervenant comme suit: That the facts alleged by plaintiffs in their said declaration are sufficient in law to enable them to obtain judgment in this cause as prayed in their declaration. That by law the donor has a privilege on the immoveable property by him given for the preservation and security of all the charges imposed on the donee as a condition of the donation, and that said privilege extends to third parties in whose favor charges were imposed on the donee by the donor as a condition and charge of the donation by his accepting thereof.

That the registration of the said deed of donation is equivalent in law to the acceptance of said charge by the third party. And *d'abondant* said plaintiffs aver that the deed called donation fyled in this cause by plaintiffs, and on which this action is based, is in reality and in fact a deed of sale of the property described in said deed and in the declaration, and that the *rente viagère réservée* and charges as well in favor of the donors as of third parties, stipulated in said deed, are the price and value of said property [illegible] all the other properties described in said deed, and that by law a privilege exists on the property in the declaration in this cause described in favor of plaintiffs as representing the *bailleur de fonds* for the payment of the part of said price delegated to plaintiffs and by them claimed by this action. That said deed called donation was an *arrangement de famille* between a father and mother on the one part, and their children on the other, a partition, *partage*, of the succession of the donors amongst their presumptive heirs, in virtue of which the co-partitioners have a special privilege on the property so divided for the amount coming to them as *soulte et retour*.

Pagnuelo, pour les demandeurs.—Michel Dupuis donna à son fils Amable, une terre, à la charge d'une pension viagère, de payer les droits de ses frères et sœurs dans la succession de leur mère, et de plus de payer à ces derniers une somme de $100, après son décès, et diverses autres charges et *réserves*. Cet acte fut enregistré pendant que le donataire était propriétaire de la terre donnée.

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La demanderesse est l'une des sœurs du donataire.

Le donataire vendit la terre au défendeur, qui est poursuivi hypothécairement.

T. Kelly, comme possédant un terrain hypothéqué à la garantie de cette vente, intervint et plaida "à l'action *qu'il n'existait pas d'hypothèque envers la demanderesse, parce qu'aucune n'était exprimée à l'acte de donation.*"

La première question à résoudre est donc : "Le donateur *et ses délégués* ont-ils privilége sur les biens donnés pour l'exécution des charges de la donation."

L'affirmative ne semble pas souffrir difficulté : Pothier, Traité des Hypothèques, No. 146, après avoir parlé du privilége du vendeur sur l'immeuble vendu pour le paiement de son prix de vente, ajoute : "Ce que nous disons de la vente peut s'appliquer à tous les autres titres d'aliénation ; celui qui a aliéné un héritage, à quelque titre que ce soit a, pour toutes les charges de cette aliénation dont l'acquéreur peut être tenu envers lui, *une hypothèque privilégiée* sur cet héritage, semblable à celle du vendeur ; *il y a entière parité de raison.*"

Notre jurisprudence, telle qu'établie par les commissaires codificateurs, et par nos statuts, est aussi explicite.

Projet C. C. B. C., titre Priv. et Hyp., art. 43, donnant la loi en force, dit : "*Les donateurs* (ont privilége sur l'immeuble par eux donné) *pour les redevances et charges qu'ils ont stipulées,*" et au titre des donations art. 60, ils ajoutent, comme donnant la loi en force : "Les charges portées *dans la donation d'un immeuble* donnent lieu *au même privilége quant au délai de trente jours* pour l'enrégistrement, que celui qui a lieu pour le *prix de vente dans le cas du vendeur,*" et ils font à ce sujet la remarque suivante, p. 162 : "Les charges de la donation sont assimilées au prix de vente quant à cette rétroactivité, s'il (l'enrégistrement) a lieu dans les trente jours, ce *qu'il n'était peut-être pas même nécessaire d'exposer.*" Il est impossible d'être plus explicite.

La section 7 du ch. 35 des S. R. B. C., réserve expressément "*le droit du bailleur de fonds, qui pourra toujours réclamer et exercer son droit d'hypothèque* et de préférence, et son privilége sur les deniers *formant le prix de la vente ou aliénation* de toute terre ou héritage, bien *qu'il n'y ait aucune* stipulation ou désignation *expresse à cet effet* dans l'acte de *vente ou aliénation* de la dite terre ou héritage."

Et le privilége, contre les tiers-acquéreurs, en faveur du *bailleur de fonds* par l'enrégistrement dans les *trente jours de la passation du titre* n'est pas donné au vendeur seul, mais à tout *bailleur de fonds ;* et nommément aux créanciers de rente constituée ou viagère portant privilége et hypothèque de *bailleur de fonds,* S. R. B. C., ch. 37, sec. 9, ch. 50, sec. 7.

Or l'acte de donation ayant été enrégistré pendant que le donataire était propriétaire de la terre et avant qu'il l'eut vendue au défendeur, il y avait *par la loi* hypothèque privilégiée pour toutes les charges de la donation.

Cette hypothèque n'existe pas seulement en faveur du donateur, comme le soutient l'intervenant, mais aussi en faveur des tiers-délégués ou bénéficiés ; car *l'enrégistrement étant considéré comme acceptation de la délégation,* et lorsqu'il est au long, comme dans le cas actuel, suffisant pour conserver les droits de toutes les parties intéressées. (4e considérant du jugement en appel, Patenaude vs. Leriger de Laplante, 1 Jurist p. 113.) Les frères et sœurs ont, par l'enrégistre-

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ment, accepté la dite délégation, qui *est par là devenue parfaite*, et par conséquent le privilége qui existait en faveur des donateurs existe pareillement en faveur des délégués. Ces principes sont clairement posés, dans la cause qui vient d'être citée.

D'ailleurs, la rente, les réserves, les charges, tant en faveur des donateurs que des tiers, se montent, à la face même de l'acte, à une somme si élevée, qu'il est impossible qu'elles n'égalent pas la valeur des propriétés données: dans ce cas, ce n'est plus une donation *mais une vente;* c'est une des réponses de la demanderesse. Pothier, Donation 612-3-5.

En troisième lieu, cet acte dit de donation est un *arrangement de famille*, un partage anticipé de la succession du donateur: la chose est évidente; donc le privilége pour *soulte et retour*, doit, dans ce cas, exister en faveur des co-héritiers.

Doherty, pour l'intervenant.—Michel Dupuis made donation of a farm to Amable Dupuis, his son, by which donation Amable undertakes to furnish his father and mother with a variety of things, and it is also stated in said donation that Amable shall, after his said father's death, pay one hundred dollars to each of his sisters, of whom the plaintiff is one.

For the payment of this one hundred dollars, no hypotheque is stipulated in said donation.

When Amable Dupuis sold the said farm so given to him by his father, he mortgaged another piece of land as security for the title he gave with it, and this piece of land he afterwards sold to the intervening party. Hence, the interest of the intervening party in the matter.

Had the several one hundred dollars which Michel Dupuis by said donation charged his son Amable been coming to the donor *himself*, the authorities cited by plaintiff would *perhaps* apply, but the old man is making donations to all the members of his family, and as donor he can make such conditions as he pleases.

He simply orders his son Amable to pay to plaintiff one hundred dollars without hypothecating the real property given for that, or any other amount, and the mere fact of the registration of the donation, at most, can amount to an *acceptation* of the delegation only.

The donation is registered for what it is worth, but such registration does not give an hypotheque—it only vests the *délégué* with the right to demand payment of the one hundred dollars as a personal debt.

Plaintiff mistakes the meaning of the Code, the donor has thereby privilege for charges stipulated in *his own favour, p.* 545 *Code*.

This privilege is incident to the *ownership* of the donor, and hence is in the nature of a *bailleur de fonds* right, but the donee for the one hundred dollars never had any right analagous to that of the *bailleur de fonds*, and hence no privilege.

The relations of co-partitioners are different, they are each selling to the other, and are consequently, as among themselves, reciprocally buyers and sellers.

The case of *Pattenaude and Laplante*, cited by plaintiff, is not in point; there it was the vendor seeking his *prix de vente*, and that case only decides with reference to this one that registration amounts to acceptation, as in the case of Ryan & Halpin, in which I was for plaintiff, but it does not decide that a delegation legally came with it or constitutes a mortgage.

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The one hundred dollars claimed by plaintiff was a *donation* to her, and if the donor had intended to hypothecate in her favor the land given to Amable Dupuis for the payment thereof, he would have so stated it in his donation.

And she never was *bailleur de fonds* herself, never having owned or possessed the property in question nor any part thereof.

Mere registration never creates an absolute privilege, at most it is but an acceptation by the party in whose favor the delegation is made.

That registration presumes the rights of all interested there is no doubt, but it gives no *absolute* rights, much less can it constitute a *privileged claim.*

In a word, the privilege of *bailleur de fonds* exists only with reference to charges, *prix de vente*, or other things which the bailleur stipulates for *himself*, stipulated "in their favor," saith the Code; even in the French version it is the donateur who has the privilege *pour les redevances, &c.*

The privilege is a very different thing from the *debt* of one hundred dollars; it belongs if at all to the vendor or donor, it is personal and peculiar to him from the fact that he is the owner of the land given or sold.

Après l'audition des parties, la cour a maintenu l'action en motivant son jugement comme suit :

La cour, après avoir entendu les demandeurs et l'intervenant par leurs avocats sur le mérite tant de l'intervention du dit Thomas Kelly que de l'exception dilatoire faite et produite par le défendeur à l'action des dits demandeurs, examiné la procédure et les pièces du dossier, et avoir sur le tout mûrement délibéré, a renvoyé la dite exception dilatoire avec dépens ;

Considérent que le plaidoyer du dit intervenant est mal fondé en droit, et que la demanderesse Josephte Dupuis, a une hypothèque privilégiée, égale à celle de bailleur de fonds sur l'immeuble désigné en la déclaration en cette cause et en l'acte de donation ci-après mentionné qui y est relaté, a aussi renvoyé l'exception péremptoire du dit intervenant avec dépens, et adjugeant au mérite de la cause ; la cour déclare l'immeuble mentionné et décrit dans la dite déclaration, affecté et hypothéqué au paiement de la somme de $100, due à la demanderesse par et en vertu de l'acte de donation, etc., etc.

Pagnuelo, avocat des demandeurs.

Bélanger et Desnoyers, avocats du défendeur.

Doherty, avocat de l'intervenant.

(P. R. L.)

COURT OF QUEEN'S BENCH, 1866.

(CROWN SIDE.)

SWEETSBURGH, DECEMBER 12TH, 1866.

Coram JOHNSON, J.

Regina vs. MADDEN.

HELD:—That the Court cannot refuse to give effect to an *ex post facto* statute which is clearly so in its terms.

This was a hearing on a preliminary plea, put in by the prisoner, who stood indicted, as the subject of a Foreign State, (under the Provincial Statutes 29th

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& 30th Vic. ch. 2 & 3) for unlawfully invading Lower Canada, on a day antecedent to the passing of these statutes.

JOHNSON J.:—This plea substantially raises two points: 1st, whether the Imperial Act 11 and 12 Vic. is in force in this country, and as a consequence whether the Provincial Statutes 29th and 30th of the Queen, chapter II and III, being, as is contended, repugnant to the Imperial law, are to receive execution as part of the law of this country.

2ndly. Whether the Provincial Acts in question are, taken together, *ex post facto* in their terms and operation, and if so, whether an indictment will lie under them.

Whether the 11th and 12th Vic. be in force in this country or not, and whether, if it be, it reaches the precise offence charged in this indictment, are points which I do not now decide. It is not easy to see, however, how, if it be in force, it can affect the present argument, unless it be shown to be clearly repugnant to the terms of the Provincial Acts—a point upon which much is to be said;—and further, unless it can be shown that the language of the 3d sec. of the Imperial Statute 3 and 4 Vic., c. 35, commonly called the Act of Reunion between Upper and Lower Canada, is not obligatory upon this Court. It is contended by the Crown that these legislative provisions are not repugnant to each other, and further that the Imperial Act 11 and 12 Vic. does not reach these cases at all.

I cannot say, speaking individually, that I entertain any serious doubt as to the legal existence of the Provincial Statutes, and their binding force upon this Court, either on the ground of their repugnance to the Imperial Statute, or on the ground that has been urged. I certainly am not called upon to discuss the abstract justice, or even the expediency of *ex post facto* laws generally; but whatever opinion may be entertained on these points, the legal existence and force of these Statutes is quite another question.

The language of the great commentator Blackstone on this subject is well known, and has never, I believe, been questioned: "Lastly, Acts of Parliament "that are impossible to be performed are of no validity: and if there arise out "of them collaterally any absurd consequences, manifestly contradictory to com- "mon reason, they are, with regard to those collateral consequences, void. I lay "down the rule with these restrictions; though I know it is generally laid "down more largely, that Acts of Parliament contrary to reason are void. But "if the Parliament will positively enact a thing to be done which is unreasonable, "I know of no power that can control it; and the examples usually alleged in "support of this sense of the rule do none of them prove, *that were the main "object* of a statute is unreasonable, the judges are at liberty to reject it; for "that were to set the judicial power above that of the Legislature, which would "be subversive of all government. But where some *collateral* matter arises out "of the general words, and happens to be unreasonable; there the judges are in "decency to conclude that this consequence was not foreseen by Parliament; "and, therefore, they are at liberty to expound the Statute by equity, and only "*quoad hoc* disregard it. Thus, if an Act of Parliament gives a man power "to try all causes that rise within his manor of Dale, yet if a cause should

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"arise in which he himself is party, the Act is construed not to extend to that; "because it is unreasonable that any man should determine his own quarrel; but "if we could conceive it possible for the Parliament to enact that *he should try* "as well his own causes as those of other persons, there is no court that has "power to defeat the intent of the Legislature, when couched in such evident "and express terms as leave no doubt whether it was the intent of the Legis-"lature or no."

And again pursuing the subject Blackstone says: "For the freedom of our "constitution will not permit that in criminal cases a power should be lodged in "any judge to construe the law otherwise than according to the letter, &c., &c., "*but in cases where the letter induces any hardship the Crown has the power to pardon.*"

This seems to be the precise doctrine acted upon by Lord Eldon in the case of Rex vs. Bailey. The question there was, whether the prisoner could under very peculiar circumstances have possibly known of the existence of the law under which he was tried. This certainly raised a consideration of justice for the executive power; but what said Lord Eldon about the law, and about his power as a judge? These are his words to the jury: "I am of opinion that "the prisoner is in strict law guilty, though he could not then own that the "law had been passed, and his ignorance of that fact can in no otherwise affect "the case, than that it may be the means of recommending him to a merciful "consideration elsewhere, should he be found guilty."

Subsequently on a consultation among the judges, a pardon was recommended, on the ground that the prisoner could not have known of the law; but, adds the reporter: "It seemed to be the opinion of the judges that the conviction "was proper on other grounds."

I adopt, therefore, the view of my obligation prescribed by Blackstone, and enforced by the authority of all the judges of England.

This is the only case that has been cited as authority at the bar in support of the plea. The views of speculative philosophers which have been largely referred to, as to the justice or expediency of *ex post facto* laws, can afford to this Court no sure ground of authority to over-ride the written law of the land. Neither of these points, it is to be observed, appear to have arisen, in a direct manner, in Upper Canada. The statute of 1838, under which the indictments there were laid, must be held to be as repugnant to the 11th and 12th Vic. as the terms under which the indictments in this Court have been laid. It is true that the statute of Upper Canada is anterior in date to the 11th and 12th Vic., but it can hardly be held to be absolutely repugnant to it, if that Imperial statute be not held at the same time to have repealed it. The Act of 1838 was, however, administered as law in Upper Canada. As at present advised, therefore, I overrule the plea of the prisoner upon both points; and I am the more impelled to do so by considerations of safety for the prisoner.

As the law now stands—a state of the law which restricts the right of appeal in criminal cases within very much narrower limits than those enjoyed in Upper Canada or in England—I have no power to reserve any point, except after conviction.

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I could not, therefore, now, if I felt disposed to do so, reserve either of these points for the consideration of the Queen's Bench sitting in criminal appeals, but I certainly shall do so at the proper time if I entertain any serious doubt upon these points, or upon any other point that may arise, and I shall thereby secure to the prisoner the benefit of all the consideration that such an interval can afford time for.

Plea overruled.

T. K. Ramsay, for the Crown.
B. Devlin, for the prisoner.
(S. B.)

COURT OF REVIEW, 1866.

MONTREAL, 31ST OCTOBER, 1866.

Coram SMITH, J., BERTHELOT, J., MONK, J.

No. 1118.

Gould et al. vs. *Cowan.*

HELD :—That mere possession of a moveable is *not* equivalent to title, but is only *presumptive* of title; a possession of three years being necessary to render such possession equivalent to actual title.

This case was inscribed for the purpose of reviewing a judgment rendered in the Circuit Court, at Montreal, by THE HON. MR. JUSTICE BERTHELOT, on the 28th day of June, 1866.

The action was one *en revendication* to recover a piano which the plaintiffs alleged to be their property, and that they had leased to one Sarah Ann Smith, on the 18th of July, 1864, and the possession whereof had been lost.

The defendant, denying the truth of the plaintiffs' allegations as set forth in their declaration, pleaded that he had purchased the piano, in good faith, on or about the 14th day of October, 1864, from one James Norton, who was then, and for more than the two months preceding that day had been in the open and peaceable possession thereof, as proprietor, for the sum of $175 currency, whereof the sum of $155 was then and there paid in cash, leaving a balance or sum of $20 currency, still to be paid, and for the payment whereof the said defendant alleged he was responsible to the said James Norton.

That when the said piano was so seized and attached, it was in the actual possession of the defendant, as the owner and proprietor thereof, and had been so in his possession since he so purchased the same as aforesaid.

The plaintiffs replied specially to the effect that the piano, at the time of the alleged sale by Norton, was "stolen property," and that the conveying away and disposing of the property by said Sarah Ann Smith was, by the laws of this Province, a "larceny," and that consequently no legal title could be derived from any person acquiring the piano from her.

The following was the judgment originally rendered in the Circuit Court:—

"The Court * * * considering that it is in evidence by the testimony adduced on the part of said defendant, that James Norton, through whom he pre-

tends to have acquired the possession and ownership of the piano, mentioned in the declaration, and *procès-verbal* of seizure, had bought the same in July, one thousand eight hundred and sixty-five, from one Sarah Ann Smith, to whom the said plaintiffs had made and granted a lease of said piano.

Considering that it is further in evidence, that the said James Norton doubted so much the title of said Sarah Ann Smith to the [illegible] of said piano [illegible] wanted from her a bill of sale of the same, and that [illegible] by [illegible] with a pretended bill of sale by one Walsh, who was not ascertained to have ever been the vendor of said piano to said Sarah Ann Smith.

Considering that the pretended sale by auction, which said James Norton caused to be made of said piano, in his own house, is not and was not a public sale as meant by law.

Considering further that the said defendant was not a sufficient length of time in possession of said piano to acquire any title to it by prescription or otherwise, and that for all these reasons the said exception ought to be dismissed, doth [illegible] the same with costs.

[illegible] that the said plaintiffs have established the allegations of [illegible], and their title and ownership to the said piano, doth declare [illegible] valid the *saisie revendication* made in this cause of the aforesaid piano therein described as 'a certain seven and one-quarter octave pianoforte made by Piersons, bearing the number 1519,' and doth adjudge and condemn the said defendant, within three days after service upon him of this judgment, to deliver up the said pianoforte to the said plaintiffs, and, in default of so doing, doth adjudge and condemn the said defendant to pay and satisfy to the said plaintiffs the sum of fifty pounds current money of this Province, as the value of the said piano, with interest thereon, from the twenty-first day of December, one thousand eight hundred and sixty-four, date of the service of process, until paid, and costs of suit."

Bethune, Q. C., for defendant.—The question involved in the present review is, whether the owners of a piano leased by them to another party can revendicate the piano in the hands of a party who purchased the same *in good faith* from a person *in the open and peaceable possession thereof*, who *purchased* it from the lessee.

The facts of the case are as follows:—

The plaintiffs leased a piano belonging to them, to one Sarah Ann Smith, on the 18th of July, 1864.

Whilst the piano was in possession of the lessee, she sold it for £40 currency to one James Norton, who took it to his own house some time in July, 1864.

On the 14th of October, 1864, the defendant bought the piano from Norton for £175 currency, and immediately removed the piano from Norton's house (where it had been ever since he purchased it), [illegible] the defendant's) house, where it was seized under *saisie revendication*, [illegible] 27th of December, 1864.

The judgment of the Court, now under [illegible] maintained the seizure, on the ground [illegible] the opinion of the Court, [illegible] doubted the validity of his own title, and that "the said defendant was not [illegible] sufficient length of time in possession of said piano to acquire any title to it [illegible] prescription or otherwise."

Gould et al. vs. Cowan.

The good faith of the defendant is in no way impugned by the judgment, and was not denied by the plaintiff's counsel at the argument of the case.

It is respectfully submitted that any misgivings Norton may have had as to the validity of his own purchase can be of no moment in the legal investigation of this case.

The rule of law by which this case is to be governed is the well-recognized one, *que les meubles n'ont pas de suite, et qu'en fait de meubles la possession vaut titre ;* subject to the as well recognized exception of *choses volées ou perdues.*

Not only can there be no pretence here that the piano was lost, but the plaintiffs themselves wholly abstain from making any such pretension, and contended that the piano when sold to Norton was stolen property.

Now it is submitted, that a sale of a moveable by a lessee thereof is not a *vol* but an *abus de confiance,* which cannot affect the title of a party (like the defendant), who purchases from another party having the open and peaceable possession of the moveable.

In the case of *vol ou perte,* the proprietor of the moveable loses its possession *against his will,* whereas in the case of a lease he parts with the possession *willingly.* If, then, the party whom he thus willingly trusts with the possession abuses the confidence placed in him, the loss must be the proprietor's and not that of an innocent purchaser.

The doctrine, "*qu'en fait de meubles la possession vaut titre,*" was recognized as the law of France long before the passing of the code which was only declaratory of the old law,—1 Bourjon, Tit. 1, desbiens, &c., ch. 6, sec. 1, No. 1, p. 145. Tit. 2, de l'Achat des meubles, ch. 1, sec. 2, p. 458. Socre Leg. de la France, p. 586, No. 44, p. 598, No. 14. Troplong, Pres. vol. 2, Nos. 1052, 1059. Marcadé, Pres., pp. 246, 247. 2 Delvincourt, p. 644 (209 *notes*). 2 Vazeille, Presen., Nos. 673, 674.

Our own Courts have at all times maintained the same doctrine, and, specially so, in the case of Fawcett et al., appellants, and Thompson et al., respondents, 6 L. C. Jurist, p. 139 and seq., and art. 2268 of our own Code has also consecrated the doctrine.

Both before and since the passing of the French *Code Civil,* the jurisprudence of France maintained sales by lessees and depositaries of moveable property, and such like persons, to parties purchasing in good faith, on the principle that such sales amount merely to *escroquerie or abus de confiance,* and cannot legally be assimilated to cases of *vol.*—2nd Bourjon, Tit. 7, Des Exécutions, ch. 3, sec. 4, No. 18, p. 695. Marcadé, Pres, pp. 254, 255, 256. 4 Duranton, pp. 374, 375, 376, 377, No. 433. 15 Duranton, No. 286, and specially at p. 329. Troplong, Pres. 2nd vol., No. 1070. 1 Teulet, p. 747, Nos. 87, 89. 1 Rogron, p. 423. Dalloz, Rec. Per. 1835, 1 part, p. 338, 339. Do. 1836, 2nd part, p. 20, 166. Journal du Palais, 1847, 2nd part, page 126. And the case already referred to of Fawcett & Thompson abundantly establishes that our own jurisprudence is conformable to that of France.

In the judgments reported in Dalloz, and the Journal du Palais, the reasons assigned clearly draw the distinction between cases of *vol* and mere *escroquerie* or *abus de confiance.*

Gould et al. vs. Cowan.

As stated by Troplong there are some judgments to be found maintaining a contrary doctrine to those enunciated in the cases cited by Dalloz; but Troplong and Dalloz both repudiate them, and the latter in his last reported case (1836) states, that the jurisprudence such as he contended for, had then become "*constante.*"

The plaintiffs' counsel contended, at the argument in the Court below, that the sale by the lessee was a *vol*, because our Provincial Statute of 1858 enacted that all bailees fraudulently disposing of property in their charge should be held guilty of larceny. It is submitted that a special statutory provision such as the one relied on can have no legal bearing on determining the legal definition of *vol* in a civil suit. As confirmatory of this view, the Court of Appeal, in the case of Fawcett and Thompson already referred to, declined applying the statute in question as a rule of interpretation of the expression *vol* or *chose volée*.

His Honor Mr. Justice Berthelot seemed to make his decision turn on the ruling of the Court of Appeal, in Herbert & Fennell, 7 L. C. Jurist, p. 302; but, by reference to the judgment reported on page 310 it will be clearly seen that the case has no kind of application to the present discussion.

On the whole the defendant confidently claims the reversal of the judgment now under review.

Dorman, for plaintiffs,—Argued, that according to the old law of France the doctrine *que la possession vaut titre* contended for by Bourjon did not exist, and in support cited: Pothier, Propriété, Nos. 218 and 219. 14 Touillier, Nos. 107 to 120, and Pothier, Vente, Nos. 270, 273. He further argued that such an offence as that committed by Sarah Ann Smith was, by section 55 of chapter 92 of the Cons. Stat. of Canada, a larceny. He also contended that our own Code, far from being declaratory of any such doctrine as that insisted on by Bourjon, established, in effect, that, by the law of Lower Canada, possession of a moveable was merely presumptive of title, and could not be pleaded in bar to the claim of the real proprietor.

The Court, in rendering judgment, sustained the pretensions of the defendant on the question of *vol*, and held that the statutory provision making the particular offence committed by Sarah Ann Smith a larceny could not be invoked as a rule of interpretation of the word *vol* in a civil suit; but, on the legal question, whether or not the possession of Norton was equivalent to a title, they were against the defendant, and held that nothing short of three years' possession could deprive the real proprietor of a moveable from exercising his recourse in the hands of a *bonâ fide* third party, such as the defendant in the present case.

Judgment of Circuit Court confirmed.

S. W. Dorman, for plaintiff.

Strachan Bethune, Q. C., for defendant.

(S. B.)

LISTE

DES JUGEMENTS RENDUS PAR LA COUR DU BANC DE LA REINE, (EN APPEL), POUR L'AN 1866.

TERME DE MARS 1866.

MONTREAL.

	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
51	The Queen	Ellice	1 Mars.	Juge en Chef, Aylwin, Meredith, Mondelet	Motion de l'Appelante réclamant la prérogative de ne pas payer taxe—Accordée.
3	Samuels	Rodier	" "	" " " " Drummond, "	Motion pour permission de fournir nouvelles cautions—Accordée de consentement.
64	Muir	Sinclair	" "	" " " " " "	Motion pour substitution d'Avocat de la part des Intimés—Accordée.
13	Bryson	Stutt	" "	" " " " " "	Re-audition ordonnée pour demain.
36	Dorion	Kierzkowski	" "	" " " " " "	Rayée du Delibéré—re-audition ordonnée pour demain.
98	Dorion	Kierzkowski	" "	" " " " " "	Do. Do. Do.
85	Angers	Ermatinger *et al*	" "	" " " " " "	Motion pour renvoi de l'Appel, attendu que le cautionnement a été donné après le temps voulu par la loi—Accordée quant aux frais et rejettée quant aux autres fins.
"	"		" "	" " " " " "	Motion de l'Appelant pour que son cautionnement soit déclaré valable, vû l'affidavit et les Exhibits par lui produits—Accordée de consentement sans frais.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
Mailloux	Doré	2 Mars.	Juge en Chef Aylwin, [illegible] Drummond, Mondelet	Motion pour renvoi de l'Appel, vû le [illegible]port du Bref, Transcri[illegible] [illegible]ossier—Accordée quan[illegible] [illegible] seulement, vû le [illegible] du Bref etc., depui[illegible] [illegible]fication de la dite M[illegible]
35 Legault	Legault	"	" " " " Meredith, " Juge Mondelet dis.	Motion pour r[illegible] l'ordre donné en v[illegible] M. le Juge Mondele[illegible] [illegible]ppelant de plaider *in for[illegible] pauperis*—Accordée.
11 Atty. Genl. Cartier	[illegible]nd Trunk R. W. Co.	"	" " " " " " Mondelet	Motion on behalf of Respondents to enlarge for 14 days from 1st March instant, the delay to fyle their cases in Appeal with costs—Rejected.
55 Groulx	Corporation St. Laurent	"	" " " " " " "	Motion pour renvoyer l'Appel avec dépens, 1o parce que le dit jugement a été rendu en vertu de l'Acte Municipal du bas Canada de 1860; 2o Parcequ'en vertu du dit Acte Municipal, le dit Appel en vertu du droit Commun Statutaire est enlevé; 3o Parcequ'il n'existe en loi aucun appel tel que celui intejeté par l'Appelant—Accordée.
57 McDonald	Nivin	3	" " " " " " "	Motion pour renvoi de l'Appel avec dépens vû le non-rapport et enfilure du Factum de l'Appelant—Accordée quant aux frais vû les Rapport et Enfilure du dit Factum, depuis la signification de la dite Motion.
42 Edmonstone *et al.*	Childs *et al.*	"	" " " " " " "	Motion de l'Appelant pour pro-

de l'Appelant — Accordée quant aux frais vû les Rapport et Enflure du dit Factum, depuis la signification de la dite Motion.

No.	Appelants	Intimés									
43	Edmonstone et al.... ons	Childs et al	"	"	"	"	"			"	Motion de l'Appelant pour produire Décharge de Augustus Heward—et desistement de sa dite motion du 2 courant —Accordée.
40	Sache	Courville et al	5	"	"	"	"			"	Motion pour renvoi de l'Appel avec dépens vû la non-enflure du Factum de l'Appelant—Accordée quant aux frais vû la production du Factum depuis la signification d'icelle Motion.
51	Ellice	The Queen	6	"	"	"	Mondelet, Johnson,			{ Juge Aylwin " Meredith, } diss.	Conf. sauf et excepté quant aux intérêts qui seront accordés à Ellice avec dépens.
51	The Queen	Ellice	"	"	"		"	"		{ Juge Aylwin, " Meredith, } diss.	Do. Do. Do.
78	Chaplean et al	Ecole de Médecine et Chirurgie, Montréal	"	"	"	"	Aylwin, Meredith, Mondelet				Motion pour renvoi d'Appel avec dépens vû la non-comparution de l'Appelant ni la présentation de la Requête—Accordée.
32	Valois	The Quebec Bank	"	"	"	"	"	"	"		Motion pour renvoi d'Appel avec dépens, vû qu'il n'a pas été fourni de cautions, et qu'il n'a pas été pris de mesure pour poursuivre l'Appel depuis l'émanation du Bref d'Appel—Accordée.
95	Montreal and N. Y. R. R. Co.	Ferres	"	"	"	"	"	"	"		Re-audition ordonnée.
94	Rutherford et al	Ferres	"	"	"	"	"	"	"		Do. Do.
64	Dubrule	Lafontaine	"	"	"	"	"	"	"		Do. Do.
61	Grimard	Burroughs	"	"	"	"	"	"	"		Do. Do.
85	Black et al	Lefebvre	8	"	"	"	"	"	Drummond	{ J. Mondelet, diss. }	Inf.
72	Corporation St. Barthelemy	Desorcy	"	"	"	"	"	"	"	Mondelet	Conf.
30	Foley	Forrestor	"	"	"	"	"	"	"		"

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
64 Jones *et al.*	Guyon Lemoine	8 Mars.	Juge en Chef, Aylwin, Drummond, {Juge Mondelet,} *diss.*	Conf.
The Queen	Brown	" "	" " " Meredith, Drummond, Mondelet,	Re-audition ordonnée—Ordonné qu'un bref d'*Habeas Corpus* émane rapportable immédiatement.
74 Compagnie Ch. Fer Montréal et Champ'n	Perras	" "	" " " " Mondelet, {J. Drummond,} *diss.*	Inf.
28 Lalonde	Brunet	" "	" " " " Drummond, {J. Aylwin, Mondelet} *diss.*	Conf.
6 Wardle	Bethune	" "	" " "	
25 Bissonnette	Bornais	" "	" " " Drummond, Mondelet,	Inf.
53 Harnois	Xavier St. Jean	" "	" " " " " "	"
57 Watt	Gould	" "	" " " " " "	"
70 Lenoir Rolland	Jodoin	" "	" " " " " "	Conf.
21 Beaudry	Roy et al.	" "	" " " " Mondelet, {J. Drummond,} *diss.*	Inf.
16 Montreal U.P.R.W. Co	Bignon	" "	" " " Drummond, Mondelet,	Conf.
81 Pennoyer	Butler	" "	" Drummond, Mondelet {Juge Aylwin,} *diss.*	Inf.
65 Walker *et vir*	Le Maire, *etc*, de Sorel	" "	" " Aylwin, Meredith, Drummond, Mondelet	"
44 Crebassa	Massue	" "	" " " " " " "	"
			{Juge Drummond, " Mondelet,} *diss.*	Conf.
2 Grant	Lochhead	" "	" " " " Drummond, Mondelet	Motion on behalf of the Appellant, that the Prothonotary of the Superior Court for Lower Canada, District of Montreal, be ordered and enjoined to take back the Writ of *Certiorari* in this cause issued and directed to the said Prothonotary, and also the Return of the said Prothonotary to the said Writ made and returned into this Court on the 9th day of December now last past, and that the said Prothonotary be ordered to amend the same, and to return there-

								...with a copy of the Judgment so by them returned, as having been verbally pronounced by the Hon. Mr. Justice Badgley on the 31st day of March, 1865, together with a copy of the notes of the said Hon. Mr. Justice Badgley which were sent down therewith on that day, and return the same so amended to this Court with all due diligence. —— Held :—That the order of the Court granting a Writ of *Certiorari* be reversed and set aside and the Writ of *Certiorari* issued in this cause under the said order quashed and annulled, and the Return made by the Prothonotary to the said Writ of *Certiorari* be taken off from the files of this Court.
17	Bryson	Stutt	"	"	"	" "	" "	Ordonné que cette cause soit la première re-audition du terme prochain.
79		Rascony	9	"	"	Aylwin, Drummond, Mondelet,	Juge en Chef, " Meredith, } *diss.*	Jugement Interlocutoire ordonnant renvoi du dossier à la Cour Supérieure avec dépens contre l'Intimé, et que Messire Maurault soit mis en cause.
56	Clement	Corporation Westpart Township Farnham,	"	"	"	" Meredith, Drummond, Mondelet		Motion on behalf of Respondents to quash, reject and set aside *in limine* the Appeal taken out in this cause, and Record sent back to the Court below : 1o on account

	APPELANS.	INTIMÉS.	DATE	JUGES.	JUGEMENTS.
					of insufficiency of security, one security being furnished instead of two; 2o The original Petition and Notice in Appeal having been not filed in the office of the Clerk of the Court below within the delay required by Law, but after the expiration of the said delay; 3o The said Appeal having been illegally and irregularly instituted, and Respondents in consequence of said Appeal suffering great loss and damage—Discharged upon payment of costs by Appellant to Respondents.
50	Prevost	Brien Desrochers	Mars.	Juge en Chef, Aylwin, Drummond, Mondelet	Re-audition ordonnée.
83	Leprohon	Vallée	"	" " " " "	Do Do.
	The Queen	Daoust	"	" " " Meredith, " "	Ordered that recognizance be entered into for prisoners appearance on the first day of next Term of June.
	Poitevin	Morgan	"	" " " " "	Motion pour appel de Jugement Interlocutoire—Accordée.
	R[illegible]d	Fabrique Ste. Jeanne Françoise de Chantal	"	" " " " "	Exception Préliminaire déboutée avec dépens.
	The Queen	Brown	"	" " " " "	Motion du Prisonnier que le Bref de *Certiorari* soit reçu —Accordée.
	" "	"	"	" " Meredith, Drummond, Mondelet, {J. Aylwin, {*diss.*	Motion du Procureur Général que le dit Bref soit cassé—Refusée.
	" "	"	"	" " Aylwin, Meredith, Drummond, Mondelet	Motion of prisoner to be discharged—Granted.

21	Dufaux	Herse	"	" " " " "	Ordonné que les parties soient re-entendues le 1er jour du

Aylwin, Meredith, Drummond, Mondelet.........Motion of prisoner to be discharged—Granted.

No.	Appelant	Intimé	Date	Juges		Jugement
21	Dufaux	Herse	"	" " " "		Ordonné que les parties soient re-entendues le 1er jour du Terme prochain.

QUEBEC.

No.	Appelant	Intimé	Date	Juges		Jugement
80	Goudreault	Poisson	12 Mars	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet		Motion de l'Intimé de comparaître après les délais—Accordé.
74	Noulan	Smith	13	" " " " " " "		Appel renvoyé faute de rapport du Bref, &c.,
55	Beaudouin	Grand Tronc	"	" " " " " " "		Motion of Respondent to strike Inscription—Refused.
52	Vanfelson	Mann	16	" " " " " " "		Jugement déboutant l'Intimé de son droit d'appel à Sa Majesté faute de procédure.
72	Canfield	Corporation of Quebec	"	" " " " " " "		Motion against return of Writ—Rejected and Writ of Appeal quashed with costs.
81	Taschereau	Robertson	17	" " " " " " "		Appel débouté faute du rapport du Bref, &c.
	Hogan	Mann	"	" " " " " " "		Motion pour appel du Jugement Interlocutoire—Refusée.
	Ex-parte Frs. Anger		"	" " " Meredith, Drummond, Mondelet,	J. Aylwin, *diss.*	*Habeas Corpus* accordé en par le prisonnier donnant un cautionnemeut de £1000.
49	Gugy	Brown	19	" " " Aylwin, Meredith, Drummond, Mondelet		Conf.
64	Venner	La Reine	"	" " " " " " "		"
17	Lebrun	Rheaume	"	" " " " " " "		"
58	Burns	Connell	"	" " " " " " "		Motion de l'Intimé pour faire renvoyer l'appel—Rejettée.
38	Laidlaw	Burns	"	" " " Aylwin, Drummond, Mondelet,	Juge en Chef, " Meredith, *diss.*	Conf.
41	Pacaud	Roy	20	" " Meredith, " "	Juge Aylwin, " Taschereau, *diss.*	Inf.
61	Blais	Blouin	"	" Juge en Chef, Aylwin, Meredith, Drummond, Mondelet		Conf.
71	Berubé	Richardson	"	" " " " " " "		Appel renvoyé faute de cautionnement suffisant.

APPELANTS.	INTIMÉS	DATE.	JUGES.	JUGEMENTS.
59 Pacaud	Picard	20 Mars.	Juge en Chef, Aylwin, Meredith, Mondelet,	Jugement ordonnant à l'appelant de donner un nouveau cautionnement devant le Greffier des appels le ou avant le 2 Avril 1866.
60 Miller	L'Ev. des Trois Rivières	" "	" " " "	Ordonné aux Intimés de répondre à l'appel du dit Miller le ou avant le 2 Avril 1866.
		" "	" " " " Drummond, "	Conf.
75 Gugy	Brown	" "	" " " " " "	Application pour *Habeas Corpus*—Rejettée.
The Queen	Sweeney			
49 Gugy	Brown	" "	" " " " "	Appel à Sa Majesté—Accordé à l'Appelant.
89 Brown	Gugy	" "	" " " " "	Requête de l'Intimé relativement aux Observations de MM. les Juges Aylwin et Badgley, transmises au conseil Privé.—Rejettée.

TERME DE JUIN 1867.

MONTREAL.

APPELANTS.	INTIMÉS	DATE.	JUGES.	JUGEMENTS.
81 Owler	Moreau *et vir*	1 Juin.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet,	Motion pour le rejet de l'Appel vû la non-production des Bref et Dossier—Accordée quant aux frais seulement vu le rapport des Bref, &c. depuis la signification de la dite Motion.
56 Clement	Corpora'on de Farnham	" "	" " " " " "	Motion pour substitution—Accordée.
Leduc	Leger Parisien	" "	" " " " " "	Motion pour appel du Jugement Interlocutoire—Rejettée.
14 Gould	Ellis	2 "	" " " " " "	Motion pour renvoi de l'Appel vu le défaut de comparution de l'Appelant—Accordée avec dépens.
75 Benning	Hibbard	5 "	" " " " " "	Motion pour discontinuation d'appel—Accordé de consentement.
92 Valls	B. B. Land Co.	6 "	" " Meredith, Drummond, Mondelet, Polette,	Conf.
Ex-parte Watier		7 "	" " " " "	

75	Benning	Hibbard	5					Motion pour discontinuation d'appel—Accordé de consentement.
92	Valls	B. B. Land Co.	6	"	"		Meredith, Drummond, Mondelet, Polette,	Conf.
	Ex-parte Watier		7	"	"	"	" " "	Requête pour être admis huissier—Accordée.
33	Aussant Lange	Cairns *et vir*	"	"	"	"	" " "	Motion pour rejet de l'appel, vu le non-rapport du dossier—Accordée vu le certificat du Greffier.
29	Mailloux	Doré	"	"	"	"	" " "	Appel renvoyé avec dépens,
08	Dorion	Kierzkowski	9	"	"	"	Mondelet, Berthelot, {Juge Meredith,} *diss.*	Inf.
36	Dorion	Kierzkowski	"	"	"	"	Meredith, Mondelet, Berthelot	"
91	Gibson	Moffatt & Young	"	"	"	"	" " Loranger	Conf.
94	Gibson	Moffatt & Supple	"	"	"	"	"	"
48	The Queen	McDonald	"	"	"	"	" Drummond, Mondelet,	Cause réservée—Verdict maintenu.
40	The Queen	Pickup	"	"	"	"	" "	" " " annullé (quashed)
	The Queen	Daoust	"	"	"	"	" " {Juge Mondelet,} *diss.*	Ordre du Juge Mondelet accordant un nouveau procès—Revisé.
19	De Beaujeu et de Gaspé *esqual et al.*	Deschamps	"	"	"	"	" " Mondelet,	Conf.
29	De Beaujeu et de Gaspé *esqual et al.*	Lalonde	"	"	"	"	" " "	"
54	Brahadi	Bergeron	"	"	"	"	" " "	Inf.
	Marie Ste. Marie	Lefort	"	"	"	"	" " "	Motion pour appel de Jugement Interlocutoire — Rejettée
	Morrison	Atchinson	"	"	"	"	" " "	Motion pour appel de Jugement Interlocutoire — Rejettée
44	Kelly	Morehouse	"	"	"	"	Drummond, Mondelet, {Juge Meredith,} *diss.*	Conf.
48	Naud	Smith	"	"	"	"	Meredith, Drummond, Mondelet,	"
18	Jones	Decelles	"	"	"	"	" " "	Motion pour renvoi de l'Appel avec dépens vu le non-rapport du dossier—Accordée quant aux frais seulement, vû le rapport du dossier depuis la signification de la dite Motion.

MONTREAL.

JUGEMENT RENDU A QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
53 Woodman	Genier	19 Juin.	Juge en Chef, Aylwin, Meredith, Mondelet	Exception Préliminaire — Rejettée avec dépens.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
49 Gugy	Brown	12 Juin.	Juge en Chef, Aylwin, Meredith, Drummond, Mondelet	Appelant déchu de son droit d'Appel à S. M. faute d'avoir fourni le cautionnement requis dans les délais voulus par le Jugement de cette Cour.
Brown	Gugy	13	“ “ “ “ “ “ “	Motion pour appel d'un Jugement Interlocutoire — Rejettée.
95 St. Cyr	McKenzie	14	“ “ “ “ “ “ “	Motion de l'Intimé pour Reprise d'Instance—Accordée.
50 Picard	Picard	“	“ “ “ “ “ “ “	Appel renvoyé faute de cautionnement suffisant.
88 Crevier	Rocheleau	15	“ “ “ “ “ “ “	Sur motion de l'Intimé, la Cour lui permet de discontinuer son Appel à S. M., et sur motion de l'Appelant, la Cour ordonne remise du dossier à la Cour Supérieure à Trois-Rivières.
35 Tilstone	Gibb	19	“ “ “ “ “ “ “	Motion de l'Appelant demandant remise du dossier faute par l'Intimé d'avoir procédé sur son appel à Sa Majesté—Accordée.
1 Pacaud	Joy	20	“ “ Aylwin, Meredith, Drummond, Mondelet, Taschereau	Motion de l'Intimé pour appel à Sa Majesté—Rejettée.
54 O'Neill	Mayor *et al.* of Quebec	“	“ “ en Chef, Aylwin, Drummond, Mondelet, Badgley	Conf.
48 Bell	Stephens	“	“ “ “ “ “	“
70 Brown	Lowry	“	“ “ “ “ “ Meredith, Drummond, Mondelet	“

No.	Appelant	Intimé	Date	Juges	Jugement
30	Larochelle	Mailloux	" "	" " " " " "	Inf.
65	Lepage	Stevenson	" "	" " " " " "	Conf.
98	Kempt	Letellier	" "	" " " " Mondelet, {J. Drummond} *diss.*	"
100	Kempt	Lamontagne	" "	" " " " " " {*diss.*	"
51	Bettersworth	Hough	" "	" " " " Drummond, Mondelet	"
62	Blais	Blouin	" "	" " " " " "	"
	Corrigan	Coté	" "	" " " " " "	Motion de l'Intimé pour faire débouter l'Appel faute de cautionnement suffisant — Rejettée.
80	Goudreault	Poisson	" "	" " " " " "	Cautionnement insuffisant — Ordonné à l'Appelant de déposer entre les mains du Greffier de cette Cour £50 pour tenir lieu du cautionnement fourni en cette cause —le dit Dépot fait le 27 Juin.
87	Evanturel	Evanturel	" "	" Alywin, Meredith, Drummond, Mondelet, {J. en Chef} *diss*	Motion pour renvoi de l'Appel faute par l'Appelant d'avoir interjetté son dit Appel dans moins de huit jours après le prononcé du Jugement en Cour Supérieure, mais seulement deux jours après le Jugement.

TERME DE SEPTEMBRE, 1866

MONTREAL.

No.	Appelant	Intimé	Date	Juges	Jugement
48	Frothingham	Smith	1 Sept.	Juges Alwin, Drummond, Badgely, Mondelet,	Motion de Edwin Atwater & *al* pour reprendre l'instance au lieu et place de John Byington Smith, décédé— Accordée.
59	Smith	Hagar	"	" " " " " "	Motion de Edwin Atwater & *al* pour reprendre l'instance au lieu et place de John Byington Smith, décédé— Accordée.
19	De Beaujeu et de Gaspé *esqual et al.*	Deschamps	"	" " " " " "	Motion pour faire déclarer appel à Sa Majesté, abandonné, vû que le cautionnement

APPELANTS.	INTIMÉS.		JUGES.	JUGEMENTS.
				n'a pas été fourni dans le délai fixé par la Cour et ordonner la remise du dossier—Accordée vû le certificat du Greffier à cette fin.
29 De Beaujeu et de Gaspé *esqual et al.*	Lalonde	1 Sept.	Juges Aylwin, Drummond, Badgley, Mondelet,	Do do do
Nagle	Felton	" "	" " " " "	Motion pour substitution—Accordée.
31 Curran	O'Connor	" "	" " " " "	Motion de Ellen Lennon pour reprendre l'instance au lieu et place de James Curran décédé—Accordée.
La Reine.	Vincelette	3 "	" " " " "	Requête pour *Habeas Corpus* —Permis au Prisonnier de retirer sa Requête et la renouveler sans frais.
La Reine	Falkner	" "	" " " " "	Motion pour Bref d'*Habeas Corpus* — Accordée — Ordonné qu'il émane immédiatement.
16 Pantom *et al.*	Woods	" "	" " " " "	Motion de la part de James Moir, l'un des Défendeurs pour appel de Jugenent Interlocutoire—Refusée.
28 Biron	Gauvin	4 "	" " " " "	Motion pour renvoi de l'Appel vû le non-service du Bref sur l'Intimé ou ses Procureurs *ad litem* en Cour Inférieure, l'huissier qui a fait retour du prétendu service étant un huissier de la Cour Supérieure pour le Bas-Canada, ayant fait affidavit de tel service devant un Commissaire de la Cour Supérieure pour recevoir des affidavits, qui n'y fait voir quand et où il lui a administré tel serment.

No.	Appelant	Intimé								Dissident	Jugement
28	Biron	Gauvin	"	"	"	"	"	"	"		Motion de l'Intimé pour qu'il lui soit donné acte de ce qu'il se désiste de la motion ci-dessus du 1er du courant —Accordée.
29	Biron	Gauvin	"	"	"	"	"	"	"		Motion de la part de l'appelant qu'à telles conditions qu'il plaira à la Cour, il lui soit permis de produire un nouvel affidavit, annexé à la présente Motion, pour amender et compléter en autant que besoin peut-être, le Retour, ou Certificat déjà fait sous l'affidavit spécial (annexé au Bref d'appel en cette cause) par l'huissier et constatant la signification du dit Bref d'appel et de l'avis y annexé
28	Biron	Gauvin	"	"	"	"	"	"	"		Motion de la part de l'Appelant pour Acte de la Déclaration qu'il se désiste de la motion ci-dessus du 1er du courant.
	La Reine	Falkner	"	"	"	"	"	"	"		Rapport du Bref d'*Habeas Corpus* et du corps du prisonnier —Ordonné que le prisonnier soit renvoyé jusqu'à demain à 10 h. A. M.
	"	"	5	"							Motion de la part du prisonnier pour être admis à caution—Rejettée.
	Ex parte Murray		6	"	"	"	"	"	"		Requête pour *Habeas Corpus* — Accordée — Ordonné l'émanation d'un Bref d'*Habeas Corpus*, rapportable demain.
43	Evans	Cross	7	"	"	"	"	"		Juge en Chef, " Meredith, *diss.*	Conf.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
13 Bryson	Stutt	7 Sept.	Juges Aylwin, Meredith, Drummond, {Juge Mondelet, {*diss* / " en Chef, concourrant	Conf.
50 Prevost	Brien Desrochers	"	" " " " {" Mondelet, {*diss* / " en Chef, concourrant	"
43 Fahrland	Rodier	"	" " " Mondelet, " "	"
Ex-parte Murray		"	" " " Drummond, Badgley, Mondelet,	Rapport du Bref *d'Habeas Corpus* et du corps du Prisonnier—Motion pour faire enfiler le retour du Bref—Accordée—Ordonné que le prisonnier soit renvoyé jusqu'à demain.
32 Millette	Laprade	"	" " " " " "	Motion de la part de l'Intimé pour le renvoi de l'appel avec dépens, 1° vû l'insuffisance du cautionnement; 2° Parceque les cautions du dit Appelant ont refusé frauduleusement, lorsqu'elles ont donné leur cautionnement de répondre aux justes questions posées par le dit Intimé concernant leur solvabilité et leurs biens; 3° Parceque les dites cautions sont insolvables et incapables de répondre à la condamnation qui serait rendue contre le dit Appelant sur le présent appel ainsi qu'il appert aux affidavits et aux documens annexés à la présente motion, auxquels il est referé.
32 Millette	Laprade	"	" " " " " "	Motion de l'Appelant pour permis de fournir nouvelles cautions et production d'un consentement signé par l'Appelant et l'Intimé—Accordée.

mis de fournir nouvelles cautions et production d'un consentement signé par l'Appelant et l'Intimé—Accordée.

sans frais, permis à l'Appelant de fournir de nouvelles cautions au lieu et place de celles qu'il a déjà fournies et ce de ce jour à huit jours et ordonné que faute par l'Appelant de ce faire, il sera déchu et débouté de son Appel et le dossier après ce délai remis à la Cour Inférieure avec dépens en faveur de l'Intimé contre l'Appelant. Discontinuation par l'Intimé de sa motion ci-dessus du 3 Sept. courant en par l'Appelant payant les dépens d'icelle—Accordée.

No.	Appelant	Intimé							Juges	
	[illegible]e Murray		8	"	"	"	"	"		Motion de la part du prisonnier pour être admis à caution—Rejettée.
36	Matthews	Tiffin	"	"	"	"	"		Mondelet, Johnson,	Motion pour renvoi de l'appel et sa mise au néant, vû que la présente cause n'est pas du ressort de cette Cour et que le Jugement duquel le présent Appel est interjeté est intervenu dans une cause non-appelable de sa nature—Accordée et renvoi du dit appel avec dépens.
81	Owler & *al.*	Moreau *et vir*	"	"	"	"	"		Badgley Mondelet,	Inf.
51	Leamy	McCready	"	"	"	"	"	"	"	Motion pour renvoi de l'Appel avec dépens vu le non-rapport du Bref d'Appel, et production d'un consentement écrit par l'Appelant et l'Intimé par lequel ils consentent que la motion soit accordée sujette au privilége de l'Ap-

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
				pelant de produire le dossier dans un délai de 15 jours—Accordée.
Groome	Henry & Bulger	8 Sept.	Juges Aylwin, Drummond, Badgley, Mondelet,	Motion pour renvoi de l'Appel vû le non service ni entâ d'une Requête en Appel en cette cause et ce. avec dépens, et vû le certificat du Greffier de la Cour de Circuit à cette fin—Accordée sans frais.

MONTREAL.

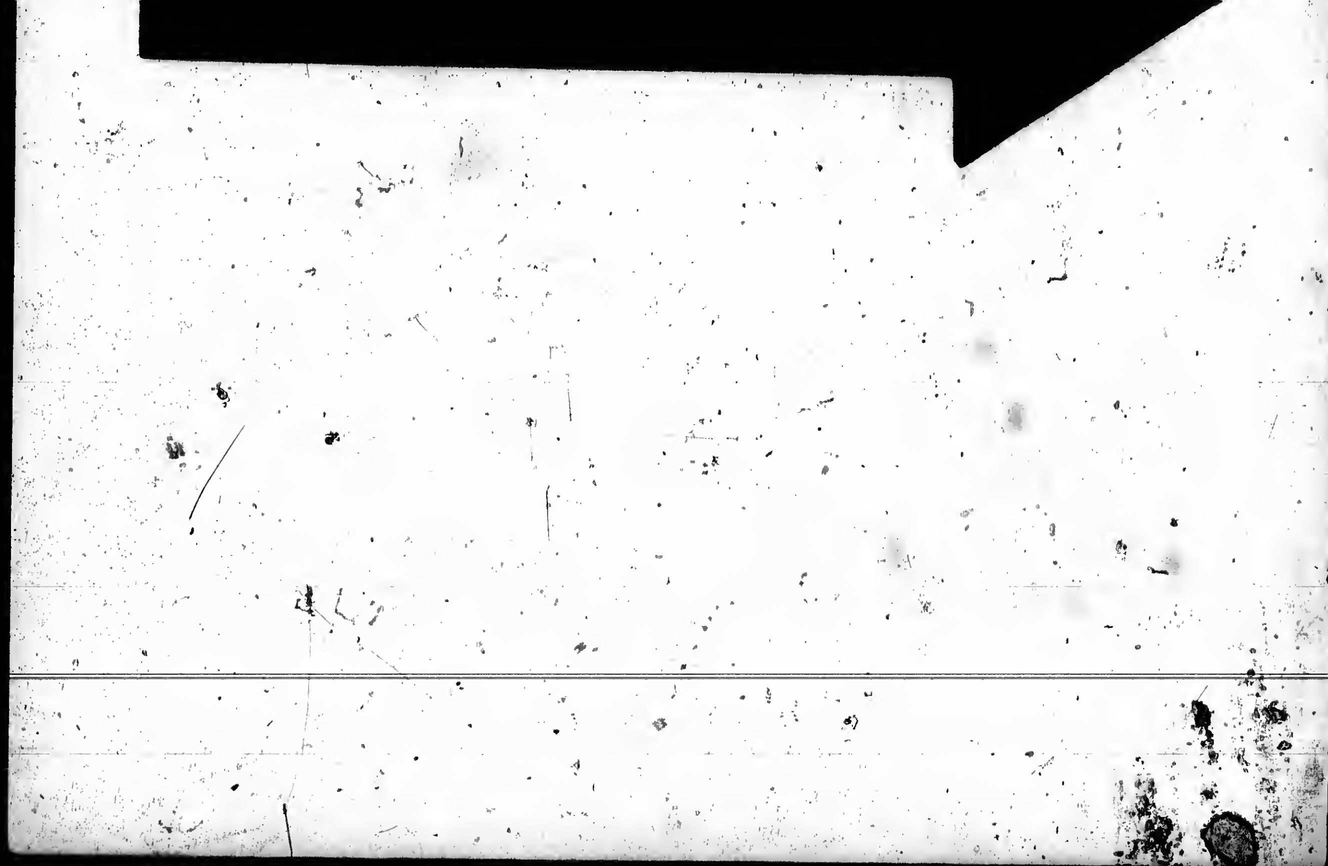
JUGEMENTS RENDUS A QUEBEC.

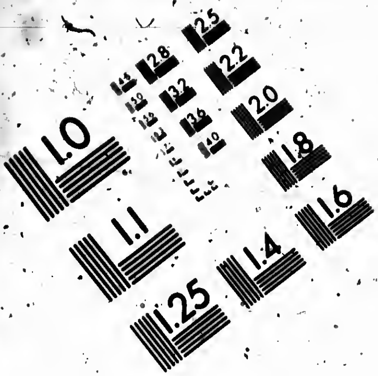
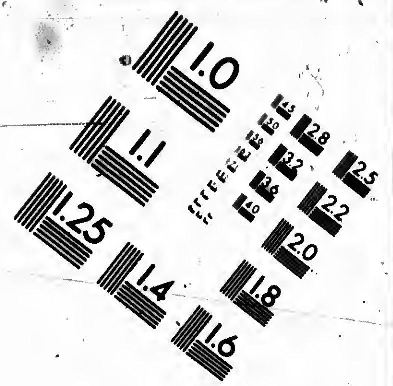
APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
15 Hogle	McCorkill	19 Sept.	Juge en Chef, Meredith, Drummond, Mondelet,	Conf.
2 Grant	Lockhead	“ “	“ “ “ “ “	“
90 Hunter	Grant	“ “	“ “ “ “ “	Inf.
75 Morin, fils	Palsgrave	“ “	“ “ “ “ {Juge Mondelet, {diss.	Conf.
58 Nordheimer	Duplessis	“ “	“ “ “ “ Mondelet,	Inf.
34 Léger	Tate et al	“ “	“ “ “ “ {Juge Mondelet, {diss.	Conf.
93 Lenoir Rolland	St. Denis *et al.*	“ “	“ “ “ “ Mondelet,	“
Belanger	Gravelle	“ “	“ “ “ “ “	Motion pour appel de Jugement Interlocutoire—Accordée.
80 Freer	Maguire	“ “	“ “ “ “ “	Inf.
62 Dorion	Doutre	“ “	“ “ “ “ “	Re-audition ordonnée.
75 Hall	Brigham	“ “	“ “ “ “ “	Re-audition ordonnée.
61 Harold	Mayor *et al.* of Montreal	“ “	“ “ “ “ “	
23 Burroughs	Kiernan	20 “	“ “ Aylwin, Mondelet, {Juge Meredith, {concourant.	Conf.
75 Latour et al	Gauthier *et al.*	“ “	“ “ “ “ “ “	“
15 Hogle	McCorkill	“ “	“ “ “ Drummond, Badgley, Mondelet,	Motion pour Règle *Nisi* pour le 1er Décembre prochain—Accordée.

QUEBEC.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
65 Lepage	Stevenson	13 Sept.	Juge en Chef, Aylwin, Drummond, Badgley, Mondelet,	Motion pour déchoir l'Appelant de son droit d'Appel à Sa Majesté, faute d'avoir fourni un cautionnement—Accordée.
89 McClaren	Conolly	“ “	“ “ “ “ “ “	Motion de l'Intimé pour ordonner au Protonotaire de transmettre quelques papiers—Rejettée.

No.	Appelant	Intimé	Date	Juges	Jugement
	"	"	"	"	Motion de l'Appelant pour diminution du dossier—Rejettée.
41	Pacaud	Roy	"	"	Motion de l'Appelant pour un Bref de mépris—Rejettée.
	Ex-parte Lavallée		14	"	Requête pour Bref *d'Habeas Corpus*—Rejetté.
89	McClaren	Conolly	"	"	Motion de l'Intimé pour permis d'enfiler des Réponses aux Griefs d'Appel après le délai—Accordée.
66	Guillemette	Larochel	17	Meredith, Aylwin, Drummond, Mondelet	Inf.
63	Larue	Evanturel	"	"	Conf.
88	Brostery	Hall	"	"	
82	Ennis	Compagnie Gr'd Tronc	"	"	
90	Lemieux	Lemieux	"	Alywin, Drummond Badgley, Mondelet	
6	Renaud	Proulx	"	"	
93	Evanturel	Remillard	"	"	
93	"	"	19	"	[illegible] à Sa Majesté [illegible] Conseil Privé—
18	Côté	Monaghan	20	"	[illegible] l'Appelant pour faire [illegible] comparution de [illegible]—Rejettée.
18	"	"	"	"	Motion de l'Intimé pour faire renvoyer l'Appel—Rejettée.
47	Tardif	Montminy	"	Meredith, Aylwin, Drummond, Mondelet	Conf.
67	Smith	Roberts	"	Alywin, Drummond, {Juge Meredith, " Mondelet} *diss.*	Inf.
94	Dionne	Valleau	"	" " Badgley, {Juge Mondelet} *diss.*	Conf.
8	Brun	Michon	"	{Juge en Chef, " Mondelet} *diss.* quant aux frais.	" avec dépens contre l'Intimé.
38	Wight	Daly	"	Meredith, Aylwin, Drummond, Mondelet	Ré-audition ordonnée.
67	Smith	Roberts	"	Aylwin, Drummond, Badgley, Mondelet	Motion de l'Intimé pour permis d'appeler à Sa Majesté en Son Conseil Privé—Rejettée.



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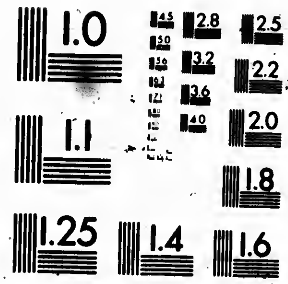
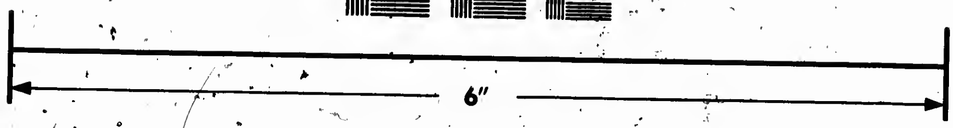

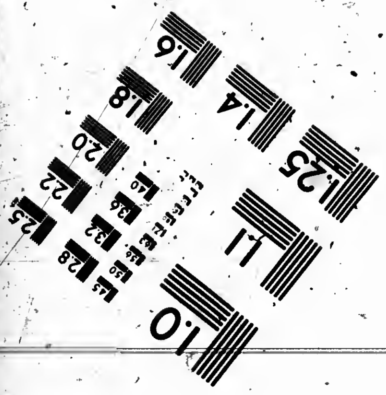
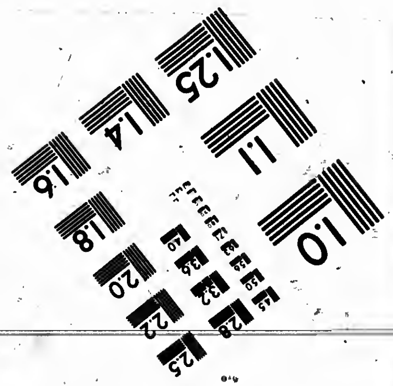

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TERME DE DECEMBRE 1866.

MONTREAL.

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
5 Dubois	Tremblay	1 Déc.	Juges Aylwin, Drummond, Mondelet, Johnson	Ordonné l'émanation d'un Bref de *Certiorari* ordonnant au Greffier de la Cour Supérieure pour le district de Richelieu de rapporter devant cette Cour tout le dossier dans la Cour Supérieure du District de Richelieu, savoir, inclusivement depuis le *Proecipe* pour l'émanation de l'ordre originaire dans la cause jusqu'au Proecipe pour l'émanation du Bref de *Fieri Facias* en vertu duquel l'immeuble en question en cette cause a été vendu et dont le produit est maintenant sujet à l'examen du rapport de distribution.
1 Beaulieu	Charlton	" "	" " Badgley, Mondelet,	Re-argument ordered on Respondents Motion of the 3rd Sept. last past, that the present Appeal be declared premature and hence dismissed with costs in as much as the same was taken within the delays allowed for the Revision of the judgment rendered by the Hon. M. Justice Loranger, in as much as the said Charlton had duly inscribed the case for Revision and that Record be remitted to the Court below.

duly inscribed the case for Revision and that Record be remitted to the Court below.

3	Samuels	Rodier	"	"	"	"	"	"	"	Motion to replace Security having become insolvent—Granted by consent.
51	Leamy	McCready	"	"	"	"	"	"	"	Motion for substitution—Granted by consent.
55	Ramsay	The Queen	"	"	"	"	"	"	"	Ordered that the Return of a Writ of Error be read in open Court and done according.
15	Hogle	McCorkill	"	"	"	"	"	"	"	Motion for a Rule *nisi* to be allowed to appeal to Her Majesty in Her Privy Council—Appellant not appearing ordered said Motion to be struck off from the Roll of Rules and the Record remitted to the Court below.
13	Bryson	Stutt	"	"	"	"	"	"	"	Do do do
	De Beaujeu	Perry & de Gaspé *& al.*	3	"	"	"	"	"	"	Motion to Appeal from Interlocutory Judgment—awarded—Ordered a writ of Appeal to issue within five days from this date.
2	Ferrier	Dillon	4	"	"	"	"	"	"	Motion pour le renvoi de l'Appel vû le non-rapport du Bref et du dossier de la Cour Inférieure et ce avec dépens—Accordée quant aux frais vû l'affidavit produit par l'appelant et le Rapport des Bref et dossier depuis la signification de la dite motion.
53	Woodman	Genier	"	"	"	"	"	"	"	Re-audition ordonnée.
69	Joubert	Mauraült	"	"	"	"	Meredith, Drummond, Mondelet,			Inscription déchargée et re-audition ordonnée.
78	Poitevin	Morgan	"	"	"	"	Drummond, Badgley;		"	Motion de l'Appelant pour substitution de Procureur—

APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
Beaudry	Le Maire, etc., de Mont'l	6 Déc.	Juge Aylwin, Drummond, Badgley, Mondelet	Accordée vû le consentement de toutes les parties.
Queen, The	Paxton	" "	" " " " "	Motion to appeal from an Interlocutory Judgment—Granted—Appeal allowed—Ordered to issue within eight days from this date.
" "	Dunlop	" "	" " " " "	Cause réservée—Verdict confirmée.
28 Delisle	Ryland	" "	" " " " "	" " " "
				Motion pour le renvoi de l'Appel avec dépens vû la non-enfilure des factums dans les delais prescrits par les Règles de Pratique de cette Cour—Accordée quant aux frais vû le consentement des parties.
Président & Syndics de la Commune de la Baie St. Antoine.	Lozeau & *vir*	7 "	" " " " "	Conf.
O'Heir	Lemoine	" "	" " " " "	
Angers	Ermatinger	" "	" " " " " Juge Mondelet, *diss.*	Inf.
McDonald	Nivin	" "	" " " " " " " *diss.*	Conf.
Religieuses Hospitalières de l'Hôtel-Dieu.	Corp. St. Jean Baptiste	" "	" " " " " Mondelet,	"
McGillivray	Brady	" "	" " " " "	"
Jones & *al.*	Lemoine	" "	Meredith, Drummond, "	Re-audition ordonnée.
			Drummond, Badgley, "	Motion pour enjoindre au Député Greffier de cette Cour de transmettre le dossier en cette cause à la Cour de première Instance avec dépens contre les dits Jones et autres et le dit Député Greffier des Appels, en antant que le certificat du Greffier du Conseil Privé, constatant que l'Appel au Conseil Privé de Sa Majesté a été institué en la

présente cause, et que des procédures ont été adoptées sur tel Appel, n'a pas été

No.	Appelant	Intimé	Date	Juges	Jugement
11	East-Towns. Bank	Pacaud	" "	" " Meredith, Drummond, Juge Polette, concourant. " " Badgley, *diss.*	Inf. présente cause, et que des procédures ont été adoptées sur tel Appel, n'a pas été filé dans les délais voulus par la loi, et en autant que le Député Greffier des Appels refuse de transmettre le dossier en la présente cause à la dite Cour de première Instance.—Rejettée avec dépens.
	Exparte Fourquin		7 Déc.	Juges Aylwin, Drummond, Badgley, Mondelet	Ordonné qu'audition soit continuée au terme prochain pour donner au Requérant le temps de fournir nouvel avis à la partie adverse.

QUEBEC.

No.	Appelant	Intimé	Date	Juges	Jugement
2	Corrigan	Coté	13 Déc.	Juge en Chef, Aylwin, Drummond, Badgley, Mondelet	Re-audition ordonnée.
93	Evanturel	Remillard	15 "	" " " " " "	Motion pour faire décheoir l'Appelant de son droit d'Appel à S. M. faute d'avoir donné cautions—Accordée.
	Exparte Donaghue		" "	" " " " " "	Motion pour Bref *d'Habeas Corpus*—Rejettée.
20	Quebec Harbour Com.	Gibb	17 "	" " " " " "	Motion pour faire renvoyer l'Appel faute de Griefs—Discontinuée en par l'Appelant payant les frais de cette motion.
24	McArthur	Hart	19 "	" " " " " "	Motion pour renvoi d'Appel faute de cautionnement suffisant—Ordonné que l'Appelant donne un nouveau cautionnement d'ici au 18 janvier prochain.
99	Cook	Verreau	" "	" " " " " "	Inf.
5	Price	Pacaud	" "	" " " " " "	Conf.
96	Corp. Quebec	Caron *& al.*	" "	" " " " " "	"

	APPELANTS.	INTIMÉS.	DATE.	JUGES.		JUGEMENTS.
55	Beaudouin	Grand Tronc	11 Déc.	Juge en Chef, Aylwin, Badgley,	J. Drummond, " Mondelet, } *diss.*	Conf.
80	Goudreault	Poisson	" "	" " " Drummond,	{Juge Mondelet,} *diss.*	Jugement de la Cour de Revision renversé et celui de la Cour de Circuit confirmé.
29	Tetu	McKenzie	20 "	" " " Mondelet	{Juge Drummond,} *diss.*	Inf.
"	"	"	" "	" " " "		Motion pour Appel à Sa Majesté—Accordée.
50	Cressé	Baby	" "	" " " Drummond, Mondelet		Confirmé.
"	"	"	" "	" " " "		Motion pour Appel à Sa Majesté—Accordée.

INDEX

TO THE PRINCIPAL MATTERS IN THE TENTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q. C.

PAGE

ACTION :—*Vide* CONDICTIO INDEBITI.

" :—An hypothecary, being in its nature real, is appealable, and the *enquête* therein ought therefore, on the requisition of either party, to be conducted as in an appealable cause. (Dupont et al. vs. Grange, Q. B.). 75

" *en rescision* :—*Vide* SERVITUDE.

" POSSESSOIRE :—Cannot be maintained, where the respective possession of the parties is uncertain owing to the want of *bornage* between properties of the two parties. (Laprade vs. Gauthier, S. C.)........................ 139

" :—In an, the plaintiff must allege, that he has possessed for a year and a day preceding the trespass complained of, otherwise the action will be dismissed on demurrer. (Cardinal vs. Belanger, S. C.).......................... 251

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" :— " OPPOSITION *à fin de conserver*.

" :— " MUNICIPAL COUNCILLOR.

APPEAL :—No appeal lies from a judgment rendered by the Circuit Court under the Municipal Act of L. C. of 1860. (Groulx vs. the Corporation of the Parish of St. Laurent, Q. B.)... 74

" :—*Vide* ACTION.

" :—A wife, *séparée de biens*, can institute an appeal from a judgment rendered against her, after the delay of a year and a day, during the lifetime of her husband. (Walker *et vir* vs. The Mayor, &c., of the Town of Sorel, Q. B.)... 77

" :—*Vide* REVIEW.

" :—An opposant, who is *not* also defendant, appealing from a judgment dismissing his opposition, is bound to give security for costs only. (Ferrier, appel., and Dillon, respt)... 226

APPEARANCE :—*Vide* PRACTICE.

ASSIGNEE :—An, under the Insolvent Act of 1864, has a right to claim and be paid, as a *tiers* opposant, a sum of money deposited in the hands of the Prothonotary by a *tiers saisi*, after judgment in a case of *saisie arrêt avant*

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jugement, and in such a case the plaintiffs have a *lien* for their costs of attachment up to the time of the publication of the attachment under which the assignee was appointed; the right to be paid which will be reserved to the plaintiffs in the judgment awarding the moneys to the assignee. (Macfarlane et al. vs. Bell & Dougall et al., T. S., & Burns, *Tiers* oppt., S. C.) 26

Bail :—Persons accused of a misdemeanor are not entitled to be bailed if, in the opinion of the presiding Judge, the evidence adduced be positive against them, although two juries have been discharged because they could not agree upon a verdict; and in such case the court will order that the prisoners stand committed *without bail or mainprize*, to be tried again at the next term, and not to be discharged without further orders from the Court. (Regina vs. Blossom et al., Q. B.) 29

" :—When the Court has ordered the commitment of a party, *without bail or mainprize*, it is *not* competent for a Judge in chambers to release such party on bail, however illegal such commitment may be. (*Ex-parte* Blossom et al., for *Hab. Corp.*, S. C.) 30

" :—When the Court has ordered the commitment of a party, *without bail or mainprize*, it *is* competent for a Judge in chambers to release such party on bail. (Exparte Blossom et al., for *Hab. Corp.*, S. C.) 35

" :—A person charged with misdemeanor, is, after two trials for the same, and disagreement of the jury on both trials, entitled to bail, and his application to be admitted to bail will be granted by the Court of Queen's Bench, on the Appeal side, although the Court, on the Crown Side may have ordered the commitment of such person, *without bail or mainprize*. (Exparte Blossom, Q. B.) 46

Capias ad Respondendum :—In the case of a, the delay between the deposit of the copy of Declaration in the Prothonotary's office, and the return day of the writ need *not* be the same as between the service, and the return day of an ordinary writ of summons. (Raphael vs. McDonald, S. C.) 19

" " " :—Where the bail of a party originally arrested under a writ of, have caused him to be imprisoned under a writ of *contrainte par corps*, issued at their instance, in order that he should undergo the imprisonment imposed as a punishment under sub-section 2 of Sec. 12 of Ch. 87 of the Cons. Stat. of L. C., the bail cannot, for that reason alone, claim that their bail bond should be cancelled and discharged. (Macfarlane vs. Lynch, S. C.) 26

" " " :—In an affidavit for, it is necessary to disclose the names of the persons from whom the information, that defendant was immediately about to abscond, &c., was obtained. (Cameron vs. Brega, S. C.) 88

" " " :—Where a party purchases a quantity of wheat, payable cash on delivery, receives delivery, and only pays a portion of the price, and then makes preparation to leave Canada for Scotland, his original domicile, where his family had resided for five years, (without paying the balance of his purchase, and without leaving any property in Canada out of which his creditor could get paid) is liable to arrest by writ of *Capias ad respondendum*. (Burns, applt., and Ross, respdt., Q.B.) 89

Carrier :—A, is not liable for the loss or theft of an overcoat, carried by a passenger in a steamboat and placed by the passenger on a sofa in the eating saloon, while he was taking supper. (Torrance vs. The Richelieu Company, C. C.) 335

Cautionnement, *juratoire et fide jussoire*:—*Vide* Usufruct.

Certiorari :—The certificate of service by a Bailiff of the notice of motion for a writ of, must be sworn to. (Ex parte Adams, for *Certiorari*, S. C.) 176

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CERTIORARI :—A writ of, issued out of the Court of Queen's Bench, civil side, and addressed to the Prothonotary of the Court below, for the return of papers, and not to the Judges of that Court, will be quashed. (Grant, appellant, and Lockhead, respondent, Q. B.)........ 183

" " :—The commissioners to whom a writ of, has been addressed and who have failed to make a proper return, will be mulcted in costs. (Exparte Leroux, for *Certiorari*, S. C.)........ 193

COMMISSION ROGATOIRE :—*Vide* PRACTICE.

CONDICTIO INDEBITI :—An action of, lies to recover back money which has been paid, but under protest, in satisfaction of a prescribed debt, when illegal coercion has been employed to obtain the payment. (The Corporation of Quebec, appellants, and Caron, respondent, Q. B.)........ 317

CONTRAINTE PAR CORPS :—*Vide* GARDIEN.

COSTS :—*Vide* SECURITY.

COUPE DE BOIS :—In the case of a sale of a, the only tradition the vendor can make is by delivery of the title and pointing out the timber to be cut, and a purchase effected by a party knowing of a previous sale of the same right is fraudulent. (Russell vs. Guertin et al., S. C.)........ 133

CRIMINAL PRACTICE :—Where a prisoner has been arraigned, on a charge of uttering forged paper, it is not competent for the Court to order the trial, by Jury, of a preliminary question raised by prisoner's counsel, to the effect, that the prisoner has been extradited from the United States, on a charge of forgery. (Regina vs. Paxton, Q. B.)........ 212

" " :—No new trial can be granted in a case of felony. (Regina vs. D'Aoust, Q. B.)........ 221

" " :—*Vide* JURY *de mediatate linguæ*.

DAMAGES :—A municipal corporation neglecting to perform certain works stipulated by a *proçes verbal* is liable for damages, including costs of protesting. (Lecours vs. the Corporation of the Parish of St. Laurent, S. C.)........ 82

" :—*Vide* SLANDER.

" :— " SEDUCTION.

" :—In an action for, for malicious arrest, the notice of action must state the place where the party was arrested and imprisoned, and if the day specified in the notice as the time when the arrest and false imprisonment took place be proved to be the day on which the defendant acted as a constable, the plaintiff, to avoid the necessity of a notice, will not be allowed to prove an arrest and false imprisonment made on the day previous, when the defendant was not a constable. (Bettersworth, appellant, and Hough, respondent, Q. B.)........ 184

" :—In an action for, against a public officer, notice of action is only necessary in case he acts *bonâ fide* in the execution of his duty, and the necessity, therefore, of such notice, can only be determined after proof in the case. (Pacaud, appellant, and Quesnell, respondent, Q. B.) 207

DECLARATION :—*Vide* CAPIAS AD RESPONDENDUM.

" :— " SAISIE GAGERIE.

DELEGATION :—*Vide* DONATION

DELIVERY :—*Vide* COUPE DE BOIS.

" :— " SALE.

DIMES :—In an action for recovery of, notice that defendant has ceased to profess the Roman Catholic religion cannot be proved by parol evidence, but a written plea that defendant has ceased to be a Roman Catholic is a notice in writing of the fact, and sufficient to exempt the party from future liability. (Proulx vs. Dupuis, C. C.)........ 114 & 115

DOMICILE :—A person formerly residing in Lower Canada and leaving it for many years and then returning to it, acquires a domicile there, although he

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may have only actually resided in L. C. a period of 17 days since his return. (Cresse, appellant, and Baby, respondent, Q. B.)................ 313

DONATION :—A third party, in favor of whom a sum of money is stipulated payable by a deed of donation, can sue the recovery thereof, by direct action and even hypothecarily, and his *hypotheque* is equivalent to that of a *bailleur de fonds.* (Dupuis and *vir* vs. Cédillot, and Kelly, intervening party, C. C.)................................ 338

EVIDENCE :—Where a wife *séparée de biens* from her husband carries on trade and commerce through her husband, authorized as her agent to that effect, under power of Attorney, the said husband may be examined as a witness against his wife. (Ireland vs. Maume, and Duchesnay et *vir*, T. S., S. C.)................................ 26

" :—The wife of an Insolvent cannot be legally examined touching his estate, although sub. sec. 4 of sec. 10 of the Insolvent Act of 1864 authorizes the examination of *any person* upon oath, respecting the Estate of the Insolvent. (In the matter of John Feron, an insolvent, and John White, assignee, and petitioner, S. C.)................ 111

" :—*Vide* DIMES.

" :—The contents of a lost document can be proved by verbal testimony, after the loss is established by the affidavit of the party invoking the lost document. (Russel vs. Guertin et al, S. C.)................ 133

" :—*Vide* PROMISSORY NOTE.

" :—In a commercial case, an agreement as to the special imputation of certain payments may be proved by parol evidence, although part of the debt be represented by a notarial obligation. (Lalonde vs. Rolland, S. C.)................................ 32

" :—In the case of a notarial obligation for £53 6s., for goods sold, if it appears by the books of the creditor that only £34 18s. 9d. were really due, the creditor will be condemned to grant a discharge of the obligation on satisfactory proof being made that the smaller amount was paid. (Lalonde vs. Rolland, S. C.)................ 321

EXECUTION :—A judgment rendered in a district other than that in which the defendant resides, may be executed *de plano* in the district where he lives; unless that he can show that he is possessed of property in the district where the judgment was rendered. (Terroux vs. Hart et al., and Hart, opposant, S. C.)................................ 19

" :—The omission of the signature of the Attorney *ad litem* of the party executing or of such party himself, on the writ, does not entail a nullity of the seizure; the 78th Rule of Practice being abrogated by 140th Section of ch. 83 of the Con. Stat. of L. C. (Levesque vs. Beaupré, and Beaupré, opposant, S. C.)................................ 257

EX-POST-FACTO :—A statute which is clearly, in its terms *ex post facto* must receive its full effect at the hands of a Court. (Regina vs. Madden, Q. B.) 342

EXPROPRIATION :—The proceedings in, if irregular, will be set aside, at the instance of any of the parties aggrieved; but with respect to such parties only as have complained. (Exparte the Mayor, &c., of Montreal, and Healey petr., S. C.)................................ 275

" :—In the case of an, the certificate of the prothonotary that the corporation of Montreal have deposited the necessary funds cannot be attacked by an *Inscription en faux*, on the ground that the required funds were not really so deposited. (Exparte the Mayor, &c., of Montreal, and Beaudry, petr. and pliff. *En faux*, S. C.)................ 278

EXTRADITION :—The French Consul General, not being an accredited diplomatic agent of his Government, is not competent to demand the extradition of a fugitive criminal. (Exparte Lamirande for *Habeas Corpus*, Q. B.).. 280

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" :—An informal translation of the *acte de renvoi* or warrant of arrest will not supply the place of the original. (Do.) 280

" :—The evidence of criminality to support the demand for extradition must be sufficient to commit for trial, according to the laws of the place where the fugitive is arrested and not according to the laws of the place where the offence is alleged to have been committed. (Do.) 280

" :—The making of false entries in the books of a bank does not constitute the crime of forgery, according to the laws of England or of Canada. (Do.) 280

False-pretence :—Proof that a promissory note was obtained on the false promise to pay the party granting it a certain portion of the proceeds cannot support a conviction for obtaining a valuable security with intent to defraud. (Regina vs. Pickup, Q. B.) 310

Folle Enchere :—A rule for, need not be served personally on the *adjudicataire*, and the motion for the rule needs no previous notice. (Lafond vs. Guibord, and Malo, opposant, and Guibord, *adjudicataire*, S. C.) 139

Gardien :—When a, has received notice of motion for a rule *nisi* for *contrainte par corps*, for failing to represent property seized, he may proceed to proof before the issue of the rule, to establish that the property has been duly represented. (Janes vs. Martin, S. C.) 331

Gothic :—*Vide* Work and Labour.

Husband and Wife :—*Vide* Evidence.

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Inscription en faux :—*Vide* Expropriation.

Insolvent Act of 1864 :—*Vide* Assignee.

" " " :— " Evidence.

" " " :—The Court has no discretion to exercise, in the case of failure to appear and petition against an attachment within five days from the return of the writ of attachment, and a defendant will not be admitted to present such petition after the five days, even on cause shown. (May vs. Larue et al., S. C.) 113

Insurance :—Insurers against loss or damage by fire are liable for the value of goods stolen at a fire. (McGibbon vs. The Queen Insurance Company, S. C.) 227

" :—When a policy of, contains the condition that if there appears any fraud, or false statement, the insured shall be excluded from all benefit under the policy, and the insured fraudulently exaggerates his claim for loss, he will be held to have forfeited all claim under the policy. (Seghetti vs. The Queen Insurance Co., S. C.) 243

" :—In the absence of satisfactory evidence that certain goods, the value whereof is claimed under a fire policy, were actually destroyed or damaged by fire, or stolen, the claim therefor cannot be recovered. (Harris vs. The London and Lancashire Fire Insurance Company, S. C.) 268

Interest :—Money voluntarily paid, in excess of six per cent. interest, during the time that the statute 16th Vic., ch. 80, was in force, cannot be recovered back, in an action *condictio indebiti*. (Massue, appellant, and Dansereau, *fils*, *et al.*, respondents, Q. B.) 179

Judgment :—*Vide* Practice.

Jury *de mediatate linguæ* :—An alien, indicted for a felony, is entitled to demand a, and in such case the Court will order the issue of a writ of *fieri facias ad triandum*, to summon thirty-six jurors speaking the language of the prisoner. (*Regina* vs. Vonhoff, Q. B.) 292

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LESSOR AND LESSEE:—The clause in a lease that the lessee shall not cede his rights, without the consent in writing of the lessor, is not comminatory, and its violation gives rise to the resiliation of the lease. (Moreau & *vir* vs. Owler et al., S. C.) 113

" " :—The right of *saisie gagerie par droit de suite*, for rent not due, cannot be exercised, without proof that the leased property is not sufficiently furnished to secure the payment of the rent. (Tracey & *vir* vs. Lasure et al., S.C.) 256

LIMITATION:—*Vide* PROMISSORY NOTE.

LISIERE DE BOIS:—A certain *usage de bois* in a, may be exercised by a Seignior, irrespective of the right and property of the commoners in the communal lands, including the land in which the *lisière de bois* is standing. (The President, &c., of The Common of St. Antoine, appellants, vs. Loseau *et vir*, respondents, Q. B.) 205

LOST DOCUMENT:—*Vide* EVIDENCE.

MALICIOUS ARREST:—*Vide* DAMAGES.

MARRIAGE:—A, contracted and celebrated without the consent of the parents of the female (a minor), and without publication of banns, and by fraud, artifice and threats, is liable to be annulled by a court of law, at the suit of the minor's parent. (Mignault vs. Hapeman, S. C.) 137

MARRIED WOMAN:—*Vide* APPEAL.

" " :— EVIDENCE.

" :—A, cannot claim to rank during the lifetime of the husband, on the moveable estate of her husband (an insolvent), in respect of an amount given to her, by their contract of marriage, in lieu of dower, and stipulated to be payable to her only in case she should survive her husband. (Masson et al. vs. Leslie et al., and Delisle et *vir*, oppts., and The Bank of Montreal, oppt. contesting, S. C.) 233

MORTGAGE:—*Vide* REGISTRATION.

MOVEABLE:—The mere possession of a, is *not* equivalent to title, but it is only *presumptive* of title; a possession of three years being necessary to render such possession equivalent to actual title. (Gould et al. vs. Cowan, S. C.) 345

MUNICIPAL ACT of L. C.:—*Vide* APPEAL.

" CORPORATION:—*Vide* DAMAGES.

" :—A public road, abolished as such by a *procès-verbal* of a Grand Voyer under the provisions of the old Road Act of L. C., but ordered by such *procès-verbal* to remain open for the private benefit of certain individuals, is not subject to the jurisdiction of a Municipal Corporation, under the Act of 1855. (Gosselin, applt., and Racette, respdt., Q. B.) 219

" COUNCILLOR:—A petitioner complaining that a person exercises the office of a, for the city of Montreal, illegally, must be "a citizen qualified "to vote," and no amendment to cure the want of proper allegation in this respect will be allowed. (Dubord vs. Lanctôt, S. C.) 244

NEW TRIAL:—*Vide* CRIMINAL PRACTICE.

OPPOSITION *à fin de conserver*:—An, made by an attorney *ad litem*, must contain an election of domicile. (La Banque Jacques Cartier vs. The Canadian Rubber Co & Kavanagh, oppt., S. C.) 200

" :—An omission to elect domicile as above may be cured by a motion to amend, after the fyling of an exception *à la forme*, on payment of forty shillings costs. (Do.) 200

OPPOSITION *à fin de distraire*:—An, may be amended, upon production of new deeds, on payment of ten dollars costs. (Chandler vs. Landrie & Meehan et al., oppts., S. C.) 196

" :—*Vide* APPEAL.

PRACTICE:—*Vide* CAPIAS AD RESPONDENDUM.

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PRACTICE :—The *mere order* for the issuing by the defendants of a *commission rogatoire* is sufficient to prevent the plaintiffs from inscribing their cause for judgment, although the plaintiffs formally notify the defendants in writing to use due diligence, and although an interval of fifteen days has elapsed between the date of the order and the day named in the inscription for hearing, *without any attempt being made by the defendants to sue out the commission so allowed to issue.* (Tarratt et al. vs. Barber et al., S. C.)............ 27

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" :— " BAIL.
" :— " APPEAL.
" :— " ACTION.
" :— " SEPARATION DE BIENS.
" :—Two causes may be united together, on the demand of one of the parties, when there is sufficient connexion between them. (Hébert, vs. Quesnel, S. C.)............ 83
" :—*Vide* SHERIFF'S SALE.
" :— " INSOLVENT ACT of 1864.
" :— " SAISIE GAGERIE.
" :—In the Circuit Court, an appearance in an appealable cause does not require to be notified to the opposite party; and a judge in chambers has no jurisdiction to reject an appearance from a record as having been irregularly fyled. (Duvernay et al. vs. The Corporation of the Parish of St. Barthelemy, S. C.)............ 136
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" :— " VENDITIONI EXPONAS.
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" :— " EXECUTION.
" :—A motion to amend a writ of summons and declaration, made after hearing on an exception *à la forme,* will be granted, on payment of costs of the exception. (Bousquet vs. Jodin et al., S. C.)............ 199
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" :— " OPPOSITION *à fin de conserver.*
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" :— " DAMAGES.
" :— " CRIMINAL PRACTICE.
" :—An error in the date on which a judgment has been rendered is not a ground of nullity, and in appeal the Court may rectify such error of date in its own judgment. (Naud, applt., and Smith, respdt., Q. B.). 217
" :—*Vide* MUNICIPAL COUNCILLOR.
" :— " TIERS SAISI.
" :— " ACTION POSSESSOIRE.
" :— " TUTOR.
" :— " EXPROPRIATION.
" :— " EXTRADITION.
" :— " GARDIEN.
" :— " STAMPS.

PRESCRIPTION :—*Vide* PROMISSORY NOTE.

PROMISSORY NOTE :—The prescription of five years, under the Promissory Note Act, ch. 64 of the Cons. Stat. of L. C., is so absolute, that no acknowledgment of indebtedness or partial payment will take the case out of the Statute; and if no suit or action be actually brought on a note within five years after its maturity, it will be held to be absolutely paid and discharged. (Bowker, applt., and Fenn, respdt., Q. B.)...... 120

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" :—Under certain circumstances a plaintiff suing on a, may be compelled to prove what value he gave therefor, notwithstanding such note may contain the words "value received." (Converse vs. Brown, S. C.,) 196

" :—An action on a, made and payable in a foreign country, and more than six years overdue, will be dismissed on demurrer. (Wilson vs. Demers, S. C.) 261

" :—*Vide* Stamps.

Queen's Bench :—*Vide* Certiorari.

Railway :—The rolling stock of a, is immoveable *par destination* and as such is not liable to seizure under a writ of execution *de bonis* (The G. T. R. Co., of Canada, appt., and The Eastern Townships Bank, respdt., Q. B.) 11

Rebellion de Justice :—*Vide* Saisie Execution.

Registration :—Two judgments, of different dates, registered on the same day and the same hour, but under different numbers, have the same hypothecary rank. (McConnell vs. Dixon and Brown, oppt., and Nivin et al., oppts., S. C.) 140

Retrait Successoral :—The action of, cannot be brought, when the cession is of a fixed and determined portion of an immovable, and such a cession cannot be regarded as a *droit litigieux* unless there be actual litigation in relation thereto pending. (Leclere et al., vs. Beaudry et al., S. C.) 20

Rescision :—*Vide* Servitude.

Revision :—There is a *no* right to a, of a judgment rendered on an application for a writ of *certiorari ;* no case being subject to revision which is not appealable to the Court of Queen's Bench. (Exparte Spelman, for *certiorari*, S. C.) 81

" :—That a judgment on an application for a writ of *certiorari may be* revised. (Exparte Beauparlant, for *certiorari*, S. C.) 102

" :—A judgment of the Circuit Court, on appeal from a conviction by a Justice of the Peace under the Agricultural Act, is *not* subject to revision, inasmuch as no appeal therefrom lies to the Court of Queen's Bench. (Guévremont vs. Plante, S. C.) 110

:—If the delay of eight days, prescribed by the 21st section of the Act 27th and 28th Vic. ch. 39, expire on a Sunday or a holy day, then the inscription may be fyled on the next juridical day following. And the inscription of causes for revision need not be personal. (Scatcherd vs. Allan, S. C.) 201

Road :—*Vide* Municipal Corporation.

Saisie-Arret :—*Vide* Tiers Saisi.

Saisie Execution :—When a party against whom execution has gone out barricades his door and removes his effects before they can be actually seized and entered in the *procès verbal* of the bailiff, is not guilty of *rebellion de justice*. (Terroux vs. Dupont, C. C.) 143

Saisie-Gagerie :—In the case of a, the delay between the deposit of the copy of declaration in the Prothonotary's or Clerk's office and the return day of the writ must be the same as between the service and the return day of an ordinary writ of summons. (Brahadi vs. Bergeron et al., C. C.) 18

" :—In the case of a, the copy of the declaration may be simply deposited (not served by a bailiff) in the office of the Prothonotary or Clerk, and it is *not* necessary that the delay between such deposit and the return day of the writ should be the same as between the day of service and the return day of an ordinary writ of summons. (Brahadi, appt., and Bergeron et al., respdts., Q. B.) 117

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" :—The right of, may be exercised (so far as the lessee is concerned) after the expiration of the eight days succeeding the removal of his effects. (Beaudry vs. Rodier, C. C.).. 202

" :—The right of, cannot be affected by the mere taking of collateral security. (Terroux vs. Gareau et al., C. C.).. 203

" :—*Vide* Lessors and Lessees.

" :—Revendication :—*Vide* Sale.

Sale :—In the case of a, of rags by sample, the purchaser may claim the resiliation of the sale, on the ground that the rags delivered were not according to sample, within a reasonable delay after delivery; and the mere reception of the rags at the railway depot where they were delivered, without special examination and comparison with the samples, and the payment of a sum to account on the supposition that all was right, will not operate as a bar to the vendee's repudiating the sale after discovery that the rags were not according to sample. (Buntin, applt., and Hibbard, respdt., Q. B.).. 1

" :—The delivery contemplated by the 12th sec. of the Ins. Act of 1864 is an actual, complete and final one, and, consequently, the delivery of goods to a purchaser's shipping agent in England, for transmission to the purchaser in Canada, and the entering of the goods in bond here, by the purchaser's Custom House broker, is not such a delivery as will defeat the vendor's remedy, under the 176th and 177th Articles of The Custom of Paris. (Hawksworth et al. vs. Elliott et al., and Brown, assignee, int. party, S. C.).. 191

" :—The acceptance, by a third party or middle man, of a delivery order granted by a vendor in favor of a vendee, for goods to be manufactured by such third party or middle man, and the setting apart these goods by him as subject to vendee's orders, as they are manufactured, is a complete delivery, even though they should be entered in the vendor's name in the books of such third party or middle man. (Broster, applt., and Hall et al., respdts., Q. B.).. 205

" :—The purchaser of an immoveable, having reason to fear eviction or trouble by mortgagees, may retain the *interest* as well as the capital of his purchase money. (Dorion vs. Hyde *et vir*, S. C.).. 327

School Law :—A payer of School rates in a municipality in L. C., though not resident therein, is an "*inhabitant*" of such municipality, within the meaning of section 55 of ch. 15 of the Cons. Stat. of L. C. (The School Commissioners of St. Bernard de Lacolle vs. Bowman, S. C.).. 103

Security :—A simple, is not liable for costs in an action against the principal debtor, if no previous notice of such action have been served on him. (Dansereau vs. Fontaine dit Bienvenu, C. C.).. 142

" for Costs :—Cannot be exacted from a person residing in Lower Canada, even supposing that he is not a householder therein, and that he has another domicile out of Lower Canada. (Ryland vs. Ogilvie, S. C.). 200

" :—*Vide* Appeal.

Seduction :—In an action of, the *frais d'entretien* can only be legally recovered from the date of service of process, and not from the birth of the child, and in such an action, a condemnation of £500 damages is excessive, in the absence of proof that the seducer is wealthy, and that there were any specially aggravating circumstances attending the seduction. Interest moreover will not be allowed, when not demanded by the declaration. (Coupal, applt., and Bonneau, respdt., Q. B.).. 177

Separation de Biens :—In an action *en*, personal service in a district, other than that where the parties reside, will suffice to give jurisdiction. (Harnois vs. St. Jean, Q. B.).. 7

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SERVITUDE :—The stipulation by a purchaser of real estate, that he will suffer all kinds of servitudes on the property purchased, accompanied by the declaration of the vendor that he knows only of a specific right of passage indicated in the deed, will not prevent the purchaser bringing an action to rescind the deed, on the ground that the right in question is accompanied by the obligation to maintain the road, and this to the knowledge of the vendor, but not of the purchaser. (Christie vs. Malhiot, S. C.) 78

" :—*Vide* TAXES.

SHERIFF'S SALE :—It is not competent to a Sheriff or Bailiff to adjudge a property at a fixed hour, if other bids are still offering, and an adjudication under such circumstances is a nullity. (Génier vs. Woodman et al., S. C.) 87

SLANDER :—A charge of theft, made by an employer, in the presence of and addressed to his own clerks, against one of his clerks, is a privileged communication, and, in the absence of proof of express malice, will not give rise to an action of damages. (Poitevin vs. Morgan, S. C.) 93

STAMPS :—It is not necessary to allege in a declaration on a promissory note that it has been duly stamped. (Doyle vs. Clément, S. C.) 332

SUB-TENANT :—A, cannot obtain the release of a seizure made of his goods, in satisfaction of the rent due the original landlord, without paying the rent due by himself for the current term, in addition to any rent actually accrued and paid by him. (Sénécal vs. Trigg and Agnew, int. party, C. C.) 203

TIERS SAISI :—The contestation of the declaration of a, ought to be accompanied by a notice to plead or answer thereto. (Pearce vs. Kelly and Masse et al., T. S., S. C.) 249

TREES :—The proprietor of forest trees growing on or near the line of division between his own and his neighbor's property cannot be compelled to remove the branches and roots of such trees because they extend or spread over the adjoining property, if such trees have been growing for upwards of thirty years, without complaint by such neighbor. (Ferguson vs. Joseph, C. C.) 333

TUTOR :—A, rendering account, after action brought, but without contestation of the plaintiff's action, is not liable for costs, and the question of costs in such a case is not within the discretion of the Court. (Loiselle et al. vs. Loiselle, S. C.) 258

USUFRUCT :—A, created by marriage contract, in case of no children surviving, may, by the terms of the contract, be freed from other security than that of the *caution juratoire;* in which case, if the wife be the usufructuary and have collected debts to a considerable amount, belonging to the usufruct, during her widowhood, and invested them in her own name, and, after second marriage, in the name of her second husband, she is liable to a *cautionnement fide jussoire.* A similiar liability would accrue from a wife becoming *commune de biens* with a second husband. (Amireau et al. vs. Martel et *ux.*, S. C.) 145

USURY :— *Vide* INTEREST.

VENDITIONI EXPONAS *de terris* :—When land seized under a writ of *Fieri Facias* has not been sold by the Sheriff, in consequence of a failure to give proper notice of sale at the church door, it may be legally sold under a writ of *vend. exp.* (Bouvier vs. Brush et al., S. C.) 194

WORK & LABOUR :—A builder has no right to claim payment of gothic work, according to double measurement. (Ouimette, appt., and Gamache, respt., Q. B.) 132

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