

IN THE QUEEN'S BENCH.

APPEAL SIDE.

Ann Cecilia Maguire,

APPELLANT

and

H. L. Routh,

RESPONDENT,

APPELLANT'S CASE.

Decemr 1860

R. POPE,

For Appellant.

Printed by J. T. Brousseau, Quebec.

PROVINCE OF CANADA,
Lower Canada.

IN THE QUEEN'S BENCH.
APPEAL SIDE.

H. L. ROUTH,

(Plaintiff in the Court below,)

RESPONDENTS,

DENIS MAGUIRE,

(Defendant in the Court below,)

and

ANN CECILIA MAGUIRE,

(Opposant in Court below,)

APPELLANT.

CASE OF THE APPELLANT.

THE Plaintiff having obtained judgment against the Defendant, sued out execution, in virtue of which certain goods, wares and merchandize in a store in which Ann Cecilia Maguire, the opposant, carried on business as *marchande publique, séparée de biens* from her husband, Denis Maguire, the Defendant, under the name and Style of Maguire, Junior, and Company were seized. Ann Cecilia Maguire then fyled an *opposition afin d'annuler*, claiming these goods as hers, alleging herself to be *séparée de biens* from her husband, in virtue of a judgment bearing date the 5th February 1859; duly executed, and fyled a copy of this judgment with her opposition. To this the Plaintiff pleaded firstly, the general issue, and secondly, by *Perpetuol Exception péremptoire en droit*, among other things, that she, the Opposant, was not *séparée de biens* from her husband, inasmuch as she had obtained the judgment *en séparation* through fraud, and for the purpose of defrauding the creditors of her said husband; and prayed to have this judgment set aside, and declared null and void. To this portion of the plea, the Opposant demurred, on the ground, that the question of her right to this judgment was *chose jugée*, and could not be pleaded in bar to her opposition. This demurrer was maintained. The parties proceeded to proof, and the Opposant proved all the allegations in her opposition, as having purchased the goods and effects seized in the cause, from various merchants and others; and the Plaintiff even gave an admission of facts, fyled in the cause, that they had been purchased by the Opposant from the different merchants whose names appear on the several accounts fyled in the cause. The Plaintiff then produced a witness by the name of Steele, who swore, that the Defendant, Denis Maguire, had told him that when his wife

obtained her judgment *en séparation*, he, Maguire, had secreted his effects to the value of £700, which were subsequently reintroduced into the store, and formed part of the stock in trade in the business which the Opposant carried on in the year 1858, in copartnership with the said witness Steele, under the name and firm of Maguire and Steele. The Opposant objected to this evidence as illegal, on the ground that the portion of the plea it went to support had been rejected on demurrer. The evidence, however, was admitted by Mr. Justice Stuart, reserving the objection. This witness Steele, in his cross-examination, admitted that, in the year 1858, having had a quarrel with the Defendant, Denis Maguire, he instigated the Attornies of the Plaintiff, who then had a judgment for a large amount on behalf of the Montreal Bank against the Defendant, to take out execution and seize the stock in trade of the said firm of Maguire and Steele, as of and belonging to the Defendant: which they accordingly did, and upon the present opposant filing an opposition claiming the goods seized as belonging to the firm of Maguire and Steele, they served *faits et articles* upon this same Steele, then one of the Opposants, in which he was requested to state, whether it was not a fact that the goods seized belonged to Denis Maguire, the Defendant, and not to the firm of Maguire and Steele, and he having intentionally omitted to answer, the Montreal Bank obtained judgment dismissing the opposition, and thereupon all the stock in trade of the said firm of Maguire and Steele was sold at Sheriff's sale. He also admits in his evidence that none of the goods alleged to have been secreted by Denis Maguire ever formed part of the stock in trade claimed by the Opposant in her opposition in the present cause, but that on the contrary, they had been sold by the Sheriff at the said sale of the stock in trade of Maguire and Steele in 1858. In addition to which he, Steele, was convicted and fined before a Magistrate for having in the middle of the night, destroyed the sign board over Maguire's store with coal tar, thereby not only obliterating the name on the sign-board, but destroying the sign-board and rendering it unfit for further use. (He further admits, that he is still at enmity with Denis Maguire, the Defendant.)

The Court below (Mr. Justice Stuart) rendered judgment on the 5th October last, dismissing the opposition, and it is from this judgment that the present Appeal has been brought.

The Opposant humbly contends that the judgment appealed from is erroneous: Firstly,—Because the evidence of Steele is illegal and inadmissible. Secondly,—Because the best evidence of the alleged fraud was not adduced, inasmuch as if the admission of Denis Maguire was valid and legal evidence as against the Opposant, Maguire himself ought to have been produced and examined as a witness in the cause, which it was competent for the Plaintiff under our present law to have done; and lastly, Because it was competent for the creditors of the Opposant's husband to have intervened by *requête civile*, and to have prevented her from obtaining her judgment *en séparation*, and not having done so, they cannot by a plea to an opposition founded on that judgment, have it declared null and void.—There is only one way by which that judgment can be destroyed, namely, by consent of the parties in putting their goods together again.

The Opposant, therefore, respectfully prays a reversal of the judgment appealed from.

Quebec, 8th December 1860.

R. POPE,

Attorney for the Appellant.