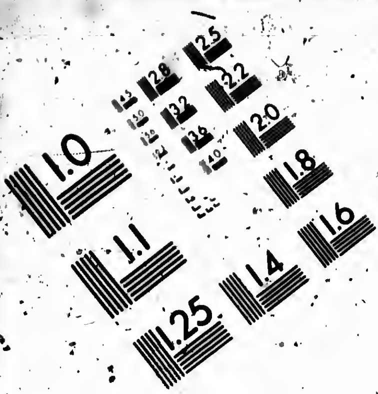

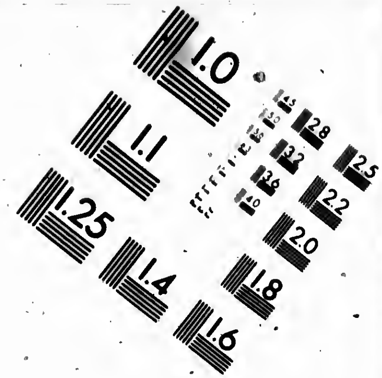

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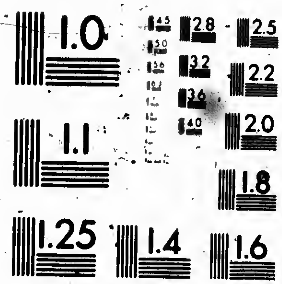

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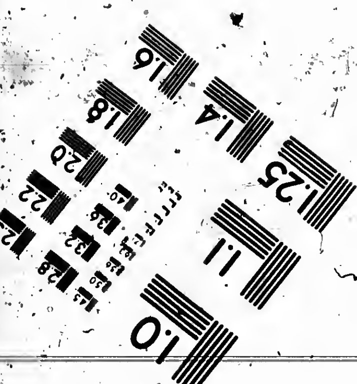

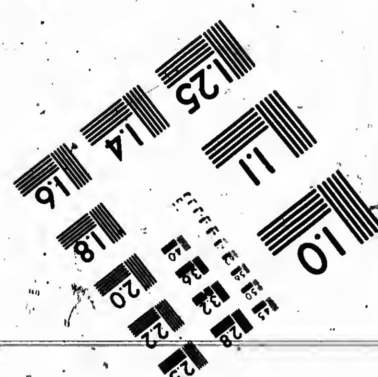

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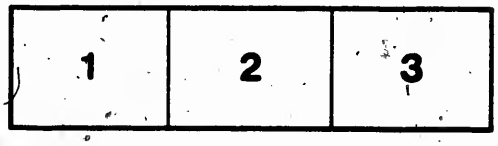

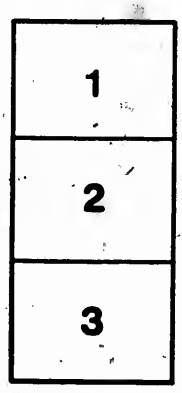

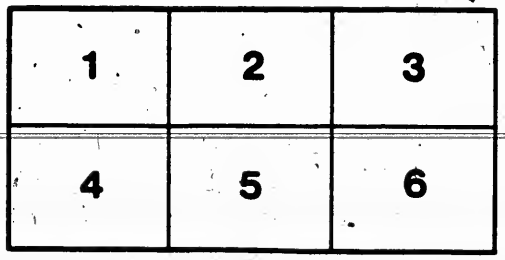

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THE

LOWER CANADA

Jurist.

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DU

BAS-CANADA.

VOL. XII.

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THE

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QUEEN'S BENCH.

(APPEAL SIDE.)

MONTREAL, 29TH FEBRUARY, 1868.

In appeal from the Superior Court, District of Montreal.

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

No. 51.

OWEN LYNCH, ET AL.,

(*Defendants in the Court below*),

APPELLANTS;

AND

ANDREW MACFARLANE

(*Plaintiff in the Court below*),

RESPONDENT.

HELD:—That after the expiration of the delay of one month accorded for the surrender of a defendant by his Bail, under a Bond in terms of Sec. 11 of Ch. 87 of the Cons. Stat. of L. C., the liability of the Bail to pay the plaintiff's debt becomes *absolute*.

This was an Appeal from a judgment rendered by the Superior Court, at Montreal, on the 28th of February, 1866, condemning the appellants to pay to the respondent the sum of $1540.49 currency, besides interest and costs.

The facts which gave rise to the respondent's action in the Court below may be briefly stated as follows:

On the 11th of May, 1861, the respondent sued out a writ of *capias ad respondendum* against one James Lynch, under which he was arrested and gave bail to the sheriff for his appearance on the return day of the writ.

On the day of the return, the appellants executed a Bond, in terms of section eleven of chap. 87 of the Consolidated Statutes of Lower Canada.

The undertaking of the Bond was,—"que lui le dit James Lynch se livrera "és-mains et à la garde du shérif du dit District de Montréal, dès qu'il en sera "requis par un ordre de la dite Cour, ou d'aucun Juge d'icelle, émané en vertu "de la loi; ou *sous un mois après le service de tel ordre* sur lui le dit défendeur

Lynch and Macfarlane.

" *ou sur eux le dites Owen Lynch et Théophile Rapin*, et qu'à défaut de soumis-
" sion à tel susdit ordre, le dit défendeur payera au dit demandeur sa créance
" avec intérêt et depens ; et que *dans le cas ou le dit Défendeur ne se livrerait*
" *pas tel que requis, ou ne payerait pas le Demandeur tel que sus dit, qu'alors*
" *eux* les dits Owen Lynch et Théophile Rapin, *s'engagent et promettent soli-*
" *dairement payer* au dit demandeur sa dite créance, avec intérêt et dépens."

Such proceedings were afterwards had in the case, that by the final judgment rendered therein on the 31st day of October, 1864, the said James Lynch was condemned to pay respondent the sum of $1203.40 currency, besides interest and costs.

The said James Lynch having wholly failed to make and fyle, in the office of the Prothonotary of the Court, a statement under oath, such as required by the 12th section of the Act, within thirty days from the rendering of the judgment, he was ordered by a judgment of the Court rendered on the 29th April, 1865, to be imprisoned in the common gaol of this district, for the period of six months, in punishment of his misconduct, and neglect to make and fyle such statement aforesaid, of which he was thereby adjudged to have been guilty.

This order, for the imprisonment of said James Lynch was *personally served* on Théophile Rapin (one of the appellants), on the 29th of July, 1865, and on Owen Lynch (the other appellant), on the 2nd of August, 1865, with a notice at foot, signed by the respondent, in the following words:—" You are hereby " required, as the bail or securities of the said defendant, James Lynch, to sur-" render, or cause to be surrendered, forthwith, the body of the said James " Lynch, for the purpose and according to the requirements of the foregoing " order, and that in default of your so doing, the said plaintiff, Andrew Mac-" Farlane, will sue you for the recovery of the debt, interest, costs and subse-" quent costs due, owing and payable to him by the said James Lynch."

The *month* after service of said order (within which, by the terms of the Bond, the appellants were bound to surrender the body of said James Lynch) *expired on the 2nd of September*, 1865, and, in consequence, the respondent sued the appellants, on the 11th of September, 1865, for the recovery of the debt, interest and costs due by James Lynch, by writ served on Théophile Rapin, on the 13th of September, 1865, and on Owen Lynch, on the 14th September, 1865, and returnable the 2nd of October, 1865.

On the 16th September, 1865 (*namely, more than one month and-a-half after the required time*), the appellants caused the said James Lynch to be imprisoned, and on the 29th of September, 1865, they offered to pay respondent $25.27 as and for the costs of his action.

The respondent, considering that the liability of the appellants to pay the debt, interest and costs due him by James Lynch had become *absolute*, by reason of their failure to surrender the body of the debtor within *one month* of the service on them of the order to that end, returned his action into Court.

The appellants pleaded three *exceptions péremptoires* and the general issue.

By the first exception, the appellants contended, that they had never been legally put *en demeure* to produce the body of said James Lynch.

By the second exception, the appellants alleged that they had done diligence

to surrender the body of the debtor, but that the respondent issued a writ of *contrainte par corps* against said James Lynch, on the 22nd of May, 1865, and fraudulently abstained from arresting said James Lynch thereunder, and that the bailiff charged with the execution of said writ informed said James Lynch to keep out of the way. And that they, the appellants, had themselves caused James Lynch to be imprisoned in obedience to the order of the 29th of April, 1865, on the 16th of September, 1865.

And by the third exception, the appellants contended that their offers to pay $25.27 of costs was all that could be legally claimed from them, and prayed that the amount might be declared compensated by the costs they had been put to in pleading to the respondent's action.

The following was the judgment of the Superior Court:

"The Court having heard the parties by their counsel upon the merits of this cause, examined the proceeding and proof of record, seen the admissions made and given by said parties respectively, and having upon the whole duly deliberated;

"Considering that the plaintiff hath established the material allegations of his declaration in this cause filed, and that the claim of the plaintiff as set forth in said declaration cannot be defeated by reason of anything pleaded and proved in this cause by the defendants; it is ordered and adjudged that the said plaintiff do recover from the said defendants, jointly and severally, the sum of one thousand five hundred and forty dollars, forty-nine cents, current money of this Province of Canada, to wit: the sum of twelve hundred and three dollars and forty cents, amount in principal of the judgment of this Court rendered on the thirty-first day of October, one thousand eight hundred and sixty-four, in a certain cause, bearing number 1208, wherein the said Andrew MacFarlane was plaintiff against one James Lynch, of the Town of Brockville, in that part of the Province of Canada heretofore constituting the Province of Upper Canada, Merchant, then in the city of Montreal, defendant; and the sum of three hundred and thirty-seven dollars and nine cents, amount of costs taxed as well upon the said judgment as upon the judgment of the Court of Queen's Bench (appeal side), rendered on the ninth September, one thousand eight hundred and sixty-four, setting aside and reversing the interlocutory judgment pronounced by said Superior Court on the twenty-eighth June, one thousand eight hundred and sixty-one, quashing the writ of *Capias ad Respondendum* issued in the above cause No. 1208 against the said James Lynch, with costs against him, and other costs subsequently incurred by the said plaintiff, as set forth in his said declaration; and for the payment of which sums of twelve hundred and three dollars and forty cents, the interest thereon and three hundred and thirty-seven dollars and nine cents, costs as aforesaid, the defendants in this cause became and were and are jointly and severally bound and liable as the sureties of the said James Lynch under the security bond entered into by the said defendants, on the seventeenth day of June, one thousand eight hundred and sixty-one, on behalf of said James Lynch, set forth and recited in the said declaration, to pay to the said plaintiff for the reasons and under the circumstances in the said declaration set forth, together with interest on four hundred

Lynch and Macfarlane.

and fifty-five dollars and twenty cents, from the twenty-second day of March, one thousand eight hundred and sixty-one; on three hundred and seventy-seven dollars and seventy cents, from the eighth April, one thousand eight hundred and sixty-one; on three hundred and seventy dollars and fifty cents, from the fourth day of March, one thousand eight hundred and sixty-one, and on three hundred and thirty-seven dollars and nine cents, from the fourteenth day of September, one thousand eight hundred and sixty-five, date of service of process in this cause until paid and costs of suit."

Doutre, Q. C., for appellants, submitted the following propositions:

Les appelants soumettent humblement que chacun de ces moyens de défense aurait dû être accueilli, comme une réponse victorieuse à l'action de l'intimé.

1ERE EXCEPTION.—Les appelants prétendent qu'ils n'ont jamais forfait leur cautionnement. Pour apprécier ce moyen de défense, il est utile d'avoir sous les yeux le texte du cautionnement.

Owen Lynch, commerçant de Beauharnois, et Théophile Rapin, hôtellier de Montréal, présents en personne, promettent et stipulent solidairement pour et de la part de James Lynch, le défendeur en cette cause, que lui le dit James Lynch se livrera ès-mains et à la garde du shériff du dit District de Montréal, dès qu'*il en sera requis par un ordre de la dite Cour ou d'aucun juge d'icelle*, émané en vertu de la loi; ou sous un mois après le service de tel ordre sur lui, le dit défendeur, ou sur eux, les dits Owen Lynch et Théophile Rapin, et qu'à défaut de soumission à tel susdit ordre, le dit défendeur paiera au dit demandeur sa créance avec intérêt et dépens, et que dans le cas où le dit demandeur ne se livrerait pas tel que requis, ou ne payerait pas le demandeur tel que susdit, qu'alors eux, les dits Owen Lynch et Théophile Rapin, s'engagent et promettent solidairement de payer au dit demandeur sa dite créance avec intérêt et dépens."

Sur une requête *ex parte* l'intimé a obtenu le 19 avril 1865 l'ordre condamnant James Lynch à un emprisonnement de six mois. Depuis l'époque où ce jugement a été rendu, la Cour Supérieure a invariablement jugé qu'un défendeur devait être notifié des procédés adoptés contre lui, pour requérir l'application des clauses pénales du Statut. Mais ce n'est pas là le vice de procédure dont se plaignent les appelants. L'ordre condamnant James Lynch à l'emprisonnement n'était pas un ordre ni à James Lynch, ni à ses cautions de le livrer. Pour nous servir des termes de cautionnement, James Lynch *n'était pas requis* de se livrer et les cautions n'étaient pas d'avantage *requises* de le livrer. L'intimé comprenant l'insuffisance de cette ordre à l'égard des cautions, a cru y suppléer en les requérant *lui-même* de livrer (*surrender*) leur principal.

Mais le cautionnement n'obligeait les cautions à agir que lorsqu'elles seraient requises par un ordre *de la Cour* ou *d'aucun juge d'icelle* et non pas sur une requisition du demandeur.

Sur l'avis auquel les cautions avaient droit, voir:

SCHRODER, Law of Bail, pp. 167, 168.

ADDISON, On Contracts, No. 1123: "In the case of penal bonds, if there is a condition annexed to the bond for the benefit of the obligor, and the obligee is, by the terms of it, to do the first act or to concur with the obligor in doing the first act, he must do or concur in doing that first act before he can demand

the penalty. If a stranger (comme ici la Cour ou le juge) is to do the first act the obligor is to procure that stranger to do it, being for his benefit; but if the obligee himself is do it, the obligee cannot demand the penalty, till he has done it; it is with regard to him in the nature of a condition precedent."

POTHIER, Obligations No. 146 : "Le débiteur ne peut être mis en demeure, que par une demande en justice."

Ici c'était une condition même du cautionnement que le principal ou les cautions fussent requis par *un ordre de la Cour ou du juge.* Les appelants soumettent donc que l'intimé eût dû les faire requérir par une règle de produire la personne de James Lynch. C'était la seule manière légale de faire procéder l'ordre de la Cour ou du juge.

2NDE EXCEPTION.—Les appelants prétendent que c'est la fraude de l'intimé qui a empêché l'ordre d'emprisonnement d'être exécuté contre le dit James Lynch; que le retour *non est inventus*, est frauduleux et faux; que James Lynch a été trouvé par les agents du demandeur et n'a pas été appréhendé dans le but de donner lieu à cette action et que les appelants ont été empêchés de livrer leur principal par le fait du demandeur.

La preuve des appelants a établi la vérité de ces assertions hors de tout doute. Il est en preuve que la première démarche de l'huissier a été d'aller dire à O'Neill, où pensionnait James Lynch, de faire savoir à ce dernier que les instructions reçues par l'huissier avec le warrant n'étaient pas de l'arrêter, mais de faire un rapport de *non est inventus*; que se conformant à ces instructions, l'huissier a rencontré plusieurs fois le dit James Lynch, et que loin de tenter de l'arrêter, il se sauvait de lui comme si c'eût été James Lynch qui fût chargé d'appréhender l'huissier; que durant ce temps, James Lynch s'est retiré aux Tanneries dans la vue de faciliter à l'huissier l'exécution de ses instructions qui consistaient à ne pas l'arrêter.

POTHIER, Obligations, No. 349 *fin ne*; "Il nous reste à observer qu'il ne peut y avoir lieu à la peine, lorsque c'est par le fait du créancier que le débiteur a été empêché de s'acquitter de son obligation."

ADDISON, On contracts, No. 1122: "He who prevents a thing from being done shall not avail himself of the non performance which he has occasioned."

IDEM, No. 1123.

3EME EXCEPTION.—Les appelants prétendent enfin qu'en supposant que la requisition qui leur a été faite sous la signature privée de l'intimé de livrer James Lynch remplissait les vues de la loi et qu'en supposant encore que l'intimé aurait fait diligence pour faire appréhender le dit James Lynch, ou du moins n'aurait rien fait pour empêcher les appellants de livrer le dit James Lynch, l'alternative assumée par les appelants de payer la dette due par James Lynch, à l'intimé, dans le cas de non livraison du dit James Lynch, n'était qu'une clause comminatoire dont ils pouvaient se purger en tout temps, en livrant le dit James Lynch.

Le point de fait sur lequel s'appuie cette prétention consiste en ce que les appelants ont effectivement livré la personne de James Lynch, après l'institution de l'action, mais avant son rapport en Cour, qu'ils en ont notifié l'intimé et lui

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ont offert les frais par lui faits jusqu'au moment de cette notification. Il est de plus en fait que le dit James Lynch a subi toute la peine de son emprisonnement de six mois et que si le jugement dont est appel était maintenu, l'intimé aurait substantiellement obtenu deux fois, sous deux formes différentes, l'accomplissement des conditions du cautionnement, c'est-à-dire la livraison de James Lynch, sa punition par six mois d'emprisonnement et en même temps la peine stipulée pour ne l'avoir pas livré !

La prétention de l'intimé, telle qu'exposée en Cour Inférieure, est que dès que le délai, durant lequel le défendeur doit être livré par ses cautions, est expiré, la peine est encourue sans remède. Il se fonde pour cela sur les termes de la 3ème sous section de la 12ème section du chapitre 87 des Statuts Refondus du Bas-Canada, laquelle est conçue dans les termes suivants:

"3. Et si le défendeur, contre lequel il a été ainsi émis un ordre d'emprisonnement ne se livre pas de lui-même ou n'est pas livré à cet effet conformément aux exigences du dit ordre à cet égard, alors les parties qui se sont portées cautions que le défendeur se remettrait sous la garde du shérif, seront dès ce moment là tenues de payer au dit demandeur la dette, les intérêts et les frais relativement auxquels il a été donné caution, ainsi que les frais subséquents."

Cette loi n'est pas plus positive, quant à l'échéance du terme ou de la condition, que ne le sont toutes les lois en vigueur dans le pays. D'après nos lois la clause pénale, à quelque genre d'obligation qu'elle soit attachée, n'est que comminatoire, et elle peut toujours être évitée par l'accomplissement, même tardif, de l'obligation à laquelle elle est jointe.

Sur la clause comminatoire, voir les autorités citées *in re* Homier et Demers, 1er Jurist, p. 13.

POTHIER, Obligations, No. 349: "Selon nos usages, soit que l'obligation primitive contienne un terme, dans lequel elle doive être accomplie, soit qu'elle n'en contienne aucun, il faut *ordinairement* (ce mot est expliqué dans la note de l'auteur) une interpellation judiciaire, pour mettre le débiteur en demeure et pour donner en conséquence ouverture à la peine."

IDEM, Obligations, No. 672.

GUYOT, Rép. Vo. clause: "Les peines stipulées dans les actes sont ordinairement réputées comminatoires, à moins que la partie intéressée ne prouve en justice qu'elle a souffert un préjudice réel par l'inexécution de la convention de la part de l'obligé, etc., etc." "Dans les jugements rendus, soit en matière civile criminelle, lorsqu'il y a quelque disposition qui ordonne à une partie de faire quelque chose dans un certain temps, peine de déchéance de quelque droit, cette disposition n'est réputée que comminatoire, c'est-à-dire, que celui qui n'a pas exécuté le jugement dans le temps fixé, n'est pas pour cela déchu de son droit à moins qu'à l'échéance de l'autre partie n'ait obtenu un jugement qui l'ordonne ainsi, etc., etc."

IDEM, Vo. Peine. Sect. 2, page 67.

ARGOU, Droit Français, liv. 3, ch. 24 et 35, tome 2, pp. 195 et 261.

ROUSSEAU DE LACOMBE, Vo. clause, No. 9, 10.

Si l'on objecte que le *Capias* est une institution anglaise et que nous devons être gouvernés par la jurisprudence anglaise sur ce point, les appelants,

sans admettre l'exactitude de cette proposition, prétendent que, même dans ce cas, ils doivent avoir gain de cause.

STORY, On Contracts, No. 1020, p. 833: When a certain gross sum of money is reserved, in an agreement, to be paid in case of the non-performance of such agreement, it is generally to be considered as a penalty, the legal operation of which is not to create a forfeiture of that entire sum, but only to cover the actual damages occasioned by the breach of contracts."

Ici le seul dommage consistait dans les d'action,—lesquels ont été offerts.

SCHRODER, Law of Bail, p. 83: "Formerly nothing was considered to be a performance to the condition of the bail bond except putting in and perfecting bail above. But it is now determined that a principal by voluntarily surrendering himself, &c., &c., the Courts will stay proceeding on the bail bond."

IDEM, p. 147: "Bail above may be put in and the principal rendered before the return of the writ or at any time pending the suit or even after judgment, subject to the following remarks. Formerly it was the practice of the Courts to allow a render after the return of *non est inventus* on ca-sa. Subsequently the time within which a render might be made was extended to the return of the first and afterwards to that of the second, Sci fac."

IDEM, p. 148: "When bail are sued in an *action of debt*, on the recognizance they have in the King's Bench by bill, the space of eight entire days in full term next after the return of the process against them, to make the render"... "Likewise when an action was commenced and afterwards discontinued and the bail rendered the principal before the bringing of a new action, the Court held: the render to be good, its being before the return of the process in the new suit."

IDEM, pp. 149, 153, 54.

TIDD'S PRACTICE, T. 1er p. 232 et suiv,—atteste que la pratique anglaise est telle que rapportée dans Schroder. la page 284 et suiv, on voit que les cautions, sous certaines circonstances, obtiennent du délai pour produire leur principal, même après la poursuite instituée contre eux. Suivant cette pratique les cautions pourraient, en Canada, obtenir, par exception dilatoire, du délai pour livrer leur principal.

TIDD'S PRACTICE, T. 1er p. 288.

L'intimé a prétendu, en cour inférieure, que la jurisprudence anglaise pas plus que celle que nous tenons de l'ancien droit français ne pouvaient avoir d'influence sur la question, vu que notre statut ne laisse aucune place à l'indulgence pratiquée en France et en Angleterre. Il a déjà été démontré qu'en France la rigueur des textes de lois ou des conventions n'était jamais un obstacle à l'exercice de cette indulgence, par les tribunaux. Il en est de même en Angleterre, dans la question qui nous occupe.

SCHRODER p. 66: "We have seen the condition of the bail bond to be that the defendant appear at the time and place mentioned in the writ, which if he do not, by putting in, and perfecting special bail to the action, the bond becomes forfeited, and the sheriff obtains a right of action for the whole debt secured by the bond, to the full extent of the penalty and costs."

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Ainsi sous quelque point de vue que l'on envisage la position qu'occupaient les appelants, lors du retour de l'action de l'intimé en Cour, le jugement de la Cour Inférieure ne peut résister aux fins du présent appel.

Bethune, Q. C., for respondent, argued, in effect as follows:—

No satisfactory evidence was adduced to prove any fraudulent action by respondent, in connection with the warrant of the 22nd of May last. And, had there been, the fact that the warrant issued at respondent's instance, was returned into court on the 9th of June, 1865 (*nearly two months before the respondent, formally notified the appellants to surrender the body of James Lynch*), establishes that the respondent's conduct, in connection with the execution of that warrant, could have had no effect to prevent the surrender demanded by the notice served on the appellants on the 29th July, and 2nd August, 1865.

The pretension that there was no *mis en demeure* is completely answered by the appellants' written admission (paper 24 of record), that they were served with the order of 29th of July, 1865, and the notice to surrender written at the foot thereof, and by the appellants' own exhibit, No. 3 (paper 15 of the record) which states in the body thereof,—that "*on the twenty-ninth day of July last*" (1865), they, the appellants, were *duly notified* as the bail or securities of the "said defendant, James Lynch, *to surrender, or cause to be surrendered* "FORTHWITH, the body of the said James Lynch, *for the purpose and according* "*to the requirements of the said judgment*"—(stated in the preceding paragraph to be the judgment or order of the 19th April, 1865, ordering the said James Lynch to be imprisoned for six months).

As to the argument, that the order for the imprisonment of James Lynch was not an order to surrender himself, within the meaning of the bail bond, the respondent answers that the bail bond was given in terms of the 11th section of the Act, chap. 87 of the Consolidated Statutes of Lower Canada, and that the 12th section of the Act explains under what circumstances such an "order to surrender himself" can issue, and the character or nature of the order.

The character or nature of such "order" is thus stated in the 2nd sub-section of said 12th section:—"then the Court, or any Judge thereof * * shall *order* the defendant *to be imprisoned* in the common gaol * * *;" *precisely the kind of order given* in the present instance.

By the 3rd sub-section of section 12, it is then enacted,—"and if the defend-"ant, *so ordered to be imprisoned*, does not *surrender himself and is not surren-"dered for the purpose* * * *then* the parties who have become security that "the defendant would surrender himself shall *forthwith be liable to pay* to the "said plaintiffs the debt, interest and costs, in relation to which such security "was given, and all subsequent costs."

Then, by said paper 15 of the record (*appellant's own exhibit*), it is distinctly alleged that the service of the order of imprisonment on them was a notification to the bail to "surrender, or cause to be surrendered *forthwith* the body "of the said James Lynch, *for the purpose and according to the requirements of the said judgment*"—(the order of imprisonment).

Then as to the argument, that the undertaking in the bail bond to pay the debt, &c., in default of non-surrender within the month, was a "*clause commin-*

atoire," from the effects of which the appellants could relieve themselves at any time, by delivering the body of the debtor.

Even on the supposition that the undertaking to pay the debt, &c., is a penal stipulation, the respondent submits that the jurisprudence of our Courts sanctions the literal enforcement of such a stipulation (*vide* Richard, appellant, and Fabrique de Québec, respondent, 5th Lower Canada Law Reports, page 3 and *seq*), and that our code has consecrated the doctrine that a penal stipulation can be enforced, and that on the simple default of the party to carry out the main obligation. *Vide* Art. 1131 and 1137. But it is further submitted that an undertaking like the present, which is based on statutory enactments, can in no sense be regarded as comminatory.

In this connection the attention of the Court is drawn to the fact, that the costs of suit are not even tendered with the appellants' plea, but an imaginary compensation thereof is simply claimed.

As to the last point urged by the appellants, that according to English practice the subsequent surrender was sufficient to relieve the defendants from the liability already incurred to pay the plaintiff's debt, the answer is quite simple. In the first place, no such bond as the one in question here is known to English practice. It is a bond purely of Lower Canadian creation, and in no respect like a special bail bond, such as defendants seek to liken it to. The very statute creating this peculiar form of undertaking providing expressly for the giving of special bail, properly so called, if parties choose to prefer that course. In the next place, there is nothing in any of the citations from the English practice books in any degree analogous to the state of facts and circumstances disclosed in the present case. Besides, the very authorities cited in no way assert that if the bail neglected to render within the eight days after the return of the action on the bail bond (a provision specially sanctioned by the practice of the English Courts), that the bail would be allowed to free themselves from liability to pay plaintiff's debt by a tender made after the expiration of the eight days.

The reason of this English rule, moreover, is doubtless to be traced to the fact, that the action against the bail, under an English special bail bond, is the only putting of the bail *in mord* provided by English practice. Here, however, the bail are put *en demeure* by the service of the order of the Court, which is a distinct intimation that if they fail to obey it, *not within eight days as in England*, but within *one month*, they will have to pay the plaintiff's debt, the bond and the statute under which it is given being express in their provisions to that effect.

Viewing this appeal under all its aspects, the respondent cannot but feel that the judgment of the Superior Court was in all respects correct, and that it will be confirmed by this Honorable Court.

BADGLEY, J. :—The respondent in this case sued the appellants in the Superior Court, on a bail bond, into which they entered under the Statute for the due surrender when required of one James Lynch, who had been arrested under a *capias ad respondendum* at the suit of the respondent.

In the original suit, a judgment was rendered against James Lynch on the

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31st October, 1864, whereby he was condemned to pay to the respondent $1203.40 with interest and costs. Having failed to make and fyle in the prothonotary's office the statement under oath required by the 2nd section of the Imprisonment for Debt Act, within 30 days from the rendering of the judgment, a judicial order was made on the 29th April, 1865, under the provisions of the statute for his imprisonment in the common gaol for six months, in punishment of his misconduct and neglect to file such statement, and service of the order was made upon the appellants with notice from the respondent requiring them, as the bail of the said James Lynch, to surrender his body for the purpose of statutory punishment, as required by the order, and in default whereof the said respondent would sue them for the recovery of the debt, interest, and costs owing by said Lynch. The statutory delay of one month having expired, and no surrender having been made, the respondent sued appellants for the recovery of the judgment he had so recovered against the said James Lynch.

The appellants pleaded three *exceptions péremptoires* and the general issue.

By the first exception, the appellants contended that they had never been legally put *en demeure* to produce the body of said James Lynch.

By the second exception the appellants alleged that they had done diligence to surrender the body of the debtor, but that the respondent issued a writ of *contrainte par corps* against said James Lynch, on the 22nd of May, 1865, and fraudulently abstained from arresting said James Lynch thereunder, and that the bailiff charged with the execution of said writ informed said James Lynch to keep out of the way. And that they, the appellants, had themselves caused James Lynch to be imprisoned in obedience to the order of the 29th of April, 1865, on the 16th of September, 1865.

And by the third exception, the appellants contended that their offer to pay $25.27 of costs was all that could be legally claimed from them, and prayed that the amount might be declared compensated by the costs they had been put to in pleading to the respondent's action.

The appellants also pleaded the general issue, and as it were not confiding in their exceptions they have made their real contention under the general issue. They argued that the surrender of James Lynch discharged them from liability for his judgment debt, from the comminatory character of the statutory provision in that respect. But all the requirements and provisions of the statute already referred to are exceptional against the creditor and beneficial for the debtor, whilst at the same time they are positive and absolute, and do not come within any dispensing or discretionary power of Courts of Justice. So the limit of 30 days is absolute for the making of the order, and the judge has no power to refuse the order for the debtor's imprisonment if he fail to comply with the duty required of him; the only discretion of the judge is as to the time of the duration of the punishment, but not in its infliction. So in like manner his failure to surrender himself, or the failure of the sureties to surrender him for the purpose of punishment under the order, different altogether from his mere detention for a civil debt, *forthwith* attaches the liability upon the sureties to pay his judgment debt, &c. The terms of the law are precise and plain, and admit of no qualification. The requirements of the law would become nugatory if a debtor at

large under the bond above stated, could in defiance of the law refrain from surrendering himself, and his sureties aid him by this neglect to compel his obedience to the order for just such time as might suit his and their purpose respecting him and his estate. A month is given by the statute to the sureties and no more, if five days made his misconduct comminatory why not five months or five years — in fact commination does not belong to this class of cases. * * The imprisonment was for criminal punishment, not for mere civil detention. * * The liability of the sureties attached forthwith upon the expiry of one month from the service of the order, and the only relief from that liability is the payment of the debt, which no Court of Justice can interfere with, the statute having made it a debt absolute in favor of the creditor, the respondent in this case.

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The judgment of the Superior Court is therefore confirmed.

Judgment of Court below confirmed.

Fortier & Doutre, for appellants.

Strachan Bethune, Q. C., for respondent.

(S. B.)

MONTREAL, 9TH DECEMBER, 1867.

In appeal from the Circuit Court, Montreal Circuit.

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

WILLIAM E. EASTTY

(*Opposant in the Court below*),

APPELLANT;

AND

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DU SAINT NOM DE MARIE DE MONTREAL

(*Respondents in the Court below*).

BONDED WAREHOUSE—LANDLORD'S PRIVILEGE.

The premises in which the goods in question lay were leased by the landlord for the purpose of being used, and were in fact at the time of the seizure used as a bonded warehouse, established by law for the temporary storage of goods belonging to merchants and traders indiscriminately, and were not by the terms of the lease destined to be exclusively furnished with movcables *meubles* belonging to the lessee. The goods belonged to the appellant, a third party, and a trader in Montreal, who had deposited them in the premises for temporary storage a few days before the seizure, and they were seized for rent, the greater part of which had become due before they had been so deposited. The goods were taken in execution by the landlord for rent due by the lessee, and the proprietor of the goods claimed to withdraw them from the seizure by the landlord, who contended that his privilege as such landlord extended to these goods.

HELD 1°—That the privilege granted to the lessor by the 161st. article of the Custom of Paris over moveables *meubles* found in the premises leased by them, was founded on the presumption that such moveables were the property of the lessee.

2°—That the privilege did not extend to such goods as the lessor must have known not to belong to the lessee.

3°—That the privilege did not extend to the goods seized. (Reversing the judgment of the Circuit Court, BERTHELOT, J.)

The judgment appealed from was rendered on the 28th June, 1866 (Berthelot, J.), and was in the following terms :

"La Cour après avoir entendu l'opposant et la demanderesse et contestante "par leurs avocats sur le mérite de l'opposition afin de distraire faite et pro-

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"duite par le dit opposant à l'encontre du bref d'exécution émané de cette Cour "contre les biens meubles du défendeur le quatorze Juin mil huit cent soixante "et cinq, et de la contestation d'icelle par la dite demanderesse, examiné la pro- "cédure, pièces et preuves et avoir sur le tout mûrement délibéré;

"*Considérant* que l'opposant est mal fondé en sa dite opposition; Considérant "qu'en loi tous les effets et objets quelconques qui sont introduits par *un tiers* "même pour un court délai, ou pour un objet particulier, dans les lieux loués "ou occupés à titre de bail, deviennent par cela même affectés et obligés, et re- "pondent pour la sureté du paiement des loyers dus pour les lieux occupés et de "toutes les obligations du bail, a renvoyé la dite opposition avec dépens, et a or- "donné et ordonne qu'il soit procédé à la vente des effets saisis ainsi qu'il pourra "appartenir, suivant la loi et pratique de cette Cour."

The appellant stated his case as follows:

The only question raised by this appeal is as to the extent of the privilege of a landlord for rent; the judgment appealed from holding certain crockery warehoused in the premises leased to one Curry liable for rent in arrear, notwithstanding the payment of all warehouse dues upon the goods.

The respondents, on the 14th June, 1865, issued execution against Samuel Edward Curry as defendant, for $192.65 interest and costs, being for rent, under which execution ninety-three crates of crockery belonging to the appellant was seized, and for which he fyled his opposition on the 23rd June following, claiming to have them withdrawn from seizure on the ground that they had been put into defendant's warehouse as a Bonded Customs Warehouse, for a certain price or rate per package, payable monthly, and that this rate had been duly paid before the issuing of the seizure.

The lease to the defendant was of a store and premises in St. Joseph street at £130 per annum for 3 years from 1st May, 1863. The second story appears *by the lease* to have been a Bonded Warehouse, and was used as such.

The answer to the opposition sets up in effect that the goods in question were placed in the premises *pour garner les lieux*, that the opposant was not a subtenant, and that therefore his property was subject to the landlord's privilege, and that moreover the opposant was aware at the time he placed the goods in store that rent had accrued.

The answer to the contestation denied that the goods were put there to garnish the premises, and alleged that in any event they were not liable for more than the storage which might be due on them.

One witness was examined for the plaintiffs who speaks of the defendant having occupied the premises, and of his having said to the defendant, in the month of April, 1865, that there was then some rent due to the respondents.

The opposant's evidence is contained in the following admissions:

"The said plaintiffs contesting admit that the premises in which the goods claimed in this cause were seized were leased to the defendant, and were used by the customers of the defendant as a Bonded Warehouse for the temporary storage of goods *in transitu* to premises of the owners. That the said goods had been but a few days in said premises before said seizure; and the rent demanded with

the exception of few days' rent had become due before the said goods had been placed therein."

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"That the storage of said goods was to be paid to the defendant monthly, and was fully paid at the time of the said seizure. That the said goods were placed in the said leased premises by opposant simply for storage and until he could pay the duties thereon and remove them to his own business premises for the purposes of his business as Commission Merchant. That the goods claimed by the said opposant were at the time of the seizure and now are his property.

(Signed), L. A. JETTE,
Atty. for Ptffs.

Montreal, 12th June, 1866.

The sole question for determination is as to whether the opposant, who had put his goods into the portion of the premises leased and used as a Customs Bonding Warehouse, to remain there, as it were only temporarily in storage, until duties were paid, is liable for the rent due and to accrue under the lease? The appellant submits he is not so liable; that the warehouse was in effect a public warehouse for a special purpose; that the goods were only temporarily placed there, not to garnish the premises; and the privilege of landlord in such case or in any case of goods warehoused with a warehouseman could not, in any case, extend beyond the payment of any amount of storage due, the agreement as between him and the defendant being, in reality, equivalent to the lease of such portion of the warehouse as could contain the goods placed in it, and that the rule laid down by the judgment appealed from goes too far in holding that any effects put into leased premises, even for a short delay, and under any circumstances, are liable to the landlord's privilege.

It will be seen that the question is one of law as to the extent of the landlord's privilege. By the 161 Article of the Custom of Paris, the proprietor could proceed by way of *saisie gagerie* in the leased premises, "sur les meubles etans en icelle." By the 162 article, the goods (*biens*) of sub-tenants were liable to seizure to the extent of the rent due to the principal tenant. But the general words *meubles* and *biens* were not held to extend indiscriminately to all the movables. It extended to what is called "meubles meublans." Brodeau on article 161, et Le Maitre dit 8, chapter 3, page 219; Pothier, "Louage," No. 126, says, it extends "sur les meubles servant à l'exploitation des maisons louees," (No. 245) says, goods of third parties placed in the leased premises may be seized when they are placed there (1) "pour garnir la maison," (2) to be consumed, (3) "pour y demeurer," when this is by the consent of the third party, proprietor of the goods. The merchandise of a tenant in a store is liable because "une boutique est en effet destinée à être garni des mèrchandises." 1 Troplong, Privileges, No. 151, Pothier No. 249. But this does not apply to things which do not garnish even if they belong to the principal tenant, such as jewels, obligations, things necessarily deposited, or even temporarily deposited without necessity, nor on property of third parties placed in the premises on account of the tenant's trade or profession, such as a watch with a watch maker, cloth with a tailor, nor on any *merchandises brutes* on which work is to be done, nor on goods of pensionnaires.

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Some of the authors extend the privilege more than others, but it is contended, on behalf of the appellant, that goods placed into leased premises with the knowledge on the part of the proprietor that they are the property of a third party and not to remain on the property, are not liable for the rent of the principal tenant. Troplong, 2nd vol. Louage, No. 530, includes as not seizable, jewels, obligations, etc., also "les objets dont la propriété n'appartient pas notoirement au locatoire, ou dont un tiers a signifié au locateur qu'il est propriétaire." So at No. 151, "Lorsqu'il est notoire que les meubles n'appartiennent pas au locataire, les tribunaux doivent, d'après les circonstances, et sans qu'il y a signification préalable, admettre que le privilége n'a pas eu lieu."

The "Code Civile" of France gives the proprietor, landlord, a privilege on "tout ce qui garnit la maison louée ou la ferme," Article 2102. And this is in effect the provision of the old law; and the decisions of the modern French Courts may therefore be referred to as authority. See 19 Duranton, No. 86. So in "Journal du Palais" for 1849, page 641. Note.—"Si une notification avait "été faite (au propriétaire) ou s'il résultait clairement des circonstances, *qu'il a "du connaitre* que les meubles n'appartiennent pas à son locataire; et cette connaissance serait même presumée contre lui à l'égard des objets mobiliers dont "l'introduction dans la maison louée s'explique par la profession du locataire, le "privilège ne comporterait par l'extension que l'on vient de lui donner." Quotes Domat liv. 8, tit. 1, No. 16. Pothier, Louage, No. 245.

So in Savulete vs. Morriseau, Cassation, Paris, 18th December, 1848, Jour. du Palais, the following are the *considerants* of the judgment:

"ATTENDU que le privilège s'étend sur tout ce qui garnit la maison;"

"ATTENDU, que ce droit de préférence est fondé sur la présumption que tous "les objets sur lesquels il s'étend sont la propriété du locataire;"

"Qu'il suit de là, que le privilège doit cesser toutes les fois que le propriétaire a *dû savoir* que son locataire n'avait aucun droit, soit par la suite de la connaissance que l'on lui en a donné, soit par la nature même de l'exploitation * * "annulle, etc."

A case analogous to the present is reported in the Jour. du Palais, 21st March, 1826, of Picoul vs. Lafitte, where plaintiff wished to hold consigned goods liable for rent, and the Syndics of the insolvent contended that the estate was only liable for the storage of the goods, the action was dismissed and the ruling of the Court is given as follows:

"Une Cour d'Appel peut décider, d'après la notoriété publique, que les marchandises déposées dans un magasin appartiennent aux tiers déposans ou consignataires, et non au locataire; que par suite ils ne garnissent pas ce magasin, et "ne sont pas soumis au privilège du propriétaire."

So 1 Persil, Privileges, page 91, holds that there is no privilege for rent in favor of the proprietor on goods placed with a commissionaire, and the declaration made by the tenant, "de son état de *commissionnaire* équivaut à la declaration "que les marchandises contenues dans sons magasin ne lui appartenaient pas."

See Jour. du Palais, verbo Privilége Index, sect. 211, where Duranton and Persil are quoted in support of this. See also, Judgment, 5th May, 1828. On this principle a *maitre d'hotel garni* cannot hold for his rent a piano leased to his

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tenant and brought into the premises after the lease, Jour. du Palais, and March, 1829.

The duty of the tenant to garnish the house would not be complied with unless there were sufficient moveables upon which the proprietor could exercise his privilege. 2, Duvergier, No. 14; Troplong, Louage, No. 530.

The appellants submit that the respondents were fully aware that the premises were to be used as a bonded warehouse. It is declared in the lease that the lessors "will have to put in good order, at their own cost, the windlass "together with the ropes required and make a door for the bonded warehouse."

In the deposition of Dubois, the agent of the plaintiff, it is said: "Ce magasin avait été loué au défendeur pour en faire une voûte, ou comme il est mentionné au dit bail, "a bonded warehouse," et le défendeur a occupé comme "tel depuis le mois de mai 1863, jusque vers le mois de mai 1865."

Again it is admitted that the premises were used "as a bonded warehouse for the temporary storage of goods," that the goods claimed by the appellant were "so placed in said warehouse "simply for storage and until he could pay the "duties thereon, and remove them to his own premises as commission merchant."

The plaintiffs therefore could not be ignorant of the nature of the business carried on by their tenant: they consented to the premises being used as a bonded warehouse, they must therefore have known that the goods deposited were not the property of their tenant, were not placed there *pour garnir les lieux*, Such knowledge on their part takes away any equitable ground of claim to be paid out of the appellant's goods. They knew from the beginning that the goods belonged to third parties, that they could not be *meubles meublant*, and were not intended to remain in the premises as the landlord's *gage*, and therefore that they had no privilege.

It is also submitted that in any event goods warehoused in a bonded warehouse can in no case be liable for more than the storage due on them. In this case the crockery had been but a short time in the premises and the dues upon it had been paid, so that nothing remained to be paid to the respondents.

The respondents stated their case as follows:

En 1863, Samuel Edward Curry, négociant de Montréal, loua des intimés un magasin que ces derniers possèdent sur la rue St. Sulpice de cette ville (ci-devant rue St Joseph.)

Il était mentionné au bail que le preneur ferait certaines améliorations à ses frais, entr'autres celles nécessitées par les exigences particulières de son commerce, son intention étant d'occuper ce magasin tant pour y placer des marchandises qu'il vendrait à commission que comme voûte destinée à l'emmagasinage de marchandises appartenant à des tiers.

En mai 1865, Curry devait aux intimés $192.65 d'arrérages de loyers, et toutes les marchandises qui se trouvaient dans le dit magasin furent saisies en vertu d'un bref de saisie-gagerie émané pour la somme ci-dessus.

Les intimés ayant obtenu jugement contre Curry, demandèrent ensuite un bref d'execution pour la vente des effets saisis-gagés comme susdit:

Sur ce, l'appelant, propriétaire de marchandises emmagasinées chez Curry et saisies par les intimés, fit opposition à la vente desdites marchandises.

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Les intimés contestèrent cette opposition, alléguant :

Que les marchandises réclamées par l'appelant garnissaient le magasin du défendeur lors de la saisie-gagerie faite d'icelles, et que ces marchandises sont de celles qui garnissent ordinairement les voûtes ou magasins du genre de celui loué au défendeur.

Qu'en louant au défendeur les intimés savaient qu'il emploierait leur magasin comme voûte, et s'attendaient à ce qu'il le garnit de marchandises telles que celles saisies, et comptaient sur ces marchandises pour la sûreté de leur loyer.

Que l'appelant n'étant pas sous-locataire du défendeur, ne pouvait soustraire ses effets au privilége des intimés, les sous-locataires seuls ayant cet avantage, lorsqu'ils ont *de bonne foi* payé leur loyer.

Enfin qu'avant de mettre ses marchandises chez le défendeur, l'appelant a été averti par les intimés que le défendeur, leur devait du loyer et que ses marchandises répondraient de ce loyer s'il les plaçait dans ce magasin.

En réplique l'appelant prétendit que ses marchandises ne formaient pas partie de celles garnissant le magasin du défendeur, et n'étaient pas sujettes au privilége des intimés, ces marchandises n'étant placées là que pour peu de temps.

Les raisons pour lesquelles l'appelant se plaint de ce jugement se réduisent à deux ; la première et la quatrième de sa requête en appel, qui peuvent se résumer comme suit :

1o. Les marchandises de l'appelant n'étaient pas sujettes au privilége des intimés, parce que lors de la saisie, l'appelant avait payé *de bonne foi* tout le loyer qu'il devait au défendeur.

2o. Parce que le magasin du défendeur, étant employé pour l'emmagasinage (*storage*) de marchandises dont les droits n'étaient pas encore payés, ces effets ne peuvent être responsables du loyer dû aux intimés.

Nous croyons mieux résumer la question qui se présente ici, en l'exposant comme suit :

Les marchandises de tiers, placées dans un magasin ou une voûte pour emmagasinage seulement (*storage*) ou vente à commission, sont-elles sujettes au privilége du bailleur ?

Voici la réponse donnée par Pothier, Louage No. 249.

" Quoique des marchandises ne soient pas au rang des meubles meublants d'une " maison ; et qu'étant destinées à être vendues, elles ne soient pas dans la maison " pour y demeurer, néanmoins elles sont obligées au bail ; car le droit du locateur " s'étend sur tous les effets qui garnissent chacune des parties de sa maison, " *suivant le genre d'exploitation de chaque partie* par conséquent le locataire " ayant fait une boutique, un magasin d'une partie de la maison, l'exploitant " comme boutique, comme magasin, les effets qui garnissent cette partie de " maison en tant que boutique, en tant que magasin, doivent être obligés au " locateur, et par conséquent les marchandises, qui sont le garnissement naturel " d'une boutique et d'un magasin.

Aussi Rousseau de la Combe. Vo. Bail, Sec. III., No. 3.

Autant vaudrait, en effet, nier le privilége du bailleur, que de dire que le propriétaire d'un voûte destinée à *l'emmagasinage* n'aura pas de recours sur les marchandises dont son magasin sera rempli.

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Il faut, comme dit Pothier, considérer le genre d'exploitation d'une maison-or, si elle est louée à un marchand-commissionaire, le locateur devra avoir son privilége sur les marchandises confiées à ce commissionnaire, sinon il n'en aura pas du tout.

Il serait inutile de discuter ici le privilége du bailleur : ce privilége existe et personne ne songerait à le nier. Il faut donc le reconnaitre et en accorder le bénéfice à ceux qui y ont droit.

Dans le cas présent, le magasin des Intimés a été loué à un commissionnaire pour y faire un commerce à commission et prendre des marchandises en magasin, (*storage*). Et, en effet, ce magasin a été employé à l'usage auquel il était destiné. Les marchandises qui y ont été saisies et que l'appelant réclame en étaient donc le *garnissement naturel*, et sont sujettes au privilége des intimés.

L'appelant prétend maintenant s'assimiler à un sous-locataire qui a payé son loyer *de bonne foi*. Mais il est prouvé qu'avant de placer ses marchandises chez le défendeur, il s'est enquis de l'agent des Intimés, si le défendeur leur devait du loyer et si ses marchandises seraient sujettes à leur privilége, et on lui a répondu que le défendeur devait et que ses marchandises seraient sujette à ce privilége. Que devient donc la prétendue *bonne foi* de l'appelant qui, malgré cet avertissement, place ses marchandises chez le défendeur et lui paye son droit de magasin (*storage*) sans s'inquiéter du propriétaire ?

N'y a-t-il pas là encore une des raisons de la loi même pour assujettir les effets de ce tiers au privilége du bailleur ; c'est-à-dire son acquiescement présumé à les soumettre à ce privilége ? N'y a-t-il pas même ici consentement formele ? Et comment l'appelant peut-il se plaindre d'un jugement qui ne l'a condamné qu'à ce qu'il avait raisonnablement droit de s'attendre, qu'à ce à quoi il s'est volontairement soumis ?

Nous devons ajouter que Son Honneur le Juge Monk a rendu un jugement identique à celui que nous défendons dans une cause de Hood *vs.* Curry & Renaud et al., opposants, en Decembre dernier.

BADGLEY, J., giving judgment said :—The privilege claimed by the landlords in this cause does not seem to me to fall within the rules of the spirit of the *droit de gagerie*, and would moreover be a dangerous interference with trade. The respondents leased their store premises to the defendant with the knowledge of his intention to convert them into a bonded warehouse, and that intention is plainly expressed in the lease : they were so converted and became a bonded warehouse under the Customs Act, and thereby to all intents and purposes became a Customs warehouse, for the deposit of goods therein on importation, to remain there until taken out for sale or exportation under the provisions of the Act. The effect of the law is that the goods are deposited in effect through the public officer, and not by the consignee or owner, who cannot remove them without payment of duty ; moreover, the deposit in the warehouse is compulsory, but it is so ordered and done for the benefit of trade. Now, no doubt exists of the lawful privilege of the landlord : under ordinary circumstances, the furniture and effects brought within his premises by his tenant at once become pledged by law for the security of the rent, and the principle is just, because otherwise landlords would be entirely at the mercy and good faith of their tenants : the contract between them is not one which the giver rests solely upon the

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credit and standing of the taker, but upon the security of the effects to be brought in and *to garnir* or furnish the premises which are contemplated to be so filled or furnished. But whilst the privilege is allowed upon the effects brought in, it rests mainly upon the fact that those effects are the property, actual or implied, of the tenant, and that they have been brought in by himself willingly and voluntarily; if such be the position of things, the landlord's privilege undoubtedly exists, and this same privilege is not peculiar to our law, it is as strongly supported by the law of England and Scotland as by our own. There the right of the landlord to detain or seize for rent is governed by the same principles as here, and in the way of trade effects the same exceptions to the privilege prevail under both systems of jurisprudence; and for the same paramount reasons, the encouragement and protection of trade and trading interests. Now amongst those mentioned exceptions are included such as flow from the necessary protection and advantage of the public, derived from commerce and trading intercourse, which would be greatly interfered with if the privilege claimed were allowed in all such cases. Independent of the public advantage they rest upon the principle of law, that the effects were not put upon the premises voluntarily. The following citations are sufficiently explanatory of a large class of such cases: "Valuable things shall not be detained for rent, for benefit and maintenance of trade, which by consequent are for the commonwealth and are there by authority of law," or as stated in another place, "valuable things in the way of trade shall not be liable to distress, as a horse standing in a smith's shop to be shoed, or in a common inn, or cloth at a tailor's house, or corn sent to a mill or market, for all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house, but to his customers." These instances are put merely as illustrations of the rule abroad, but precisely the same law holds good here, therefore, whatsoever goods are by the usage of trade and for the benefit of trade in the house of the tenant, and not belonging to him actually or constructively, they are privileged from the *gage* of the landlord, who must presume that they are not the property of the tenant, nor put by him upon the premises. These instances are all familiar with the students of Pothier's Traité de Louage and our other authors who have treated the matter, and they will doubtless learn from them also the general principle, that whatsoever is necessary for the carrying on of trade comes within the exception, and, therefore, necessarily goods delivered to any person exercising a public trade or employment, to be carried, wrought or managed in the way of his trade or employ are, for that time, under a legal protection and privilege from the *gage* for rent; and so also the goods of a principal in the hands of his factor, because they are upon the premises in the way of trade. This includes all that class which comprises auctioneers, brokers and commission merchants as such, because in the exercise of public trade they receive valuable things to be managed in the way of their trades, not for themselves but for the [illegible] the owners of those things; the publicity of the trade and the necessity of carrying it on, form the grounds of exception in their favour, which upon the same principle cover and protect all materials to be worked upon, conveyances which carry them to and from the place of manufacture; so also whilst they are in the hands of a common carrier, whilst he is carrying the

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goods, whilst in the hands of a factor to whom they are consigned or left for sale, and whilst in the hands and warehouse of a wharfinger or warehouseman where they are lodged and deposited. A common instance of this class is the auctioneer, who receives your property for sale, or those other traders receiving goods for sale on commission who do not hold the goods as their own but for the use of others. Now this has been upheld by our own jurisprudence, in the case of Henderson vs. Proctor—Medgley opposant. The opposant, a foreign owner, consigned goods to the defendant, a commission merchant, and claimed *main levée* of his goods seized for rent due by defendant; the goods were in the defendant's possession for purposes of sale, and the landlord's privilege was strongly urged, but by the Court it was held, Chief Justice Reid stating "this case rests on principles too clear to admit of a doubt. The goods could never be considered to belong to the defendant to be liable to plaintiff's *saisie gagerie*. To do this, it is necessary that they should occupy the premises as belonging to the defendant, and the Chief Justice referred to Pothier. Louage No. 24: "les meubles doivent exploiter la maison ou métairie qui a été louée. Quels sont les meubles qui sont censés exploiter? Ce sont ceux qui paraissent y être pour y demeurer ou pour y être consommés ou pour garnir la maison. Les choses qui sont dans une maison non pour y rester, ni pour la garnir, mais qui y sont comme en passant, ne peuvent donc point passer pour choses qui exploitent et garnissent la maison et ne sont point obligés au locateur. Cela doit surtout avoir lieu à l'égard des choses qui n'appartiennent pas au [illegible]taire." And the Chief Justice ended by saying, "We think these principles decide the case in favour of the opposant." The same was held in another case of Shuter vs. Begley and Tinelli, opposant. This was an opposition by the owner of goods seized by the landlord for rent as being in the possession of his tenant, an auctioneer, with whom the goods were deposited for sale on commission. The opposition was contested and maintained and *main levée* granted. Mr. Justice Pyke giving the unanimous judgment of the Court for the same reasons as in the previous case. Now if the public benefit, through consideration of general trust, protect the owners of goods in the cases above adverted to, and upon the principles above stated, they apply more effectively still to the goods in this case, which the law required to be placed in the bonded warehouse, and which were not there as the goods of the tenant, *pour garnir les lieux ou pour y demeurer ou pour y être consommés*; they were in the warehouse therefore compulsorily under the customs act only and temporarily, and could not have been there at all but for and under the protection of a public trade law, which brings this warehouse under the description of a public warehouse, which Pardessus refers to in his vol. 5, p. 417—in speaking of the vendor's right of revendication of goods sold by him and being as it were *in transitu* to the purchaser, "on ne pourrait toutefois considérer comme magasin de l'acheteur un entrepot public dans lequel des marchandises auraient été momentanément déposées en route pour les vérifications, déclarations, acquittements de droits, ou contestations relatives aux douanes, octrois et autres impots indirects." Upon the whole, all and singular these exemptions are made so, on the ground of public convenience and for the benefit of general trade, not for the protection of individual or particular traders, and in this special case it may be said more so than in the others, because the goods were deposited in the bonded warehouse as it were

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upon compulsion. I think the landlord's privilege does not reach them, and that the judgment of the Superior Court must be reversed.

The judgment in appeal was recorded in the following terms :—

"Considering that the premises in which lay the goods seized in this cause were leased by the respondents for the purpose of being used, and were in fact at the time of the seizure used as a bonded warehouse established by law for the temporary storage of goods belonging to merchant and trader indiscriminately, and were not by the terms of the lease destined to be exclusively furnished moveables, *meubles*, belonging to the lessee;

Considering that the goods so seized belonged to the appellant, a trader in the City of Montreal, who had deposited them therein for temporary storage a few days before the seizure thereof, and that they were so seized for rent, the greater part of which had become due before they had been so deposited;

Considering that the privilege granted to the proprietor by the 161st article of the *Coûtume de Paris* upon moveables, "meubles," found in the premises leased by him is founded on the presumption that such moveables are the property of the lessee;

Considering that the said privilege does not extend to such goods as the proprietor must have known not to belong to the lessee;

Considering, therefore, that the said privilege did not extend to the goods seized in this case, and that there is consequently error in the judgment rendered in the Court below on the 28th day of June 1866: The Court here doth set aside and annul the said judgment, and proceeding to pronounce the judgment which the Court below ought to have given doth grant the conclusions taken by the said appellant in his opposition, and doth order *main lévée* of the seizure of the goods therein claimed by him, the whole with costs in both Courts against the respondent."

Judgment reversed.

A. & W. Robertson, for appellant.

Jetté & Archambault, for respondent.

(F. W. T.)

COUR DE CIRCUIT.

MONTREAL, 29 OCTOBRE 1867.

Coram BERTHELOT, JUGE.

C. C. No. 1100, des dossiers de St. Hyacinthe.

Leclerc qui tam vs. *Bilodeau*.

Le demandeur prit à St. Hyacinthe, dix actions *qui tam*, en vertu du ch. 67 des S. R. du B. C., contre différentes personnes qui se sont associées à d'autres pour construire un pont, à St. Hyacinthe, dans un but de commerce suivant le demandeur, et avoir bâti le dit pont, reçu des argents de ceux qui s'en servaient, et avoir fait divers actes de commerce jusqu'au jour de l'action, sans déposer une déclaration de société, ainsi que le prescrit le statut.

L'Hon. L. V. Sicotte, seul juge résidant à St. Hyacinthe, devant qui la cause est portée, fait une déclaration écrite, déposée au dossier "qu'il est la personne nommée dans l'acte du 8 juin 1842, constituant la dite société, et dans l'action, Louis Victor Sicotte, avocat, et qu'il a été une des parties à cet acte, comme intéressé à la construction du pont dont il s'agit dans cet acte, et un des propriétaires jusqu'en 1855, époque à laquelle il a cessé d'être tel propriétaire, en s'abstenant à dessein de faire le paiement annuel, tel que déterminé par l'acte du 15 mars 1854, dont il est question dans les écritures."

Jugé—Que cette déclaration ne donne pas ouverture à une demande en récusation.

Le demandeur alléguait dans sa déclaration, que le 8 juin 1852, par acte fait devant Mtre Blanchard, à St. Hyacinthe, les nommés Louis Victor Sicotte,

Joseph C. Perrault, Louis R. Blanchard, Maurice Buckley et d'autres formèrent une société dans le but de construire un pont à St. Hyacinthe, sous le nom de *La Compagnie du Passage d'Yamaska*, ce pont devant être construit sur la rivière Yamaska; le défendeur faisait partie de cette société; des argents furent souscrits, fournis et payés par les actionnaires, le pont fut bâti.—Depuis sa formation, la dite société a acheté, vendu, transporté, etc., des ponts dans le District de St. Hyacinthe, a tenu des assemblées, nommé des officiers pour la représenter, a établi des taux de péage sur le dit pont, et les a perçus jour par jour jusqu'au moment de l'action. Que la dite société a été formée, et continuée par le défendeur et les autres membres dans un but de gain, profit et lucre, et est une société entièrement commerciale. Que les défendeurs n'ont pas fait enregistrer, suivant la loi, une déclaration de la dite société, et chaque membre est passible d'une pénalité de £50 réclamée par l'action.

Des motions *to quash* ayant été faites pour tous les défendeurs, et arguées le 20 mars 1866, devant l'Hon. juge L. V. Sicotte, celui-ci fit et déposa dans le dossier la déclaration suivante;

"Louis Victor Sicotte, Juge de la Cour Supérieure, siégeant dans la Cour "de Circuit à St. Hyacinthe, fait connaître aux parties, dans les différentes causes "arguées devant lui, le premier jour du terme de mars courant, dans lesquelles "Jean Olivier Leclerc est poursuivant *Qui tam*, contre E. Bilodeau, L. Blan- "chard, Antoine Cassavant, Alexis Richer, Hypolite Langelier, Joseph Richer, "Pierre Desports, Louis Lefebvre, Alfred Brien, et Joseph Robitaille, qu'il "est la personne nommée dans l'acte du 8 juin 1852 et dans l'action, Louis "Victor Sicotte, avocat, et qu'il a été un des parties à cet acte, comme "intéressé à la construction du pont dont il s'agit dans cet acte, et un des pro- "priétaires jusqu'en 1855, époque à laquelle il a cessé d'être tel propriétaire, en "s'abstenant à dessein de faire le paiement annuel, tel que déterminé par l'acte "du 15 mars 1854 dont il est question dans les écritures.

"Cette déclaration est faite pour permettre aux parties de faire valoir les "causes de récusation qu'il y a dans les faits sus-relatés.

Déclaré cour tenante ce 26 mars 1866.

(Signé,) "L. V. SICOTTE,"
"Juge."

Le demandeur produisait, le 30 juin suivant, une demande que les dossiers fussent transmis à Montréal, attendu la dite déclaration et la récusation qu'il faisait en conséquence du dit Hon. Juge.

Cette motion fut accordée le même jour; les dossiers transmis à Montréal et la cause fut inscrite et plaidée à Montréal sur la dite récusation, le 12 mars 1867.

M. *Pagnuelo*, pour le demandeur.

L'Hon. L. V. Sicotte, seul juge résidant à St. Hyacinthe, fait le 26 mars 1866, une déclaration par écrit qu'il est la personne mentionnée (L. V. Sicotte, avocat) dans la déclaration et dans l'acte d'association, comme ayant été un des fondateurs de la société incriminée; mais qu'il a cessé de faire partie de cette société en 1855 en cessant à dessein de faire les paiements dûs par l'acte d'association. Cette déclaration du fait pour permettre aux parties de récuser le dit juge, si

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elles le jugeaient convenable, en conformité à l'ordonnance de 1667, titre 24, art. 17.

D'après l'art. 20 (même titre,) dans les huit jours après que cette déclaration a été signifiée aux parties, l'une d'elles peut récuser le juge; c'est ce qui a été fait par le demandeur, qui a déclaré accepter les causes de récusation contenues dans cette déclaration, et en conséquence récuser l'Hon. juge. Là-dessus son Honneur le Juge Sicotte ordonna le transfert des dossiers à Montréal. Quelques jours auparavant, les défendeurs avaient fait une motion pour faire déclarer le demandeur déchu de son droit de récuser parce qu'il ne l'avait pas fait dans les huit jours qui ont suivi la déclaration, mais cette motion fut rejetée parce que cette déclaration n'a jamais été signifiée au demandeur, (voir art. 20.)

Les défendeurs, de même que son Honneur le juge Sicotte, paraissant vouloir suivre à la lettre l'ord. 1667, ont présenté à cette Honorable Cour une motion, le 12 mars courant, demandant le renvoi des dossiers à St. Hyacinthe parcequ'il n'y a pas de raisons valables de récusation contre L'Hon. L. V. Sicotte; la cause étant en même temps inscrite sur la récusation, la cour est appelée à déclarer si son Honneur le Juge Sicotte avait une cause raisonnable de se déporter de la connaisance de cette action, ainsi qu'il l'a fait, et si le demandeur était justifiable d'accepter cette récusation.

Les causes de récusation d'un juge d'après l'ord. de 1667, sont très nombreuses, la parenté ou l'alliance du juge avec les parties ou l'une d'elles (titre 24, arts. 1, 3, 4), s'il a un différend sur pareille question (id. art. 3), s'il a donné conseil ou *ouvert son avis hors la visitation et jugement* (art. 6,) s'il a un procès devant une des parties comme juge (art. 7,) s'il a fait des menaces à l'une des parties (art. 8.) Enfin l'art. 12 finit par dire "n'entendons aussi exclure les "autres moyens *de fait et de droit* pour lesquels un juge pourrait être valablement récusé." Tous les commentateurs de cette ordonnance ont mis un nombre considérable de cas de récusation sous cet énoncé général, entr'autres celui d'une amitié considérable (Jousse, 1 vol., p. 417, où il cite plusieurs auteurs et le droit Romain); ainsi celui qui aurait bu et mangé souvent avec une partie depuis un procès serait récusable (id.) "au surplus dit Jousse (p. 418,) il est de la prudence d'un juge "de se déporter de la connaissance d'une cause où son "ami est intéressé, surtout si cette amitié est intime: il y a même souvent beaucoup plus de raison de se récuser pour cette cause que pour celle de parenté."

L'Hon. L. V. Sicotte tombe-t-il dans quelqu'un de ces cas? Le demandeur, tout en ayant la plus grande confiance dans l'impartialité et la justice de L'Hon Juge, ose affirmer qu'il avait le droit de le récuser ainsi qu'il l'a fait.

"Le principe général en matière de récusation, dit Pigeau (1 vol., p. 364,) "est que toutes les fois qu'un juge a quelqu'intérêt à favoriser une partie, *intérêt "de sang, intérêt personnel, intérêt d'amour-propre,* il est récusable, les cas sup"posés par le tit. 24 de l'ord. de 1667, ne sont qu'une partie des conséquences "de ce principe." Il est évident en effet que tous les cas énoncés ci-dessus tombent sous l'un ou l'autre des ces trois grands motifs.

Or L'Hon. L. V. Sicotte a été l'un des fondateurs de l'association incriminée, il en a été même l'un des directeurs, et je crois le président, la loi qui exige l'enregistrement de la déclaration de toute société commerciale existait alors (en

1852); son devoir comme directeur, et surtout comme président, était de faire enrégistrer cette déclaration afin de mettre tous les membres de cette société, la plupart cultivateurs sans instruction et se confiant en ses lumières, et pour se mettre lui-même à l'abri de la présente poursuite; il reste deux ans au moins l'un des directeurs et cette déclaration n'est pas produite; ne doit-on pas présumer; 1o. Ou qu'il a donné alors son avis comme avocat que cette société ne tombait pas sous l'effet de cette loi comme les défendeurs le prétendent aujourd'hui. Cette présomption n'est-elle pas raisonnable? alors, comme ayant donné son avis, il est récusable; c'est l'un des cas formels de l'ord. 2o. Ou bien les actionnaires pourront lui dire: "M. le Juge Sicotte alors avocat, actionnaire et directeur de la société du pont pendant deux ans, savait qu'il devait faire enrégistrer une déclaration de société pour nous actionnaires, qui nous confions en lui? il savait qu'il exposait chacun de nous à une pénalité de cinquante louis, cependant il est resté inactif, n'a pas déposé la déclaration requise et aujourd'hui par sa faute nous sommes poursuivis!" Pense-t-on, abstraction faite de la personne de l'Hon. Juge, qu'il soit possible de supposer qu'il n'y aurait pas dans tous les cas, une question d'amour-propre au fond de cette affaire pour le directeur, l'avocat et l'actionnaire devenu juge?

2e. L'Hon M. Sicotte était lui-même le meilleur juge de cette cause de récusation; "Le juge pénétré des sentiments qui conviennent à son caractère, dit "Pigeau (vol. p. 363) ne doit pas attendre qu'on le récuse; la justice, le res-"pect de soi-même, d'accord avec la loi, lui recommandent de s'abstenir, et "d'exposer les raisons qu'il croit avoir de le faire" ce qui est sage et convenable, et je ne crois pas qu'un juge, son égal, lui commande de siéger dans une cause dont il s'est déporté, à moins que ce ne fût pour une raison si futile et si frivole qu'elle ne puisse soutenir l'examen le plus bienveillant, ce qu'il serait ridicule de soutenir ici, or du moment qu'il y a matière à raisonnement, la récusation du juge doit être acceptée, et je crois qu'il serait plus insultant de rejeter sa récusation volontaire comme frivole que de l'accepter et le décharger d'un fardeau souvent bien lourd pour sa délicatesse.

Voilà ce que le demandeur soutient en supposant que cette partie de l'ordon. de 1667 fut encore la loi du pays à ce sujet, mais le demandeur soumet qu'elle est tombée en dessuétude depuis longtemps et il en appelle à l'expérience de votre Honneur à ce sujet. Du moment qu'un juge a déclaré qu'il connaisait une cause de récusation en sa personne, on l'en croit à sa parole et il est exempt de siéger dans cette affaire sans qu'on lui fasse de procès à ce sujet; cette coutume est aujourd'hui si universelle qu'il est inutile d'y insister davantage; elle a pris son origine en France même, car Pigeau (p. 364) nous rapporte que dans les "provinces il est *d'usage très fréquent* de faire le déport et de décider l'affaire "sans qu'il ait été déclaré valable. Il y a même des juges qui sans faire de décla-"tion s'abstiennent du jugement."

Or, une loi ne s'abroge pas seulement par une autre loi formelle mais encore par le non usage, et le demandeur invoque la pratique de cette cour d'accepter sans procès la récusation volontaire d'un juge.

3e. Enfin supposant tous ces motifs insuffisants, il en est un péremptoire; il est formulé comme suit par le demandeur; L'Hon. L. V. Sicotte a un intérêt

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personnel dans les présentes poursuites, puisque, *vis-a-vis des tiers*, il est encore membre de la dite société incriminée, et passible lui-même de la pénalité de cinquante louis, de la même manière que les défendeurs dans ces différentes causes, pour n'avoir pas déposé la déclaration requise de formation de société."

Cett proposition est basée sur le même chapitre 67 des S. R. du B. C. ; la sect. 1ère §2 dit: cette déclaration contiendra les nom, surnom, qualité et "résidence de chaque associé, et les nom, titre ou raison sous lesquels ils "conduisent ou entendent conduire les affaires," &c. &c., et le par. 3 ajoute :" " Une semblable déclaration sera déposée de la même manière chaque *fois qu'il " y a quelque changement ou modification dans le personnel de la société* ou dans "le nom, titre ou raison sous lesquels la société entend conduire ses affaires."

Enfin la sect. 3e déclare: " Et nul signataire ou *associé* ne *sera considéré " comme n'étant plus associé* avant qu'une nouvelle déclaration constatant ce " changement dans la société n'ait été faite et déposée en la manière ci-dessus "prescrite, par lui ou par ses associés ou par l'un d'eux.

Or il est allégué dans la déclaration qu'il n'a jamais été déposé de déclaration de société ni aucune autre quelconque, et la déclaration de l'Hon. L. V. Sicotte constate qu'il n'a cessé de faire partie de la dite société qu'en cessant à dessein de continuer les paiements requis par l'acte d'association. Vis-à-vis de ses co-associés, ce défaut de paiement de l'Hon. L. V. Sicotte pouvait être suffisant pour le priver des bénéfices de la société ; mais n'ayant pas fait et déposé une déclaration qu'il avait cessé d'être membre de la société, ainsi qu'il était tenu de le faire par le 3me par. de la 1ère section, il a continué, vis-à-vis des tiers à être membre de la société incriminée, il est considéré comme étant encore associé, suivant la sect. 3. Donc L'Hon. Juge Sicotte, étant encore, suivant les termes formels de la loi, co-associé des défendeurs vis-à-vis des tiers est encore, comme eux, soumis à la pénalité de cinquante louis; il a donc un *intérêt personnel à favoriser l'une des parties*, il a donc agi sagement en se récusant.

Le demandeur réfère en outre, sur la nécessité de l'enrégistrement de la dissolution de société ou d'un changement dans le personnel, à une cause de Jackson vs Paige et al., (6 Jurist, p. 105), dans laquelle votre Honneur a décidé, suivant le statut, que même une dissolution notariée de société n'était pas suffisante pour décharger l'ex-associé des obligations résultant de l'état d'associé, lorsqu'une déclaration de dissolution n'avait pas été enrégistrée ; et votre Honneur référait à une cause de Murphy vs. Paige, 5 Jurist, p. 335.

J'attirerai encore l'attention de la cour sur une cause de Tilorier rapportée dans Troplong, 2 vol. Société, No. 903, p. 379 où il a été décidé que plus de vingt ans après la dissolution d'une société *par la mort* du principal associé, la société existait encore *vis-a-vis* des tiers parce que les asssociés n'avaient pas publié cette dissolution aux termes de l'art. 46 du code de commerce, sur lequel notre statut est basé ; ce jugement fut donné en première instance, confirmé en appel, et il a aussi dû être confirmé, en cassation, puisque Troplong qui formait partie de cette dernière cour, établit clairement (p. 381 et 2) que ce jugement est conforme aux principes. (Voir 17, Sirez, 2 partie, p. 163, affaire Prédelys, (2 Août 1817.)

En voilà certes plus qu'il n'en faut pour établir que L'Hon. L. V. Sicotte

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avait de justes raisons pour s'abstenir de connaître de ces différentes causes, et pour empêcher qu'un juge, son égal aux yeux de la loi, le force d'en prendre connaissance,

Voici le jugement de la cour.

La cour.....considérant que la déclaration faite par le dit Honorable juge Louis Victor Sicotte, en date du 26 mars 1866, ne donne pas ouverture à la demande en récusation présentée de la part du demandeur le 30 Juin 1866 et qu'il n'y a pas lieu d'ordonner en conséquence d'icelle la transmission du record à la cour de circuit pour ce District—a renvoyé la dite demande en récusation et ordonné que le dossier en cette cause soit remis et renvoyé au greffe de la cour de circuit dans et pour le District de St. Hyacinthe, par le griffier de cette cour à Montréal, pour qu'il soit procédé ainsi que de droit et qu'il pourra appartenir en la dite cause, et sans égard à la dite demande à récusation, avec dépens ainsi qu'il pourra appartenir.

Demande en récusation renvoyée.

S. B. Nayle, pour le demandeurs.
S. Pagnuelo, conseil,
Papineau et *Morrison*, pour certains défendeur.
Chagnon, *Sicotte* et *Lanctôt*, pour d'autres défendeurs.
(S. P.)

SUPERIOR COURT.

SHERBROOKE, 23RD DECEMBER, 1867.

Coram SHORT, J.

No. 66.

Hingston vs. *McKenty*.

The defendant was arrested at the instance of the plaintiff, under a warrant of arrest, issued by a commissioner for taking affidavits, to be used in the Superior Court, and which empowered the gaoler to detain the defendant "for forty-eight hours, and no longer, unless before the expiration of that time a writ of *capias ad respondendum* be duly served upon him." No writ of *capias* was served within the forty-eight hours, but the defendant was detained for two days longer, when the writ of *capias* issued in this cause was served upon him in gaol.

HELD:—That the detention of the defendant after the expiration of the period of forty-eight hours was illegal, and that the arrest made under the writ of *capias* while the defendant was so illegally detained was void; and the defendant was discharged from custody, upon his petition to that effect.

The defendant was arrested on the 8th May, 1866, under a warrant of arrest issued at plaintiff's instance by John Thornton, a commissioner for taking affidavits to be used in the Superior Court, under Con. Stat., L.C., C 83, § 53, and was delivered into the custody of the keeper of the gaol at Sherbrooke at 9 A.M of the 8th May. The warrant of arrest was in the form given by the Statute directing the gaoler to detain the defendant for forty-eight hours and no longer, unless within that time a writ of *capias* be duly served upon him. No writ of *capias* was served within the forty-eight hours, but the defendant was nevertheless detained in gaol until 11 A.M. of the 13th May, when the writ of *capias* was served upon him.

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The defendant petitioned the Court to be discharged from custody, upon the ground that his detention after the expiration of forty-eight hours was illegal, and that his subsequent arrest at the suit of the same party while so illegally detained at his instance, was also illegal and void, and on the further ground that the commissioner who issued the original warrant of arrest had neglected to transmit a duplicate thereof together with the original of the affidavit upon which it was founded to the Prothonatary of the Superior Court, as required by Con. Stat., L.C., C. 83, § 54. The plaintiff answered the petition generally, and the parties went to evidence thereon. It appeared that before the expiration of the forty-eight hours the Deputy Sheriff called at the gaol and verbally directed the gaoler to detain defendant until further orders, but he did not see the defendant and nothing further was done until the 13th May, when the writ of *capias* was served.

Barbise, for the defendant. The arrest under the writ of *capias* in this cause is in the nature of a detainer, and the original detention of the defendant under the warrant of the commissioners being illegal, the second detainer at the suit of the same person is irregular also.—Where a defendant had been arrested, and was discharged on the ground of a defect in the affidavit of debt, and a new detainer for the same cause of action was lodged against him on the day of his discharge, in the Fleet prison where he was then confined, it was held that such detainer was irregular, and the Court ordered the defendant to be discharged out of custody, Claughton *vs.* Farquharson 7, Moore, 312. Where a plaintiff arrested a defendant and discontinued the action and paid him the costs, but before he was actually discharged out of custody lodged a detainer against him for a larger debt arising out of the same cause of action, it was held that the detainer was irregular, and the defendant was discharged. White *vs.* Gompertz 1, Dowling & Ryland 556. Where a party was arrested under a writ of *capias* and the arrest was declared illegal on the ground of informalities in the affidavit it was held that he must be completely and fully restored to his liberty before he could be arrested under a second *capias* at the instance of the same plaintiff. Hamel *vs* Cote, 11 L.C.R., p. 479.—In ex parte Eggington, 24 English Law and Equity Reports, p, 446, it was held that a person who had been illegally arrested (upon a Sunday) could not be legally detained under a second warrant, subsequently lodged against him, which had been issued at the instance of the same parties, and in the same cause it was held that where a return to a *habeas corpus* states that a prisoner is detained under civil process, it is competent to him to show by affidavit that he was originally arrested on a Sunday. In this case the Sheriff returns, that he arrested defendant on the 10th May, 1867, but it further appears by his return, that the writ was not served until the 13th in the gaol at Sherbrooke, and in point of fact nothing beyond a verbal order given by the Deputy Sheriff to the gaoler was done until then. The service of the writ must be contemporaneous with the arrest, otherwise the defendant might be left in ignorance of the cause for which he is arrested, and even of the name of the plaintiff at whose suit the writ has issued. In this case the warrant authorized the keeper of the gaol to detain defendant for forty-eight hours only, unless within that period he should be *served with a writ of capias*. The proceedings are also defective, inasmuch as the

commissioner did not transmit to the Prothonotary a duplicate of his warrant and the original affidavit upon which it was issued, as he was bound to do by law. The affidavit was produced by him when examined as a witness, and proves to be insufficient, the cause of the alleged indebtedness of defendant to plaintiff not being stated therein.

Sanborn, Q. C., for plaintiff.—This is not a matter which can be brought before the Court by means of a petition, and is not one of the cases where the Court or Judge has power to order a prisoner to be discharged from custody upon summary petition, under Con. Stat. L.C., C. 87, § 8. The proceedings in this cause are regular, and have no connection with any action which took place previous to the issuing and service of the writ of *capias* herein. Even if this matter could be enquired into, the sheriff returns that he arrested the defendant on the 10th May, 1867 (within forty-eight hours), and the correctness of this return can only be impeached by means of *inscription en faux*, which has not been attempted in the present case. The sheriff had the writ in his possession before the expiration of the forty-eight hours, and was not bound to serve the defendant with a copy at the same time that he arrested him, and no actual arrest was necessary, the defendant being at the time in the custody of the sheriff. The defendant has applied for and received a weekly alimentary allowance from the plaintiff during the time of his imprisonment, and has thereby acquiesced in the legality of the proceedings.

Stuart, J.—The present application on behalf of the defendant to be discharged from custody, is made on the ground that he was illegally detained in gaol by the plaintiff under a warrant previously issued by him, at the time of his arrest under the writ of *capias ad respondendum* in this cause and the service of the writ. The law relating to the issue of warrants of arrest by commissioners for taking affidavits to be used in the Superior Court provides that no person so arrested and conveyed to gaol shall be detained therein for a longer period than forty-eight hours, unless within that time the ordinary process of *capias* has been issued and executed in due course of law, and the warrant issued in this cause, following the form given in the Statute, directs the keeper of the gaol to detain the defendant for that time and no longer, unless a writ of *capias* is duly served upon him within that period. The defendant was lodged in gaol in the morning of the 9th May, and no effectual proceeding appears to have been taken until the 13th, when he was served with the *capias* in this cause. It is said that it is established by the return of the sheriff that he arrested the defendant on the 10th May, and that this return is conclusive, unless impeached by *inscription en faux*. But the sheriff also states that he did not serve the writ until the 13th, and in a legal point of view the arrest did not and could not have taken place until that day. The service of the writ must be made at the same time that the arrest takes place, for it could never be permitted that a person arrested and imprisoned under *capias* should remain for several days possibly without information as to the person who has caused his arrest or the amount of the debt claimed from him. I am therefore of opinion that the defendant ought to have been set at liberty at the expiration of the forty-eight hours, and that his detention after that time was illegal. This being the case the plain-

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tiff cannot be permitted to take advantage of his own wrongful act in causing this illegal detention to take place. I think the matter is brought properly before the Court by way of summary petition, and that the defendant must be discharged.

Petition granted.

Sanborn & Brooks, for plaintiffs.
G. H. Borlase, for defendant.
(G. H. B.)

MONTREAL, 5th MARCH, 1868.

Coram BERTHELOT, J.

No. 1517.

O'Connor vs. *Brown* et al.

HELD:—That copies of the depositions of witnesses examined in another cause may be fyled in a cause proceeding at *enquête* for the purpose of discrediting a witness examined therein.

On the 6th of February, 1868, the defendant, T. S. Brown, attempted to fyle two depositions taken in a case, Stevenson vs. McOwan, with the view of discrediting the testimony of a witness already examined in this cause. The plaintiff objected to this, and the Court (MONDELET, J., presiding) maintained the objection.

On the 27th February, 1868, the said defendant made a motion before the Superior Court to revise the ruling at *enquête* of the 6th February.

BERTHELOT, J., on the 5th March, 1868, rendered judgment reversing the ruling at *enquête*, and permitting the fyling of the two depositions.

The judgment was *motivé* as follows:

"La Cour, après avoir entendu les parties par leur avocats sur la motion du 27 Février dernier, aux fins de faire réviser les jugements rendus en cette cause, le six du dit mois de Février dernier, par l'Honorable Juge alors présidant aux *enquêtes*, examiné la procédure, et avoir délibéré a révisé ceux des dits jugements, tendant a répriser au dit défendeur la production à son enquête en cette cause des deux pièces marquées M et N par lui présentés le dit jour, et en autorise et permet la production en cette dite cause.

Motion granted.

A. & W. Robertson, for plaintiff.
Cross & Lunn, for defendants.
(J. L. M.)

COURT OF QUEEN'S BENCH.

MONTREAL, 5TH MARCH, 1868.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram DUVAL, C. J., CARON. J., DRUMMOND, J., LORANGER, J., *ad hoc.*,

ALEXANDER M. DELISLE,

(Defendant in the Court below.)

APPELLANT:

AND

WARWICK H. RYLAND,

(Plaintiff in the Court below,)

RESPONDENT.

SHAREHOLDER—CALLS ON SHARES—COMPENSATION.

Held;—That compensation takes place *ipso jure* of the debt due by a shareholder in the Montreal and Bytown Railway Company, incorporated by 14 & 15 Vic., cap. 51, with a debt due by the Company to the shareholder for arrears of salary as President of the Company.

This was an appeal from a judgment of the Superior Court, Montreal, 31st March, 1866, (MONK, A. J.) in the following terms:

The Court, &c, &c., considering that the said plaintiff hath fully proved the material allegations of his said action, particularly that the defendant was and is a shareholder in the said Montreal and Bytown Railway Company to an amount unpaid on the stock held by him of the sum of nine hundred pounds, and that the said defendant is indebted to the said Montreal and Bytown Railway Company in the said sum of nine hundred pounds, being the amount of unpaid stock due and owing by the said defendant to the Montreal and Bytown Railway Company, and considering that the said plaintiff hath established his right in law to have and demand as a judgment creditor of the said Montreal and Rytown Railway Company from and out of the said sum of £900 pounds, unpaid stock so due by the said defendant, the amount of the judgment hereinafter mentioned, and further, considering that the said defendant hath failed to show the existence of any legal claim against the said Montreal and Bytown Railway Company, by reason of which the said defendant could set off by way of compensation, the matters and things set up in compensation, as set forth in the said exceptions, the Court doth overrule the said exceptions, and doth condemn the said defendant to pay to the said plaintiff the sum of six hundred and thirty-eight pounds four shillings and seven-pence, current money of the Province of Canada, with interest on the sum of six hundred and twelve pounds and ten shillings, from the thirteenth day of September, one thousand eight hundred and fifty-four, until paid, the said sum of six hundred and thirty-eight pounds four shillings and seven pence, being the amount in principal, costs of suit and subsequent costs on execution issued upon a certain judgment obtained by one Joseph Doutre, against the said Montreal and Bytown Railway Company, in this Court, on the thirteenth day of April, one thousand eight

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hundred and fifty-six, for the sum of six hundred and twelve pounds and ten shillings of principal with interest upon the said sum of six hundred and twelve pounds and ten shillings, from the thirteenth day of September, one thousand eight hundred and fifty-four, and which said sum of six hundred and thirty-eight pounds four shillings and seven pence, amount of said judgment and costs and subsequent costs and bearing interest as aforesaid, and the said judgment and execution were transferred and made over by the said Joseph Doutre, to the said plaintiff, by deed of transfer passed before Maitre Papineau and his colleague, notaries public, on the fifth day of October, one thousand eight hundred and fifty-seven, and duly signified to the said defendant on the sixth day of November, one thousand eight hundred and fifty-seven, &c. &c.

W. H. Kerr stated the pretensions of the appellant as follows, in his factum:

The present Appeal is instituted from a Judgment rendered in the Superior Court at Montreal, on the 31st March last, by which the defendant in the Court below was condemned to pay £638. 4s. 7d. currency, with interest on the sum of £612. 10s. from the 13th September, 1854, together with the costs of suit.

The declaration fyled in the Court below, sets out that Joseph Doutre, Esquire, recovered judgment against the Montreal and Bytown Railway Company for the sum of £612. 10s. with interest and costs, &c., that the said Joseph Doutre sued out a writ of execution against the goods and chattels, &c., of said Company, which was afterwards returned by the Sheriff, to whom it was addressed, unsatisfied either in whole or in part. That afterwards the said Joseph Doutre, by deed of transfer before Papineau and colleague, Notaries, ceded and transferred to Warwick H. Ryland, the present respondent, for valuable consideration, all his rights and interest in the said judgment and execution.

It further sets out the present appellant was, from the 4th of May, 1853, and ever since has been, a shareholder to the extent of forty shares, or sum of £1,000, of the capital stock of said Company, and that the defendant, now appellant, never paid anything on account of the said stock so held by him, and that the same is still unpaid, and that for the reasons above stated the appellant is personally liable to the respondent as a creditor of the said Company, for the debt so due by the said Company, to the said now respondent, to an amount equal to the amount so unpaid on the stock so held by him, to wit, £1,000.

To this the defendant pleaded, that during two years and a half, or upwards, after the establishment of the said Company, he was President and Director of the Montreal and Bytown Railway Company, and that as such he was entitled to the sum of £2,704. 19s. 0d. for salary as President of said Company, and also for moneys expended by him in and about the said Company as appeared by the entries made in the books of the said Company in which credit was given, and that the amount so credited by the said Company to the present appellant operated in law an extinguishment by compensation of any amount which he might have owed the said Company upon any shares of stock subscribed for him and unpaid. A *defense au fond en fait* was also fyled.

It was proved that at a meeting of Directors of the Montreal and Bytown Railway Company, held the 9th November, 1853, the present appellant was appointed President of the said Company, and that as such President the sum of

one thousand pounds was voted him for his services for the year ending on the first Monday of March then next, (1854), and for which credit was given him in the books of the said Company.

It was further proved, that on the 22nd March, 1854, at a meeting of the Directors of the said Company, the appellant was again named and appointed President of the Company, and his salary as President was fixed at one thousand pounds per annum, to be computed from 1st March, 1854, and for which credit was given him in the books of the Company.

The great question in this case is as to whether the amount due by the appellant to the Company for balance unpaid upon the stock, was compensated by the amount due by the Company to him in March, 1854, for the salary as President up to that date.

The 1188 art. of the code is as follows:—"Compensation takes place by the sole operation of law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind or quality. So soon as the debts exist simultaneously they are mutually extinguished in so far as their respective amounts correspond."

No doubt can be entertained, that supposing the appellant on the 1st March, 1854, was indebted to the Company in the sum of £1,000, amount of his stock therein, so soon as his salary of £1,000 became due on that day, the debts being equally liquidated and demandable and having each for object a sum of money, there was compensation, and the appellant ceased to be the debtor of the Company.

It is to be remembered also, that the debt which is the basis of the plaintiff's action was only contracted on the 23rd of May, 1854, two months after compensation had taken place as aforesaid.

The object and intention of the Legislature as declared by the eightieth clause of the 66th cap. C. S. Canada, is simply to place the creditors of Railway Companies in the same position as the Companies with respect to their rights to recover from shareholders who have not paid the balances due upon their stock, but no greater right is rested in the creditors than belonged to the Company, and if the Company had no action, neither have the creditors. In this case it is clear that the Company would have no action.

The respondent takes it for granted that early in 1854, the Company became insolvent, and therefore he alleges the salary of the appellant accrued, after the insolvency, cannot be set up in compensation, and he insists that the appellant in this case is only entitled to rank for such salary *au marc la livre* upon the estate of the Company, but he fails to show at what date in 1854 the Company became insolvent, and it surely is not too much to suppose that the Company was solvent when the auteur of the plaintiff gave them credit for the debt sued for in this case on the 23rd May, 1854. Moreover, there really is nothing to show that the Company was at any time insolvent, it is quite possible that there was no money in its coffers and yet if proper exertions had been used that its debts could have been paid. Neither has he cited any authorities supporting his view of the law as to the non-existence of compensation under those circumstances.

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The respondent set forth his pretensions as follows, in his factum:

The appellant was sued as a stockholder in the Montreal and Bytown Railway Company.

His liability is fixed by Statute, sec. 19, paragraph first of 14 and 15 Vic., chap. 51, page 809 of Consol. Stat. of Canada, enacts that "each shareholder shall be individually liable to the creditors of the Company to an amount equal to the amount unpaid on the stock held by him, for the debt and liabilities thereof, and until the whole amount of his stock shall have been paid up."

The declaration in this action alleged that in and by a judgment rendered on the 30th of April, 1856, in a cause bearing the No. 524, wherein Joseph Doutre was plaintiff, and the Montreal and Bytown Railway Company, a body politic and corporate, duly incorporated as such by virtue of a Public Act of this Province, was defendant, the said Company was condemned to pay to said Joseph Doutre six hundred and twelve pounds and ten shillings, with interest from the 13th day of September, 1854, and costs, afterwards taxed at twenty-one pounds, fourteen shillings and seven-pence;

That at the time of the rendering of said judgment, and for more than six months immediately preceding that time, the said Company was, and has ever since continued to be, and still is, insolvent, *en déconfiture*.

That the said Company having failed to satisfy the aforesaid judgment, the said plaintiff on the 19th October, 1857, sued out execution in said cause No. 524, against the goods and chattels, lands and tenements of the said Company, which execution was afterwards, by the Sheriff of this District, to whom it was addressed, returned unsatisfied either in whole or in part, in which execution the said plaintiff incurred costs to the extent of four pounds.

That the said Joseph Doutre, by a certain deed of transfer, passed before Papineau and colleague, Notaries Public, at Montreal, on the 5th day of October, 1857, in effect, sold, ceded and transferred to plaintiff thereof accepting for good and valuable consideration, all his right and interest in said judgment and execution, and by law derivable therefrom and subrogated him in all his rights, titles, privileges and hypotheques, *noms, raisons et actions* resulting from said judgment; which said transfer of judgment was, on the 6th day of November, 1857, duly signified to said defendant and also to said Company.

That the said several sums so due and payable to plaintiff by said Company, form, united, the sum of six hundred and thirty-eight pounds, four shillings and seven pence, with interest as aforesaid.

That on the fourth of May, 1853, the said A. M. Delisle subscribed for and became a shareholder to the extent of forty shares of twenty-five pounds each, to wit, to the extent of one thousand pounds of the capital stock of the said Company; and that the said defendant hath, ever since the fourth day of May, 1853 continued to be, and still is a shareholder to the extent of the said forty shares, or sum of one thousand pounds, on account whereof the said defendant has not paid anything, leaving the whole of the said stock so held by him as aforesaid unpaid: That at all the times herein before referred to, the defendant was the president and director of said Railway Company.

That by reason of the premises and by-law, the said defendant was, and is

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individually liable to the said plaintiff who is a creditor of the said Company, in the manner aforesaid, for the debt so due by the said Company, to the said plaintiff to an amount equal to the amount so unpaid on the stock so held by him as aforesaid, to wit, to the amount of one thousand pounds, and being so liable, &c.

Wherefore &c., (prayer that he be condemned to pay plaintiff £1000.)

The defendant pleaded two pleas of *compensation* and a *defense en fait*. By the first he alleged in substance that the defendant was president and director of said Railway Company for two years and a half at a salary, and said Company had became indebted to him for salary accrued and for money laid out and expended in the sum of £2438 5s. 8d. as appears by extract or statement from the books. That the amount so credited operated an extinguishment by compensation of any shares of unpaid stock.

By the second, the defendant says that prior to the issuing of the execution mentioned in plaintiff's declaration, the defendant had ceased to be debtor of the said Company for any shares, subscribed for by him, because he had signed two promissory notes each for £500 for the use of said Company, which had been negotiated and were unpaid, and upon which he was liable and that by reason of the premises the stock subscribed for by defendant was paid.

Special and general answers, and a replication were fyled to said pleas, in substance as follows:

That the allegations in said pleas were untrue and *insufficient in law*. That defendant never paid up his stock subscribed for; that said Railway Company was bankrupt in 1854, and since that such unpaid stock was fund out of which to pay creditors like plaintiff. That defendant was bound to pay up his stock, and then if he had any claim, he might claim like other creditors; that the Company was not indebted to defendant, that salary never was due according to law or justice; that great irregularities had been perpetrated by the president and directors of said Company to the knowledge of defendant; that defendant had not paid said notes; that under the circumstances, said exceptions could not be maintained.

Issue being joined the parties went to proof.

The plaintiff produced a copy of the judgment No. 524 and of the execution in the cause with sheriff's return, that said judgment and execution were unsatisfied in whole or in part. The appellant was examined as a witness; and also upon *faits et articles*. It is only necessary here to refer to his answer to the 2nd, 3rd and 4th Interrogatories to be satisfied that said stock subscribed for by defendant had not been paid up.

W. H. Hopper, the secretary and book-keeper of said Railway Company, says: "There is another ledger called the stock ledger, in which the defendant's name appears as a stockholder of one thousand pounds of unpaid stock."

The defendant examined no witnesses.

The judgment appealed from was rendered on the 31st March, 1866; it overruled the exceptions of compensation pleaded by defendant, found the defendant to be debtor to the Montreal and Bytown Railway Company in £900 unpaid on his stock, approved the plaintiff's claim as a judgment creditor of the Montreal

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and Bytown Railway Company having execution against the Company unsatisfied, and condemned the defendant accordingly as prayed for by plaintiff.

The respondent humbly submits that said judgment should be affirmed with costs, for the following *reasons*:—

Because plaintiff's demand was well founded and compensation or set off was never and could not be operated or allowed as claimed by defendant's pleas;

Because the appellant was and is a shareholder in the Montreal and Bytown Railway Company, to an amount of £1000, of which £900 was *unpaid stock*, and he was liable, in consequence, as plaintiff complained and as the judgment appealed from has found;

Because the appellant as such shareholder was individually liable to the creditors of the said Company (respondent one of them) having executions against said Montreal and Bytown Railway Company unsatisfied, to an amount equal to the amount unpaid on the said *stock* held by appellant, and was and is so to continue liable until the whole of his stock is really *paid up*.

Because the appellant as such shareholder in said Company and one of the corporators must be regarded as privy to the said Judgment No. 524, and to be concluded by it.

Because the appellant considering the proofs made, and as a shareholder in said Company, whose stock was and is not paid up into the *caisse* of the Corporation, was and is liable towards a creditor with execution unsatisfied in manner and form as found by the judgment appealed from.

Because the amount of appellant's stock *not paid up* formed part of the capital stock of said Montreal and Bytown Railway Company, and was pledged towards creditors like respondent, and the appellant and other shareholders in said Company were in the position of trustees for the creditors of said Company.

LORANGER, J., *ad hoc* dissentiens:—L'unique question soulevée sur le présent litige est de savoir si l'appellant poursuivi par un créancier par Jugement de la Compagnie du Chemin de fer de Montréal et Bytown, peut lui opposer, en compensation des versements de ses parts non payées, le montant du salaire que lui doit la Compagnie pour services rendus comme son président. La question en est une d'interprétation de la clause 80 du chapitre 66 des Status Refondus du Canada, quant à la loi qui regit les Compagnies de chemins de fer.

Cette clause 80 de la loi porte:

"Chaque actionnaire sera responsable individuellement envers les créanciers de "la compagnie pour un montant égal au montant dont il est redevable pour les "actions possédées par lui pour les dettes et obligations de la Compagnie et jus- "qu'à ce que le montant total de ses actions ait été payé, mais il ne pourra être "poursuivi pour ses dettes qu'après qu'une saisie exécution contre la Compagnie "aura été rapportée sans qu'il y soit satisfait en totalité ou en partie, et le montant "de cette exécution sur le montant recouvré avec dépens contre tel actionnaire."

L'effet de cette disposition est sans doute d'affecter les actions qui forment le capital social aux créances passives de la Compagnie, et d'établir entre le créancier de la Compagnie et son actionnaire les rapports de créancier et débiteur. Un lien de droit personnel assujettit donc dès l'origine, c'est-à-dire, du moment de sa souscription, l'actionnaire au paiement des créances des tiers, puisque la clause ci-

tée leur ouvre une action personnelle, dont l'exercice est seulement subordonné à l'accomplissement de la condition qui y est prescrite, c'est-à-dire ; l'émanation d'une saisie exécution non satisfaite, en d'autres mots, à l'insolvabilité de la Compagnie.

A mon avis cette clause doit s'interprêter comme s'il y était dit :

Les parts ou versements des actionnaires sont déclarés être le gage des créanciers, qui en cas d'insolvabilité de la Compagnie, auront une action personnelle, pour en recouvrer le montant alors non payé.

Les actionnaires sont donc dès le principe devenus les débiteurs des créanciers de la Compagnie qui peut bien recevoir le montant des actions, mais qui ne peut priver les créanciers de leurs recours contre le capital social par des compensations volontaires ou forcées—des parts par des obligations contractées envers ceux qui les doivent, c'est-à-dire les actionnaires.

Cette responsabilité personnelle de l'actionnaire vis-à-vis les tiers créanciers de la Compagnie qui s'oppose à la compensation du capital souscrit par une dette de la Compagnie est sans doute exorbitante des règles du droit commun régissant l'extinction des créances. Mais en créant des Compagnies auxquelles elle a conféré des priviléges exceptionnels, et assigné une existence particulière, la loi les a aussi assujetties à une régie spéciale necessitée par la nature même de l'entreprise qu'elle protége. Ce qu'il faut surtout à une Compagnie de ce genre, c'est la confiance du public, le crédit. Pour en assurer le succès il fallait offrir des sûretés aux créanciers, et la sureté la plus naturelle était le capital social. Aussi dérogeant à la règle générale qui ne donne au créancier contre le débiteur de son débiteur que le recours oblique de la saisie arrêt, le statut, dans l'espèce que l'on s'occupe, lui a-t-il donné le recours direct de l'action personnelle. En donnant à ce créancier l'action directe, il fallait bien lui en accorder les accessoires ou les priviléges. Si dès l'origine la loi a considéré le tiers créancier de la Compagnie comme créancier de l'actionnaire, il s'en suit rigoureusement que les obligations subséquentes de la Compagnie, vis-à-vis ses actionnaires, ne peuvent l'affecter. Autrement cette sureté donnée au créancier ne serait qu'illusoire. Elle se changerait même en danger pour lui. Ce que le public connait ce qui fait sa sureté, c'est le capital social. Il accorde sa confiance à la Compagnie sur la foi de cette sureté. Si par des transactions qu'il ne peut connaître, faites entre la Compagnie et ses actionnaires, vous diminuez cette sûreté, si vous l'anéantissez en soustrayant ce capital à l'action du tiers qui le contemplait quand il a fait des avances à la Compagnie, vous manquez à la foi publique, vous détruisez par là même le crédit de ces entreprises.

En y réfléchissant, cette restriction, qui s'oppose à la compensation, n'est pas d'ailleurs aussi extraordinaire qu'on serait peut-être porté à le croire à première vue. Si au lieu d'être limitée au montant de ses actions, la responsabilité de l'actionnaire qui n'est toujours qu'un associé, était illimitée, comme dans la société, en nom collectif, est-ce que dans aucun cas quelconque il pourrait offrir en compensation au créancier ce que lui doit la société ? Manifestement il ne le pourrait pas, puisqu'il n'a pas cessé d'être débiteur personnel. Eh bien, cette disposition le statut l'a appliquée d'une manière limitée aux Compagnies de Chemins de fer. Elle a dit : l'actionnaire ne sera responsable que jusqu'à concurrence de

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sa souscription, mais tant qu'il ne l'aura pas payée il peut être contraint à le faire entre les mains des créanciers de la Compagnie, en cas d'insolvabilité, sans pouvoir invoquer le bénéfice d'une compensation particulière opérée entre la Compagnie et lui ! Quand on songe que comme membre de la Compagnie, comme un des associés, il est après tout un des débiteurs des tiers créanciers, on ne trouvera peut-être pas la chose si extraordinaire.

C'est ainsi que dans de semblables espèces la Cour de cassation en France et la Cour de Chancellerie en Angleterre ont jugé la question ; la première par arrêt du 23 Janvier 1856—Brenner vs. les Syndics Arlaud, tel que rapporté au Recueil Général de Sirey pour l'année 1857 et la seconde In re Overend, Gurney & Co., présidée par Lord C. Chelmsford rapportée au 12me vol. du Jurist.

CARON, J. giving the judgment of the Court said :

Delisle est actionnaire dans la compagnie du "Montréal et Bytown Railway Company" au montant de $4000 de parts—Il a aussi été Directeur et président de la dite Compagnie pendant à peu près 2½ ans, avec un salaire annuel de £1000, qui lui avait été voté et avait été réglé par résolution du Bureau des Directeurs. Ryland, l'intimé, est cessionnaire des droits de Jos. Doutre, l'un des créanciers de la dite compagnie, en vertu d'un Jugement qu'il a obtenu contre elle, et qu'il a transporté, avec toutes les formalités requises, à Ryland. Ce jugement ainsi transporté ayant été mis à exécution au nom de Doutre le cédant, et par le retour du shérif ayant été constaté que sur les biens appartenant à la compagnie, il ne pouvait être satisfait ni en tout ni en partie, le dit intimé, se fondant sur la clause 80 des S. R. C., page 809 chap. 66 (acte concernant les chemins de fer) a porté la présente action pour le montant de son Jugement, contre l'appelant comme *actionnaire* qui n'a pas payé le montant de ses parts, suivant le droit que lui en donne la dite clause—(voir les allégations de la Déclaration, telles qu'exposées dans le factum de l'intimé ;) par sa déclaration, Ryland demande condamnation personnelle contre le défendeur.

Le défendeur a plaidé *l'issue générale* et deux exceptions, l'une de *paiement* et l'autre de compensation. Dans son plaidoyer de paiement le défendeur allègue qu'il a signé avec plusieurs autres, deux billets de $2000 chaque, pour la dite Compagnie, dont il a payé partie et est responsable pour le reste.

Trois témoins ont été entendus dans la cause : Delisle lui-même, Bellingham, Hopper.

De la part de l'intimé (demandeur) il est établi que dans le livre appelé Ledger of Stock, le nom de Delisle parait pour £1000 de parts souscrites et non payées.

De la part de l'appelant, il n'a été entendu aucun témoin.

Les questions à résoudre me paraissent être les suivantes : 1o L'Appelant (Delisle) a-t-il prouvé la créance qu'il offre en compensation, 2o Quand et comment est devenue due cette créance, est ce avant ou après que l'insolvabilité de la Compagnie est devenue notoire et connue. Si c'est avant, la compensation invoquée a-t-elle eu lieu ? Quid si ce n'est qu'après.

Voyons d'abord quant à la première question. Par Bellingham, il est prouvé que la Compagnie est entrée en opération en 1853, il en a été Secrétaire jusqu'en Août 54, il tenait les livres ; Delisle, le 1er président, et l'était encore lorsque

lui (B) a résigné en août 54, était présent lorsque le salaire de Delisle comme président a été voté; l'entrée en a été faite dans les livres, comme des autres officiers; ce salaire a été fixé à £1000 par an. Le défendeur Delisle était aussi souscripteur pour £1000; ne considère pas la Compagnie insolvable lorsqu'il a résigné en 1854; beaucoup d'effets 20 or 30 thousand *pounds untouched, and few debts if any*, les salaires votés suivant la loi et entrés dans les livres; les deux années de salaire dûs au président (D) sont de 1853 et 1854 et non de 1854 et 1855—erreur de date—a eu crédit pour un *call* sur son salaire. Le défendeur a rempli les devoirs de président pendant plus de 15 mois après que le salaire lui a été voté—Quand Bellingham a résigné, la Compagnie n'était pas en faillite et il était dû à Delisle pour salaire plus qu'il ne fallait pour couvrir sa souscription; il lui revenait une balance, qui lui est encore due—parlé de billets signés par Delisle et autres pour la Compagnie, mais ne prouve rien de positif à ce sujet.

Delisle, autre témoin, prouve que l'insolvabilité de la Compagnie a eu lieu après que le salaire a été acquis.

Hopper, secrétaire, a succédé à Bellingham, prouve que le salaire de Delisle a été voté, entré dans les livres à son crédit—jusqu'au 11 août 55. D'après un état extrait des livres qu'il produit, il paraît au crédit de Delisle le 11 août 55. une somme pour salaire de £2408 4 4. Le Ledger où sont faites ces entrées est de l'écriture de Hopper, qui prouve en outre que les extraits produits par Delisle comme pris des livres de la Compagnie, sont corrects.

Il est bon d'observer, à ce sujet, que l'intimé a déclaré dans la cause, qu'il se servait du témoignage de l'appelant qu'il avait appelé comme témoin.

Or ce témoignage corrobore parfaitement sur tous les points importants, celui donné par le nommé Hopper, et de ces deux témoins; les faits suivants sont prouvés hors de tout doute, savoir, que Delisle a été nommé président de la Compagnie en 1853; que son salaire a été fixé à £1000 par an; qu'il a servi comme président pendant plus de deux ans avec droit de retirer le salaire qui lui avait été alloué et cela jusqu'au 13 août 1855, époque à laquelle le dit appelant, ainsi que les autres officiers de la Compagnie, ont été notifiés que les salaires seraient discontinués pour l'avenir; que dans le commencement de mars 1854, il était déjà dû à l'appelant une somme de £1000 pour une année de services expirée à cette époque et que les livres de la Compagnie constatent que le 11 août 1855, il lui revenait pour salaire seulement une somme de £2408 4s. 4d. que longtemps avant que la Compagnie soit tombée en faillite, il était et avait été dû une somme beaucoup plus considérable que celle que devait à la Compagnie l'appelant pour les versements échus;

De tous ces faits prouvés il me parait résulter que la compensation des versements par le salaire dû à l'appelant s'est opérée de plein droit au fur et à mesure que d'un côté les versements sont devenus exigibles, et que de l'autre le salaire est devenu dû. L'on ne niera pas que l'appelant, à chaque quartier, aurait pu exiger et recevoir son salaire et payer ses parts à mesure qu'elles seraient devenues exigibles. Or sa position peut-elle être changée parce qu'il a permis à la Compagnie, dans l'avantage des actionnaires et des créanciers, de jouir de ce qui lui était dû, puisque son salaire excèdait ses versements.

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L'Intimé fondé son action sur un statut spécial donnant un recours exceptionnel aux créanciers de la Compagnie, en leur permettant de poursuivre directement ceux de ses actionnaires qui n'auraient pas acquitté leurs versements; mais ce recours n'est accordé que dans le cas seulement, où l'actionnaire n'ayant pas acquitté ce qu'il doit, pourrait être poursuivi par la Compagnie elle-même; c'est le droit de la Compagnie qui est transféré au créancier, c'est ce droit et ce droit seulement qu'il peut exercer; c'est une substitution qui lui est faite, par laquelle il ne saurait avoir plus de droit que la Compagnie elle-même; le statut qui est la base de l'action de l'Intimé n'a rien changé au droit commun quant aux manières dont s'éteignent les obligations; la compensation est restée depuis comme avant l'un de ces moyens et conséquemment lorsque l'Intimé portait son action, l'appelant n'aurait pas pu être poursuivi par la Compagnie elle-même pour ses versements; il aurait pu sans doute lui opposer la compensation, il pouvait également le faire à l'action de l'Intimé, qui n'étant que subrogé à la Compagnie ne peut avoir plus de droit qu'elle.

De tout ceci il résulte, que lorsque le dit intimé portait son action, il ne se trouvait pas dans le cas auquel il est pourvu par le statut sur lequel il s'appuie.

Une derniere observation à faire c'est que la salaire de l'appelant ayant été acquis avant que la Compagnie soit tombée en faillite et partant la compension s'étant opérée de plein droit dans un temps où cette Compagnie était regardée et réputée solvable, les principes applicables aux Compagnies en faillite ne sont pas ceux qui doivent nous guider dans la décision de la présente cause.

Pour toutes ces raisons la majorité de la cour est d'avis que le Jugement doit être infirmé et l'action de l'intimé renvoyée. C'est dans ce sens qu'est rédigé le Jugement que l'on va lire.

The Judgment in appeal was recorded as follows:

"Considérant que de la preuve au dossier et particulièrement des documents et extraits produits par l'intimé lui-même et aussi des témoins qu'il a fait entendre, il ressort que le 9 Novembre 1853 à une assemblée des directeurs de la compagnie ayant nom: "The Montreal and Bytown Railway Company" qui forme le sujet du présent litige, l'appellant a été par résolution à cet effet, duement élu président de la dite compagnie et qu'à la même assemblée il a été aussi résolu que l'appellant recevrait la somme de £1000 courant pour ses services comme président pour l'année devant finir le premier Lundi de Mars prochain (Mars, 1854.)

Considérant qu'à une autre assemblée des Directeurs de la compagnie, tenue le 22 Mars 1854, aux fins d'élire ses officiers pour l'année suivante, il fut résolu que l'appellant était de nouveau élu président et de plus que son salaire serait pour la dite année de la somme de £1000.

Considérant que l'appellant a rempli les devoirs attachés à la charge de président avec le droit de recevoir le susdit salaire depuis la nomination, le 9 Novembre 1853, à venir au 13 Août 1855, époque à laquelle l'appellant de même que les autres officiers de la compagnie, a été notifié qu'à compter de cette date son salaire serait discontinué à l'avenir.

Considérant que d'après les extraits pris des livres de la compagnie produits et prouvés par l'intimé lui-même il appert que le 11 Août 1855, il était dû à l'appellant pour salaire seulement la somme de £2408 4 4.

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Considérant que cette créance admise par la dite compagnie et constatée par ses livres étant claire et liquide était légalement susceptible d'être opposée en compensation contre toute somme, que l'appellant devait ou pouvait devoir à la dite compagnie, et que cette compensation s'est opérée de plein droit au fur et à mesure qu'est devenu dû le susdit salaire, que l'appellant aurait pu recevoir mais qu'il est présumé avoir laissé entre les mains de la compagnie afin de rencontrer les versements qu'il lui devait au fur est à mesure qu'ils sont devenus dus et exigibles.

Considérant que cette compensation du montant entier des dits versements s'est opérée avant que la compagnie soit tombée en faillite et que partant les principes applicables aux compagnies en faillite ne sont pas ceux d'après lesquels doit se décider le présent litige.

Considérant que lors de l'institution de l'action, l'appellant n'était redevable d'aucune somme quelconque sur les actions par lui possédées dans la dite compagnie et que le montant total de ses dites actions avait été satisfait et éteint en la manière susdite et que partant l'appellant ne se trouvait pas à l'égard de l'intimé dans le cas auquel il est pourvu par le statut sur lequel est fondée l'action.

Considérant enfin que pour ces raisons il y a mal jugé dans le jugement de la Cour Supérieure, savoir le jugement rendu le 31 Mars, 1866, casse et infirme le dit jugement et procédant à juger comme aurait dû faire la cour inférieure déboute le demandeur de son action avec dépens, &c.

W. H. Kerr, for appellant. Judgment reversed.

Mackay & Auttin, for respondent.

(F. W. T.)

AUTHORITIES OF PLAINTIFF.

No compensation of liability as shareholder. Jurist (London) A. D. 1866. vol. 12 case of Overend, Gurney & Co. (limited.) Shareholders as partners, Redfield, on Railways, p. 608 and note—Sirey.—A. D. 1858, p. 95. Part—25 Bioche. Vol. 13, pp. 12, 6.

APPEAL SIDE.

MONTREAL, 29TH FEBRUARY, 1868.

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

No. 93.

EGLAUGH,

(*Defendant in the Court below,*)

APPELLANT:

AND

THE SOCIETY OF THE MONTREAL GENERAL HOSPITAL,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—1. That in an action *en bornage*, the existence of a fence between the two properties for upwards of 30 years before action brought, entitles the defendant to claim such fence as the legal boundary or division line between the properties.

2. Although such fence be so constructed as to form an irregular encroachment on the plaintiff's land, to the depth of about 7 feet by about 48 feet only in length along a portion of the line of division between the properties, and although the title deed of the defendant and the title deeds of *all* his *auteurs*, show the line of division between the properties to be a *straight* line, *throughout its entire length*, and are *silent* as to the *encroachment*, and although defendant's possession only dates back a little over 4 years,

Eglaugh and The Society of the Montreal General Hospital.

he nevertheless can avail himself of the possession up to the fence, of all those from whom he derives title to the property described in the deeds.

3. Verbal evidence, to the effect, that the fence had been for upwards of 30 years in the same line as it was at the time of the action, is sufficient, although it be proved, that such fence was *entirely destroyed by fire and remained* so destroyed *for upwards of a year*, and none of the witnesses testify to having seen a vestige of the old fence after the fire, or to having been present when the new fence was built.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, on the 30th day of June, 1866, maintaining an action *en Bornage* instituted by the respondent against the appellant.

The contiguous properties of the two parties were both purchased, at Sheriff's sale, on the 7th February, 1828; the one by the respondent, the other by one Benjamin Hall.

Benjamin Hall sold the property he so purchased on the 4th day of September, 1858, to Dame M. A. D. Beaudry, wife of Onésime Brien dit Desrocher, who sold it to the defendant on the 11th day of May 1859.

The respondent's property faces on Dorchester Street of this city, and that of the appellant on St. Constant Street.

The encroachment complained of by the respondent is an irregular one, being to the extent of about 7 feet in depth to the extent of about 48 feet in length, on a portion of the line of division between the two properties; as shown *in green* on the plan attached to the Surveyor's Report, paper 44 of the Record.

The appellant pleaded, in effect, that a fence had existed, for upwards of 30 and even 50 years along the present line of division betwen the two properties; during which time he and his *auteurs* had possessed the properties acquired by appellant as enclosed, including the encroachment complained of; and that the respondent recognized such fence as the true line of division between the two properties by renewing it entirely, after the original fence had been destroyed by fire, during the great fire of the 8th of July 1852.

Both the interlocutory judgment, ordering the *bornage* and the appointment of a Surveyor, and the final judgment, homologating the Surveyor's report, were rendered by *The Hon. Mr. Justice Monk.*

The following was the interlocutory judgment:—

"The Court having heard the parties by their Counsel upon the merits of this "cause, and also upon the motion of the said defendant of the twenty-sixth day "of December last, that Certain Interrogatories *sur faits et articles* submitted by "the defendant to the said plaintiff, be taken and held *pro confessis*, having ex- "amined the Record and proceedings and evidence adduced and fyled of record "and having deliberated, doth order that the defendant do take nothing by his "said motion, and it is ordered that by a Surveyor to be named by the parties in "this cause, or in default, by any Judge of this Court in Vacation, the property "of the Plaintiff and that of the said defendant mentioned in the Declaration in "this cause, be visited and surveyed, boundaries *bornes* be fixed, determined and "established between the said land the property of the plaintiff, and the said land "the property of the defendant, on the North-East side line, where the said pro- "perties adjoin each other, and that the said Surveyor do establish the true line of "division on the said North-East side, according to law and the titles of the said

"parties, and do fix and place metes and *bornes* in the true line of division there-
"of, and do ascertain and report to this Court to what extent, if to any, the said
"defendant hath encroached upon the land and property of the said plaintiff, of
"all which the said Surveyor shall make Report to this Court on or before the
"seventeenth day of April next, the said report to be accompanied with a figura-
"tive plan of the said properties and the boundaries thereof, and the Court doth
"hereby reserve to adjudicate and pronounce upon the other conclusions taken by
"the said plaintiff in and by the Declaration in this cause, until the said Report
"and Survey shall have been made and fyled in this cause, but doth reject and
"dismiss the demand and conclusions of the said plaintiff for damages, and doth
"reserve to adjudicate hereafter as to costs."

The following was the final judgment:

"The Court having heard the parties by their respective Counsel upon the
"merits of this cause, and also upon the motion of the plaintiff for the homologa-
"tion of the Report of Joseph Rielle Expert and Surveyor named in this cause,
"for the execution of the Interlocutory order of this Court of the twenty-eight
"day of February last past, the said Report bearing date the sixteenth day of
"April one thousand eight hundred and sixty-six, and fyled in this Court on that
"day, as also upon the motion of the said defendant for the rejection of the said
"Report having examined the Record and proceedings, the said Report and figu-
"rative plan annexed thereto and forming part thereof, the Declaration and
"pleadings in this cause, and maturely deliberated, doth reject the motion of the
"defendant, and doth grant that of the plaintiff, and doth homologate and con-
"firm the said report to be executed according to its form and tenor: And the
"Court doth declare that the line E H drawn in red upon the said plan and
"being seventy-six feet six inches in length from the point E to the point H,
"shall be hereafter the true line of Division on the North-East side between the
"property of the said plaintiff described in the Declaration in this cause, and
"that of the said defendant, the said point E being at a distance of thirteen
"feet seven inches from the rear face of the brick buildings erected on the said
"defendant's lot, and coinciding with the western angle of the brick
"out-building erected on the property of Mrs. E. Powell and forming the
"South Eastern boundary of defendant's property as shewn upon the said plan:
"and the said point H, being at a distance of fourteen feet eight inches from the
"said rear face of the brick buildings erected on the defendant's property, and
"coinciding with the southern angle of the brick-house erected on the property
"of one Benoit, and forming the North-West boundary of the said defendant's
"property.

"And the Court, considering that it appears from the said Report and Sur-
"vey that the said defendant hath encroached upon and possessed himself of a
"portion of the property of the said plaintiff, and namely so much thereof as is
"shewn upon the said plan colored *green* measuring forty-eight feet eight inches
"on the North-East side along the said division line E H and forty feet on the
"South-West side by a perpendicular width of seven feet at the North West end
"and six feet at the South-East end, and containing the said encroachment an-

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"area of two hundred and eighty-eight superficial feet, as shown upon the said "plan, it is hereby ordered that the said defendant do forthwith restore and deli- "ver up to the said plaintiff the said above described portion of land upon which "he, the said defendant, hath encroached, and in default of the said defendant "so to do, it is ordered that he be ejected therefrom and the plaintiff put into "the possession and enjoyment thereof, under the authority of this Court. And "the Court doth condemn the defendant to pay the costs of this action, each "party to pay one half of the cost of the said survey and *bornage;* And the "Court doth dismiss the plaintiff's demand for damages."

Bondy, for Appellant (after drawing special attention to the wording of the judgments): Ce qui frappe d'abord en lisant ces jugements, c'est une absence complète de motifs, un silence absolu sur les raisons sur lesquelles ils sont fondées.

Pas une ligne, pas un mot, dans ces jugements, au sujet de la prescription plaidée par l'Appelant, et qui était la question principale, l'âme de cet important débat. L'Honorable juge semble avoir oublié complètement l'existence de la 39ème clause du chapitre 83 des Statuts Refondus du Bas-Canada (727ème page de la version française) qui exige que " tout jugement dont il y aura appel, pro- "noncé par la Cour Supérieure, contiendra un exposé sommaire des points de "fait et de droit, et des *motifs* sur lesquels le jugement est fondé."

L'Appelant regrette d'autant plus cet oubli, qu'il se trouve par là dans la nécessité, pour l'information de cette Honorable Cour, de substituer, de mémoire, les remarques explicatives faites verbalement par l'Honorable Juge, lors du pro- noncé du Jugement du 28 Février 1866, à l'audience, aux *motifs écrits* que le Jugement aurait dû exposer, et qui auraient, s'ils y eussent été inclus, présenté un caractère d'authenticité indéniable.

Si la mémoire de l'Appelant ne lui fait pas défaut, l'Honorable Juge, en rendant le Jugement du 28 Février 1866, aurait exprimé l'opinion que la preuve de la possession trentenaire était suffisante; mais, s'appuyant sur la doctrine sanctionnée par la majorité de cette Honorable Cour dans la cause de Stoddart et Lefebvre (dont le Jugement en date du 12 Novembre 1863 est rapporté à la 481ème page du 13ème volume des Décisions du Bas-Canada) il aurait rejeté la prescription plaidée par l'Appelant, parce que ce dernier n'aurait établi aucun lien de droit, aucune connexité contre lui et les possesseurs antérieurs, de manière à pouvoir invoquer l'avantage de leur possession et la joindre à la sienne.

L'Appelant n'entend pas plaider ici la question de droit si savamment discutée devant cette Honorable Cour dans la cause de Stoddart et Lefebvre. Il se contentera de démontrer que cette question ne s'élève pas dans la cause actuelle, et qu'ainsi elle ne peut servir de base au Jugement qui sera rendu.

En effet, l'Appelant a acheté son terrain de Madame Desrochers et son époux, en vertu d'un acte de vente reçu le 11 Mai 1859 devant M. le Notaire Doucet. M. et Madame Desrochers avaient eux-mêmes acheté ce terrain de Benjamin Hall par acte reçu le 4 Septembre 1858 devant M. le Notaire Labadie, et y avaient construit, durant les huit mois de leur courte occupation, les quatre maisons en brique à deux étages qui s'y trouvaient lorsqu'ils le revendirent à

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l'Appelant. Enfin, Benjamin Hall avait lui-même acheté ce même terrain du Shériff du District de Montréal, à une vente judiciaire qui en fut faite le 7 Février 1828, le jour même que l'Intimée se rendait adjudicataire de son propre terrain, à cette même vente judiciaire.

Voilà donc un enchaînement, une succession non interrompue de titres qui font remonter l'origine de la possession de l'Appelant jusqu'en 1828, et qui lui donnent le shériff même comme son premier auteur. Et c'est en présence de pareils faits que l'on ose dire sérieusement que l'Appelant n'a pas succédé légalement et régulièrement dans la possession de ses prédécesseurs.

Cette prétention paraît si incroyable que, pour lui donner quelque couleur de plausibilité, l'Intimée a soutenu devant le Tribunal Inférieur que l'Appelant ne pouvait joindre sa possession à celle de ses auteurs que par rapport à l'étendue précise de terrain que lui donnaient ses titres, et non par rapport au terrain compris dans l'équerre dont ses titres ne font aucune mention; qu'en un mot, les titres de l'Appelant ne lui conféraient aucun droit de possession sur l'excédant de contenance que renferme son terrain; qu'il n'y avait, en conséquence, aucune connexité, aucun lien de droit, aucune transmission légale de possession entre lui et ses prédécesseurs relativement à cet excédant de contenance; et que n'ayant pas possédé lui-même personnellement pendant une succession non interrompue de trente années, il ne pouvait pas invoquer le bénéfice de la prescription.

Ainsi d'après cette étrange doctrine, il ne suffirait plus, dans un acte d'aliénation, de dire: "Je vous vends une étendue de terrain de 77 pieds de front "sur environ 38 pieds de profondeur," mais il faudrait ajouter pour que l'acquéreur puisse prescrire contre son voisin: "Je vous vends, en outre, tous mes "droits de possession sur l'excédant de contenance qui pourrait se rencontrer "dans ce terrain." Ainsi un acte de vente aurait l'effet de conférer à l'acheteur des droits moins amples, plus restreints, que ceux que possédait le vendeur. Ainsi le contrat de vente aurait bien la vertu de transmettre la propriété à l'acquéreur, mais non la possession qui n'est par elle-même qu'une présomption de la propriété. Ainsi le plus ne renfermerait plus le moins.

Si cette doctrine que la Cour Inférieure a cru devoir accueillir comme bien fondée, était vraie, il vaudrait mieux effacer de suite de notre Code l'article 2242 qui établit la prescription de trente ans sans titre, dans tous les cas de possession, il faudra un titre à l'avenir.

Si les 228 pieds de terrain que renferme l'équerre en difficulté en cette cause n'appartiennent pas à l'Appelant, qui donc peut les réclamer? Ce n'est assurément pas l'Intimée, puisque Benjamin Hall a possédé comme propriétaire tout ce terrain à la suite d'une vente par le Shériff, pendant plus de trente années consécutives, depuis le 7 Février 1823 jusqu'au 4 Septembre 1858, et que le cours de la prescription trentenaire s'est accompli tout entier dans sa personne.

Sera-ce le vendeur le Shérif, ou plutôt Thomas Thain, le Défendeur exproprié? Non, puisque d'après la doctrine de l'ancien droit enseignée par Pothier au numéro 255 du Traité de la vente, l'acheteur n'est pas tenu de faire raison du surplus de contenance qui pourrait se trouver dans le terrain qu'il acquiert. Et si, sous l'empire de l'article 1501 de notre Code, qui a substitué une doctrine contraire à l'ancien droit, l'excédant de contenance devait revenir, dans le cas

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actuel, au propriétaire originaire exproprié par la Justice, la conséquence serait que les terrains des parties en cette cause ne seraient plus contigus et qu'il n'y aurait plus lieu à un bornage, dans l'endroit que forme l'équerre.

Non: il n'y a qu'un seul point de vue sous lequel cette question, qui en réalité n'en est pas une, puisse être envisagée. Le vendeur n'étant pas admis, d'après le droit alors existant, à réclamer l'excédant de contenance que renferme le terrain acheté par l'Appelant, ce dernier se trouve donc avoir succédé aux droits de possession et de propriété de son vendeur et de ses auteurs sur cet excédant. Ce droit que la loi dénie au vendeur qui vend plus qu'il n'a promis, pourquoi l'accorderait-elle au voisin qui n'a jamais possédé? Et d'ailleurs, que l'on consulte les titres de l'Appelant, dans lesquels on trouve que son terrain est borné en profondeur par celui de l'Intimée, et l'on en vient de suite à la conclusion que la clôture qui sépare ces terrains et qui a toujours existé avec la même équerre, étant la borne et limite apparente, sinon de la propriété, du moins de la possession respective des parties, les titres de l'Appelant et de ses auteurs lui ont conféré la transmission de la possession de tout le terrain jusqu'à la clôture en question.

L'Intimée a bien soulevé quelques autres questions de droit dans la Cour Inférieure. Ainsi, il a prétendu qu'en vertu du vieux brocart de droit "*nul ne peut prescrire contre son titre*" l'Appelant ne pouvait pas prescrire au-delà de la contenance de ses titres. Mais l'on sait fort bien—et les auteurs de droit sont unanimes sur ce point—que cette règle de droit veut dire seulement que l'on ne peut pas se changer à soi-même la cause et le principe de la possession, substituer une possession *animo domini* à une possession *précaire*, mais qu'elle n'empêche pas d'étendre les limites de sa jouissance à titre de propriétaire. "Prescrire au-"delà de son titre, n'est pas prescrire contre son titre, "dit Troplong. Ou en d'autres termes "Déborder son titre, n'est pas prescrire contre son titre." C'est pourquoi, dit le même auteur, "l'acheteur d'un arpent de terre taxativement, peut en prescrire deux arpents."

Ainsi, encore, l'Intimée a prétendu qu'il y avait eu interruption de possession, parce que la clôture qui divise les terrains respectifs des parties avait été détruite par le grand incendie qui eut lieu à Montréal en 1852, malgré que cette clôture ait été reconstruite au même endroit et dans la même direction quelques mois après cet incendie. Sur cette question les auteurs de droit abondent, et tant sous l'empire de l'ancienne législation que de la nouvelle, tous sont unanimes à proclamer les principes suivants: "Que la possession ne laisse pas d'être conti-"nue, quoiqu'un obstacle physique et de force majeure la paralyse momentané-"ment."

"Que la possession une fois acquise, se prolonge d'elle-même par la volonté du "possesseur, quand même cette volonté ne se traduirait par aucun acte exté-"rieur."

"Que le possesseur actuel qui se trouve avoir anciennement possédé, est pré-"sumé avoir possédé dans les temps intermédiaires, sauf la preuve contraire. "*Probatis extremis, præsumuntur media.*"

"Que pour établir une interruption de possession, dans ce cas, il ne suffit pas "de prouver une pure abstention, un repos de la part de possesseur, puisque la

" possession se conserve *animo*, mais qu'il faudrait encore le fait actif d'un tiers " qui serait venu s'entremettre dans sa jouissance, et s'en attribuer les pro- " fits."

L'Appelant ne fait que signaler, en passant, ces deux prétentions évidemment fausses émises par l'Intimée devant la Cour Inférieure, mais qui n'ont été appuyées d'aucune autorité, et n'ont été invoquées au hazard et sans étude, que pour étayer une mauvaise cause qui paraissait crouler, persuadé que l'Intimée ne voudra pas assumer devant la première Cour du pays la responsabilité de mettre en doute des questions de droit aussi élémentaires et aussi universellement résolues depuis des siècles.

Reste donc la seule question de fait à examiner. L'Appelant a-t-il, oui ou non, prouvé une possession trentenaire, tant par lui que par ses auteurs, antérieure à l'action de l'Intimée contre lui?—

M. Jean-Bte. Homier qui demeure vis-à-vis le terrain de l'Appelant, qui le voit tous les jours, qui y a mis ses voitures du temps que Benjamin Hall le possédait, qui est entré plusieurs fois en pourparlers avec ce dernier pour l'acheter, qui était présent à la vente des terrains des parties en cette cause par le Shérif de Montréal, le 7 Février 1828, qui les avait même visités avant la vente dans la vue de les acheter, prouve qu'il a connaissance que la clôture qui divise les terrains en question existe depuis 36 ans, dans la même direction et avec la même équerre; et que l'Appelant et ses auteurs ont toujours possédé sans interruption et à titre de propriétaire, durant ce temps, tout le terrain qui s'étend jusqu'à la clôture, y compris l'espace de terrain renfermé dans l'équerre. Cette clôture a été détruite par le grand incendie de 1852, mais elle a été refaite trois mois après, au même endroit avec la même équerre.

Le témoin Laurent Rivard dit Dufresne, plus âgé que M. Homier, a connaissance que la possession de l'Appelant et de ses auteurs sur tout le terrain en question, remonte à 46 ans.

Le témoin Charles Cousineau, plus âgé encore, a vu lui-même construire la clôture en question par Thomas Thain, en 1812.

Ainsi donc la possession de l'Appelant et de ses auteurs remontait à plus d'un demi-siècle, lorsqu'il a pris fantaisie à l'Intimée de convoiter le bien de son voisin et de le dépouiller par la voie insidieuse et hypocrite de l'action en bornage.

Thomas Thain, qui a été exproprié des terrains en question en cette cause par la vente judiciaire du 7 février 1828, et Benjamin Hall, qui a possédé le terrain de l'Appelant pendant une période consécutive de plus de 30 ans, étant tous deux décédés, l'Appelant, privé du bénéfice du témoignage important qu'ils lui auraient donné, a dû recourir à des voisins et à des vieillards au fait de l'histoire de la localité. La déclaration de ces derniers est certaine, précise, concluante, et ne laisse aucun doute sur la question du fait de la prescription.

Une circonstance qui a bien son importance et qu'il ne faut pas perdre de vue, c'est que l'Intimée elle-même, après l'incendie désastreux de 1852, a fait rebâtir la clôture de division qui sépare son terrain d'avec celui de l'Appelant et cela, au même endroit, dans la même direction, et avec la même équerre que l'ancienne clôture. La preuve de cette circonstance est établie par le fait que la face unie

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de la clôture se trouve du côté du terrain de l'Intimée. L'Appelant a voulu compléter cette preuve par les interrogatoires sur faits et articles qu'il a soumis à l'Intimée. Mais ici, la foi punique de son adversaire s'est montrée dans toute sa nudité. A toutes les questions qui lui furent posées relativement à l'existence de l'ancienne clôture, à sa reconstrution, à la possession respective des parties, l'Intimée s'est contentée de répondre que ses Directeurs actuels n'avaient aucune connaissance de ces faits et qu'ils n'en savaient rien.

L'Appellant ne craint pas de dire hautement que ces réponses sont indignes d'un corps public, et qu'elle ne rencontre pas les exigences de la loi. Sera-t-il donc permis à une Corporation dont l'existence ne remonte pas au-delà de 1823, lorsqu'on lui demande des renseignements sur la contenance de son terrain, sur des faits de possession journaliers, sur la position d'une clôture de division, sur la reconstruction de cette clôture par ses employés, sur ses relations de voisinage, de répondre ironiquement que les Directeurs actuellement en charge ne connaissent rien de ces faits, sans prendre la peine de consulter les livres et régistres de la Corporation à cet égard, et sans recueillir les informations de ses employés, et de ses vieux serviteurs? Une Corporation, plus qu'un individu, est-elle dispensée de connaître la vérité et de la dire en justice? Assurément non: Et l'appellant espère que, contrairement à la décision du Tribunal Inférieur, cette Honorable Cour déclarera que les Interrogatoires sur faits et articles soumis par l'appellant à l'intimée doivent être tenus pour confessés et avérés.

Enfin une dernière circonstance à remarquer, et ce n'est pas la moins singulière, c'est que le rapport de l'arpenteur même de l'intimée constate qu'elle possède une plus grande étendue de terrain que celle que lui donnent ses titres. Est-ce bien là le cas, pour l'intimée, de se plaindre et de se récrier contre les prétendues empiétations de son voisin?

En résumé:

L'origine de la possession des parties en cette cause leur est commune; elle remonte au titre du Shérif, à la vente judiciaire du 7 février 1828. Cette possession a toujours été la même depuis lors jusqu'à ce jour. L'intimé n'a jamais possédé le terrain qu'elle réclame. Une possession de plus d'un demi siècle en assure, au contraire, la prescription à l'appellant. Serait-il juste, serait-il légal, serait-il raisonable, sous ces circonstances, de détruire un état de choses si bien établi, pour le simple plaisir de satisfaire l'humeur processive et les convoitises exagérées d'un voisin agressif et querelleur? L'appellant ne le croit pas, et il espère que le jugement définitif de cette Honorable Cour lui donnera raison.

Bethune Q. C., on behalf of the respondent, argued in substance as follows:

No direct evidence was adduced as to who renewed the fence in question, but the appellant has argued, that because the boards were all nailed on the respondent's side of the fence the respondent must be presumed to have made it all. Whatever presumption might be considered to arise from that fact, however, was destroyed by the evidence of the steward of the Hospital, who stated in his deposition (paper 38 of the Record), that all the fences surrounding the respondent's property, except a few *pagées* very recently built by a Mr. Ray adjoining his property, and the fence facing on Dorchester Street, had the boards nailed on the side next the respondent's property.

Several witnesses have doubtless sworn, that the fence existed where it now is more than 30 years previously to the institution of the respondent's action, but is abundantly proved, by the appellant's own witnesses, that the original fence was entirely destroyed by the great fire of the 8th July 1852, *and that about a year and a half elapsed before* the present fence was erected. Then again, the first witness examined by appellant, who was a very aged man and recollected when the encroachment, (called by him *une équerre*) first existed in the time of Mr. Thain, stated, in his re-examination, when pressed on the subject of the straightness, or otherwise of the division line at that time,—"il y avait une équerre *autrefois*, et cette équerre est *maintenant plus loin*." No one witness, moreover has sworn to ever seeing any vestige whatever of the old fence after the fire, or to being actually present when the new fence was erected, or to any other fact that would go to establish beyond doubt, that the present fence is really where the appellant's witnesses seem to think the old fence originally stood. The respondent respectfully submits therefore on this point that there is no satisfactory evidence that the present fence was erected precisely in the line of any former fence, and consequently, that such fence cannot be held and considered as the legal boundary or division line between the properties in question.

Then it is to be noted, that *none* of the titles even hint at anything like a line of division of the very peculiar shape contended for by the appellant, but, on the contrary, *all make the line of division between the appellant's and respondent's properties a straight one.*

The appellant's own possession only dates in 1859, a little over 4 years before the institution of respondent's action, *and he certainly never purchased from any body any rights of possession in the strip of ground which is the subject matter of the present suit.*

According to the surveyor's Report the strip of ground in question indubitably belongs to the respondent, and as the appellant failed to establish any legal title thereto, the Court below declared the same to be the property of the respondent, and condemned the appellant to restore it to the respondent. And the respondent confidently relies, that the judgment appealed from will be in all respects confirmed.

The following was the judgment of the court of appeal:—

"The court * * * Considering, that the said appellant hath established the material averments of his peremptory exception and pleading in this cause fyled, with respect to the prescription by him pleaded to the action and demand of the Respondent, for the *bornage* of the line between their respective properties in the Declaration and pleadings in this cause mentioned, and considering, that the said appellant hath proved that he hath been in possession by himself and by his *auteurs* for upwards of thirty years before the institution of this action publicly, peaceably and without interruption of his said property with the rear line thereof, having the deviation therein existing at the time of the institution of the said action to wit: of an encroachment beyond a straight line of about seven feet in depth by about forty feet in length, forming a superficies of about two hundred and eighty-eight feet, considering, that in the *bornage* of their said respective

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properties the said appellant was entitled to have the said line between the said properties drawn and established according to his prescriptive rights therein, including in his favor the deviation aforesaid, considering, that the appellant was willing to make the said *bornage*, in conformity with his said prescriptive rights, but that in the interlocutory judgment in this cause rendered, ordering the *bornage* of the said respective properties the pretensions and rights of property of the appellant to the said deviation have been set aside, considering that the *bornage* so ordered was carried into effect and a straight line in conformity with the said interlocutory judgment has been established and reported, under the said interlocutory judgment, while said straight line was afterwards homologated by the final judgment of the Superior Court in this cause rendered, considering that in the interlocutory judgment aforesaid, setting aside the prescriptive pretensions of the said appellant, there was error, and that the said *bornage* effected in virtue thereof was invalid, and that in the said final judgment of homologation of the said report of *bornage* there was also error, doth reverse and set aside, as well the said final judgment of the Superior Court rendered in this cause at Montreal, on the thirtieth day of June one thousand eight hundred and sixty six, and also the said interlocutory judgment in this cause rendered by the said Superior Court, on the twenty eighth day of February 1866, together with the operation of *bornage* and report performed in virtue thereof and proceeding to render such judgment as the said Superior Court should have rendered, doth order, that by a surveyor to be named by the parties in this cause, or, in default, by any judge of the Superior Court in vacation, and according to the practice in such cases of the said Superior Court, the respective properties of the said parties be visited and surveyed, and boundaries, *bornes*, be fixed and established between them where they adjoin each other, according to their present and existing boundaries, as now separated, and that the said surveyor do establish the said line of division upon the said properties according to the prescriptive rights of the said appellant in his said property, and of his public peaceable and uninterrupted possession thereof for upwards of thirty years before the institution of this action, by himself and his *auteurs*, predecessors, in the possession thereof as aforesaid, and do fix and place metes and bounds, in the said line of division, and do report the same to the said Superior Court, without delay, to be accompanied with a figurative plan of the said boundaries between them as aforesaid. The whole with costs of this Court and of the said Superior Court, up to and before the rendering of the said interlocutory judgment in this cause by the said Superior Court."

Judgment of Superior Court reversed.

Bondy & Fauteux, for appellant.

Strachan Bethune, Q. C., for respondent.

(S. B.)

(APPEAL SIDE.)

MONTREAL 9TH MARCH, 1868.

Coram DUVAL, Ch. J., CARON, J., DRUMMOND, J., JOHNSON, J., *ad hoc.*

No. 93.

DORION,

(Plaintiff in Court below,)

APPELLANT;

AND

HYDE ET VIR.,

(Defendants in Court below,)

RESPONDENTS.

HELD:—1st. That where a party is sued, for the price of land which is burdened with hypothecs beyond the price claimed, and the party sued has demanded before action that such hypothecs should be discharged, or good and sufficient security given against all possible trouble arising from such hypothecs, and the plaintiff has failed to cause the hypothecs to be discharged or the required security to be given, his action ought to be dismissed purely and simply.

2nd. That mere personal security in such a case is insufficient.

3rd. That although in such an action, the defendant, by her plea, only prays for the dismissal of the action, in case the necessary security be not given within a delay to be fixed by the judgment, and although the judgment in the Court of original jurisdiction be rendered according to the conclusions of said plea, and such judgment be confirmed in Review, the Court of Appeal, on an Appeal instituted by the plaintiff only and without any cross Appeal by the defendant, and although the Respondent pray, in her answers to the reasons of Appeal, and in her *factum*, for the confirmation of both judgments, will nevertheless reform those judgments and dismiss the original action purely and simply.

This was an Appeal, from a judgment rendered by MR. JUSTICE SMITH, in the Superior Court, at Montreal, on the 30th of April 1866, and confirmed, in Review, by JUSTICES BERTHELOT AND MONK (JUSTICE BADGLEY *dissenting*) on the 27th of October 1866. Vide 10 L. C. J., p. 327.

The action in the Court below was brought to recover from the female defendant, the sum of $253.08 then claimed to be due in principal and interest, under a deed of sale from the plaintiff to her.

The defendant pleaded, amongst other things, that the property sold by said deed was burdened with hypothecs considerably in excess of the whole unpaid price, and that she had notarially notified plaintiff of the fact and demanded good and sufficient security against all trouble arising from such hypothecs, before the institution of the plaintiff's action.

The plaintiff answered that he had notarially offered good and sufficient *personal* security before the action was brought.

The conclusions of the plea demanded that the defendant should be allowed to retain the purchase money to meet the hypothecs in question, and that, in default of the plaintiff giving good and sufficient security on real estate that the defendant would never be troubled by reason of such hypothecs, within a delay to be fixed by the Court, the plaintiff's action should be dismissed with costs, and that under any circumstances the plaintiff should be condemned to pay costs.

The judgment of the Superior Court was in accordance with the conclusions of the plea and a period of one month from the judgment was fixed as the period within which the requisite security should be given.

Dorion and Hyde et vir.

The plaintiff having inscribed the cause for revision, the judgment was confirmed as before stated.

The plaintiff then appealed. The defendant not only failed to institute a *cross* appeal, but both in her answers to the reasons of appeal and in her *factum* she prayed that the judgments in the Superior Court might both be *confirmed*.

The Court of appeal, however, being of opinion, that these judgments were *erroneous*, in that, they did not dismiss the plaintiff's action *purely and simply*, proceeded to *reform* these judgments, and, in so doing, rendered the following judgment:

"Considérant que sur le prix de vente, pour partie duquel est portée la présente action, il avait été payé, lorsqu'elle fût instituée, une somme de six cent piastres, que partant il ne restait alors dû sur le prix total qu'une balance de $650, dont $200 seulement étaient alors exigibles, avec une année d'intérêt se montant à $53 $\frac{1}{3}$; qu'à la dite époque, il existait des hypothèques non prescrites et duement enrégistrées affectant la propriété vendue à un montant excédant de beaucoup la somme restant due sur le prix de vente, en principal et intérêts échus et à échoir, que dès avant l'institution de l'action l'intimée avait dénoncé à l'appellant l'existence des dites hypothèques et l'avait requis de les faire disparaître ou de lui donner caution bonne et suffisante pour la mettre à l'abri des troubles que pourrait bien en résulter et qu'à défaut de le faire retiendrait ce qui restait dû sur le prix de vente, le tout suivant protêt produit en la cause, que nonobstant ces notifications et requisitions l'appellant a porté sa présente action sans avoir au préalable fait disparaitre les dites hypothèques et donné le cautionnement requis.

Considérant que le cautionnement personnel offert par l'appellant n'est ni légal ni suffisant et que partant il doit être regardé comme non avenu.

Considérant que pour ces raisons l'intimée a droit de retenir la balance du prix de vente pour se protéger contre la charge d'éviction auquel elle était exposée.

Considérant que cette balance était insuffisante pour la protéger au montant qu'elle perdrait au cas d'éviction ni le paiement fait de $600 sur le prix total de la vente, et qu'à cette fin elle n'avait que les intérêts échus et à échoir sur cette balance lesquels intérêts elle a aussi droit de retenir, sauf à en compter lorsqu'on fera disparaître les dites hypothèques ou qu'un cautionnement légal et suffisant sera fourni.

Considérant que pour toutes ces raisons, l'appellant sous les circonstances n'avait aucun droit d'action contre l'intimée et que celle qu'il a portée aurait dû être renvoyée purement et simplement et que partant par les jugements dont est appel, quoique correct au fonds, il a été mal jugé en ce que, au lieu de débouter le demandeur ils condamnent la défenderesse à payer la somme demandée en principal et intérêts sous certains termes et conditions et que partant il convient de réformer les dits jugements sous ce rapport, réforme et annule les deux jugements dont est appel, savoir celui rendu en première instance par la Cour Supérieure en date du 30 avril 1866 et aussi celui rendu par la dite Cour Supérieure siégeante en révision le 29 septembre 1866, et procédant à rendre le jugement

qui aurait dû être rendu, déboute le demandeur de son action avec dépens tant en Cour de première instance, qu'en Cour de révision et sur le présent appel." Dorion and Hyde et vir.

Judgments of Superior Court reformed.

Kelly & Dorion, for Appellant.

Mousseau & David, for Respondent.

(S. B.)

SUPERIOR COURT, (IN INSOLVENCY,)

SHERBROOKE, 23rd DECEMBER, 1867.

Coram SHORT, J.

No 4.

Ex parte STEPHEN E. SMITH, AN INSOLVENT,

Petitioning for his discharge:

AND

DAVID ROBERTSON & CO. and OTHER CREDITORS,

Opposing.

HELD: That a voluntary assignment made by an Insolvent under 29 Vic. Cap. xviii §2 to a duly appointed Official Assignee is valid although the Assignee is not resident within the district within which the Insolvent has his place of business.

The insolvent, who had been engaged in business as a general trader at the Town of Sherbrooke, on the [redacted] June, 1866, made a voluntary assignment to John Whyte, Esquire, a duly appointed Official Assignee, resident in the City of Montreal, and upwards of one year from the date of assignment having expired, applied for his discharge.

This application was opposed by several of his creditors, upon various grounds, but the only objection relied on by the opposing creditors at the argument was, that the assignment was illegal inasmuch as the insolvent, at and prior to the said assignment, was residing and carrying on business in the District of Saint Francis, and the assignment was voluntary and made without calling a meeting of the creditors of the insolvent, and was made to an Official Assignee residing in the District of Montreal, whereas, by law, the insolvent could only legally assign to an Official Assignee resident in the District of Saint Francis, in which district there is a resident Official Assignee duly appointed by the Montreal Board of Trade.

The opposing creditors had all fyled their claims with the assignee and received a dividend from the estate of the insolvent.

E. T. Brooks, for opposing creditors:

The assignment is a nullity—Section 4th of the Insolvent Act of 1864 authorised the insolvent in case no assignee is named at the meeting of creditors to be called by the insolvent, or if the assignee named refuses to act to make an assignment to any Official Assignee resident within the District or County within which the insolvent has his place of business. The Act 29, Vic. Cap. xviii, § 2 provides that "a voluntary" assignment may be made to any Official Assignee appointed under the said Act" (of 1864) without the performance of any of the formalities or the publication of any of the notices required by subsections one, two, three and four of section two of the said Act," but this is merely intended

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to dispense with the formality of calling a meeting of the creditors, and does not enlarge the liberty of choice of an assignee, which is still limited to an Official Assignee resident within the District in which the insolvent carried on business. This has been decided by Loranger, J. in the case of Whyte vs. Short at Arthabaska, and by a majority of the Court of Review at Montreal in the recent case of Douglas vs. Wright and Brown, 11 L. C. Jurist, p. 310.

The 4th subsection of section 12 of the Insolvent Act of 1864 provides that all proceedings before the judge or Court in Lower Canada, shall be had before the judge or Court having jurisdiction at the domicile of the insolvent, and it is necessary that the the assignee should reside within the same jurisdiction for this reason, and also that he may be more effectually able to wind up the Estate of the insolvent and to collect the debts due.

G. H. Borlase, for Insolvent. The statute amending the Act of 1864 permits a voluntary assignment to be made to "any Official Assignee appointed under the said Act," without limitation as to residence, and the Court cannot imply a restriction which is not expressed, and could scarcely have been intended—*Ubi lex non distinguit, nec nos distinguere debemus*. As a mere matter of convenience it will in the majority of the cases of insolvency occurring amongst country traders, be found more advantageous to the creditors that the assignment be made to an assignee resident at one of the commercial centres, where the great bulk of the creditors also reside. In almost every case of insolvency which has occurred in this District, it will be found that a large majority of the creditors reside at Montreal. The Act of 1864 does not by any means render it necessary that the assignee should reside in the District or County of the insolvent. At the meeting of creditors called by the assignee, they may name an assignee, without limitation as to residence, and if they fail to do so, or the assignee refuses to act, the insolvent may assign his estate to any solvent creditor for a sum exceeding $500, "resident within this Province." In many cases of failures amongst county traders, such a creditor would almost certainly not be resident within the same District. In this case the opposing creditors have acquiesced in the assignment by fyling their claims and accepting their dividends from the assignee, and cannot now question its validity. The decision in the case of Douglas vs. Wright and Brown, was not rendered unanimously and has been appealed from,

SHORT, J. I am of opinion that the objection made by the opposing creditors to the validity of assignment is unfounded, and that the Insolvent is entitled to his discharge. The Act amending insolvent Act of 1864 permits an assignment to be made to "any official assignee" without limitation as to place, and I cannot infer that a limitation was intended where none is expressed. Had the Statute of 1864 provided that in all cases the Assignee, whether named by the creditors or being a creditor to a certain amount, or selected by the insolvent, should reside in the District where the insolvent carried on his business, the case might have been different, but there exists no such restriction. The creditors are left free to select whom they please, and when the assignment, in default of nomination at a meeting of creditors, is made to a solvent creditor resident within this Province" he may or may not be a resident of

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the same District as the insolvent. I think not only that the wording of the Act of 1864 permits the insolvent to select any Official Assignee, but that it was the intention of the legislature that this choice should be unfettered in this respect. As I hold the assignment to be valid, it is unnecessary for me to decide whether the opposing creditors are precluded from questioning it in consequence of having fyled their claims and received the dividends, but the objection certainly comes with a very bad grace at this stage of the proceedings. Opposition dismissed and insolvent's discharge granted.

G. H. Borlase, for Insolvent.

Sanborn & Brooks, for Opposing Creditors.

(G. H. B.)

MONTREAL 28TH NOVEMBER, 1867.

Coram, MONDELET, J.

No. 1632.

Hynes vs. *Lennan* et al. *esqual.*

HELD:—That an admission by defendants' attorney of the existence of a will referred to in plaintiff's declaration, and a consent that an authentic copy thereof should be considered as fyled, in the cause, as plaintiff's exhibit, No. 1, is null and void, and of no effect.

The Plaintiff claimed $557.91, for wages, directing his action against Dame Ellen Lennan, widow of the late James Curran, master carpenter, as well in her quality of residuary legatee by virtue of the last will of the late James Curran, as in that of executrix of said will, duly named as such conjointly with Edmund Oxley and the said Edmund Oxley in his quality of executor of said will.

The plaintiff set up in his declaration, that the will was made on the 17th July, 1866, and that the testator died on the 20th July, 1866.

The following document was fyled with the declaration purporting to be a list of exhibits.

" A declaration and bref de sommation ; exhibit, No. 1, une copie authentique " du testament ou acte de dernieres volontés de feu James Curran fait et " passé devant Mtre. W. A. Hall et confrères Notaires Publics en la cité de Mon- " tréal le dix-sept Juillet, mil huit soixante et six.

" Les defendeurs ès qualité admettent par leur avocat et procureur *ad litem* " l'existence du testament auquel réfère le demandeur et consentent à ce qu'une " copie authentique d'icelui soit considerée comme duement filée en cette cause " comme son exhibit No. 1 et en même temps."

De consentement

(Signé) M. DOHERTY. (Signé) HENRY J. CLARKE,
Avocat des défendeurs *esqual.* Avocat du demandeur.

The défendants being examined *sur faits et articles* admitted the qualities in which they were sued. No *extrait mortuaire* was fyled to prove the death of Curran and no copy of the will was fyled. The following was the judgment of the Court:

Hynes vs. Lennan et al.

The Court; &c. * * * * * * having heard the parties by their counsel upon the merits of this cause, examined the proceedings, the evidence and proof of record and having upon the whole maturely deliberated; considering that the plaintiff hath not proved the material allegations of his declaration, and namely the will by him in his said declaration declared, no such will being fyled.

Considering that the consent purporting to be given by counsel, that a copy of said will, be considered as fyled, is null and void the same being beyond the power in law (to avail in any way) of such or any counsel.

Considering further, that there is no legal evidence that the defendant Ellen Lennan is executrix as in and by plaintiff's declaration alleged and set forth.

Considering that there is no evidence of the death of the Testator to the said will as in and by plaintiff's declaration alleged.

Considering therefore that the plaintiff's action should be and the same is hereby dismissed with costs, distraits to Marcus Doherty, Esquire, attorney for defendants.

Action dismissed.

Henry J. Clarke, Q.C., for plaintiff.
Marcus Doherty, for defendants.
(J. L. M.)

COUR DE CIRCUIT.

STE. SCHOLASTIQUE, 7 FEVRIER, 1868.

Coram J. A. BERTHELOT, J.

No. 143.

Prévost vs. *Forget*.

JUGE:—1o Que la donataire universelle en usufruit par contrat de mariage, est tenue d'avancer les frais d'inventaire des biens sujets à son usufruit.

2o Que les honoraires d'un notaire employé par les héritiers du défunt, qui agit à la confection de tel inventaire concurremment avec le notaire choisi par l'usufruitière, forment partie de ces frais.

L'action du demandeur est portée contre la défenderesse sous les circonstances suivantes:

Le 15 février 1813, Joseph Lauzon contracte mariage avec la défenderesse après avoir fait un contrat de mariage devant Desforges, notaire, dans lequel il fut stipulé communauté de biens et donation mutuelle et réciproque en usufruit en faveur du survivant de tous les biens que délaisserait le premier mourant pour en jouir le survivant à sa caution juratoire.

Le 30 juin 1864, Joseph Lauzon décède *ab intestat*, sans enfans, laissant des héritiers collatéraux, et des biens considérables, tant dans sa succession que dans sa communauté.

La défenderesse, comme usufruitière, fait procéder à l'inventaire des biens délaissés par son mari, et pour ce emploie un notaire de son choix. Les héritiers de feu Joseph Lauzon, de leur côté, voulant sauvegarder leurs intérêts, emploient le demandeur qui est notaire pour assister à l'inventaire, lequel est fait par le notaire choisi par la défenderesse, concurremment avec le demandeur, notaire choisi par les héritiers.

Le demandeur poursuit la défenderesse comme usufruitière en recouvrement

de ses honoraires, comme notaire instrumentaire au dit inventaire, lesquels honoraires elle est tenue d'avancer comme faisant partie des frais d'inventaire. Prévost vs. Forget.

La défenderesse plaide qu'elle n'a jamais requis le demandeur de procéder à cet inventaire qui a été fait par le notaire de son choix, qu'elle a payé; et ne peut être tenue de payer le demandeur qui n'a agi que sur la requisition des héritiers—et qu'elle n'est pas obligée en loi, en sa qualité d'usufruitière, de payer ce que le demandeur lui réclame.

La preuve révèle que la défenderesse a employé pour cet inventaire un notaire de son choix—et que les services du demandeur n'ont été donnés que sur la demande des héritiers. La preuve fait voir aussi que la défenderesse a fait venir à ses frais un troisième notaire pour aider comme conseil, celui qu'elle avait choisi. Plusieurs membres de la profession entendus comme témoins, qui dans leur pratique avaient eu occasion d'agir concurremment avec un autre notaire dans la confection de quelque inventaire, font voir, que le second notaire aussi bien que celui agissant comme premier gardant la minute, est payé à même la masse des biens de la succession ou communauté.

Per curiam.—Le demandeur était un des notaires instrumentaires à la confection de l'inventaire fait en novembre 1864 devant M. Champoux, notaire, qui en a gardé la minute, et a agi comme tel concurremment avec le notaire choisi par la défenderesse au vu et su de cette dernière, et a contribué notablement à la rédaction du dit inventaire; les héritiers do feu Joseph Lauzon, dont les intérêts n'étaient pas les mêmes que ceux de l'usufruitière, avaient le droit de choisir un notaire pour les représenter au dit inventaire et y sauvegarder leurs droits, et les honoraires du notaire ainsi choisi par les héritiers forment partie des frais d'inventaire; la défenderesse comme usufruitière est en loi tenue d'en avancer les frais—et par conséquent obligée do payer les honoraires du demandeur qui a agi dans cette occasion à la requisition des héritiers, et ce du consentement et de l'agrément du notaire choisi par la défenderesse. Jugement pour £16. 5s. valeur des services du demandeur avec dépens.

Prévost & Berthiaume, Avocats du demandeur.
Ouimet & Mathieu, Avocats de la défenderesse.
(W. P.)

Autorités citées par le demandeur.
Merlin. Répertoire. Verbo. Inventaire, page 524, S. 3, page 531, S. 6. Ferrière. Art. 286, No. 5, Art. 285, Inventaire, No. 3. Pothier v. 4, page 295, No. 228. Denisart. Verbo. Inventaire No. 91. Guyot, Répertoire, Verbo. Inventaire. page 501, Tom. 9, 2d alinéa. Pigeau. proc. C. Tom. 2 page 324. Actes de Not. page 492. Nouveau Style des Not. T. 5, page 184. Pothier C. d'Ord. page 470, S. vii. No. 143.

DISTRICT DE TERREBONNE.

STE. SCHOLASTIQUE LE 8 FEVRIER 1867.

Coram J. A. BERTHELOT, J.

No. 653.

Charlebois vs. *Raymond.*

JUGE:—Que celui qui est à la poursuite d'un animal sauvage est censé en être le premier occupant, tant qu'il est à sa poursuite, et qu'il n'est pas permis à un autre de s'en emparer pendant ce temps, et que dans ce cas ce dernier doit en payer la valeur au poursuivant.

Le demandeur par son action allègue que le 10 septembre 1866, il s'est mis à

Charlebois vs. Raymond.

la poursuite, lui et ses hommes, dans la paroisse de St. Benoit, d'un animal sauvage, savoir, un ours, et qu'il l'a ainsi poursuivi sans interruption jusqu'au lendemain, époque à laquelle le défendeur, profitant de l'épuisement de l'animal, l'aurait tué, et s'en serait emparé. Il réclame du défendeur $15, valeur de l'ours que ce dernier a gardé par devers lui. Le défendeur, par ses défenses, nie les faits et le droit d'action du demandeur.

La preuve fait voir que le demandeur s'est mis à la poursuite de l'ours, le lundi, et l'a ainsi poursuivi avec ses hommes et ses chiens jusqu'à la nuit. Le lendemain matin le demandeur s'est mis de nouveau à la recherche de l'animal, qu'il a suivi à la piste jusqu'au moment où l'ours a été tué par le défendeur qui était embusqué dans une pointe de bois pour guetter son passage. Le demandeur suivait de très-près l'animal, auquel ses chiens donnaient la chasse, et est arrivé à l'endroit où l'ours a été tué presqu'au même instant où il a été tiré par le défendeur. C'est le chien du demandeur qui a chassé l'ours de la pointe de bois à la sortie de laquelle il a été tué par le défendeur. Le défendeur a refusé de rendre l'ours au demandeur, et de lui en donner une part. L'ours avait été blessé par les chiens du demandeur, qui l'avaient mordu.

BERTHELOT, J.—Chez les Romains le sentiment de Gaius "qu'on ne devenait propriétaire d'une bête qu'on avait blessée, qu'on ne l'eut effectivement prise," a prévalu et a été suivi par l'empereur Justinien.

Dans le droit français, il n'en est pas ainsi; la bête appartient à celui qui l'a blessée quand il continue de la poursuivre et non pas à celui qui la prend nonobstant cette poursuite, comme l'a remarqué Cujas, livre 4.

Le demandeur, dans la présente cause, s'est mis le premier à la poursuite de l'animal qui a été blessé par ses chiens, et a continué sa poursuite sans interruption et sans perdre la trace de la bête, jusqu'au moment où elle a été tuée par le défendeur qui n'avait commencé sa chasse que depuis une heure ou deux.

Le demandeur était censé être le premier occupant de l'animal, et le défendeur ne pouvait s'en emparer après l'avoir tué, et doit par conséquent en payer la valeur au demandeur.

Jugement pour cinq piastres et les dépens.

Jugement pour le demandeur.

Prevost & Berthiaume, pour le demandeur.
Ouimet & Mathieu, pour le défendeur.
(W.P.)

Autorités citées par le demandeur.
Pothier, Tom. 4, Traité du droit de propriété, page 354, No. 26 in fine.
Nouveau Denisart, Verbo Chasse. No. 12, p. 497.
Autorités citées par le défendeur.
Art. 587, Code Civil B. C. Toullier, Tom. 4, Nos. 6 et 20. Pothier, Vol. 4 No. 48. Statuts Refondus, Chap. 29, Sect. 7.
La Cour réfère aux autorités suivantes:
Inst. Just. Trad. de Ferrière, Tom. 2, L. 11, Art. 1. p. 32. Vide p. 9, du Tome 1. Voir notes et autorités du Juge C. M. Précédent, Cadieux *vs.* Dupuis et al., décidé le 23 mai 1836.

COUR DU BANC DE LA REINE.

EN APPEL.

Coram AYLWIN, J., MEREDITH, J., DRUMMOND, J., MONDELET, J., TASCHEREAU, J.

PHILIPPE NAPOLEON PACAUD,

ET APPELANT

MESSIRE PIERRE ROY,

INTIMÉ.

QUEBEC, 20 MARS 1866.

JUGÉ:—Que le secrétaire-trésorier des Commissaires d'école qui fera un rapport faux au Gouvernement pour obtenir l'octroi du fonds des écoles communes, pourra être poursuivi par tout citoyen intéressé dans la bonne administration des écoles et être condamné à payer une amende de pas moins de $10 ni plus de $40, en vertu du chap. 15, Sect. 126, des Statuts Refondus pour le Bas-Canada.

L'Intimé, qui est le curé de la paroisse de St. Norbert d'Arthabaska, avait été nommé secrétaire-trésorier des Commissaires d'école pour la municipalité de la paroisse de St. Norbert d'Arthabaska, en 1860.

Dans le mois de janvier 1861, il adressa au Gouvernement, en sa qualité de secrétaire-trésorier, le certificat suivant: "Je, soussigné, secrétaire-trésorier de la "municipalité scolaire de St. Norbert d'Arthabaska, dans le comté d'Arthabaska, "déclare que j'ai actuellement et *bonâ fide*, reçu et mis à la disposition des com- "missaires de la dite municipalité cent onze piastres et 30 centins courant, "somme égale à la part afférente à la dite municipalité sur les deniers octroyés "par la Législature pour le soutien des écoles, pour les derniers six mois de l'an- "née 1862, laquelle somme j'ai prélevée par cotisation: P. Roy, Ptre," quoiqu'il n'eût réellement et vraiment collecté que celle de £1. 13. 7. Messire Roy, en vertu de son dit certificat et de sa charge, retira du Gouvernment la somme de $111.30.

L'Appelant poursuivit l'Intimé en vertu du chap. 15, Sect. 126, des Statuts Refondus pour le Bas-Canada, pour lui faire payer une amende de pas moins de $10 ni plus de $40.

Dans son action datée du 4 avril 1864, signifiée à l'intimé le 22 du même mois, devant la Cour de Circuit pour le District d'Arthabaska, l'appelant alléguait qu'il demeurait dans la paroisse de St. Norbert d'Arthabaska depuis au-delà de dix ans; qu'il était père de plusieurs enfants en âge de fréquenter les écoles communes; qu'il était propriétaire de biens-fonds valant au-delà de $2000 et intéressé à la bonne administration des écoles communes dans la municipalité de la paroisse de St. Norbert d'Arthabaska. L'appelant alléguait par son action, que l'intimé avait fait un rapport faux au moyen duquel il avait obtenu frauduleusement, du fonds des écoles publiques le ou vers le 20 février 1863, la somme de $111.30, et que l'intimé avait fait sciemment cet acte de fraude, et il concluait par son action à ce que l'intimé fût convaincu d'avoir fait cet acte de fraude, et à ce qu'il fut condamné à remettre les $111.30 au fonds des écoles publiques et

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à payer en outre une amende de pas plus de $40, ni moindre de $10, pour le fonds local des écoles de la paroisse de St. Norbert d'Arthabaska et avec les dépens, et faute par lui de payer la dite amende et les frais, qu'il y fût contraint par corps et à demeurer détenu dans la prison commune du District d'Arthabaska, à raison de trois chelins par jour jusqu'à ce que le tout fût payé.

A cette action l'intimé plaida trois moyens principaux : 1o. Que l'appelant n'avait pas droit de poursuivre cette offense en son nom, mais que l'action aurait dû être intentée par le procureur-général, parcequ'il demandait par les conclusions de son action que l'intimé fut condamné à remettre les $111.30, au fonds des écoles publiques. 2o. Qu'il y avait cumul d'action : L'appelant demandait des choses distinctes et séparées par son action, d'abord l'amende et ensuite le remboursement de $111.30.

3o. Il y avait prescription ; cette action aurait du être intentée plus tôt, puisque l'action pouvait être intentée devant des juges de la paix et que l'action devant les juges de la paix est prescrite dans ces trois mois.

La Cour Inférieure adopta ce dernier moyen, et l'action de l'appelant fut renvoyée avec les dépens le 7 mars 1865.

Cette cause fut portée devant la Cour du Banc de la Reine, en appel, et après de longs débats, ce tribunal donna gain de cause à l'appelant.

TASCHEREAU, J. *dissentiens.* Les principaux allégués de l'action du demandeur sont :

1o. Que le défendeur a illégalement et sur production d'un certificat ou rapport faux, obtenu une somme de $111.30 du fonds des écoles publiques, et qu'il doit remettre à qui de droit.

2o. Qu'il s'est rendu passible d'une amende de pas moins de dix piastres et n'excédant pas $40 ; laquelle amende peut être recouvrée sur la poursuite de toute personne intéressée à la bonne administration des écoles communes, devant tout juge de paix ou devant la Cour de Circuit.

3o. Que le demandeur est intéressé à la bonne administration des écoles publiques, comme résidant en la municipalité, père de famille et y possédant des biens immeubles.

La question, suivant moi, n'est pas actuellement celle de savoir si le défendeur a bien ou mal agi, mais celle de savoir si l'action du demandeur a été bien portée ; s'il y a eu cumul de causes d'action, et s'il a droit d'action pour l'une ou pour l'autre de ses deux demandes.

La première question, suivant moi, à décider, est celle de savoir si les deux chefs d'actions sont compatibles l'une avec l'autre, et, s'ils ne le sont pas, s'il y a cumul sur toute la procédure. Dans mon opinion, la demande du remboursement d'une somme de $111.30, comme due au fonds des écoles publiques, est une demande tellement distincte et séparée de celle d'une amende de $40 réclamée au profit des écoles locales, qu'il me paraît hors de doute qu'elles sont incompatibles et ne peuvent être portées par une seule et même action et par le même demandeur ; l'une est une réclamation pure et simple de dette, et l'autre est une action pénale *qui tam.* S'il y a incompatibilité entre ces deux chefs d'action, il y a cumul d'action, et si ce cumul d'action existe, pouvons-nous adjuger sur l'un et sur l'autre de ces chefs d'action ? Je pense que non, et que le

demandeur aurait dû choisir entre ces deux chefs d'action celui sur lequel il voulait seul procéder. A son défaut de faire cette déclaration, pouvons-nous faire le choix pour lui? Je ne le crois pas. Quelles données aurions-nous pour dire au demandeur; nous écarterons l'un des chefs plutôt que l'autre? Je crois donc que le demandeur, en omettant de faire ce choix, a mis la Cour dans l'impossibilité d'adjuger sur sa demande. Mais on dira peut être que le demandeur n'a aucun droit d'action pour le remboursement des $111.30 au fonds des écoles publiques, et qu'en écartant cette partie de la demande, il reste toujours la partie scolaire de l'amende sur laquelle cette Cour peut adjuger: j'admets que le demandeur n'a pas d'action pour ces $111.30, mais, comme la question de cumul d'action et du choix de celui des chefs d'action sont des questions préliminaires qui doivent s'agiter et se décider avant que d'en venir au mérite, je considère que la difficulté ne peut être surmontée de cette manière. Le demandeur persiste à ne pas faire choix de celui de ses chefs d'action qui lui doit paraître le plus acceptable et de cette manière, il s'oppose au choix que la Cour paraît vouloir faire. Pourquoi nous constituerions-nous les gardiens et les protecteurs d'un client qui ne se défend pas bien et ne se présente pas légalement devant nous? Pourquoi viendrions-nous au secours du demandeur, et suppléerions-nous à ses omissions? C'est à lui seul de veiller à ses intérêts. Etant d'opinion qu'il y a cumul d'action, et que, vu le défaut du demandeur d'opter pour celui des chefs de son action sur lequel il désire procéder seul, nous ne pouvons faire ce choix pour le demandeur, il va sans dire que le demandeur doit pour cela être renvoyé de sa demande purement et simplement, et sauf à se pourvoir.

Leacock and Hay.

La question de prescription de trois mois, quant à la pénalité, s'est aussi soulevée en cause, et, par analogie, on a prétendu que comme le droit d'action eût été prescrit si on eût été essayé de recouvrer cette amende devant un juge de paix, conformément à la section 26 du ch. 103 des S. R. C., qui dit que si nul délai pour porter la plainte ou faire la dénonciation n'est fixé spécialement par l'acte ou les actes du parlement relatifs à chaque cas particulier, la plainte sera portée et la dénonciation faite dans les trois mois à compléter du jour où la matière qui fait le sujet de telle plainte ou dénonciation a originé, cette prescription de trois mois doit avoir lieu, lorsque la plainte était portée devant la Cour de Circuit, conformément à la section 126 du ch. 15 des S. R. B. C., qui règle que l'un ou l'autre, sera un tribunal compétent pour connaître de ce délit, sans parler du délai dans lequel la poursuite devra s'en faire. De prime abord, je serais disposé à dire que cette opinion est fondée en logique, sinon en loi; car après tout, pourquoi faire la distinction entre l'un et l'autre de ces tribunaux, et pour quoi dire que dans un cas il y a une prescription ou limitation de trois mois, et que dans l'autre il n'y aura pas telle limitation? En réalité, n'est-ce pas dire que le défendeur sera toujours sur la menace d'une telle poursuite, tant qu'il vivra, puisque, d'après l'opinion émise, la prescription ne s'inférant pas par analogie, nulle prescription quelconque ne pourrait jamais venir en aide au défendeur, puisqu'il serait toujours passible d'une poursuite devant la Cour de Circuit? Mais je ne puis, quant à présent, me prononcer formellement contre ou pour telle opinion, qui, d'ailleurs, serait superflue, vu que je suis d'opinion que l'action du demandeur, pour les raisons ci-dessus, n'est pas soutenable, et que l'appel doit être rejeté et le jugement de la Cour inférieure confirmé.

Pacaud and Roy.

Depuis que j'ai mis par écrit les notes ci-dessus, j'ai cru qu'il s'était opéré dans l'opinion des Honorables Juges qui forment la majorité de la Cour, sur le jugement qui va être prononcé, un changement remarquable relativement à cette partie de la demande du demandeur qui a trait au recouvrement de $111.30 que le défendeur a reçuer, ainsi que le prétend le demandeur.

Lors de l'argument, il fut à peu-près compris, sinon décidé, que le droit d'action relativement au recouvrement de ces $111.30 n'appartenait pas au demandeur, mais bien à la Couronne, et la seule question à débattre serait celle de l'amende et des chefs d'exception qui s'y rattachent. Mais, je comprends qu'actuellement quelques-uns des membres de la Cour maintiennent le droit d'action, non-seulement pour l'amende, mais pour le remboursement de $111.30.

Ceci explique pourquoi, dans mes notes premières, je n'ai pas traité cette partie de la question. Je vais maintenant expliquer ma manière de voir à cet égard. Le Statut dit (ch. 15, sec. 126 des S. R. B. C.) " Si quelque commis-" saire ou syndic d'école ou tout autre personne fait un certificat ou rapport faux, " au moyen duquel il obtient ou cherche à obtenir frauduleusement des deniers " sur le fonds des écoles publiques, il devra non-seulement rembourser les deniers " ainsi obtenus, mais il encourra de plus une amende de pas plus de quarante " piastres, ni de moins de dix piastres, au profit du fonds, local des écoles, laquel-" le sera recouvrée sur la poursuite de toute personne intéressée à la bonne admi-" nistration des écoles communes, sur le serment d'un témoin digne de foi, devant " toute juge de paix ou devant la Cour de Circuit ; et si cette amende n'est pas " payée sous dix jours après jugement, elle sera prélevée, ainsi que les frais, par " la saisie et vente des biens et effets du défendeur ; et, à défaut de biens et " effets suffisants, le défendeur pourra être emprisonné et détenu dans la prison " commune pendant un jour pour chaque soixante centins du montant de l'a-" mende et des frais, ou de la balance qui peut être due." Or, je le demande, est-il, par cette section, donné droit d'action au demandeur pour recouvrer les $111.30, et pour demander que le défendeur soit condamné à payer cette somme au fonds public des écoles ? Il n'y a pas un mot dans la rédaction de cette section qui puisse prêter à cette interprétation. On trouve bien que le défendeur remettra ce qu'il a inducment reçu. On trouve bien aussi que le recouvrement de l'amende pourra être fait à la poursuite de tout individu intéressé au bon fonctionnement des écoles, mais pas un mot n'indique que le droit de poursuite s'étende à faire remettre à la demande du demandeur, les $111.30 illégalement reçues. Une telle interprétation est contraire à tout principe, et je crois qu'il n'y a pas de précédent à citer pour montrer que la couronne ait jamais permis à un particulier (*private prosecutor*) de poursuivre une action de dette pure et simple appartenant à la couronne, simultanément avec une amende. On ne trouvera pas de Statut qui ait conféré à un particulier (*private prosecutor*) le droit de poursuivre autre chose qu'une amende avec le recouvrement de ce qui lui est dû personnellement pour dommages, si ce n'est notre statut pour la protection d'agriculture, et, dans ce cas, le dommage n'appartient pas à la couronne, mais bien au particulier poursuivant. Mais on dira que c'est l'action populaire que le Statut a voulu donner ? Je réponds par une question. Qu'est-ce que l'action populaire ? Toutes les définitions que nous en trouvons vont à dire que cette

action populaire n'est donnée à un particulier (*private prosecutor*) que pour recouvrer une amende pour infraction ou violation de quelque Statut pénal, et cette action s'exerce par le plaignant particulier *qui tam pro Domino rege quam pro se ipso*, et jamais on ne trouvera que la couronne ait permis à un plaignant particulier de faire le recouvrement d'une de ses créances ou dettes purement civiles. (*Tomlin's law Dictry*, vo. action).

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Dans le droit Romain, il y avait les actions publiques et les actions populaires intentées par les citoyens; mais ces actions étaient toujours sous forme d'accusations criminelles pour la répression des crimes publics; quant aux actions publiques, et pour la répression de certaines contraventions à l'édit du prêteur, telles que l'action "*de dejecto vel effusi*" contre ceux qui ont fait ou laissé tomber quelque chose de nuisible sur un lieu où l'on a coutume de passer. Quant aux actions populaires, cette dernière action répondrait assez à l'indictement pour nuisance publique. Mais ces actions, au civil, n'existent pas dans nos lois. Dans notre système de droit commun, le nombre des actions est limité aux personnelles, réelles et mixtes, subdivisées en [illegible] et immobiliaires et possessoires et pétitoires; et dans quelle catégorie [illegible] de ces actions placerions-nous l'action par laquelle un simple parti[illegible] sans votre expressément autorisé par la Législature, réclamerait, dans [illegible] la couronne, une dette purement civile appartenant à la couronne? [illegible] peu puis imaginer le nom, et je ne la trouve ni dans le droit Romain, ni dans notre droit commun, ni dans aucun Statut, et encore moins dans le ch. 15 des S. R. B. C. [Quoique l'argument *ab inconvenienti* ne soit pas le plus fort de logique, cependant, dans certains cas, il sert à démontrer la fausseté de l'interprétation des lois, que l'on doit toujours supposer sages, et faites pour le plus grand bien. Supposons pour un instant que la réclamation de la dette civile en cette cause, ou bien du chiffre minime de $111.30, portât celui de £10,000, ne serait-il pas possible qu'un défendeur qui aurait accaparé ce montant du fonds des écoles et qui désirerait le garder, s'arrangerait avec un voisin et conviendrait de se laisser poursuivre par ce bon voisin pour le recouvrement de ces £10,000, et de l'amende de £10, et lui dirait: *vous porterez votre action si mal, vous aurez le soin de faire si peu de preuve, que la poursuite sera renvoyée.* Et les £10,000 que deviendraient-ils? Ils resteraient au défendeur. Ne serait-ce pas chose jugée? Pourrait-on recommencer la poursuite? Non, si l'interprétation donnée par la ma[illegible]de la Cour est saine et légale; car, à moins que le recours ne soit réservé au moyen *d'un sauf à se pourvoir*, le défendeur au civil peut réclamer son renvoi au moyen du plaidoyer de chose jugée. Voilà une des conséquences singulières qu'entraînerait cette interprétation. Donc le législateur n'a pu vouloir donner à un simple particulier le droit de compromettre les réclamations civiles de la couronne en conférant à un individu quelconque l'exercice des termes semblables. L'action, si action il y a, pour le recouvrement de ces $111.30, réside donc exclusivement dans la couronne.

Je passe maintenant à citer quelques autorités pour démontrer qu'il y a cumul d'actions en cette cause; je citerai en première ligne la décision de cette Cour du Banc de la Reine, prononcée le 9 juillet 1857, par leurs Honneurs Sir L. H. Lafontaine, Aylwin, Duval et Caron, dans la cause d'Oneil vs. Atwater

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et que l'on trouve rapportée à la page 442 du 9e vol. de nos rapports judiciaires. Le demandeur en cette cause la poursuivait le défendeur pour assaut et batterie, injures verbales, poursuite malicieuse et incarcération comme magistrat. La Cour Supérieure et la Cour d'Appel furent unanimes à déclarer qu'il y avait cumul de causes d'action et ordonnèrent que le demandeur eût à faire choix d'une de ces causes d'action, et qu'à défaut de ce faire, il serait renvoyé de sa demande. Je cite ce précédent pour faire voir ce que c'est que cumul de causes d'action, et pour en démontrer les conséquences. Dans le cas présent, le demandeur poursuit le recouvrement d'une dette purement civile, en même temps que le recouvrement d'une pénalité. L'une de ces causes est civile, l'autre est criminelle. Peu importe qu'elles proviennent du même délit, il suffit que leur nature soit différente, et elles sont aussi différentes que le possessoire l'est du pétitoire. Comme je l'ai dit plus haut, le demandeur, quoiqu'il ne lui ait pas été enjoint de faire choix d'une de ses causes d'action, a cependant été notifié de l'existence de ce cumul, et de l'incompatibilité de ces causes d'action; et cependant il n'a jamais voulu déclarer son intention de renoncer à l'une pour s'en tenir à l'autre, mais il a persisté à les maintenir l'une et l'autre; et, dans ce cas, la Cour ne pouvant faire choix de l'un ou de l'autre chef de poursuite, doit renvoyer son action *in toto*.

Je regrette d'avoir à dire que le factum de l'appelant contienne des injures si fortes à l'adresse de l'intimé, qui, de prime abord, eût dû s'attendre à plus de respect de la part de l'appelant, à raison de sa qualité de ministre de l'Evangile. Quoique l'injure n'ajoute rien au droit et en bien des cas n'ait pour résultat que de blesser, je connais que dans certaines circonstances il faille frapper fort pour démasquer la fraude; mais, dans ce cas-ci, où l'erreur ou l'ignorance ont seules dû être la cause de ce qui peut paraître étrange dans l'affaire, l'appelant aurait également atteint son but par un exposé fidèle et exact de ses sujets de plainte et de la preuve, sans avoir recours à une grande dépense d'éloquence et de fleurs de rhétorique pour flétrir un respectable prêtre."

MONDELET, J. "1o. Il est évident que l'appelant a intérêt dans la bonne "administration des écoles communes.

"2o. Il n'y a pas ce cumul d'action dont se plaint l'intimé.

"3o. Il n'y a pas de limitation d'action, comme le prétend l'intimé.

"La défense en droit n'était pas le mode de se plaindre du cumul d'action "s'il y en eût eu. Elle aurait dû être renvoyée.

"Au mérite, il est constaté que l'intimé a fait un rapport faux: il est par con-"séquent passible de l'action qui a été intentée contre lui, par l'appelant: puis-"qu'au moyen de ce faux rapport, il a obtenu l'allocation du gouvernement, la-"qu'elle, par la loi, ne pouvait être accordée, qu'en autant qu'une somme corres-"pondante aurait été prélevée sur les contribuables. Le motif de la loi à cet "égard est d'intéresser à la cause de l'éducation, les localités et tous ceux qui "les habitent. Des procédés comme ceux qu'a frauduleusement commis le curé "Roy, sont de nature à produire un effet tout contraire. Il importe à la société "que la cause sacrée de l'éducation ne reçoive aucune atteinte du charlatanisme "religieux ou politique, le législateur l'a sagement voulu ainsi, les cours doivent "punir toutes les tentatives que l'on serait disposé de faire, de quelque part

"qu'elle viennent, pour nullifier les sages dispositions des lois, et empêcher que
"des individus, soit pour une cause ou pour une autre, ne substituent au véritable
"et patriotique moyen de faire avancer le peuple, celui de le tenir dans l'asservis-
"sement et dans l'ignorance, et par conséquent, dans la dépendance. Il est à
"espérer que le curé qui a tenté cet expédient, n'y retournera plus, et ce qui lui
"advient aujourd'hui, sera un salutaire avertissement à qui de droit. L'action
"aurait dû être maintenue, au lieu d'être déboutée. Le jugement doit être in-
"firmé et les conclusions de l'action de l'appelant doivent être accordées."

Le jugement est motivé comme suit :

"La cour, après avoir entendu les parties, par leurs avocats respectifs sur le mérite; examiné le dossier de la procédure en cour de première instance, ainsi que la Requête, en appel, produite par le dit appelant et sur le tout mûrement délibéré.

"Considérant qu'il est prouvé que l'intimé, défendeur en cour de première instance, le premier janvier mil huit cent soixante et trois, à St. Norbert d'Arthabaska, district d'Arthabaska, en sa qualité de secrétaire-trésorier de la municipalité scolaire de la paroisse de St. Norbert d'Arthabaska, dit district, a fait un certificat faux de cotisation pour lequel il a faussement et frauduleusement certifié avoir reçu et remis à la disposition des commissaires de la municipalité susdite la somme de cent onze piastres et trente centins (cents) courant, égale à la part afférente à la dite municipalité, sur les deniers octroyés par la législature, pour le soutien des écoles, pour les derniers six mois, pour l'année mil huit cent soixante et deux ; lequel certificat, le dit défendeur, en cour de première instance, a signé là et alors en sa qualité de secrétaire-trésorier.

"Considérant que, au moyen du dit certificat faux et frauduleux, le défendeur en cour de première instance, a obtenu et s'est, le ou vers le vingt février mil huit cent soixante et trois, fait frauduleusement payer par le surintendant d'éducation des écoles pour le Bas-Canada, qu'il a trompé et ce, sur les deniers du fonds des écoles publiques du Bas-Canada, la dite somme de cent onze piastres et trente centins (*cents*).

"Considérant que, par la loi, le dit intimé est, par là, passible d'une amende n'excédant pas quarante dollars ni moins de dix dollars.

"Considérant que l'appelant, demandeur en cour de première instance, était bien fondé à porter contre l'intimé, la présente action, en laquelle il n'y a pas cumul prohibé par la loi, ni prescription de trois mois, contre icelle, comme à l'égard de certaines poursuites devant les Juges de Paix.

"Considérant, par conséquent, qu'il y a erreur dans le jugement dont est appel, savoir : le sept mars mil huit cent soixante et cinq, par la Cour de Circuit, pour le district d'Arthabaska, déboutant l'action de l'appelant ; cette cour casse, annulle et met au néant le dit jugement ; et procédant à rendre le jugement qu'aurait dû rendre la dite Cour de Circuit, déboute la défense en droit de l'intimé, défendeur en cour de première instance, et procédant au mérite, cette cour condamne l'intimé, défendeur en cour de première instance à payer la somme de quarante piastres d'amende au profit du fonds local des écoles de la paroisse de St. Norbert d'Arthabaska, aux dépens tant de la cour de première instance qu'en cette cour ; au payement, et satisfaction du présent jugement sera l'intimé contraint suivant la loi. et à défaut de biens et d'effets suffisants, pour satisfaire au dit jugement,

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sera le dit intimé emprisonné en la prison commune du susdit District d'Arthabaska et, là, détenu à raison et suivant au jour, par chaque soixante *cents* du montant de la dite amende et des frais, ou de la balance qui pourra être due avec ensemble les dépens, jusqu'à ce que la dite amende ait été payée avec dépens.

Il est, de plus ordonné que le dossier soit remis à la Cour de première instance.

Dissentiens: L'Honorable M. le Juge Aylwin, qui est d'opinion que la condamnation devrait être tant pour la somme frauduleusement reçue par l'intimé que pour l'amende.

E. L. Pacaud, procureur de l'appelant.

Talbot & Lusignant, procureurs de l'intimé.

(E. L. P.)

EN APPEL DE LA COUR DE CIRCUIT, DISTRICT DE MONTREAL.

MONTREAL, 29 FEVRIER 1868.

Coram DUVAL, J. en Chef, AYLWIN, J., DRUMMOND, J., BADGLEY, J.

ARCHIBALD FERGUSON,

(*Demandeur en Cour Inférieure.*)

APPELANT.

ET

JACOB HENRY JOSEPH,

(*Défendeur en Cour Inférieure.*)

INTIMÉ.

JUGE.—1o. *L'echenillage* n'est pas obligatoire en ce pays. 2o. La prescription trentenaire s'applique aux arbres plantés sur l'héritage voisin près de la clôture de division. 3o. *Secus* des branches et racines de ces arbres.

En Septembre 1864, M. Ferguson avait intenté contre l'intimé une action, en cour de circuit où il alléguait que les parties étaient propriétaires de deux immeubles adjacents et séparés par une clôture près de laquelle l'intimé avait laissé croître des peupliers et des saules, dont les branches et les racines s'étendaient sur la propriété de l'appelant; qu'une quantité considérable de chenilles et autres insectes étaient tombés de ces arbres, et avaient dévasté ses pruniers; que sa perte s'élevait à $100; il concluait à ce qu'il fût ordonné à l'intimé de couper les branches et les racines qui s'étendaient sur sa propriété, d'enlever les peupliers et les saules à telle distance de la clôture commune que leurs branches et racines ne pourraient plus nuire à la propriété de l'appelant, et faute par l'intimé de se conformer à telle injonction dans un certain délai, permis à l'appelant d'enlever les dits arbres, branches et racines, aux frais, risques et périls de l'intimé; enfin que ce dernier fût condamné à lui payer $100, par forme de dommages-intérêts, et les dépens.

L'intimé répondit à l'action par une *fin* de non-recevoir tirée de deux motifs; savoir, que *l'échenillage* n'étant pas obligatoire en ce pays, et chaque propriétaire étant, suivant une coutume immémoriale, tenu de protéger sa propriété contre ces insectes, l'intimé n'était pas responsable du dégât qu'ils avaient pu commettre;

sur l'autre point, l'intimé ayant été, par lui même et ses auteurs, en possession, depuis trente ans et plus, des dits peupliers et saules, cette plantation continue et la croissance des branches pendant cet espace de temps, constituaient un droit de prescription en sa faveur. Ferguson et Joseph.

M. Ferguson prouva, par plusieurs témoins, que ses arbres fruitiers avaient été dévastés par les chenilles, et que les branches et les racines des saules et peupliers de l'intimé s'étendaient sur sa propriété, à une distance de quinze ou vingt pieds.

De son côté, l'intimé fit constater, à l'enquête, que les peupliers et saules avaient cinquante ou soixante ans d'existence ; que les chenilles avaient été fort abondantes pendant l'été de 1864. Un témoin, James Davidson, jardinier de trente cinq ans d'expérience, et qui a étudié spécialement les habitudes des chenilles, établit une théorie assez singulière et qui mérite l'honneur d'une mention particulière ; voici un extrait de son témoignage : " The only way we have of " checking caterpillars, is by destroying their rings, both in the fall and in the " spring. If the rings are not destroyed, the caterpillars, as soon as formed, im- " mediately destroy the foliage of the trees where the rings were, that is, where " the caterpillars have been bred. It is necessary, also, to destroy the caterpillars " that are left on the trees once a day ; that is my practice. I never observed " caterpillars travel until they had ceased growing, so long as the tree on which " they have been bred supplies them with food, unless removed by violence. " When once caterpillars commence travelling they cease feeding and become " harmless.

" There is a garden opposite mine with a great many apple trees in it. The " owner of that garden never takes any trouble to destroy rings or caterpillars ; " and last year, and other years, they came over into my garden by millions, and " I did not mind it for they did my trees no harm, because at this stage of their " existence they cease feeding or to commit depredations, for they are then about " to get into the cocoon state.

" There are four states of caterpillars ; the fly, the egg, the caterpillars and the " cocoon ; nobody can tell where the fly comes from ; it is impossible to prevent " the eggs from being deposited in the trees.

" I submit that if the rings are scrupulously taken off, and the caterpillars that " have been formed on those trees killed off constantly for a fortnight, the fruit " trees will receive no harm from the caterpillars that come from the neighbours " or other parts, because, as I said before, the caterpillars never travel until they " have ceased feeding ; generally speaking, where caterpillars destroy fruit trees, " it is owing to the negligence of the owners of the fruit trees.

" The foliage in my garden was not injured in the least, because I took care to " destroy my own rings and caterpillars ; and although the caterpillars came from " my neighbour's garden on to my trees, they did my foliage no harm.

" In fact, I find their economy very similar to silk worms, they commence imme- " diately feeding as soon as they are hatched, and then they sicken and com- " mence to travel to find a favourable position into which to spin their cocoon, " therefore they cease to commit depredations as soon as they travel."

A l'audition, *Day*, pour le demandeur, prétendit qu'une servitude ne pouvait

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s'acquérir sans titre, que par conséquent la prescription n'était pas acquise au défendeur ; en outre qu'il fallait user de sa propriété de manière à ne pas nuire au voisin : enfin, que le défendeur était responsable du dégât commis sur le terrian voisin par les chenilles provenant de sa propriété ; et il cita :

Ferrière, petit comm. de Cout. de P., Art. 186, T. 1, p. 403-4.

Domat, T. 1. p. 205, Dommages, Tit. 8-§1, p. 206.

Pothier, T. 2., Cont. de Soc., No. 235-236, p. 622.

Guyot. Rép., T, 1, Vo. *Arbre*, p. 561.

Anc. Desgodets, p. 109, a N. n. b. et p. 324, a N. Nos. 20. 21 et n., h., i. et p. 325-326.

Nouv. Dosgodets, (Lepage) T. 1, p. 227-8.

Code Can. p. 392 à 395, Servitudes réelles, art. 30 à 33.

Nouv. Denizart, T. 2, Vo. *arbre*, cité dans le code.

Roy, pour le défendeur, répondit, qu'en l'absence d'une loi spéciale à cet effet, *l'échenillage* n'était pas obligatoire ; que les chenilles n'étant ni sa propriété, ni sous sa garde, il ne pouvait être garant des dommages qu'elles causaient ; sur la question de prescription, qu'il ne s'agissait pas pour le défendeur d'acquérir mais bien de se libérer d'une servitude ; et il référa aux autorités suivantes.

Guyot. Rép., Vo. *arbre*, p. 562, c. 2.

Nouv. Denizart, Vo. *arbre*, p. 248, c. 2. a. 1. § II et cite *Henrys, Boniface.*

Nouv. Desgodets, T. 1 part 1, ch. 6, art. 4, p. 367, dernier alinéa.

Prost de Royer, Vo. *Arbre*, p. 138 et 139, et les arrêts *Perdrigeon Gondouin ; præsertim*, ce dernier, qui, adoptant le plaidoyer de prescription trentenaire, renvoie la demande qui concluait *à faire couper les branches* de deux chênes qui s'étendaient sur l'immeuble du demandeur.

Brillon, Dict., T. 1, p. 239-240, rapporte les deux arrêts *Perdrigeon* et *Gondouin.*

Pandectes françaises, T. 5, p. 453.

Fournel, voisinage, T. 1, p. 145-155, a. 4.

Toullier, T. 3, p. 376, Nos. 512 à 414, *in fine*, et 515.

Troplong, *Prescription*, T. 1, p. 346-7, p, 479.

Proudhon, *Usage*, T. 1, p. 609 à 613.

Code du B. C., Art. 562.

Les prétentions du défendeur furent accueillies et sanctionnées par le Tribunal Inférieur et l'instance déboutée par le jugement, dont suit le teneur :

Le 30 Décembre 1865. Présent, *L'Hon. Juge Berthelot.*

" La Cour, après avoir entendu les parties par leurs avocats au mérite de cette " cause, examiné la procédure, pièces produites et preuves et avoir sur le tout dé- " libéré, considérant que le demandeur n'a pas prouvé les allégués de sa déclara- " tion, 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 soix- " ante ans, sans que le demandeur ou ses auteurs aient jamais élevé aucune pré- " tention à les faire enlever, et que le défendeur doit être maintenu dans sa pos-

" session 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, publique " et continue, et que d'ailleurs il n'est pas prouvé qu'il soit la cause des domma- " ges dont le dit demandeur se plaint, a renvoyé la dite action avec dépens, dis- " traits à Mess. Roy et Joseph, avocats du défendeur.

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Ce jugement, porté en appel, y fut confirmé sur la question des dommages réclamés et de la prescription, mais modifié en ce qui concernait *l'élagage* des branches.

BADGLEY, J., *dissentiens.*—The lands of the parties adjoin in the rear; that of the appellant is a flourishing orchard of plum and other fruit trees, whilst that of the respondent is an open field separated from his neighbour's land by a low wooden fence and seven or eight very old scraggy and unornamental poplar and willow trees. The roots of these trees, as they naturally would, got under the fence and intruded into the orchard, whilst their overhanging branches shaded off the light and the sun, and themselves, in general, bred legions of caterpillars. These trees appear to have been a source of annoyance to the appellant for some years, but in the early part of 1864, whilst his fruit trees were clear of vermin, he requested the respondent more than once to cut off the overhanging branches and to destroy the caterpillars which were swarming upon them. The request was treated with indifference, and although the appellant employed extra labour and laid out money to protect his trees from the destructive inroads of the respondent's vermin, his trees in a few days were eaten off clean of leaf and blossom; and in consequence he sued the latter for the injury suffered by him in the loss of the season's fruit, and for the additional outlay for its protection, at the same time requiring the respondent to cut down the trees themselves and to pay for the injury done by their roots to his orchard ground. The law protects the respondent's plea against cutting down the trees, as they exceeded 30 years of growth, being 50 or 60 years old; the law does not compel the tree grower to follow and grub up the root in its natural course, but authorizes the person affected by their entrance upon his land to cut up such roots wherever he may find them within his land. (See Code Civ. of L. C., art. 529.) The remedy in this respect being in the appellant's hands, he has no right of action; but he has a right of action for the removal of the overhanging branches, and, in my opinion, for injury caused by his own gross neglect in encouraging an emigration of caterpillars from his own trees and premises to those of his neighbour. The damage done from the overhanging branches is merely nominal and can only be so considered; but it is said that *échenillage*, like many other slovenly agricultural and horticultural annoyances, is not compulsory in this country although it was made so in old France, by arrêts of 4th Feb., 1732, 29th January, 1771 [illegible] by Prost de Royer, *Vo.* agriculture, as he says *in conformity with the Ordinance of* 1601, *qui admoneste de chasser les bêtes nuisibles.* However that may be, if the obligation is not compulsory, that compulsion must be restrained to oneself, and though the distance of trees from the common boundary is not precisely fixed, Goupy on Desgodets (p. 316, 7, 8,) says that *en pleine campagne, dans le cas ou il n'y a point de coutume*, in the country, *il faut essentiellement que le voisin ne souffre aucun dommage de ces arbres et dans les jardins surtout à la ville*, fruit trees must not injure

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mitoyen wall[illegible] their roots, nor have their branches attached to these walls, "et ne s'étendent jamais au delà," and Prost de Royer says that, in this case, the general maxim of natural law must be followed, *qu'il n'est pas permis de nuire à son voisin. Sic utere tuo ut alienum non lædas.* It may be that the respondent might not be compelled to clear his own trees from their caterpillars; he was of perfect liberty to do as he pleased with his own; he might be as regardless of the injury done to his own trees as he pleased, provided he kept his devastating creatures within his own territory, but if by so doing he knowingly and negligently injures his neighbour also, he becomes liable for the consequences of his own negligence; the criterion is, whether the respondent was guilty of negligence, viewing his conduct with reference to the condition which a prudent man would, under such circumstances, have observed. The appellant appears to have acted with forbearance and neighbourly good will, he notified the respondent and requested him to clean his trees and cut his branches, but without avail; the caterpillars on his own trees he did not injure them, because these trees were very old and scraggy, nor could he injure them in the open field in common grass, but he could not but know the voracious and migratory habits of these injurious creatures, and should have kept them [illegible] a man may keep an animal *feræ naturæ* on his own land, or a ferocious dog, and no one can interfere with him for so doing until some mischief happens, yet as soon as the animal has done injury to any person, then the act of keeping it becomes, as against the injured person, an act for which the owner is responsible. Such is the case here; so long as the caterpillars remained within the respondent's boundaries, he could not be interfered with; as soon as they invaded his neighbour's orchard, and injured the appellant, the respondent became liable for the injury done by him. The appellant has proved the value of the fruit loss at $30, and he has proved his additional outlay at $9, for which he ought to have judgment. The overhanging branches should be cut off on a line upwards, just within the fence line, within [illegible] days from the entering of the judgment.

CARON, J., *per curiam.* L'action est par l'appelant Ferguson pour deux objets.

1o. Pour dommages lui résultant de ce que les chenilles qui se trouvaient dans les arbres croissant sur le terrain du défendeur, contigu à celui du demandeur, se sont communiquées aux arbres fruitiers du demandeur et lui ont causé des pertes, au montant de £25.

2o. Pour le forcer à abattre les dits arbres s'étendant par leurs racines et leurs branches sur le jardin du demandeur et y causant divers dommages et inconvénients qu'il n'est pas tenu d'endurer et dont il a droit d'être débarrassé.

Le défendeur a répondu à l'action en disant:

1o. Que quant aux chenilles, il n'était pas prouvé qu'elles fussent la cause des dommages dont se plaint le demandeur, et que quand même ces chenilles seraient venues des arbres du défendeur, il n'était pas tenu de les détruire, vu que *l'échenillage* n'est pas obligatoire dans le pays.

2o. Que quant aux arbres [illegible] ils étaient depuis plus de [illegible] ans à la place qu'ils occupent actuellement, et que partant il a, par cette possession trentenaire, acquis le droit de les y laisser, à titre de prescription: [illegible]

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regarde les dommages prétendus causés par les chenilles, il suffit de dire que le demandeur n'a nullement établi, à la preuve, que les dommages dont il se plaint aient été causés par les chenilles provenant des arbres du défendeur, et de plus que le demandeur a failli de montrer qu'on droit, le défendeur était tenu de détruire les chenilles qui étaient dans ses arbres pour les empêcher de se répandre dans le jardin du demandeur. Au reste, il est suffisamment établi en fait que l'échenillage n'est pas, par l'usage, considéré comme obligatoire et qu'il n'est pratiqué que volontairement, et suivant qu'il plaît à chacun. Sur ce premier point (la question de dommages) nul doute que le jugement dont est appel ne soit correct, lorsqu'il renvoie, quant à cette partie, l'action du demandeur.

La question de savoir si la prescription trentenaire, dont le jugement donne le bénéfice au défendeur, est également bien décidée, souffre plus de difficulté.

J'ai toujours été sous l'impression que le droit de laisser les branches et les racines s'étendre sur le terrain contigu du voisin était un véritable droit de servitude, qui, comme tout autre, ne pouvait s'acquérir sans titre. L'on ne doit pas être surpris de trouver dans les livres nouveaux écrits sur le code français, cette prescription reconnue et admise, par la raison bien simple que le code français permet l'acquisition des servitudes par une possession suffisante et sans titre.

L'on ne doit pas non plus être surpris de trouver, en France, nombre d'arrêts qui ont décidé la même chose antérieurement au code, parce que cette prescription était reconnue par plusieurs coutumes, et par le droit romain, et aussi parceque c'est dans le ressort de ces coutumes, et dans les pays régis par le droit romain, que la plupart de ces arrêts ont été rendus ; mais ce qui doit surprendre c'est que dans le ressort du parlement de Paris, dont la coutume ne contient aucune disposition semblable mais qui, au contraire, a un article spécial déclarant que les servitudes ne peuvent s'acquérir sans titre, l'on puisse trouver des décisions déclarant que le droit qui nous occupe pouvait s'acquérir à titre de prescription.

Avant de céder l'opinion que j'avais sur le sujet, il m'a fallu examiner avec attention les autorités citées au soutien de cette proposition ; voir où, et sous quelles circonstances ont été rendus les arrêts dont on entend se prévaloir ; si c'est en pays de droit écrit, si c'est dans les coutumes ; savoir s'il y avait des dispositions sur le sujet. Si quelques-uns de ces arrêts ont été rendus par le parlement de Paris, voir quelle en est la date, les circonstances et le nombre, et si, dans ce parlement, les arrêts en question peuvent être regardés comme formant jurisprudence.

Etablir d'abord la loi d'après la coutume de Paris, sur la manière d'acquérir les servitudes en général, et voir ensuite si cette loi, quant au parlement de Paris, a été altérée, quand et comment.

Malgré la disposition de la coutume de Paris (art. 186) qui décrète que nulle servitude ne peut s'acquérir sans titre, il est indubitable que le voisin qui avait, pendant plus de trente ans, souffert, près de la ligne commune, l'existence d'un arbre planté en contravention aux règlements, perdait, même dans le ressort de cette coutume, par prescription trentenaire, le droit de le faire arracher. Cette doctrine, admettant, en fait d'arbres, la prescription de 30 ans, ne peut être niée ; les

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opinions des auteurs et les décisions des tribunaux sont d'accord pour l'admettre non seulement d'après le droit nouveau, mais également d'après le droit ancien, non seulement dans les pays régis par le droit romain, mais dans les pays de coutume y compris celui de Paris.

La raison qui a fait admettre cette prescription dans la coutume de Paris et autres qui exigent un titre pour l'acquisition des servitudes en général, est que c'est au *propriétaire* de l'immeuble sur lequel est planté l'arbre qu'est imposée par la loi, l'obligation de ne planter qu'à une distance fixée de la ligne commune, c'est en faveur de l'immeuble voisin que cette obligation est imposée au propriétaire de l'arbre; c'est l'immeuble sur lequel est l'arbre qui est le fonds servant, tandis que le voisin est le fonds dominant, c'est donc le premier qui est chargé de la servitude en faveur du second; or, même d'après la coutume de Paris, l'on a toujours pu, au moyen de la prescription trentenaire, se libérer d'une servitude. D'après cette manière de voir, le propriétaire qui, pendant trente ans, a permis à l'arbre de son voisin de croître et de s'étendre vers la ligne plus que la distance permise, est censé avoir renoncé au droit de le faire abattre, et consenti à ce que le voisin fût, à toujours, libéré de l'obligation de le faire disparaître. Considérée de cette manière, la coutume de Paris ne se trouve pas opposée à la prétention généralement admise, puisque, d'après cette coutume, l'on peut toujours se libérer d'une servitude par la prescription trentenaire. (Voir Solon Prescrip., p. 199, No. 244. Proudhon "Usage," p. 371-372. Frérot, Répertoire des lois du voisinage, p. 25 et 26. Le jugement de la cour inférieure est donc encore correct en refusant au demandeur le droit de faire abattre les arbres dont il se plaint en son action. Les autorités citées au barreau et plusieurs autres établissent clairement la prescription dont le jugement a donné bénéfice au défendeur. Prost de Royer, V. Vol., page 138.

Sébire et Carteret, vo. *arbre*, p. 3.
Arrêt du parlement de Paris, 5 Août 1606.
Fournel, Voisinage, p. 142 et suiv.
2 Malleville, p. 122.
5 Pardessus, servitude, p. 456.
Labaie, p. 146 et les autorités qu'il cite.
Basnage, sur art. 608, Normandie.

Mais ces autorités, tout en établissant la prescription trentenaire, quant aux arbres mêmes, soutiennent unaimement que "cette prescription ne s'oppose pas "à ce que le propriétaire incommodé par les branches ou les racines ne puisse "user du droit qu'il a de les couper ou de les faire couper." (Solon, 199. Frérot, p. 26, Proudhon, Usage, p. 193.)

Or, dans ses conclusions, le demandeur se plaint des branches et des racines et demande que celles qui s'étendent sur son terrain soient coupées, et cette partie de la demande aurait dû être accordée, puisqu'il est établi par la preuve que le demandeur souffre de ces branches et racines.

Je suis donc d'avis que le jugement doit être infirmé, tout en exonérant le défendeur de l'obligation d'abattre les arbres et de payer au demandeur les dommages causés par les chenilles, je condamnerais le défendeur à élaguer les

branches et à couper les racines, si non permis au demandeur de le faire faire lui-même aux frais du défendeur.

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JUGEMENT.

" 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 l'appelant en cette cause, et sur le tout mûrement délibéré, considérant que dans le jugement dont est appel, savoir dans le jugement de la Cour de Circuit en date du trentième jour de Décembre, mil huit cent soixante et cinq lequel renvoie l'action du dit appelant, demandeur en Cour Inférieure, il y a erreur, casse et annule le susdit jugement, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Inférieure, de Circuit ; Considérant, en droit, que l'*échenillage* forcé ou l'obligation pour le propriétaire de détruire les chenilles qui se trouvent sur ses arbres de manière à les empêcher de se rendre sur l'héritage voisin, n'existe pas dans le pays et qu'en fait il n'est pas établi que les dommages dont se plaint le demandeur lui ont été causés par les chenilles provenant des arbres du défendeur : La Cour déboute le demandeur de cette partie de ses conclusions où il demande à être indemnisé pour cette cause : Considérant de plus en droit, que l'obligation imposée au propriétaire par l'usage ou par la loi de ne planter des arbres sur son héritage qu'à une certaine distance de la ligne limitative entre lui et son voisin se prescrit par trente ans, et que la possession pendant ce temps de tels arbres plantés à une moindre distance, libère le propriétaire de l'obligation de les abattre ; Considérant en fait que de la preuve faite en cette cause, il résulte que les arbres dont se plaint le demandeur existent et ont été tolérés par le demandeur et ses auteurs depuis plus de trente ans à l'endroit où ils étaient lors de l'institution de l'action et que partant le défendeur a, par suite de cette possession, été libéré de la servitude légale à laquelle autrement il serait soumis, et qu'au contraire il a par là acquis le droit de garder les dits arbres à l'endroit où ils sont actuellement, la cour déboute encore le demandeur de cette partie de son action où il demande que le défendeur soit condamné à les abattre et faire disparaître ; considérant en outre que cette prescription ne s'applique pas aux branches et aux racines de tels arbres, lesquelles branches et racines peuvent et doivent être retranchées en tout temps à la demande du propriétaire sur l'héritage duquel elles s'étendent et se prolongent, considérant enfin qu'il est constaté par la preuve au dossier que partie des branches et des racines provenant des arbres du défendeur en litige en cette cause s'étendent et se prolongent au-delà de la ligne de démarcation entre les parties, sur le terrain du demandeur, la Cour admet cette partie de la demande de l'appelant où il conclut à ce que les branches et racines des dits arbres s'étendant ainsi et se prolongeant sur son terrain, soient coupées, et ordonne en conséquence que sous quinze jours de la signification du présent jugement, le dit défendeur sera tenu de couper, retrancher et enlever toute cette partie des dites branches et racines qui dépasse la ligne de démarcation ou clôture séparant les héritages des dites parties, et qui s'étend et se prolonge au delà de la dite ligne du côté du dit appelant sur son terrain, sinon et à défaut de le faire par l'Intimé, sous ce délai, permis au dit appelant de le faire faire, aux frais et dépens du dit intimé, lequel est en outre condamné aux dépens, tant en Cour de première instance que du présent appel.

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Et la Cour, sur motion de MM. Day et Day, avocats de l'appelant, leur accorde distraction de dépens sur le présent appel en cette cause."

Day & Day, pour le demandeur.

Ferguson & Joseph, pour le défendeur.

Jugement infirmé.

(R. R.)

EN APPEL.

MONTREAL, 9 MARS 1868.

Coram DUVAL, C.J., CARON, J., DRUMMOND, J., JOHNSON J. *ad hoc*.

No. 93.

DORION,

(Demandeur en Cour Inférieure,)

APPELANT,

vs.

HYDE, *et vir*,

(Défendeurs en Cour Inférieure,)

INTIMÉS.

JUGE :—1er. Que l'acheteur poursuivi pour paiement du prix de vente et des intérêts sur icelui, n'a pas dénoncé les hypothèques dont la propriété vendue est chargée sans faire d'offres réelles pour se garantir des frais d'action.

2nd Que l'acheteur d'une propriété vendue avec la clause de franc et quitte mais grevée d'hypothèque peut retenir les intérêts stipulés au contrat de vente, tout en jouissant des fruits et revenus de la propriété vendue, si partie du prix de vente n'est payée par l'acheteur et ce indéfiniment jusqu'à ce que le vendeur donne caution ou fasse disparaître les hypothèques qui grèvent la propriété.

Dans cette cause, il y avait deux questions soumises à la décision de la cour, dont la première a été rapportée dans la dernière livraison du Jurist, page 49 ; et la seconde question qui se lisait comme suit : " En supposant que le vendeur " ne puisse forcer l'acheteur à lui payer le prix d'acquisition vu que la propriété " vendue est chargée d'hypothèque, peut-il au moin l'obliger à payer des intérêts " sur prix de vente quand surtout, il a été stipulé dans le contrat de vente que " l'acheteur paierait des intérêts au vendeur sur le prix de vente."

L'appelant allégua dans sa réponse que si la défenderesse a le droit de retenir le montant en capital du prix de vente, la défenderesse ne peut en loi retenir les intérêts dus et échus sur le prix de vente, vu que la dite défenderesse a perçu et perçoit les fruits et revenus de la propriété vendue.

La défenderesse répliqua généralement et la contestation fut liée là-dessus.

La Cour Supérieure présidée par son honneur le Juge Smith, rendit son jugement le 30 avril 1866, dont voici un résumé succinct.

Considérant que la défenderesse est endettée de la somme de $200.00 en capital et $53.08 pour intérêt sur balance du prix de vente ;

Considérant que la vente a été faite avec la clause de franc et quitte et que la propriété est hypothéquée pour un montant plus élevé que le prix de vente ;

Considérant que la défenderesse a raison de craindre d'être troublée, elle a droit de retarder le prix de vente et les intérêts sur icelui jusqu'à ce que le demandeur fait faire cesser le trouble ou donner caution hypothécaire, la cour maintient l'exception de la défenderesse mais condamne la défenderesse à payer les $200.00

échues pour le capital et les intérêts dûs, en ordonnant qu'il soit sursi à l'exécution du jugement, tant pour le capital que les intérêts, jusqu'à ce que le demandeur ait donné caution ou fasse cesser le trouble comme dit est;

Considérant que la dite défenderesse a dénoncé les hypothèques au demandeur avant l'institution de l'action et que le montant des hypothèques est plus élevé que le montant encore dû;

Considérant que le demandeur n'a offert aucune caution suffisante.

Considérant que le demandeur n'a aucun droit aux intérêts, déboute les réponses du demandeur.

La cour adjuge de plus que si dans un mois le demandeur n'a pas donné suffisante caution son action sera déboutée purement et simplement.

La cause portée devant la cour supérieure siégeant en révision, fut confirmée le 29 septembre 1866 par les Honorables Juges Berthelot, Monk, son honneur le Juge Badgley, *dissentiente*.

Son honneur le juge Badgley s'exprime ainsi en donnant les raisons pour lesquelles il différait d'opinion avec ses honorables confrères.

The action is brought by the vendor of the immoveable sold against the defendant, the purchaser in possession, for an instalment of the price, $200, and $453 of interest due upon the balance of the price of sale. The sale was for $1250, payable by instalments, whereof $600 have been paid; the interest was payable annually on the unpaid balance. The defendant met the action by the exception of apprehended trouble from existing mortgages, and required security. Three mortgages existing on the property anterior to the plaintiff's possession of it and three others created by himself, arising out of his contract of marriage with his first wife, out of her will and out of his *Tutelle* to their common children, have been set up as the grounds of the plea and the objects to be secured against. The plaintiff has replied a special replication by which he pleads that the three earlier mortgages have been prescribed, and cannot affect the vendee as *tiers détentrice* of the property sold by him to her; that he is prepared to give security for the mortgages created by himself which he offers by personal security as legally sufficient, but that at all events he is entitled to have the interest claimed by him and withheld by the defendant, and for which judgment should be entered in his favour.

As all these severally stated mortgages are set out in defendant's plea and in the judgment rendered, it suffices to observe that two of the three earlier mortgages were given in '36, and the third in March, '41; that one of the first two was registered in '42 and the others in '43. These mortgages were established upon the lot prior to its purchase in 1845 by Madame Dorion, the plaintiff's first wife, and consequently prior to his acquisition of it under her last will, she having died in April, '51. His sale was made to the defendant in March, '61. The time elapsed from the date of the three first mortgages and the plaintiff's acquisition of the *immeuble* and possession as *tiers détenteur* are shewn plainly, as well as that elapsed in addition from his acquisitions in April, '51, to his sale to defendant in March, '61. It would seem therefore that as to time settled for prescription *entre presents* by the article of the Custom, whether the mortgages run from their dates or as erroneously stated from their registration, prescription against

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them was acquired for the *immeuble* in question, and they were perfectly innocuous against the defendant as *tiers détentrice*, and could not give occasion either to trouble or the fear of trouble. As matter of practice and procedure, the party pleading an exception to the action in the nature of an affirmative allegation puts himself in the position of a plaintiff upon the exception, and plaintiff replying thereto is as it were defendant in exception, and may of course except and plead whatever would negative or tend to negative the exception in the case; the plaintiff has pleaded by his answer to the exception the legal prescription of the three first mortgages, which he is justified in pleading as being of those rights which belong to persons *ayant intérêt de les faire valoir*; one of the objects of prescription being the liberation of real property from mortgage, it is a favourable plea in law, and in this case, the replication is a plea of liberation to the hypothecary demand set up against him by the plea of the defendant. In thus pleading the existence of the mortgages, the defendant has assumed the position of a mortgagee by excepting the right of the mortgagees for enforcing their mortgages against her as *tierce détentrice*, as they then appeared to exist, and thereby necessarily subjecting her plea to be met by all valid descriptive objections against it. The time limited for prescription under the article having run out, the plea of trouble apprehended from the three first mortgages is not honest or legal, and therefore upon this point I am compelled to differ from the majority of the Court. We all agree upon defendant's right to have security against the mortgages contracted by the vendor himself which more than cover the entire balance remaining due upon the price of the sale, including the instalment sued for. For these the plaintiff must give the proper legal security, personal security being useless, unless accepted by the defendant. The only point remaining is the demand for the interest, which in my opinion is legally due and claimable by the plaintiff from the defendant. In whatever way interest may arise upon a sale of real estate, whether *ex naturâ rei* or by stipulation in the deed of sale, it cannot be brought into connection with mortgage trouble; the statute clearly applies only to the price of the sale. The statute says the purchaser fearing trouble may suspend the payment of *the purchase money*, the price, until *the vendor has removed the trouble* or *unless he shall give security against it*. These are the two alternatives, and they apply to the *price* only. By the effect of an hypothecary action against a *détenteur* and his *délaissement* of the mortgaged land, the land only, that is, its value when sold, would go to pay the mortgage money, but the *détenteur* would not be thereby relieved from the payment of the interest, the *jouissance* of the *fonds*, to his vendor; of course this applies to the interest or valued *jouissance* up to the institution of the action. The hypothecary action does not immobilize the interest due, nor can the mortgage have that effect, because neither go beyond the value of the mere land itself. The interest is independent of the mortgage right, and must belong to some one. It cannot belong to the vendee because he has agreed to pay it to his vendor, or if there be no stipulation respecting it, the law establishing it *ex naturâ rei* as *jouissance*, appropriates it in like manner to the vendor, otherwise the vendee would enjoy *fruits et intérêts* together. Interest in fact becomes as it were immobilized, or, more correctly expressed, stopped in its course, only by the seizure of the *fonds*, or by the deposit of pur-

chase money under proceedings for confirmation of title; except in these cases it belongs to the vendor and may be claimed by him *nonobstant les hypothèques*. The authorities are precise as to these only means above referred to for stopping the currency of the interest and the *jouissance des fruits de l'immeuble*; so long as the *terre* tenant has *les fruits* so long he must pay his interest; Grenier des Hyp. 1 vol. p. 300, explains this clearly: "A ce sujet je dois remarquer pour "éviter toute confusion dans les idées, que l'inscription seule n'est pas à proprement parler, un acte de l'exercice de l'hypothèque, elle n'a pas le caractère de "tout ce qui est prescrit de l'hypothèque, elle est seulement un signe de son existence, pour avertir les tiers. Mais cette hypothèque n'est point encore en "mouvement puisque l'inscription peut être effacée par l'acquittement ou par "l'extinction de la créance. Ce mouvement ne commence qu'aux poursuites, "dont l'objet est de fournir au délaissement ou à l'expropriation de l'immeuble "hypothéqué, afin d'opérer le paiement de la créance qui est le but de l'hypothèque. En sorte que l'inscription seule n'empêche nullement que le débiteur "n'eût la pleine propriété de l'immeuble qu'il a hypothéqué, et qu'il ne jouisse "de tous les droits attachés à la propriété. Cette idée est la clef des principes "en cette matière." And afterwards, he adds at p. 304 speaking of a sale of property having mortgages registered against it, "Il est de toute évidence que l'existence de ces inscriptions n'influe en aucune manière sur l'effet de la vente. Il "ne pourrait y avoir quelques clauses préjudiciables aux créanciers que sous le rapport des intérêts du prix. Or rien n'empêche que l'acquéreur ne paie les intérêts du prix au vendeur." And again the same author in his 2 vol. p. 321 says, "il résulte des principes que j'ai exposés, que tant qu'il n'y a point eu d'exercice de l'hypothèque, de la part des créanciers inscrits contre l'acquéreur de "l'immeuble grévé de cette hypothèque, celui-ci a su profiter des fruits et que "par conséquent n'est pas devenu débiteur des intérêts qui les représentent; il "peut se les retenir s'il les a payés au vendeur, ou si en acquérant il s'était libéré envers ce dernier du prix de la vente. S'il n'avait point acquis l'immeuble, "le débiteur en aurait joui, les inscriptions ne les auraient certainement pas empêchés, et dès lors l'acquéreur a pu en jouir de même. Il n'est donc pas tenu "envers les créanciers des intérêts du prix de la vente qu'à courir du jour de la "ratification qu'il leur fait, car l'inscription n'empêche point l'exercice de la "propriété de la part du débiteur et le tiers-détenteur fait les fruits siens tant "qu'il est de bonne foi. Après l'inscription, l'acquéreur est à l'égard des créanciers comme il était auparavant." The authorities to the same effect will be found cited from Zachariæ, Duvergier, Marcadé. In the case of Dinning vs. Douglas, decided in appeal and reported in 8 L. C. R. pp. 310, in which Chf. J. Lafontaine rendering the Judgment for the Court composed of himself and Judges Aylwin, Duval and Meredith, confirmed the Judgment of the S. C. "Qu'étant en possession des immeubles, jouissant des fruits et revenus, s'il peut retenir le prix de la vente, il doit au moins payer les intérêts. L'ancien droit et le "nouveau droit Français s'accordent à imposer cette obligation à un acheteur "placé comme l'est Dinning vis-à-vis de son vendeur." The Chief Justice closes by citing from Troplong 2 vol., vente No. 611, which may be reproduced even here with effect. "Mais en se dispensant de payer le prix, l'acquéreur n'est pas moins

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" obligé de servir les intérêts, il continue à jouir de la chose, il profite de la vente " il ne peut donc priver le vendeur des intérêts auquels il a droit : la loi a voulu " tout simplement donner à l'acquéreur les moyens de pourvoir à sa sureté par la " séquestration du prix entre ses mains, mais elle n'a pas voulu que ce fut pour " lui une occasion de s'enrichir aux dépens du vendeur. L'acheteur ne peut donc " empêcher les intérêts de courir qu'en consignant." With all this it appears to me to be just and reasonable that in this case which is that of a purchaser averring fear of trouble from alleged mortgages, he could have no more justifiable cause of such fear than his vendor, himself, and that the mortgages if indeed existing could not touch or claim *les intérêts du prix* except upon their due exercise of *poursuite pour leurs hypothéques*; the apprehension of the trouble must be confied distinctly to the price as representing the land covered by the mortgages and cannot reach to the interests which remain subject to the agreement of the parties for their payment or to the decision of law if they arise *ex naturâ rei*: upon this part of the cause, I am also compelled to differ from the majority of the Court, according to my view of the proper judgment in the cause, the security should be limited to the mortgages created by Plaintiff himself, until which the Defendant should have suspension of payment of the price of the land purchased, but she should be condemned to pay to the Plaintiff the $53 of interest claimed by him. The pretension that she may withhold the interest to make up for the paid instalments is unreasonable and illegal: the security if given covers the whole mortgage to be secured against and if not given, applies to the price as it is when the plea is pleaded: no such pretension is pleaded, and the contention must be taken upon the pleadings filed."

Le demandeur porta la cause devant le tribunal d'appel en alléguant pour raisons d'appel que l'appelant a le droit d'avoir les intérêts stipulés sur le prix de vente. La loi commune comme la jurisprudence du pays sont positives sur ce point, et établissent que l'acheteur ne peut jouir des revenus de la propriété et des intérêts en même temps, surtout quand il a été stipulé spécialement dans le contrat de vente que l'acheteur paierait des intérêts.

Dans la présente cause l'acheteur a promis de payer des intérêts dont le montant échû s'élèverait à la somme de cinquante-trois dollars et huit centins, lors de l'institution de la présente action, et dont le montant annuel s'éleve à la somme de $53.00 sur la balance du prix de la vente, que l'intimée redoit encore à l'appelant.

En supposant que l'intimée serait justifiable à retenir les intérêts du prix de vente et à jouir des revenus de la propriété tant que l'appelant ne pourrait faire disparaître les raisons de trouble, et en supposant que l'appelant ne pourrait jamais faire cesser ce trouble, l'intimée jouirait donc dans le même temps indéfiniment de la propriété du prix de vente et des intérêts sur le dit prix de vente, contre toute équité, contrairement à la loi et au grand détriment du vendeur, qui se trouverait injustement dépouillé de sa propriété ! ! Ce serait un moyen facile de s'enrichir aux dépens d'autrui ! !

Nous disons contrairement à la loi, parceque la loi, tout en voulant que l'acheteur qui craint d'être évincé, puisse retenir le prix d'acquisition jusqu'à ce que le vendeur fasse disparaître les raisons de trouble, ne peut vouloir que l'acheteur

retienne de même les intérêts tout en jouissant de la propriété. L'acheteur ne payant les intérêts qu'à terme fixe et après l'échéance, a déjà joui pendant tout le temps passé des revenus de la propriété qui représentent les intérêts que donne l'acheteur. L'acheteur dans ce cas ne souffre aucun trouble, aucune éviction.

L'acheteur serait reçu à dire qu'il sera lésé et qu'il en souffrira quelque dommage, toutes les fois qu'il y a des hypothèques sur la propriété. Les hypothèques n'affectent que le capital et quelque soit le montant des hypothèques qui grèvent la propriété, si l'acheteur est troublé ou évincé, il ne perdra que la propriété ou le prix d'achat. —Mais quant aux fruits, sera-t-il obligé de les rembourser? Non jamais! Pas plus que le détenteur d'immeuble affecté à une rente foncière qui en est évincé, aucune contestation là-dessus. L'acheteur a donc tort de dire qu'il souffre des dommages en payant les intérêts quand il jouit des revenus de la propriété. Maintenant examinons si toutes les autorités sont bien unanimes sur cette dernière question. Pothier, traité de la vente No. 284, dit: que l'acheteur doit les intérêts même pendant qu'un tiers le poursuit pour réclamations sur la propriété vendue. Il s'exprime comme suit: "L'acheteur doit les intérêts du prix, non-seulement avant qu'il a été mis "en demeure de payer, mais même pendant le procès, sur la demande qui lui "en est faite par un tiers pour délaisser, quoiqu'il ne soit pas obligé de payer "pendant ce temps le prix à son vendeur qui ne lui offre pas de caution; il ne "peut en ce cas se décharger des intérêts que par le dépôt du prix, n'étant pas "juste qu'il puisse jouir *tout à la fois et de la chose et du prix.*" Bien plus au No. précédent, le même auteur ajoute, que l'acheteur doit payer des intérêts quand il n'y en a pas eu de stipulé, si la chose vendue rapporte des fruits et revenus. Nos. 283 et 28[illegible], loco citato. Le code Napoléon, qui contient un article absolument rédigé dans le même sens que nos lois, sous le No. 1653, créa un grand nombre de commentateurs sur la question qui nous occupe, dont les commentaires sont tous unanimes à confirmer la doctrine de Pothier, que nous avons rapportée ci-dessus.

L'article 1653 statue: "Si l'acheteur craint d'être troublé ou a sujet de craindre d'être troublé par une action soit hypothécaire soit en revendication, il "peut suspendre le paiement du prix jusqu'à ce que le vendeur ait fait cesser le "trouble, si mieux n'aime celui-ci donner caution, à moins qu'il n'ait été stipulé "que nonobstant le trouble l'acheteur payera." Ce sont les mêmes termes de notre loi sur laquelle l'intimée s'appuie pour refuser à l'appelant le paiement des intérêts réclamés. Ceci posé, lisons les paroles mêmes des commentateurs sur cette question. Marcadé, vol. 6, sur l'art. 1653, dit: "Cet article se comprend assez par lui-même, ajoutons seulement 1o: que les intérêts, lorsqu'ils sont dus, couraient néanmoins pendant la suspension du paiement, puisque la crainte du trouble, ni le trouble lui-même, tant qu'il n'y a pas éviction, n'enlèvent pas la chose à l'acheteur, celui-ci ne pourrait faire cesser les intérêts que par la consignation du prix."

Dans la présente cause, il n'est pas besoin de dire qu'il n'y a pas eu de consignation, car la chose appert par le plaidoyer de l'intimée.

Zachariæ, droit civil français, vol. 2, page 533, dernier §, en disant que "l'a-

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"cheteur, qui a un juste sujet de craindre d'être troublé par une action de "nature à pouvoir entraîner son éviction est autorisé à suspendre le paiement du "prix, à moins que le vendeur ne fournisse caution pour sa restitution." Dans la note marginale, au bas de la même page, au No. 1o, ajoute: "Mais l'acheteur "ne peut même dans ce cas, se refuser au paiement des intérêts du prix," et cite plusieurs arrêts qui ont jugé dans le même sens. Vide la fin de la même page sur l'article 1652. Duranton, droit français, contrat de vente, vol. 16, page 381, No. 353, s'exprime dans les mêmes termes que les auteurs précédents, et cite la loi 13, § 20, ss. des act. emp. "*cum re emptor fructur acquissimum est eum pretii usuras pandere*, avec les arrêts de la cour de cassation du 22 mai 1827; de la cour de Paris des 5 juin et 7 juillet 1813; de la cour de Bruxelles du 7 Août 1809, dont un pourvoi a été rejeté à la cour de cassation le 16 mai 1814, et un arrêt de la cour de Bordeaux du 29 août 1833.

Au vol. 9 des "Lower Canada Reports," page 310, dans une cause de Dinning, appelant, *vs* Douglas, intimé, nous trouvons que le tribunal de la Cour d'Appel a confirmé cette doctrine, présidé par les Honorables Juges feu L. H. Lafontaine, Aylwin, Duval et Meredith. La note marginale se lit comme suit: "Qu'un acquéreur en possession de la propriété acquise et jouissant des fruits "et revenus d'icelle et retenant le prix d'acquisition, jusqu'à ce que le vendeur "se soit conformé à un jugement ordonnant de faire disparaître certaines opposi-"tions filées à une demande pour lettres de ratifications est tenu de payer à son "vendeur l'intérêt sur le prix d'acquisition à son échéance, nonobstant que ce "dernier ait fait défaut de faire disparaître les oppositions, ainsi qu'il lui était "enjoint par le jugement:" Le feu Juge en Chef Lafontaine, en rendant son jugement, dit: L'acheteur en possession des immeubles jouissant des fruits et revenus, s'il peut retenir le prix de la vente, il doit au moins payer les intérêts; l'ancien droit comme le nouveau droit français s'accordent à imposer cette obligation à l'acheteur et cite Troplong, vol. 11, 642.

Sirey, Codes Annotés, Liv. III, titre VI, de la Vente, Code Napoléon, page, 786, art. 23 sur l'article 1653 qui est le même que notre loi, rapporte un arrêt qui a jugé "Et même l'acquéreur qui a déjà payé une partie de son prix ne peut retenir les intérêts du surplus pour sureté de l'à-compte payé ni demandé qu'il soit compensé avec cet à-compte, alors que surtout le danger existait avant la vente, et conséquemment avant le paiement volontaire de l'à-compte, 2 jan, 1830, Riom. Cet arrêt en faveur de l'appelant convient en tous points avec cette contestation et répond pleinement à la prétention de l'Intimée de retenir les intérêts pour *compenser* les paiements déjà faits: mais son plaidoyer ne demande pas cette compensation, si même elle pouvait valoir en loi, que l'arrêt rejette sans hésitation; parceque la rétention du prix est établi par la loi; la rétention des intérêts ne peut découler que d'un contrat entre les parties, l'une est trouble, l'autre est compensation des sommes payées volontairement en à-compte.

L'intimée allégua dans son factum que la loi autorisait l'acheteur sous de telles circonstances à garder le prix de vente et que les intérêts faisaient parties du prix de vente comme l'accessoire fait partie du capital, et que la loi ne faisait aucune distinction et disait *shall get in the purchase money*, c'est-à-dire; tout l'argent de l'acquisition.

De plus l'Intimée prétendit que les lois citées par l'appelant et disant que l'acheteur ne peut garder le prix qu'en servant les intérêts ne s'appliquent qu'au cas où l'acheteur a payé plus que la moitié du prix de vente qu'il est exposé de perdre par les hypothèques considérables qui affectent la propriété.

Lors de l'argumentation, l'appelant répondit que les intérêts sont tout-à-fait distincts du prix de vente puisqu'ils n'entraient point en considération dans le contrat et que l'adage cité par l'intimée était faux dans le présent cas, comme dans l'espèce d'un propriétaire de la nue propriété d'un fonds qui quoique propriétaire du capital n'était point propriétaire de l'accessoire ou l'usufruit.

Que la question des intérêts devait se décider suivant la position des parties au jour de la passation du contrat de vente, sans considérer si l'acheteur avait payé une portion du prix de vente qu'il pouvait être présumé avoir payer volontiers comme il l'avait fait.

Qu'il suffirait en admettant la prétention de l'intimée pour un acheteur de payer une portion du prix de vente pour se donner le droit de garder le prix de vente, les intérêts et la propriété tout ensemble sans jamais en rendre compte comme il pouvait très souvent arriver du moment que le vendeur se trouve sans moyens de donner caution ou de faire disparaître les hypothèques.

CARON, J.—Action pour prix de vente, payable par installements, $200.00, et l'intérêt $53.00 pour l'année, et sur la balance du prix restée dûe.

Le jugement de la Cour Supérieure, en première instance, a renvoyé l'action ; un jugement de la même Cour siégant en révision a confirmé ce premier jugement ; le présent appel est des deux.

L'examen du dossier soulève trois questions. 1o. les trois hypothèques existant sur la propriété vendue antérieurement à l'acquisition de l'Intimée, sont-elles prescrites de façon à ne faire courir à l'acquéreur aucun risque de troubles ?

2o. La caution personnelle offerte par le demandeur est-elle légale et suffisante ?

3o. Le demandeur a-t-il, du moins, droit au intérêts qu'il réclame ?

La première question est sans importance et il n'est pas nécessaire de la décider, quoique la chose fut facile, parceque les autres hypothèques non prescrites encombrant la propriété vendue et sur l'existence desquelles il n'y a aucun doute, excèdent de beaucoup la balance du prix restée due.

La seconde question ne souffre aucune difficulté ; nul doute que le cautionnement personnel offert n'est pas légal et qu'il n'était pas nécessaire de l'accepter.

La troisième question est donc la seule qui demande quelque considération.

Les parties sont d'accord à dire que sous les circonstances, le défendeur a droit de garder le capital de la balance due pour se protéger contre le danger d'éviction qu'il court par suite des hypothèques dont est chargé l'immeuble ; mais l'appelant prétend que quant aux $53 d'intérêt demandées par l'action et que le jugement lui refuse, il aurait dû les obtenir ; il émet la proposition que les intérêts étant la représentation des fruits et revenus de l'immeuble, tant qu'il recevra ces fruits et revenus, il doit payer les intérêts. Pour bien apprécier cette prétention, posons un exemple: j'achète un immeuble pour £1000 payables dans un an avec intérêt ; avant l'échéance de ce terme, il se découvre sur l'immeuble

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une hypothèque excédant le prix de vente; le vendeur me demande son prix à l'expiration de l'année; mais comme il ne fournit pas caution ainsi qu'il y est tenu d'après notre statut j'ai droit de retenir le prix pour me protéger contre les suites de l'hypothèque découverte; mais comme je n'ai rien payé sur ce prix et que je le retiens en entier, étant considéré comme la vraie valeur de l'immeuble et partant comme une protection suffisante contre le risque auquel je suis exposé, je serai obligé de payer à mon vendeur les intérêts sur ce prix que je garde, car autrement, jouissant des fruits et revenus de l'immeuble et aussi des intérêts de l'argent qui en sont la représentation, j'aurais entre les mains plus qu'il ne faudrait pour rencontrer la perte à laquelle je suis exposée, lequelle ne doit être présumée s'élever qu'au montant du prix convenu; si dans ce cas je jouissais de l'immeuble et en même temps de l'intérêt de l'argent, ce serait pour moi un profit, tandis que je n'ai droit qu'à une assurance à une sûreté que je ne perdrai rien. C'est à ce cas ainsi posé que s'appliquent les nombreuses autorités citées de la part de l'appelant; sa prétention, ainsi posée et comprise, ne souffrirait aucune difficulté; reste à savoir si c'est là la position de l'appelant et si ses autorités s'appliquent au cas que le dossier représente; je ne le pense pas. Prenons l'exemple cité plus haut; supposons que la moitié du prix (£500) ait été payée comptant lors de l'acte, et que le reste soit payable dans un an, avec intérêt; qu'il se soit dans le cours de l'année découvert des hypothèques excédant le montant du prix total (£1000); à l'expiration de l'année, le vendeur me demande sa balance (£500) avec intérêt; s'il ne peut me fournir caution pour me protéger contre l'hypothèque dont est grevé l'immeuble, sans doute j'aurai droit de garder cette balance qu'il me demande; mais cette balance, que je garde ainsi, est-elle suffisante pour me garantir contre le danger que je cours par suite d'une hypothèque de £1000? Sûrement non. Est-ce que dans ce cas là, tant d'après le Statut que d'après la raison et l'équité, je n'ai pas droit de me protéger autant que possible contre un danger dont le vendeur est la cause, et dont il aurait dû m'informer; est-ce que je ne suis pas exposé à perdre les £500 que j'ai payés, et si c'est le cas, pourquoi ne me permettrait-on pas de garder aussi bien les intérêts que le capital; dans ce cas je ne suis pas plus que protégé, je ne le serai assez qu'en autant que les intérêts, en s'accumulant entre mes mains, formeront une somme suffisante pour m'indemniser des £500 que j'ai payés, dans le cas où je serai tenu de payer l'hypothèque ou de délaisser l'immeuble; ce n'est pas avoir deux profits ainsi que l'a prétendu l'appelant. Il est bien entendu que je serai obligé de tenir compte de ces intérêts sur lesquels même je serai, d'après les circonstances, tenu de payer, l'intérêt, mais sûrement on ne me forcera pas de me dénantir de ma sûreté, au risque d'en éprouver des dommages.

Tel est cependant le cas qui se présente en cette cause; la moitié du prix a été acquitté, il ne reste plus que $650, sur le capital du prix; pourtant il y a des hypothèques non prescrites à un montant beaucoup plus considérable; les intérêts et le capital restant ne seront pas suffisantes pour l'indemniser s'il paye les hypothèques ou s'il délaisse; il serait donc de toute injustice de ne pas lui laisser les intérêts. Ce n'est pas le cas supposé par les autorités dont nous avons parlé, et je suis d'avis que le défendeur a droit de garder les intérêts comme le capital sauf à régler, quant au montant, en temps opportun.

Le jugement dont est appel condamne le défendeur à payer au demandeur les deux cents piastres ($200) échues sur le prix et aussi les $53 d'intérêt demandées, pourvu que sous un délai fixé le demandeur fournisse bonne et suffisante caution, à défaut de quoi sous ce délai, son action sera renvoyée avec dépens.

Ce jugement est correct quant au fond. Il décide que sous ces circonstances l'intimée avait droit de retenir les intérêts tout aussi bien que le capital; c'était la question principale, de fait la seule vraiment importante. Cependant je pense que ce jugement ne saurait être confirmé en son entier, ni dans la forme sous laquelle il a été rendu.

Il ne peut être approuvé en son entier; il admet comme existantes sur la propriété plusieurs hypothèques qui paraissent avoir été prescrites et ne plus exposer l'intimée à aucun risque d'éviction; cependant le jugement déclarant que l'immeuble est encore affecté de ces hypothèques, l'appelant sera tenu de fournir caution quant à ces hypothèques tout aussi bien que pour celles qui en réalité ne sont pas prescrites et affectent véritablement la propriété. Il est donc à propos de ne pas imposer cette charge à l'opposant; il convient de lui laisser la liberté de ne faire disparaître que celles des dites hypothèques qui ne sont pas prescrites, et de ne fournir caution que pour celles qui ne l'auront pas été. Il suffit de déclarer généralement qu'il existe sur la propriété des hypothèques à un montant excédant la balance, en principal et intérêt, qui restait entre les mains de l'intimée.

Quant à la forme, il semble que sous les circonstances qui ont précédé l'institution de l'action, les dénonciations et requisitions faites de la part de l'intimée, tel que mentionné plus haut, l'appelant n'avait aucun droit d'action existant alors, et que celle portée aurait dû être renvoyée purement et simplement. Cependant le jugement condamne la défenderesse à payer la somme demandée, en par le demandeur donnant caution, et ce n'est qu'à défaut de tel cautionnement sous le délai imparti, que l'action sera renvoyée.

Ce jugement conditionnel et incertain me paraît susceptible de difficultés, la principale desquelles consiste à déterminer qui décidera du montant du cautionnement à donner, et de la suffisance et solvabilité des cautions qui seront offertes; si, sur ces questions, les parties ne s'accordent pas il faudra un nouveau procès et le jugement rendu en cette cause restera sans exécution.

Pour ces raisons il me paraît que le jugement doit être réformé, et l'action renvoyée purement et simplement, tout en réservant au demandeur le droit de se pourvoir ainsi qu'il avisera.

Vide le jugement rapporté dans la dernière livraison de Février, page 50.

Kelly & Dorion, pour l'appelant.

Mousseau & David, pour l'intimée.

(P. A. A. D.)

PRIVY COUNCIL.

DECEMBER 13TH, 1867.

In Appeal from the Court of Queen's Bench, District of Quebec.

Coram LORD ROMILLY (MASTER OF THE ROLLS), SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, AND SIR RICHARD TORIN KINDERSLEY, J. J.

JEAN BAPTISTE RENAUD,
(Plaintiff in the Court below,)

AND

JOSEPH GUILLET *dit* TOURANGEAU,
(Opposant in the Court below,)

LEGACY—RESTRAINT ON ALIENATION.

HELD:—Reversing the judgment of the Queen's Bench, that a condition attached by a testator to a legacy, with the view of rendering it not seizable by the creditors of the legatee, is not valid either by the old Law of France or the general principles of jurisprudence.

The facts of this case fully appear in the report 7 L. C. Jur. 238 and *seq.*

The opinions of Messrs. Justices Meredith and Berthelot there appear. The opinion of Mr. Justice Alywin, transmitted to the Privy Council, is in the following words:

After stating the facts and the judgments of the 5th of May, 1862, and the 10th of March, 1863, he stated his opinion in these terms: "I am of opinion that this latter judgment is correct, and that the judgment of the Superior Court was wrong, inasmuch as the last relied upon the law of *France* exclusively, without reference to the law of *Lower Canada*, which is the governing law. The *considérants* or reasons given by Mr. Justice *Taschereau*, who decided the cause in the first instance, appeared to me to be insufficient. First, because it is stated that *la défense d'aliéner contenue en telle clause du dit testament contient une défense d'aliéner qui ne peut en loi produire d'effets sérieux et doit plutôt être considérée comme renfermant un conseil plutôt qu'une défense sérieuse d'aliéner.* I cannot understand how a will like that of the testator, which forbids any and every alienation to be made within twenty years from the day of the death of the testator, and directs that any and all deeds and instruments contrary to the intention of the testators shall be null '*sous peine de nullité de tous actes qu'ils feront contraires à mon intention*' can be interpreted as not being serious and as merely conveying a simple counsel or advice to be followed or to be disregarded either by the legatee or devisee, or by a creditor, as the case may be. Ever since the 41 Geo. III, C. 4, in *Lower Canada* (Consolidated Statutes, C. 34, p. 321) we have an express enactment which altered the old French law. By sect. 2 of the Consolidated Statutes it is enacted that every person of sound intellect and of age, having the legal exercise of his or her rights, may devise or bequeath by last will and testament, whether the same be made by a husband or wife in favour of each other, or in favour of one or more of their children, as the testator sees meet, or in favour of any other person or persons whatsoever, all and every their lands, goods, or credits, whatever be the tenure of such lands, and whether they be '*propres acquets*' or '*conquets*,' without any reserve, restriction or limitation whatsoever. I can only see the judgment of the Superior Court as directly contrary to the

Statute. Under the old French law *a défense d'aliéner* if perpetual, without an entail or substitution, or an indication of another party who was to take the property bequeathed and to carry out the condition which was broken by the legatee, was regarded as null and void. But the doctrine of *Ricard* and *Pothier* had only reference to a perpetual or an unlimited *défense d'aliéner* and had no relation to a temporary *défense* for a time limited (*Troplong* "*Donations*," No. 271, *Demolombe*, vol. xviii. No. 291). Another *considérant* again appears to me to be erroneous: it is this: *que la clause susdite ne peut être considérée comme léguant la propriété ou la possession des dits immeubles au défendeur à titre d'alimens ou comme insaisissables à moins d'une stipulation expresse à cet égard*, as to stipulation, it could not be found in a will, but if it be a condition that the alienation during twenty years shall be null, and if it be the result *ex vi termini*, that the property becomes *insaisissable*, the will must carry out the bequest whatever may be the form; the substance, that is, the intention of the testator must be carried out. In the words of the judgment in appeal, it is more correct to say that *la prohibition d'aliéner doit être réputée équivaloir à une clause d'insaisissabilité temporaire:* So much, then, with reference to the first judgment. I come now to the judgment of the Superior Court of the 5th of May, 1862, by Judge *Taschereau* upon which the same appeal has been brought, which is the judgment of the 20th of September, 1865, when the Court was composed of the Honorable the Chief Justice *Duval*, and of *Aylwin*, *Meredith*, *Drummond*, and *Mondelet*, Justices, and the judgment of the Superior Court was again reversed, Justices *Meredith* and *Drummond dissentientibus*. It is necessary to notice that upon the return of the record to the Court below, the respondent obtained permission to file another plea of perpetual exception in lieu of that originally pleaded, and the parties having again proceeded before the same Judges, the second judgment of the 15th of April, 1864, was rendered. The judgment of this court, which was delivered on the 20th of September, 1865, reverses this last judgment, and contains a narrative of the proceedings which occurred after the amended plea of exception pleaded. It is to be observed that the second judgment is precisely the same as the first with reference to the question of *défense d'aliéner*; it is, therefore, unnecessary that anything further should be added to what has already been said. With reference to that portion of the second judgment of Judge *Taschereau* which relates to the rights asserted on the part of the respondent with reference to *Judith Kenner*, the wife of the testator, it is only necessary to state that to enable the respondent to claim the share of the appellant, it would be necessary that there should be a *partage*, or partition, of the whole of the property of *Tourangeau* and his wife as the *communauté de biens* to be divided between the heirs. But to do this, it would be required that a new suit should be brought to effect the partition, hence the opposition would still be maintained instead of being rejected."

Sir R. Palmer, Q. C. (with whom was Mr. H. M. Bompas) for the appellant: The question turns upon the construction of the clause in the will of the testator, the respondent's father, restricting alienation or incumbrance, for a period of twenty years, of real estate bequeathed absolutely to the respondent.

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Such restriction, if valid, goes to defeat the just claims of creditors and leaves the respondent in the full enjoyment of the property; a result not to be found in any code of law. Now we contend that this clause of the will is null and void in law as against public policy. Mr. Justice *Meredith*, whose judgment we rely on and desire to avail ourselves of, as part of our argument controverts the authorities cited by Justices *Aylwin* and *Berthelot* and shows that the passages cited from *Demolombe* and *Troplong* do not bear out the conclusion sought to be drawn from them. This is apparent from the provisions of the civil law on which the old law of France is founded. Dig. B. xxx. Tit. 1, Art. 114 § 14. B. xxxii. Tit. 1, Art. 38 § 4. It is to be observed that both *Troplong* and *Demolombe* are writing upon the law as it at present exists, namely, the *Code Civil*, and expounding the old French Law which is applicable to our case only so far as it illustrates or defines the present law: *Troplong, Droit Civil Expliqué; contrat de Mariage*, Tom. iv., p. 63, No. 30. It is almost needless to illustrate the case by a comparison with the law of this country. It is no answer to say that the testator might have provided against alienation by giving the estate over on breach of the condition; here he gives his immoveable property absolutely; the condition is subsequent and not precedent, and there is no gift over in case of breach of the condition. By the law of England, such a restriction, depending upon a condition subsequent, would, even if there was a gift over, be invalid: *Holmes v. Godson* (1); Saunders v. Vautier (2); Doe dem. Mitchinson v. Carter (3); Exparte Dickson's Trusts (3); Egerton v. Earl Brownlow (4); but even if the clause in the testator's will restricting alienation or incumbrance were valid it could only affect one half of the lands seized, and the opposition ought to have been dismissed as to the residue of the lands. Even if the prohibition against alienation or incumbrance in the will were valid, it is only against the alienation by act of the devisee himself, and cannot operate against the right of the appellant, an execution creditor, coming in by operation of law, and not by the act of the devisee.

LORD ROMILY:—

Their Lordships are of opinion that it is not necessary to trouble Mr. Bompas, having heard Sir *Roundell Palmer* very fully, as we are all quite clear as to the principles and law to be applied to this case. We are of opinion that such a restriction as was made by the testator *M. Tourangeau* in his will was not valid either by the old law of France or the general principles of Jurisprudence. We may add that we entirely concur in the reasons stated in the very able judgment of Mr. Justice Meredith, which have been forwarded with the record. Their Lordships will advise Her Majesty that the judgment of the Court of Queen's Bench in this case be reversed, and with costs.

Appeal maintained.

(1) 8 D. M. & G. 152.
(2) Cr. & Ph. 241; (3) 8 Term Rep. 57 & 300.
(3) Sim. (N. S.) 37.
(4) 4 H. L. Cases.

Sir R. Palmer, Q. C., & H. M. Bompas, Counsel for Appellant.
Bischoff, Coxe & Bompas, Solicitors for Appellant.

(F. W. T.)

COURT OF QUEEN'S BENCH, 1868.

MONTREAL, 29TH FEBRUARY, 1868.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

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

JOHN SUPPLE,
(Plaintiff in the Court below,)
APPELLANT;

AND

HENRY THOMAS,
(Defendant in the Court below,)
RESPONDENT.

FORGED MORTGAGE—ASSIGNMENT—IMPUTATION.

Henry Thomas, on the 13th of October, 1860, in good faith assigned to John Supple a forged mortgage, whereby certain property in Upper Canada was declared to be mortgaged to him by James McLean, to secure advances over a period of five years to be made by Thomas to Robert McLean, a son of James McLean. Thomas received for the assignment $3884.23. On the 30th December, 1860, Supple made an agreement with Robert McLean, under which they had various commercial transactions together independent of and apart from the matters referred to in the mortgage, and *inter alia*, Supple advanced money to Robert McLean to get timber out of the woods. It appeared that Supple charged Robert McLean in his account with the amount paid to Thomas for the assignment of the forged mortgage, and also charged interest and commission; that a judgment was obtained by Supple against Robert McLean, in Quebec, on the 4th September, 1861, for $11,673.63, and subsequently, general credit was given of the proceeds of the timber got out by Robert McLean under his agreement with Supple.

HELD:—1° That Thomas was bound to guarantee to Supple the existence of the debt at the time of the assignment

2° That Thomas could not insist upon the application of the proceeds of the timber sold to the payment of the consideration paid by Supple to him for the assignment ($3,884.23) before the payment of the advances to get out the timber under the agreement.

This was an appeal from a judgment rendered in the Superior Court, at Montreal, on the 3rd March, 1866, in the following terms:

SMITH, J.—"The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and evidence of record, seen the admission made and given by the said defendant, and having upon the whole duly and materially deliberated; Considering that the plaintiff hath established by sufficient proof the execution of the said mortgage declared on in this action, and the transfer thereof to the said plaintiff by the said defendant, and further considering that the said mortgage was intended to cover and did in fact cover a debt due to the defendant by one Robert McLean, and for the security of which debt, James McLean, the father of the said Robert McLean, had become responsible, and for which a mortgage was given, to wit, the said mortgage; and further considering that it appears from the evidence adduced that the said plaintiff had entered into a contract with said Robert McLean to advance moneys to the said Robert McLean to enable him to get out timber, and that by and with the consent of James McLean, the purchase and assignment of the said mortgage was by the said consent of the said father and son to stand for, and operate as a security to the plaintiff for the said advances so to be made by the said Supple to the said Robert McLean, and further considering that the said advances were so made by the said Supple to the said [illegible] McLean under

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the said agreement, and that the sum paid by the said Supple to the said defendant was in truth and in fact an advance in cash so made to the said Robert McLean by the said Supple, and was so obtained to secure the mortgage to his the said Supple's name to secure himself for the repayment of the advances made by him to the said Robert McLean, and by and with the knowledge and consent of the said James McLean, and further considering that the timber was so got out by the said Robert McLean, and was in the possession of the said Supple to secure him for the said advances, and further considering that the said timber was sold by the said Supple, and the said advances were paid so far as the proceeds of the said timber were sufficient for that purpose, and the said Supple charged the said sum in account with the said Robert McLean, and for which a judgment was obtained by the said Supple. And considering that the said sum of nine hundred and seventy-one pounds being the first advance so made by the said Supple to the said Robert McLean, was so paid by the proceeds of the sale of the said timber to the said Supple by the said Robert McLean; and further considering that the said transaction was well known to the said James McLean, and that the knowledge of the said mortgage being a forgery was not known to the said defendant until long after the sale of the said timber, and the absconding of the said Robert McLean and recourse of the said defendant against the said Robert McLean, thereby entirely lost to the said defendant. The court doth dismiss the action of the said plaintiff against the said defendant with costs distraits to Messieurs R. & G. Laflamme, Attorneys for Defendant."

This judgment was rendered in an action for the recovery of $3884.23 cts. with interest from the [illegible]ctober, 1860, and for recovery of costs that amounted to $240.00. The plaintiff also claimed damages to the amount of $4000. His claims [illegible]ed on the following allegations:

An indenture of assignment made at Montreal on the 13th October, 1860, between plaintiff and defendant in consideration of $3884.23 cts., paid by plaintiff, defendant assigned, without any warranty whatever, save of his own act and deed only, a certain indenture of mortgage in and by said assignment declared to have been executed by James McLean, of Richmond, in the County of Carleton, Upper Canada, in favour of Henry Thomas, bearing date 26th September, 1859, and declared to exist upon certain lands therein described, situate in Upper Canada, to have and to hold the said mortgage and the said debt thereby secured to the said plaintiff, subject nevertheless to such right of redemption as the said premises were now subject by virtue of the said indenture.

That the indenture was duly executed according to the Law of Upper Canada.

The transfer of the said mortgage purported to have been executed on the 26th September, 1859, in the name of James McLean, and to have been signed in presence of one R. McLean, the son of James McLean, the party purporting to have executed the said mortgage, whereby, as appear on the face thereof, the lands purported to have been mortgaged in favour of the said Henry Thomas by the said James McLean, as the owner of the premises.

That it was alleged in the said mortgage that whereas the defendant had agreed with the said Robert McLean upon getting this security to furnish to

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Robert McLean such goods as he might require for five years, not to exceed £1000 at 6 months' credit, with interest at 6 per cent., and the said James McLean had agreed to become security for his said son to the amount of £1000, it was therefore declared that James McLean did thereby bargain, sell, and assign to defendant the lands therein described. The said transfer to be null if the amount was paid. That at the date of the transfer the plaintiff supposed a mortgage to exist, and paid the sum of $3884.23. [illegible] plaintiff afterwards discovered that the said mortgage so pur[illegible]ssigned never existed, that the said James McLean never [illegible]ge in favour of defendant, in fact that the said alleged mo[illegible]d and counterfeited, that the money given by the plaintiff t[illegible]d been paid for a pretended, false and forged mortgage, and [illegible]alue given therefor.

That the plaintiff instituted a suit brought on the faith of the existence of the said mortgage, and that he was put to great costs, loss and expenses, and paid the same, to wit, to the extent of £60, and moreover that he suffered damages to the amount of one thousand pounds currency.

To these allegations the defendant pleaded:

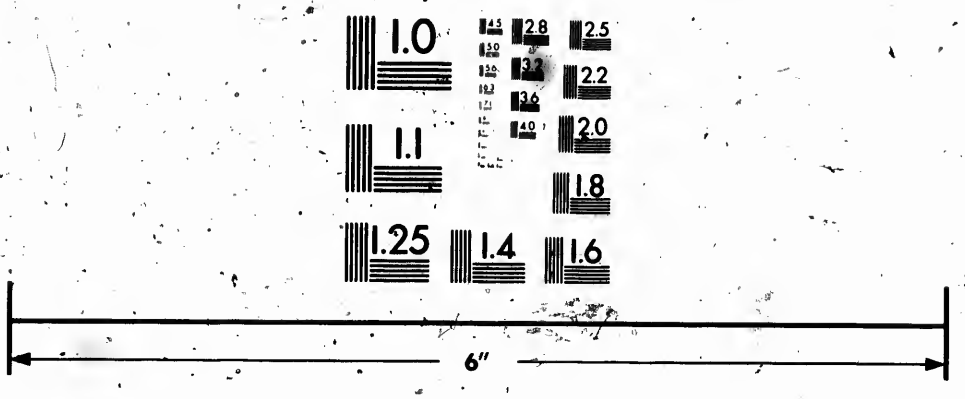
That at the time of the transfer of the said mortgage by him to the plaintiff, he (the plaintiff) was engaged with the said Robert McLean in divers transactions, and was making advances to him in goods and moneys, and had against him an account, and did continue to have such transactions with the said Robert McLean after the transfer of the said mortgage.

That the said plaintiff did receive from said Robert McLean since the transfer of the said mortgage more than a sufficient sum of money to pay the amount which he sought to recover from the Defendant by the present action, and that the same had been wholly paid unto him, the said Plaintiff, by the said Robert McLean, who was personally and primarily bound to pay and satisfy said mortgage.

The defendant moreover pleaded a *défense en fait*.

A. Robertson, Q. C., for appellant—The plaintiff's *enquete* consisted of the answers of the Defendant, *on faits et articles*, the articulations of facts, and the admission (No. 25 of record) establishing the assignment to plaintiff of the alleged mortgage, that the mortgage was forged, and the action brought by plaintiff dismissed on that ground; that the Defendant was present at the trial in Upper Canada, and admitted the mortgage was forged—although at the date of the transfer, he was not aware of it; and that the costs of said suit amounted to the sum of £57 11s. 6d. The defendant examined two witnesses only, the plaintiff, and one Hunter, formerly plaintiff's clerk. With their depositions are produced statement of accounts between Robert McLean and the appellant, also the agreement between them, under which the timber was got out, and a copy of judgment obtained by the plaintiff in the Superior Court at Quebec on the 4th September, 1861, for $14,373.63. It appears that the plaintiff charged Robert McLean in his account, with the amount paid to the respondent for the transfer of the alleged mortgage of James McLean, and also charged interest and commission, and that subsequent to the judgment, general credit is given of the proceeds of timber got out by Robert McLean under said contract with the appellant. The respon-

IMAGE EVALUATION TEST TARGET (MT-3)



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dent contends this was a payment by Robert McLean of the amount paid to respondent by appellant in consideration of the transfer; that the moneys obtained out of the sale of Robert McLean's timber should be imputed not to the payment of the advances made by appellant to Robert McLean to get out the timber sold, but on the sum paid to respondent for the transfer of the forged mortgage. The balance due the plaintiff by Robert McLean, including the consideration of the transfer, interest and commissions, was reduced by the sale of timber in May, 1862, to the sum of £866 3s. 8d. which, with the admitted costs of suit and interest, would exceed the sum paid to the respondent for the transfer, which sum the appellant sought to recover by the action. It will be seen that the transfer was made by the respondent to the appellant "without any warranty or guarantee except of his own acts and "deeds only." Is the respondent, under these circumstances, bound to guarantee the existence of the debt at the time of the transfer? It is submitted that he is so bound, that there being no hypotheque, nor any binding obligation on James McLean—the instrument being a forgery—the respondent is bound to guarantee the appellant and restore him the money paid to obtain the transfer. The following authorities may be referred to:—

Dans la vente d'une créance comme dans la vente de tout autre objet, la garantie de droit est toujours sous-entendue. Le cédant doit donc garantir l'existence de la créance au temps du transport—2 TROPLONG, Vente No. 931.

No. 933. If debt is transferred with hypotheque, the hypotheque must exist. "Il faut que l'hypothèque promise soit entière au moment du contrat."

No. 936. Transport, *sans garantie*, does not dispense *cédant* from guaranteeing the existence of the debt at the moment of transport.

No. 932. Even if transport was made, *sans restitution de deniers* even then, "Elle laisse subsister le recours du cessionnaire pour défaut de l'existence de la créance."

14 TOULLIER, No. 273. p. 318.

Art. 1693. C. N. Celui qui vend une créance doit en garantir l'existence au temps du transport quoi qu'il soit fait sans garantie.

POTHIER, Vente, No. 1559,—C'est ce que les auteurs appellent la garantie de droit, parceque le cédant en est tenu, de plein droit et sans qu'on en soit convenu par la nature même du contrat qui n'existerait pas sans cette garantie laquelle consiste à promettre que la créance existe et qu'elle est véritablement due au cédant, &c. Ces principes sont empruntés du droit romain.

12 DALLOZ v. VENTE p. 919.—La loi oblige le cédant à la garantie de l'existence de la *créance* et pas seulement *du titre*, il faut que le cédant prouve qu'il a vendu une chose utile, qu'il justifie son droit à la chose vendue, ainsi il y aurait lieu à la garantie si le titre de la créance vendue était nul ou se trouve compensé.

1 BOURJON, p. 466, No. 17.—Approfondissons la garantie de droit; par l'effet de la garantie légale tout cédant est obligé (encore qu'on n'eût parlé d'aucune garantie par le transport) de garantir que la dette cédée était due et subsistante au jour du transport —Ib., No. 17.

No. 19—Cela a lieu non-seulement dans le cas que le transport ne fait mention d'aucune garantie, mais même dans le cas qu'il est fait sans garantie.

No. 20.—Les raisons qui fondent la proposition précédente; c'est à dire qu'il resulte toujours une certaine garantie d'un transport quoique la lettre d'icelui semble l'en exclure sont: 1. Qu'il y aurait dol de la part d'un cédant qui exigerait un prix d'une dette non existante. 2. Il est garant de son fait aussi que du défaut de propriété dans sa personne et des hypothèques procédantes de son chef, &c.

2. Can the respondent legally insist upon the application of the proceeds of the timber sold to the payment of the consideration by appellant to the respondent ($3,884.23) before the payment of the advances to get out the timber under the contract?

The appellant submits that the respondent has no such right; that the respondent gave no value whatever to the appellant for the moneys paid; the transfer was an absolute nullity. *There was no transfer made to the appellant of any debt against Robert McLean.* There is no evidence in the record to shew the indebtedness of Robert McLean to the respondent; the transfer ought to have been of a debt against him as the principal debtor and of the supposed security contained in the mortgage. But the claim against the original debtor was not transferred, and the respondent cannot be allowed to invoke the subsequent recognition by Robert McLean of the debt as due by him, namely, by his giving a confession of judgment on a claim which included the amount of the transfer. It will be seen also that the contract between the appellant and Robert McLean bears date on the 31st December, 1860, the transfer being dated the 19th October, 1860: At the date of the transfer there appears to have been no debt due appellant by Robert McLean except a small balance of an old account.

By this contract the appellant was to make advances to Robert McLean for the purpose of getting out certain timber, which was to be delivered to the appellant, and which was in fact delivered on the 19th March, 1861. The contract says: the lumber so delivered was to be held by the appellant and to be "considered as his *bonâ fide* property until full payment to be made of the aforesaid advances, and of any other debt due by the said Robert McLean to the said John Supple." This was equivalent to an agreement by which the appellant was authorised to pay himself; first his advances on the timber, and next any other debt due. This imputation was agreed to, and so long as the advances remain unpaid, respondent ought not to be allowed to say that the imputation should be made upon the moneys paid for the transfer. There was no liability or indebtedness by Robert McLean for the moneys paid by the appellant to the respondent binding him to pay the amount, until the confession of judgment on the 2nd September, 1861, copy whereof is fyled. The charging of the moneys paid to the respondent created no liability on Robert McLean. It was charged at a time when the appellant supposed the mortgage had a legal existence. It was charged in error on reliance that the transfer was a good transfer, it was only years after the confession of judgment, that the result of the suit against the supposed mortgagor brought out the fact of the forgery. The entry therefore in the books, and the acceptance of the confession of judgment, cannot be held as a waiver of recourse against Thomas as *cédant*. The forgery had not then been discovered, and the course of conduct of the appellant ought not to be held, as a waiver of his recourse. It is not pretended the respondent was in bad faith in transferring a mortgage which had no existence. The transfer was made in good faith, but it was accepted in like good faith, although, years afterwards, it was found out to be worthless. Both *cédant* and *cessionaire* being in good faith, the loss must be thrown upon the *cédant* who obtained appellant's money without legal cause

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or consideration, and who is in law bound to warrant the existence of the debt and mortgage transferred. The appellant held only a transfer of a supposed mortgage against James McLean, but no transfer of debt against Robert. The mortgage turned out to be a forgery; the loss must fall upon the party who undertook to transfer what did not exist. That imputation must be made on the oldest debt does not alter the matter. All the advances for the transfer had been made to Robert McLean before the date of the confessions of judgment. These advances constituted the oldest debt contracted by Robert McLean towards the appellant, and the confessions of judgment first gave the appellant a right to claim payment from Robert of the mortgage transferred, as if made by James McLean. To extinguish the debt against the respondent arising out of his liability for the forged mortgage, by applying the proceeds of the timber got out with appellant's advances, is to contradict the terms of the contract and the objects the parties had in view. When the appellant paid the $3884.23 to the respondent it was on the faith that the mortgage existed. He states in his evidence he considered the land mortgaged was worth a thousand pounds more than the sum paid, and that he wished to get as much security as he could. He was about to make a contract with Robert McLean and to give him advances to get out timber, and by stipulating that his advances on the timber should be paid out of the proceeds, as well as any other debt, he cannot be held as agreeing to apply the proceeds of the timber first to pay for a transfer which was of no value, and which the respondent is in law liable to guarantee as an existing debt. The judgment appealed from was rendered, on the ground, *first*, that James McLean was shewn to have consented to the transfer to the appellant, and that the transfer was to avail, with the consent of James McLean, to the appellant, as security for any advances made to the son Robert: and *secondly*, because the appellant had given no notice to the respondent of the mortgage being a forgery until after Robert McLean had absconded from the Province, thereby depriving the respondent of his r[illegible]e. It is respectfully submitted that the grounds above mentioned are [illegible]er pleaded by the defendant, nor proved in the record. No consent was ever given by the mortgagor, nor in any way proved. It is in evidence that the respondent was notified of the allegation of James McLean that the mortgage was a forgery. The respondent was examined as a witness for the now appellant in his suit against James McLean, and it was the evidence given in that suit and the judgment dismissing the action that first established the forgery. The appellant testifies he had no opportunity of shewing the original mortgage to James McLean nor was it in law necessary he should have called in the respondent *en garantie*, nor given him formal notice of a forgery of which the appellant had no better proof than the denial of the apparent mortgagor, a denial which was communicated to the respondent by the appellant. The respondent does not complain of his not being called in *en garantie* in that cause. The only evidence as to what is called in the judgment the absconding of Robert McLean is contained in the deposition of Hunter, where he says: "I believe Robert McLean had left the country "previous to the receipt of the proceeds of the sale of the said lumber." The defendant rested his defence on the alleged payment by Robert McLean of the

sum paid for the transfer, and ought not to have been allowed the benefit of a pretended consent of James and Robert McLean to change the nature of the transfer and make it apply as security for a contract not then made, and which is in direct contradiction to the terms of the mortgage by which it was to secure a debt to the respondent, and not a debt due to the appellant.

R. Laflamme, Q. C., for respondent. There is no doubt that the mortgage in question was a forgery. The defendant who at the time such mortgage was executed, was making advances to Robert McLean the son, demanded as a security a mortgage from the father James McLean; the son forged the signature of his father, and produced an apparently good instrument executed in favor of the respondent who continued upon the faith of this document to make advances to the son Robert, within the limit of the amount secured. At a subsequent period Robert McLean intending to carry on lumber operations, applied to John Supple, the appellant, to make him advances and to pay off his liabilities to the respondent, and his other creditors, which was agreed to. To effect this the appellant took a transfer of this mortgage from the respondent, who made over the same without any warranty whatever. It is not denied that in the case of a transfer of a debt made without warranty that the assignor is bound to warrant the existence of the debt: this question does not arise in this case. The appellant contends that the respondent Thomas cannot claim any imputation because there was no debt due by Robert McLean to Thomas, that there was no transfer because the transfer was an absolute nullity, because the mortgage was a forgery; that by the contract entered into between him and McLean on the 31st of December, 1860, he was entitled to pay his advances first, and next any other debt due to him. That for these reasons the rule of appropriation of payments could not obtain.

The amount of this mortgage was unquestionably due by Robert McLean to Thomas. His indebtedness is not in issue. Moreover, it is proved by the transfer, the admission of Supple himself, the account fyled, which includes this amount, upon which Supple obtained a confession of judgment from Robert McLean in Quebec. With respect to the transfer, according to law, the position of Thomas in relation to Supple and Robert McLean, and that of Robert McLean himself towards Supple in so far as the question of imputation can arise, must be examined and determined irrespectively of the question of forgery. What was in effect the substance of his mortgage? It was a debt due by Robert McLean to Thomas, for the security of which he, McLean, pretended to have obtained the security of his father's property. He owed the amount to Thomas; there can be no question as to that fact. The mortgage was given to cover any amount which Thomas might advance during a period of four years. The moment Thomas had made the advances, Robert McLean was liable, and the mortgage attached to the claim. Thomas transferred his claim, with its accessory the mortgage, to Supple, who thereby substituted himself as creditor for Thomas' claim. Supple admits that he paid this debt of McLean as an advance. It is proved by his own books, his account fyled, wherein the amount and the commission of five per cent. is entered as the third item of advances made by him to McLean. The claim, therefore, against *Robert McLean* was genuine; he was bound to pay it to Supple as he

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had bound himself to pay it to Thomas. If the mortgage had been good, as the most onerous debt for him in the absence of any appropriation, he was entitled to appropriate the first payments to its discharge. If considered as an ordinary debt, in the absence of any appropriation, payment of it must be held to have been made at the date of the receipt of any amount sufficient to cover it. Thomas stood in the same position as that of a transferrer of a promissory note, genuine as to the maker, but with a forged endorsement. If sued by the holder, the transferrer would certainly be entitled to set up that the maker had paid the note, and therefore had no claim against him, and it would be no answer on the part of the holder to say that the note was a nullity because the principal security, *i. e.* the endorsement, was a forgery.

The contract between Supple and Robert McLean of the 31st December, 1860, upon which Supple relies to deny to the respondent the right of claiming the appropriation of payments, contains no stipulation whatever which might lead to any such conclusion.

By the contract Supple undertook to make *advances to* Robert McLean *for supplies already made and to be made by the said John Supple, to enable the said Robert McLean to manufacture* timber; the latter transferring all the timber made and to be made, and to be considered as his property *until full payment of the aforesaid advances, and of any other debt due by the said Robert McLean to the said John Supple*, and a commission of five per cent. on the amount which he shall require to pay, and on £600 which he had already advanced.

It is proved by Supple himself and his bookkeeper, that the amount paid to Thomas was charged by him as one of the first advances, with the commission of five per cent. and interest. On the 19th December, 1864, he obtained a judgment at Quebec against McLean upon a confession from McLean for $11,373, which comprised the whole of the advances, including the amount of this mortgage, interest and commission. The only balance now due to him upon this judgment and subsequent advances, is admitted by him to be £866 3s. 8d. What proportion of this balance represents the original advance made by Supple for the payment of the mortgage? It is impossible to ascertain, but assuredly a proportion of it has been paid. Supposing it to be a part of the whole sum of $11,373, for which judgment was obtained, over $10,000 of this amount has been paid. If the amount of the mortgage is an integral part of the judgment, it has been paid in proportion. If it is an item of the running account, the credits given, without any special appropriation, for over $8000, prove that the first items were paid in 1862, and consequently this mortgage. It is impossible to conceive upon what ground Supple can now subtract from his account and his judgment this debt of McLean, which he willingly paid and included in his charges and advances, retaining at the same time his commission and interest, and calling for more from Thomas, with all this, than is actually due him. If Supple recovered his money he could not charge commission, and according to law he is not entitled to obtain interest upon money paid by error when it was received in good faith.

The only ground upon which Thomas can be made liable is that he transferred a claim he had against Robert McLean, which was secured by a mortgage upon the property of McLean's father, he standing as the *garant* first of the existence

of the debt, and secondly of the mortgage. As such, he had a right to exercise all the rights of a *caution*, and demand the imputation of payments to be made on the debt for which he is made responsible, if it stood first in date and in the words of 2 *Pardessus* Droit Commer. No. 587; p. 525. Paris 1841.

"La caution n'étant obligée de payer qu'autant que le débiteur cautionné ne payerait "pas lui-même quelquefois, le cautionnement n'ayant été donné que pour certaines dettes "d'un débiteur, le caution a intérêt d'examiner si ce dernier est libéré, d'entrer en con- "séquence, dans l'examen des comptes courants qui pourraient exister entre ce débiteur "et son créancier, et de faire valoir, dans son intérêt, des exceptions qui n'auraient ni "force ni utilité si elles étaient invoquées par le débiteur principal.

"Un exemple peut rendre ce principe facile à saisir. Pierre et Paul ont été en compte "courant depuis le 1er Janvier jusqu'au 31 octobre 1840, et dans ce compte étaient "portées au débit de Pierre, certaines obligations garanties par un aval ou par un cau- "tionnement que Jacques avait donné; au moment où le compte courant est arrêté et ba- "lancé, Pierre est déclaré débiteur envers Paul, d'un solde de 25000 francs; Paul, qui ne "peut parvenir à en être payé par son débiteur, agit contre Jacques en vertu du cautionne- "ment qu'il avait donné pour quelques-unes des dettes entrées dans le compte courant au "débit de Pierre; Jacques aura le droit d'examiner les éléments de ce compte courant "et de s'assurer s'il n'y a pas eu une époque où par l'effet de la comparaison entre le "crédit et le débit, les engagements qu'il avait cautionnés se sont trouvés éteints par la "compensation. Supposons en effet, que ces engagements eussent été échus le 1er Mars; "que le 1er Avril, Pierre se soit trouvé par l'effet de versements effectifs, ou de reconvre- "ments faits pour son compte, dans une position telle, que ce jour là son crédit excédat "son dédit mais qu'ensuite par l'effet de nouvelles opérations, il ait été constitué et ait "continué jusqu'à la fin du compte, d'être en débit, ces événements postérieurs ne peu- "vent rien changer au fait accompli le 1er Avril. La compensation qui est un élément "essentiel du compte courant, avait éteint les engagements cautionnés par Jacques; "et des négociations postérieures auxquelles il n'a pas participé, des engagements nou- "veaux qu'il n'a pas cautionnés, ne peuvent faire revenir ceux que cette compensation "avait éteints.

The same principle was affirmed by the Superior Court of Queen's Bench in a case somewhat analogous to the present one, which will be found in 1 Lower Canada Rep. p. 136, Symes *vs.* Perkins.

STORY ON CONTRACTS, § 878 *Of the appropriation of payment.* "The general rule in re- "gard to the appropriation of payment on account, is that the party who pays money "has a right to apply the payment as he sees fit; if there be several items due from him "he can designate that one to which it shall be applied. If the party making this pay- "ment do not at the same time make any specific appropriation thereof then the party to "whom the payment is made may apply it as he pleases. If neither party make any "specific application of the payment to the discharge of any particular debt, the presump- "tion is, that the first items of a running account, or that the debts which are first in "point of time, are to be thereby discharged. In all cases if the parties themselves "have omitted to make any specific appropriation of payments, the law will appropri- "ate them according to the justice and equity of the case, for the benefit of both parties. "This general rule applies equally in favor of sureties and garantors; and any appropri- "ation made by the party, entitled at the time to make such appropriation is binding upon "all parties.

Shaw *v* Picton 4 B. & C. 715 S. C. 7 Dowl. & Ry. 201 Dunn *vs.* Slee. Holt, 399.

Devaynes *v* Noble, 1 Meriv. 585. Plomer *v* Long. 1 Stark N. P. 153; 1 Story Eq. Jurisp. § 459. a to 459. h 3d Ed. where the whole matter is elaborately discussed and all the cases cited Bosanquet *v* Wray, 6 Taunt 597. Bank of Scotland *v* Christie, 8 Clark and Fennell R. 214, 227, 228. Thompson *v* Brown Mood. and Malk. 40.

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"In cases where there are running accounts between the parties, however, there being "various items of debt on the one side and of credit on the other, occurring at different "times, the rule obtains, that where payments are made without special appropriation "by either party, they are to be applied to the discharge of the separate items in the or- "der of time in which they stand in the account. The earliest item of debt being first "extinguished, and so on until the whole account of debt is cancelled.

Theobald. Principal and Surety. P. 221 n. 239.

"If there is only one account, and that a running account, there is no room for any "other appropriation than that which arises from the order in which the receipts and "payments take place and are carried into the account. Presumably in such a case, it is "the first item on the debit side of the account which is discharged or reduced by the "first item on the credit side. The appropriation is made by the very act of setting "the two items against each other. Upon that principle all accounts current are "settled.

BABOLEY, J.—The appellant's declaration sets up a deed of assignment executed at Montreal in Lower Canada by respondent to appellant on the 13th Oct., 1860, of a mortgage purporting to have been executed on the 16th Sept., 1859, by James McLean of Richmond, in Upper Canada, in favor of said Thomas, and registered the next day, by which certain real property in Upper Canada was declared to be mortgaged to secure Thomas for advances to be made by him to Robert McLean, son of the said James McLean, over a period of five years, payable at a credit, but not to exceed £1000 or $4000; that since the transfer was made the plaintiff had discovered that the pretended mortgage so assigned had never had existence, that it was a forged instrument made by the said Robert McLean in his father's name, without his father's knowledge or consent; that these facts had been established in a suit at the city of Ottawa, brought by the appellant (plaintiff) to foreclose said pretended mortgage, and that the appellant was entitled to recover from the (defendant) respondent the sum of $3884.23 paid as the consideration of the transfer and the cost of the action against the pretended mortgagor. The declaration alleged that the appellant, supposing the indenture of mortgage to be good and effective, paid to Thomas the consideration money therefor in good faith and on the faith of its authenticity, and that Thomas was by law bound to warrant to him its existence as a mortgage at the time of his assignment thereof; but that the *pretended* mortgage was false, forged, and entirely worthless, and that the considerati[on] money paid to Thomas by the appellant was without value given for it and by error, and Thomas was therefore liable to refund the same. The respondent did not deny the liability charged upon him, but pleaded specially his discharge and avoidance thereof by reason, that at the date of the assignment the appellant was making advances to Robert McLean and had an account with him, and continued to have such transactions with him, and that since that date, the appellant had received from Robert McLean, who had paid the same and who was personally and primarily bound to pay the mortgage, a more than sufficient sum of money to cover the sum demanded of Thomas by the appellant in this action. Thomas also fyled the plea of general issue, which, of course, was but little or only partially applicable to the averments of the declaration; the facts to which it might have applied having been admitted by the parties, namely, the costs and expenses incurred in the injectment suit in Upper Canada, and the actual forgery and worthlessness of the

pretended indenture of mortgage. It may also at once be stated, that the accounts of the alleged transactions between the appellant and Robert McLean, adverted to in the special plea, have been produced and fyled of record, that those transactions with their dates and figures have been proved and verified, and that the contention at the bar did not turn upon those particulars, nor have been objected to by the respondent, his discharge being specially rested upon the rule of imputation, his entire argument going to support that pretension, and therefore the onus of proving it rested with him. Now, the transactions between the appellant and Robert McLean were as follows, as shewn by the general account produced. Previous to the date of the assignment Robert McLean was indebted to the appellant in the sum of £15 8s., for an omission in their settlement of account of the previous Feb.—which was charged in the books at 1st Oct., 1860. The assignment was made on 13th Oct., 1860, when the consideration money was entered £971 1s. 2d. at which date was also charged against Robert McLean £12. 10s., paid to him in Montreal. The next entry, was on the 7th Nov. following, with five others to 31st Dec., 1860, inclusive, for money advances to Robert McLean, in all £100. 1s. 6d.; at this last date Robert McLean and Supple, the appellant, executed an agreement at Ottawa, in Upper Canada, whereby the appellant was to make and give to Robert McLean from time to time, advances and supplies for the manufacture during the winter season of 100,000 cubic feet of timber, to be taken by him to Quebec at the earliest opening of the navigation; the advances in money were to include those already received by Robert McLean, in consideration whereof, Robert McLean transferred over, made and delivered to Supple, all the red and white pine timber, then made and to be made by him during the season, with full power to take and hold possession of all or any part of the said timber as his Supple's *bonâfide* property, *until full payment of the aforesaid advances* and of *any other debt due by Robert McLean to Supple*, as well as of the commissions, &c. After the date of the agreement, the account shows in detail numerous entries evidently in connection with this timber agreement and incidental thereto, such as supplies, advances in money, raftsmen's wages, expenses of sale and keeping over at Quebec, leaving finally a balance upon the general account of £866. 3s. 8d., due to Supple by Robert McLean. Only two items appear to the credit of the account, viz., £3[illegible]. 3s. 1d., for gross proceeds of sale of part of the timber entered as of 26th August, 1861, and the sum of £1925. 0s. 7d. for gross proceeds of the remainder of the timber sold, entered as of the 20th May, 1862. Now this is the state of the account and transactions, as shewn in the general account, which included the amount paid by Supple to Thomas for the alleged mortgage, and it is out of these two items of credit, that Thomas, *pro tanto*, expects to relieve himself from the money paid to him by Supple for his imaginary mortgage, and which items he claims to have a right to impute against the money demanded of him, entirely irrespective of the agreement between Supple and Robert, under which they arose. It will be remembered that the transaction between Supple and Thomas was entirely independent of Robert. Thomas sold to Supple, a security which had still four years to run from that time, the price by Thomas appears to have been measured by him at the amount of Robert's

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liability to him, and that value he required to receive and did receive for its transfer to Supple, whilst Supple appreciated the property mortgaged, as quite available for the purchase money paid by him: hence, therefore, this transaction of the assignment was entirely between Thomas and Supple. Now the plea rests upon the rule of the imputation of payment, which can only arise between the creditor and debtor, or between their representatives upon a continuance of the original account between the latter, or between the original debtor or creditor and the representatives of the other. The transactions between Thomas and Supple did not bring Thomas personally within the character of either debtor or creditor in the account between Supple and Robert McLean, because, in so far as the mortgage was concerned, Robert McLean had nothing to do with it civilly, and could only be affected by it criminally. It appears to be plain enough, therefore, that strictly, Thomas could not avoid his own liability by the credits given to Robert in his account with Supple. The law rule of imputation as between creditor and debtor is precise, the debtor may in the first instance appropriate the payment; if he omit to do so, the creditor may appropriate, but if neither appropriate, the law will appropriate the payment to the earliest debt. This is the rule, but it is also a rule, that the creditor is not limited to the time of payment to state, as the debtor is, to what debt he will apply it, but may make such application at any period, until the law should be called in to make it for him upon his failure to do so, after action brought, namely, upon submission of the case for the verdict of a jury or for the decision of a court of Justice. But again the rule of imputation admits of exceptions and distinctions, which vary the application of the general rule as between the parties to the original account. It is scarcely necessary to repeat, that the transaction between Thomas and Supple was a solitary one, having no reference or connection with any possible transactions between Supple and Robert. As between Thomas and Robert, the mortgage was a guarantee to the former, but it lost that character when Thomas sold it to Supple, simply and absolutely as an available mortgage which the latter paid for upon the supposition of its actual existence as a mortgage, and which it is plain he would not have paid for at all, had he been aware of the untruthfulness of his supposition. Now had no subsequent transactions been had between Supple and Robert, Thomas could have had no possible plea to avoid his paying back the money he had received for what had no appreciable value. But for the sake of argument admitting that the forgery of the mortgage did not relieve Robert McLean from his commercial engagement to Thomas, and allowing Thomas a beneficiary interest in Robert's payments to Supple, Thomas, at all events, could have no more right than Robert could have, to the imputations spoken of, and it is therefore essential to consider carefully the transactions as they really existed between Supple and Robert. It is true that the account produced shows an entire account between them, and the rule is, that it is the first item on the debit side of the account, that is discharged or reduced by the first item on the credit side of the account, the appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled and particularly cash—and bankers accounts. 1 Mer. 608, 2 B & Ald 39, 4 Q. B. 794. But notwithstanding this rule, and although the pay-

ment of money on account generally, without specific appropriation of it, would in many cases go to discharge the first part of an account, yet that rule cannot be taken to be conclusive; it is evidence of an appropriation only, and other evidence may be adduced, as of a particular mode of dealing or of an express stipulation between the parties, which may vary the application of the rule, as shown in 1 Mer. 572, Clayton's case, see also 4 B. and Ad. 768, 4 Q. B. 792. In this case the lumber agreement between Supple and Robert establishes the mode of dealing between them for their transactions under it, and this is the usual and notorious course of agreement constantly made between lumbermen, manufacturers and merchant suppliers, all through our timber districts. The agreement speaks for itself. By the express terms of the agreement Robert was to manufacture timber by and from Supple's advances, which timber so manufactured Robert conveyed and transferred absolutely to Supple as his property; and in fact, it is proved, that delivery of the timber was made to Supple, to be by him realised and held until the full payment of those advances was made out of the proceeds of the said timber. The contract between them was absolute, and Robert McLean was really only Supple's agent to manufacture timber for him out of his advances, which were to be accounted for and paid first out of the sale, and surplus, if any, was to accrue to the benefit of Robert for the discharge of any other debt he might owe to Supple. The advances were to be first paid, the surplus was to be at the credit of Robert, but in Supple's hands. These transactions, therefore, are manifestly within the exception to the general rule of the payment of the first item at the debit side by the first item at the credit side, and any other mode of appropriation in this case would be gross injustice against Supple, and in breach of the agreement with which Thomas could have no direct interest.

There is another objection derivable from the mortgage itself and the time of its enforcement; assuming *ex argumento* that Robert had to do with it. The mortgage could not be enforced until 1864, when alone its genuineness could be tested by a suit at law, and when in fact that test was applied by which its forgery was established. Now the timber transaction between Supple and Robert took place in 1861 and 1862, and the account between them was closed in 1862, when the balance of £865. 3s. 8d. was made up; whilst the mortgage purchased by Supple as an available security, at least for the price paid for it, was running; but, being only enforceable after four years from the assignment, until it did become enforceable it was no more than an extended credit, postponing the demand for immediate payment and giving time therefor on a future day. Nor does Thomas allege that it could be enforced before its maturity, which could not legally be any more than a promissory Note or Bill of Exchange before it had run out, and at which time only could the rule of the first item of the account apply. Until the mortgage matured, therefore, Supple could, under no circumstance, have been compelled by Robert or by Thomas to apply the proceeds of the timber to *that* transaction, and *before it fell due* the proceeds of the timber had been already appropriated under the express condition of the timber agreement.

The Judgment in Appeal was *motivé* as follows:

The Court, &c., considering that the said Indenture of Mortgage in the said

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declaration and pleadings mentioned, purporting to bear date on the twenty-sixth day of September, one thousand eight hundred and fifty-nine, by one James McLean, and Mary McLean, his wife, to and in favor of the said Henry Thomas, was false and forged, and of no value or validity. Considering that the assignment and transfer of the said mortgage by the said Henry Thomas to the said John Supple by indenture of assignment, executed between them at Montreal, on the thirteenth day of October, one thousand eight hundred and sixty, for the consideration of three thousand eight hundred and eighty-four dollars and twenty-three cents, equal to the sum of nine hundred and seventy-one pounds one shilling and twopence, to the said Henry Thomas, paid by the said John Supple at the date last aforesaid, was null and void, the said mortgage then being false or forged and of no value. Considering that the said consideration money was so paid by the said John Supple to the said Henry Thomas by error and mistake, under the supposition that the said Indenture of Mortgage was good and valid. Considering that the said Indenture of Mortgage had been delivered to the said Henry Thomas by one Robert McLean, to secure the said Henry Thomas for advances to be by him made in goods to said Robert McLean therein mentioned, which advances at the date of the said assignment amounted to the said sum of three thousand eight hundred and eighty-four dollars and twenty-three cents, received as aforesaid by the said Henry Thomas from the said John Supple under supposition of the validity of the said Indenture of Mortgage. Considering that the said John Supple and Robert McLean had various commercial transactions together independent and apart from the said Assignment and before the time when the said Indenture of Mortgage became and was exigible, which transactions were entered into under and by virtue of the agreement between them filed of record, bearing date the thirtieth day of December, one thousand eight hundred and sixty. Considering that on the first day of August, one thousand eight hundred and sixty-two, on which day of the said transactions, made up and balanced to the said first day of August, one thousand eight hundred and sixty-two, there then remained to the credit of the said transactions in the hands of the said John Supple, in favor of the said Robert McLean, the sum of two hundred and two pounds seventeen shillings and elevenpence. Considering that the said Henry Thomas has a beneficiary interest in the said mentioned balance to have the same applied in deduction of the said consideration money paid to him for the said assignment, and of the interest therein claimed of him by the said John Supple. Considering that the said John Supple has a right and is entitled to demand and have of and from the said Henry Thomas the payment to him of the said sum of nine hundred and seventy-one pounds one shilling and twopence, with interest thereon from the said thirteenth day of October, one thousand eight hundred and sixty, less the said above balance of two hundred and two pounds seventeen shillings and elevenpence, leaving a balance due thereon to the said John Supple on the said first day of August, one thousand eight hundred and sixty-two exceeding the sum or balance which the said John Supple has himself in and by his account current by him produced and fyled in this cause, fixed and established at the sum of eight hundred and sixty-six pounds three shillings and

eightpence. Considering that the said Henry Thomas is also indebted to the said John Supple in the sum of sixty pounds for law costs and expenses necessarily by him incurred as in the said declaration mentioned for the prosecution at law of the said Indenture of Mortgage, but without effect, from the forgery and in validity thereof. Considering that in the judgment rendered in this cause by the Superior Court, sitting at Montreal, on the 31st day of March, one thousand eight hundred and sixty-six, there was error, doth reverse and set aside the said judgment and proceeding to render such judgment as the said Superior Court should have rendered, doth declare the said indenture of Mortgage to have been and to be false and forged and worthless; that the assignment thereof made by the said Henry Thomas to the said John Supple was null and void and of no effect; that the consideration money therefor received by the said Henry Thomas from the said John Supple on the 13th day of October, one thousand eight hundred and sixty, was so paid by the said John Supple to the said Henry Thomas by error and mistake without consideration therefor; that the said Henry Thomas was liable to pay to the said John Supple the said sum of money, with interest thereon from the date last aforesaid, together with the sum of sixty pounds by the said John Supple by him necessarily paid, laid out and expended for the enforcement of the said Indenture of Mortgage, but without legal effect therefor, the same being found to be false and forged; that from the said consideration money and interest made up to the first of August, one thousand eight hundred and sixty-two, the said Henry Thomas is entitled to have imputed and deducted the sum of two hundred and two pounds seventeen shillings and elevenpence at the credit of the said Robert McLean on the said first day of August, one thousand eight hundred and sixty-two, in the hands of the said John Supple for the balance of the particular dealings and transactions, with express stipulations therefor between them, leaving a balance in favor of said John Supple upon the said consideration money, with interest thereon, by himself stated, in his accounts current in this cause filed, to be eighteen hundred and sixty-six pounds three shillings and eightpence, with interest thereon from the said first day of August, one thousand eight hundred and sixty-two, doth condemn the said Henry Thomas to pay and satisfy to the said John Supple the sum of nine hundred and twenty-six pounds three shillings and eightpence, to wit the sum of eight hundred and sixty-six pounds three shillings and eightpence aforesaid, with interest thereon from the first day of August, one thousand eight hundred and sixty-two, and the sum of sixty pounds, with interest thereon from the second day of August one thousand eight hundred and sixty-four, date of the service of process in this cause, with costs of the said Superior Court and of this Court, &c.

Judgment reversed.

A. & W. Robertson, for appellant.
R. & G. Laflamme, for respondent.
(F. W. T.)

Appeal Side.

MONTREAL, 9TH JUNE, 1868.

Coram DUVAL, Ch. J., AYLWIN, J., CARON, J., DRUMMOND, J., BADGLEY, J.

No. 83.

O. D. TEASEL,

(*Defendant in Court below,*)

APPELLANT;

AND

ELIZABETH PRYOR,

(*Plaintiff in Court below,*)

RESPONDENT.

HELD:—That in an action of damages, based on the allegation that the defendant knowing a horse to be unsound falsely and fraudulently represented the animal to be sound, and that the plaintiff purchased the horse from defendant, on the faith of the truth of such representation, it must be established beyond doubt that these facts are true, to entitle plaintiff to recover.

This was an appeal from a judgment rendered in the Circuit Court, at Montreal, by the HON. MR. JUSTICE MONK, on the 10th day of June, 1867, condemning the appellant to pay to the respondent the sum of $114 and interest and costs.

The demand of the respondent will be best understood by reference to the *ipsissima verba* of the declaration, which were as follows:—

"That on or about the eleventh day of December last (1865), at Montreal aforesaid, the said plaintiff purchased from the said defendant a certain brown horse belonging to the defendant, he being then and now a horse dealer, *on the representation of the defendant that the said horse was sound and a good carriage horse*, and which the plaintiff had represented to the defendant she wanted, and plaintiff avers, that *the said defendant represented* and stated the said horse *to be sound*, and in every way and respect fit and suitable *for a carriage horse*, and said plaintiff *purchased* the said horse *on such statement and representation;* the said sale being so made for and in consideration of the sum of one hundred and seventy dollars currency, which the said plaintiff paid and caused to be paid to the said defendant, and the said horse was by the plaintiff received.

That *shortly afterwards* the said plaintiff *perceived* that the said horse was *unsound in his forelegs, and wholly unfit for a carriage horse*, of *all* which the said defendant was *well aware*, and was duly notified.

That notwithstanding every care on the part of the plaintiff, and the fact that the said horse was only exercised, and not put to severe work, the said horse, shortly after the said sale, was found to be, and continued to be unsound in the forelegs, and unfit for a carriage horse.

That the said defendant at Montreal aforesaid, on or about the day first aforesaid, *falsely and fraudulently represented* the said horse to be "*sound as a bell,*" and an *excellent carriage horse; well knowing* said horse to be *unsound*, and that it was *not* an *excellent carriage horse*, but *wholly unfit to be so used* and the said plaintiff *trusting* to the said *representations* of the said defendant, bought

and paid for and received said horse, being unaware of the fact that he was unsound.

That the said plaintiff informed the said defendant so soon as she discovered said horse to be lame, of the fact, and demanded of the defendant to take back the said horse, in default whereof the plaintiff would cause the same to be sold.

That a notarial demand and protest was given to defendant, more particularly by protest made on the thirteenth day of January, eighteen hundred and sixty-six, by the ministry of Stuart and colleague, notaries public, but the defendant refused to take back said horse, or to return the price thereof, and the said horse was afterwards, to wit, on the day named and notified to the said defendant, sold by public auction in presence of defendant at Tattersalls, for the net sum of sixty-one dollars.

That the said plaintiff by reason of the premises was obliged to expend divers large sums of money in and about keeping said horse and in causing him to be sold, and in protesting and in notifying said defendant, as well as by the loss accruing by said sale, and had suffered other great loss and damage, to wit, in the sum of one hundred and fifty dollars."

The appellant pleaded in effect, that true it was he had sold and delivered to the respondent a certain brown horse, on or about the 12th day of December, 1865, for $170 currency; that he was served with notarial demand and protest of the 13th of January, 1866, referred to in the declaration; and that said horse was subsequently sold at Tatersalls for $61 currency, to one Arthur Ryan, who subsequently sold the horse to another party for $150 currency; but that all the other allegations of the declaration were untrue and were expressly denied by the appellant.

The following was the judgment of the Court:

"The Court having heard the parties by their counsel, upon the merits of this cause, examined the proceedings, proof of record, and having deliberated, considering that the plaintiff hath proved by legal and sufficient evidence the material allegations of her declaration, and particularly that the horse in question in this cause, at the time of the purchase thereof, from defendant, was and continued to be unsound, and that defendant was aware of the unsound condition of said horse when sold, and that he was unfit for the purpose for which said horse was purchased.

The Court doth condemn the defendant to pay to the plaintiff the sum of one hundred and fourteen dollars currency, difference between the price paid defendant for the horse and the nett proceeds realized by the sale of the said horse, with interest upon the said sum of one hundred and fourteen dollars, from the third day of February, one thousand eight hundred and sixty-six, date of the service of process in this cause until actual payment and cost of suit, *distraits* in favor of Messrs. A. & W. Robertson, the attorneys of the said plaintiff."

Bethune, Q. C., for appellant:—It is to be noted, that neither in the declaration nor in the judgment, is it contended, that the appellant *warranted* the horse to be sound. And the respondent's own son, who was the only witness to the bargain, attests distinctly that the appellant *refused to warrant* the horse, stating,—"*I* will not warrant him, or any other horse under any consideration," or words to that effect.

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The *declaration* alleged, that the appellant *represented* the horse to be *sound* whilst *knowing* him to be *unsound*, and the *judgment*, on the other hand, proceeds on the theory simply, that when the purchase was made, the horse "*was and continued to be unsound*," and the appellant "*was aware of the unsound condition of said horse when sold:*" ignoring the question, whether or not the appellant *represented* the horse to be sound.

The horse was sold (according to the declaration) "on or about the 11th December," 1865. And (according to Mr. Holland's evidence), on Christmas day (25th December, 1865), they "drove to Church with the horse, and, on the afternoon of that day," he "found that the horse was dead lame and unfit to be used." The horse was then (according to the same evidence) placed in charge of MR. SWINBURNE, veterinary surgeon, who attended him "for some 8 or 10 days." And he added, that he "understood the horse was *used* on one occasion *after* that to drive the plaintiff to town."

On the 12th January, 1866, the horse was placed at Alloway's, where he remained until the 16th of that month, when he was sold at Tattersalls.

ALLOWAY swore, that he carefully examined the horse and that he was in his opinion unsound, being lame, and that such lameness existed "for some time." He declined, however, although repeatedly pressed to do so, to define the length of the period "*some time.*" Alloway also asserted that the horse was lame on the day of the sale by Auction.

Alloway further stated, that "*some three weeks after* the auction sale," he showed the horse to Mr. Williamson, veterinary surgeon, R. A.),—that he was *then* in the stables of Ryan who had bought him at the auction,—that he "brought him out into the street and trotted him,—and that he was then *very lame.*" "And WILLIAMSON attested, that about the beginning of February," 1866, he had examined a large brown horse, at Ryan's stables, which had been pointed out to him by Alloway. In his opinion the horse thus pointed out was permanently unsound. He added that the horse "was also lame, although *not very* lame," and that he considered "the difficulty with the horse must have been of long standing."

And one GEORGE CLARK, a groom of Alloway, who had been a groom with appellant during a part of the time the horse was at the appellant's stables, and up to the time of the sale to respondent, described the horse as "sluggish," and asserted, that his legs had to be often bandaged with wet bandages, and that Mr. Swinburne, was obliged to give him a *ball* sometimes, and sometimes a *powder*, and sometimes a *drench*. He also stated, that while the horse was at Alloway's "he went *tender* on his fore feet." But, *whilst the horse was at the appellant's* he had *never seen the horse lame*, nor did he "*ever hear of his being so*,"—and this notwithstanding that the horse was driven out for exercise, as long as two hours at a time.

This was the respondent's whole case, which the appellant respectfully submits was of itself altogether insufficient to sustain the respondent's action.

Then, on the part of the appellant, Mr. JOHN S. HALL proved, that he had borrowed the horse in question from the appellant, from about the 16th July, 1865, to the 30th Aug., 1865. That during that time he drove him *every day*

from River St. Pierre (where he lived and which was about *three miles* from town) *to town and back*, and that during this time the "*condition and driving*" of the horse "*materially improved*." He also stated, that he "*never perceived any unsoundness* in him," and that "*he never showed any tenderness or lameness.*" And he added that he saw the horse occasionally afterwards, and that he seemed to him to be "*improved, both in condition and appearance*, and decidedly *heavier*," than when he had him.

WILLIAM EVA, one of appellant's grooms, swore, that he "*never saw the horse lame all the time he was in defendant's stables*," nor did he "know *anything wrong* about him,"—nor did he ever "*show any signs of lameness*," whilst in the appellant's stables. In contradiction of George Clark, he also swore, that the horse was *never bandaged or physicked*, as asserted by Clark.

SWINBURNE also testified, that he had shod the horse about the 15th December, 1865, and that he then showed no "*lameness or any indication whatever of unsoundness.*" He then explained, that he met the respondent's servant a day or two afterwards driving the horse in Sherbrooke Street,—that the day "was an *extremely cold one*, and the animal was in a *very overheated condition*, as if he had been driven at a very great pace. *He was in fact steaming all over as if he had been in the river.*" The witness then remarked to his son who was walking with him that he should not wonder if the horse should be seized with an illness. In verification of his prediction he was called in about 8 or 10 days afterwards to attend the horse, and, from the description given by him of the condition of the horse, it is manifest, that the state of the horse on Christmas day, as described by Mr. Holland, was in great measure (if not solely) caused by the over driving and over heating referred to by Swinburne, who says himself that "if the horse had been driven, in the state he saw him in when he visited him, he certainly would appear to be lame." Then, as to the state of the horse at the auction sale, he swears positively, that "the horse was trotted round and showed no *signs of lameness*,"—that he moreover "*carefully* examined the horse's *legs*, and that he "was then *perfectly sound* about his *feet* and *legs*." He also testified that he knew the horse, "from the time Mr. Teasel first brought him down from Upper Canada," and that he "*never knew of the horse either being unsound or lame, during all the time he was at Mr. Teasel's.*" And, in contradiction again of George Clark, he swore, that he "*never attended that horse on any account whatever*, while he belonged to the defendant," and that he "*never gave him during that time any medicine of any kind.*"

And ARTHUR RYAN, (a horse dealer) who bought the horse at the auction sale, testified, that the horse was *trotted round*—that he *examined* him himself, —and that he was "*perfectly sound.*" He added,—"he certainly was *not* lame, *either then or at any other time* when I had him." He then explained, that he was surprised at the low price at which the horse was knocked down to him, and he "therefore *drove him about the next day*," in his trotting cutter, and "*found him all right.*" And he swore positively, that he "only kept him *five or six days*," when he "sold him to an American *horse dealer* named Kenna, for the sum of $125 in silver." And he added, that in the following March he

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saw the same horse in Brighton, about six miles from Boston, and that "he was then *still owned by Kenna*, who used him as a saddle horse, *and he was asking* $500 *in greenbacks for him.*

The evidence of ALLOWAY, as to the horse being *lame* on the day of the auction, and *very lame* while in Ryan's possession, is, on the first point *flatly contradicted* by both SWINBURNE and RYAN, two witnesses of great experience, wholly disinterested, and whose character for veracity stands unimpeached in the record. And on the second point, it is partially contradicted by WILLIAMSON, who testified, that the horse Alloway pointed out to him at Ryan's was *lame* although *not very lame*, and is *flatly contradicted* by Ryan, and by the *fact*, that an American *horse dealer* gave $125 for the horse (more than double the auction price,) *five or six days only after the auction.*

It is clear from Ryan's evidence, that the horse shown by Alloway, (*some three weeks after the auction*) to Williamson, at Ryan's stables, must have been another horse. Alloway might very easily have been mistaken in the horse, as he was only at his own place about three days, and in his cross-examination he admitted, that when he first saw the horse he recognized it as one that had come from Quebec, whereas it really came, (as proved by Swinburne,) from Upper Canada. And in this connection it is also to be noted, that George Clark, (Alloway's groom) would not hazard the assertion that the horse was *lame* while at Alloway's; he merely asserting that the horse went *tender* in his fore-feet. And this same witness distinctly affirms, that when the horse was in appellant's possession, the horse was *not* lame.

Then again, particularly as to the charge of fraud, it is to be noted, that before the purchase was concluded by the respondent, the attention of her son was called by the appellant to the peculiar formation of the hocks, which by the uninitiated would be called *curby*, and that Mr. Fulford (who examined the horse for the respondent) was of opinion, that the formation of the joint was only natural. On the same occasion also, (as proved by Mr. Holland,) the appellant told both Mr. Holland and Mr. Fulford that he had *never driven the horse himself*, but that MR. JOHN S. HALL had driven him daily for a month or two, and that he, the defendant, *referred them to Mr. Hall, for any further particulars about the horse.* And MR. HALL testified, that Mr. Holland called accordingly at Mr. Hall's office, and made all necessary enquiry about the horse.

Such conduct is surely anything but evidence of fraud. And Mr. Holland himself withdrew all charge of fraud, as respects the plaintiff; pretending that it was Swinburne who had "*swindled*" him, because he had recommended him, (he said) to buy the horse.

Then, again, we have it proved by the respondent's own witness, that the horse was *twice* driven through the town and thoroughly tested by the respondent, before she bought him, and that her own groom was so satisfied with the result of the trials, that he said,—"it is an elegant horse entirely, and don't let anybody else have the offer of him, until Mr. Holland will see you to-morrow."

On the whole then, apart from the actual condition of the horse on the day of the auction sale, or even after, it results, from the *combined evidence* of HALL, CLARK, EVA, SWINBURNE, and even MR. HOLLAND himself and the *respon-*

dent's groom (HUGHES) that at *no time before Christmas day*, 1865, (some fourteen days after the sale,) was the horse in question *lame* or *otherwise unsound, or reputed to be so*. And it is also manifest, that the state of the horse on Christmas day, must have been the result of the overheating attested to by Swinburne. And it was moreover *not established in evidence* (since such evidence as the respondent adduced was destroyed by that of the appellant,) that the horse was lame, or otherwise unsound when tendered back and sold at auction by the respondent. And yet, the judgment complained of affirms, that it was proved to the complete satisfaction of the honourable Judge who pronounced it, that when the appellant sold the horse to the respondent it was unsound, and this to the knowledge of the appellant.

It is deemed unnecessary to discuss the matter further, and the appellant, therefore, simply claims at the hands of this court the reversal of the judgment in question.

Robertson, Q. C., for respondent:—It will be seen that the issues raised were issues of fact, and the respondent submits that the allegations of the declaration were made out in proof, and that the judgment below ought to be maintained.

Philip H. Holland, plaintiff's son, who was the only witness of the sale, and to whom it was made, states that he "mentioned to the defendant the description of horse required, namely, a large horse, steady, for a carriage, sound and free from vice. He, the defendant, said that he had a horse in his stable that would exactly suit the requirements which I mentioned." He adds that he said he was sound as a bell, and that, relying on the representations and statements of the defendant, he bought and paid for the horse; that the horse was carefully used and only driven about half a dozen times from the plaintiff's residence, two miles from town, and that he was lame on his fore-legs; that he consulted Mr. Swinburne as to buying the horse, who advised witness to buy; that about the end of December or the beginning of January he told the defendant how the horse was, and tendered him back; that he wrote to defendant the letter of 11th January, 1867, (No. 5 of Record), also tendering back the horse, and after this Mr. Swinburne and the defendant called upon him, when Mr. Swinburne "denied all knowledge of the horse," and that the defendant insisted that the horse *was sound* when he was sold.

Hughes, the plaintiff's servant, who tried the horse before the sale, and had the sole charge of him, shews the horse was carefully used; that within a few days after he was brought home he refused to eat, had difficulty in moving, and remained so a few days more, when he mentioned to Mr. Holland there was something wrong with the horse; that the next morning when he was brought out "he was entirely gone on all his legs;" that Swinburne, farrier, was sent for, who doctored the horse, and that he was in the stable eleven days without being out, and that when driven into town he was so lame that his mistress "would not ride behind a horse so lame," and that he was left at Alloway's. Here he remained till the time he was sold at Tattersalls.

The attention of the Court is directed to the evidence of Alloway (No. 17 of Record,) and the evidence of Thomas John Williams, Veterinary Surgeon, Royal Artillery, as to the condition and lameness of the horse, and to the evidence of

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George Clark, who was in defendant's employ, and shewed the horse to Philip Holland before the sale in January, as he says. He mentions that Mr. Swinburne gave the horse a ball or powder from time to time which would usually make him eat. He adds: "and I saw him very often pointing with his fore-"feet in the stable, that is to say, first put forward one foot, then changing and "putting out the other, as if he had something wrong with him."

The defendant examined witnesses to shew that the horse was sound when sold, and that the lameness was caused by fast driving by the witness Hughes. The witness Hall drove the horse "from about the 16th July to the 18th of August, 1865, and says he never perceived any unsoundness in him, nor any tenderness or lameness."

Evans, one of the defendant's servants, says that on one occasion Mr. Holland asked Mr. Swinburne if he would warrant the horse, and that the defendant said no; that the horse was not lame previous to the sale, and that his legs were not bandaged after driving, and that he never saw him get a powder.

Swinburne states that he saw plaintiff's servant about the 16th of December driving the horse in Sherbrooke street at a great pace, that he was steaming as if he had been in the river, and that he then remarked that he should not wonder if he should be sick. He states that when he visited the plaintiff's stables, he saw the plaintiff, and that on no occasion did she or the servant complain of the horse being lame. He states he saw the horse at the sale at Tattersalls and that he was not then lame and showed no signs of lameness, and that he carefully examined the horse at the sale, and that, in his opinion, "the horse was perfectly sound about his feet and legs;" and that he never gave the horse any medicine. He distinctly says he "never recommended the horse to the plaintiff before the sale."

Ryan, who bought the horse at the sale, says he examined the horse and considered him perfectly sound; that he showed no signs of lameness whilst in his possession for 5 or 6 days, when he sold him to an American for $125 in silver.

Hughes, plaintiff's servant, brought up in rebuttal, states that he was the only person who drove the horse while in plaintiff's possession, that he drove him carefully, and never overheated him.

That there is a conflict between the evidence for the plaintiff and that for the defendant will be manifest; but it is submitted that the balance of evidence is in favor of the plaintiff. The balance of professional evidence is clearly in favor of plaintiff. Dr. Williamson's evidence establishes the lame and unsound condition of the horse whilst in Ryan's possession; nor ought Ryan's evidence to be taken as being equal to that of a skilled veterinary surgeon of large experience. Swinburne's evidence is given with a manifest bias. He denies having ever given any advice to Mr. Holland to buy the horse, notwithstanding the clear evidence given by that gentleman on the point, and the fact admitted by Swinburne himself that Mr. Holland charged him as being chiefly the cause of what he called the "swindle" practised. This affords a key to the evidence given by Swinburne. His story of the horse being overdriven is contradicted by Hughes, and by the fact that he (Hughes) was the only person who drove the horse, during the five or six times he was driven into town.

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The fact of there being no written warranty relied on at the argument below, and the admission of Mr. Holland in cross-examination that the appellant said he would give no warranty, or, as he understood, *no written warranty* ought not, under the circumstances of the case, to relieve the appellant. He was clearly told the kind of horse the plaintiff required; he stated he had precisely the kind of horse she wanted, that he was "sound as a bell," and it is clear it was on these false representations that the horse was bought. There was therefore an implied warranty that the horse was reasonably fit for the purpose for which he was bought, namely, as a carriage horse for a lady, and he cannot escape from liability by such general evidence as that of Hall, who says he drove the horse, having borrowed him, some six weeks in the summer of 1865; or on the evidence of Swinburne, impeached as it is by Alloway, Williamson and Hughes, as well as by respondent's son.

The evidence of Clark, the former groom, as to the wet bandages and the powder and the draughts, is contradicted; but there is no evidence to contradict what that witness said as to his "*pointing*," and no clearer evidence could be given of unsoundness in the legs than that a horse is "very often pointing with his fore-feet in the stable," as that witness testifies. Horse dealers seldom give written warranties, but they often do what subjects them to actions such as that in question; they, knowingly, make false statements as to soundness and thereby induce purchasers to buy horses palpably unsound, as was done in this case. It is submitted that the defendant is liable under the evidence, and the respondent further relies on the following authorities:—

"To constitute a warranty in the sale of a horse, no particular language is required, and it may be stated as a general principle that whatever the vendor represents at the time of the sale is a warranty." 2 *Stephens, N. P., p.* 1289, *verbo* "*deceit.*"

"It is not essentially necessary that the false statement of the defendant be accompanied with an intention to injure the plaintiff, because the *legal* fraud which is sufficient to sustain the action is complete when the intention to mislead is followed by actual injury."— *Ib., p.* 1305.

"A verbal representation of the seller to the buyer of a horse, in the course of dealing, that he may depend upon it 'the horse is perfectly quiet and free from vice,' is a warranty."—3 *M. & R., p.* 2.

"If the vendor is cognizant of any defect in the thing sold, materially lowering its value in the market, the law implies a promise from him to make disclosure thereof, and the *passing over in silence* of an important fact or circumstance which ought in good faith to be known, is equivalent in contemplation of law to an express representation or even a warranty."—*Addison Contracts, p.* 55.

"Ordinary praise will not violate the contract, or a mere expression of an opinion."—*Ib., p.* 129. "But if there has been a *suppressio veri* or concealment of the truth, that alone, in certain cases and under certain circumstances, will amount to a fraud."—*Ib., p.* 130.

"There is a fraudulent concealment violating the contract where the vendor of a mare stated at the time of the sale 'that he believed the mare to be sound, but would not warrant her,' and the mare was unsound to his knowledge."—*Wood vs. Smith*, 5 *M. & R., p.* 124.

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"If a purchaser makes no inquiries as to the soundness of the animal, and the vendor has said or done nothing to throw the purchaser off his guard or to conceal a defect, there is no fraudulent concealment on the part of the vendor."—*Jones vs. Bright*, 3 *M. & R.*, *p.* 175.

Il en est autrement, si le défaut de la chose est capital, et s'il rend la chose impropre à l'usage auquel elle est destinée. Si le vendeur a connu ce défaut, et qu'il ne l'a pas déclaré, il a cherché à tromper l'acheteur; il a commis une action qui doit donner lieu à des dommages et intérêts. S'il ne l'a pas connu, on aura égard à sa bonne foi, et il sera traité sévèrement.—2 *Troplong*, *Vente*, *No.* 547.

Si le vendeur connaissait le vice redhibitoire et qu'au lieu de le déclarer, il eut laissé l'acheteur dans l'ignorance, la simple stipulation de non garantie ne l'affranchirait pas.—*Ib. No.* 550.

Mais si les parties sont descendus de ces généralités vagues, de ces louanges labiales, à une conclusion expresse: si la qualité de la chose a fait l'objet d'une promesse qui a determiné l'acheteur, ces conventions ne seront pas des pourparlers sans valeur; il y aura obligation positive et le vendeur sera tenu de garantie.—*Ib. No.* 563.

DUVAL, CH. J., & CARON, J., *dissenting*, simply remarked that the case was one of evidence, and that according to their reading of the evidence the judgment of the Court below was in all respects correct, and ought to be confirmed.

BADGLEY, J.:—The respondent being in want of a carriage horse, commissioned her son Mr. Holland, to procure one, who in consequence applied on the 5th of December, 1865, to Swinburne, a known respectable veterinary surgeon to assist him. Swinburne told him at once that no good carriage horses were to be had in the city at the price he proposed to give, but recommended him to look over the horses in the appellant's stable. Mr. Holland accordingly visited the stables, and in the absence of the owner, the stable groom showed him the horse in question. This was his first visit. After calling two or three times he met Teasel himself, to whom he stated his want of a carriage horse for his mother, when Teasel, he says, pointed out the horse as the only one he thought might suit him. After some conversation, Teasel, speaking of the horse, said that it was a dull horse, had the work in him, but required a little more urging than a high spirited horse. The day following Mr. Holland called again with Mr. Fulford, in order that Mr. Fulford, who was considered by Mr. Holland to be a judge of horses, might examine the horse in question. On this occasion Teasel directed their attention to the peculiar form of the hocks, which he said were natural, although the uninitiated might call them curby, and Fulford agreed that they were natural. On this occasion also Holland asked Teasel to warrant the soundness of the horse, but Teasel replied that he would not warrant that horse nor any other on any consideration. Teasel referred Holland for further information to Mr. Hall, who had driven the horse for a month or two not long before.

Holland again called with respondent's servant, and drove the horse and was satisfied with him. After all these ample opportunities afforded him of knowing all about the horse and satisfying himself during six days by unrestricted personal examination, by Mr. Fulford's inspection and survey, by information from Swinburne and Hall, and by repeated trials by himself and his servant, who

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professed to have a good deal of experience in horses, the horse was bought on the 11th Dec., 1865, for $175, and taken to the respondent's stable. On the 15th respondent's servant brought the horse to Swinburne's forge to be shod, and told him it was a very fine horse and suited the respondent very well. On the following day, the 16th December, Swinburne again saw the horse, he said, "I "saw this same servant man driving the horse in question in Sherbrooke street. "The day was an extremely cold one, and the animal was in a very over heated "condition, as if he had been driven at a very great pace. He was, in fact, "steaming all over as if he had been in the river. I was so struck with what I "saw, that I could not help remarking to my son, who was with me at the time, "that I should not wonder if the horse became sick, and had a bad cold." When Swinburne was called in to attend the horse on the 26th December, he had the influenza, and appeared to be in a very high fever. On the 16th January, 1866, the horse was sold by auction at Tattersalls' to one Ryan, for $61. The respondent then sued appellant and obtained judgment for $114, the difference between the said sum of $61 and $175, the price which respondent had paid to Teasel. Teasel appeals from this judgment which is now about to be reversed; Teasel's pretension being fully maintained by the majority of the Court.

The action is brought to all intents as an English action, whilst it has been supported by both French and English authorities promiscuously, and this has given some trouble in settling the contention, not so much as to the final decision as in distinguishing between the two systems brought into use in support of the demand. The declaration bases the action upon the misrepresentations of Teasel which are alleged to have caused the purchase. There are two counts; the first avers the representation to be, "that the horse was a sound and good carriage horse," the breach being "that shortly after its purchase, it was found to be unsound in his fore legs, and wholly unfit for a carriage horse." The second avers the representation "that the horse was sound as a bell, and an excellent carriage horse," the breach being "that the representation was false and fraudulent, because the horse was not sound as a bell, &c."

Now, the averments must be followed, because their denial is the issue, and the Court cannot supply what is *non allegata*. It may be remarked *in limine*, that the soundness of a horse and its unfitness to be a carriage horse, especially an excellent one, are distinct and different things, because a horse may be sound and yet unfit for a carriage, whilst, again, it might be a strong and useful carriage horse for years, though not sound as a bell, by which is meant a perfection of soundness, scarcely, if ever, to be realized in any creature, whether man or animal. It is likewise fitting to remark the distinction between warranty and representation, because the respondent has put under our notice authorities as to both, from both English and French law, chiefly the former, although warranty has neither been averred nor proved in the action, which rests solely upon the alleged misrepresentations. It is elementary to say that warranty forms part of a contract, whilst representation is only incidental or collateral to a contract. In suits at law on these respectively, the distinction is, that to support a charge of misrepresentation, three circumstances must concur. 1st. It must appear that the representation was contrary to the fact. 2nd. That the party making it

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knew it to be contrary to the fact; and 3rd. That the false representation caused the contract to be made by the other party. But in suits on warranty, these circumstances need not concur, because no question can be raised upon the *scienter* or the fraud of the misrepresentation: proof of the warranty and of its breach being alone sufficient. In England the rule of the law is that a party who has got an unsound horse, has no remedy unless there is a warranty, or unless fraud is proved, because in general the seller of a horse only warrants by law that it is such, namely, a horse and nothing more. Rey, a very intelligent French author in his recent work on Redhibitory actions, clearly gives the rule of the English law whilst comparing the English and French systems: "*Il n'y a pas en Angleterre de lois concernant les vices Redhibitoires des animaux domestiques. Les lois ne reconnaissent pas de garantie pour la bonté ou qualité de la chose vendue à moins de convention particulière dans le contrat, et sauf les usages de commerce et le cas de fraude de la part du vendeur.*" In France and here, however, a legal warranty attaches upon the seller, but this legal warranty is for the same purpose as the English conventional warranty, the protection of the purchaser against *latent defects and diseases* which are presumed to be within the knowledge of the horse dealer, and not of occasional buyers. The 1,614th Article of the French Code has been transferred into our Civil Code under its 1,422nd Article. From the evidence adduced it is clearly established that Teasel's observations made about the horse in the course of his conversation with Holland were not the alleged representations of the declaration, and that Teasel positively refused all warranty for the horse. Now by our common law there is no verbal warranty for such sales when the price exceeds a certain amount, and the legal warranty extends only to three defects: Asthma, glanders, and chronic pleuritis. The redhibitory action is said to be "une action particulière par laquelle l'acheteur agit contre le vendeur d'une chose défectueuse à ce qu'il ait à la reprendre à cause des vices et défauts cachés qui s'y trouvent et qu'il n'a pas declaré, &c. Ces actions ont lieu en vertu d'un contrat particulier, &c. Bien aussi sans convention particulière par la disposition des lois." Those hidden defects are such "qui ne se reconnaissent pas, comme la pousse, la morve et la courbe." This rule will be found in 2 Loisel p. 45, Règle 17, Liv. 3, Tit. 4 and 2, Ferrière Dict. *de droit*, vices redhibitoires. Although the legal warranty thus holds the vendor, these vices must be co-existent with the sale, and Galisset states the rule in commenting upon the article of the French code which applies to our article identical with it, "remarquons d'ailleurs que l'article en disant défauts cachés de la chose vendue, a nécessairement entendu parler des défauts existants au moment de la vente, car un défaut non existant ne pouvait être un défaut caché et il serait absurde d'imposer au vendeur la garantie d'un vice qui n'aurait pas existé au moment de la vente." Now these redhibitory vices specified are such as "rendent la chose vendue impropre à l'usage auquel on la destine ou qui diminuent tellement cet usage que l'acheteur ne l'aurait pas acquise ou n'en aurait donné qu'un moindre prix s'il les avait connus." But it is essential, that the vice must be *caché* and also anterior to the sale. The common law establishes a certain number of days from the delivery within which the redhibitory recourse was allowed and not afterwards; during

this delay, the warranty of the vendor subsists, and the delay was fixed by our commen law at nine days from the delivery, and no later. There can be no doubt that this law governs this case. The evidence does not prove the existence of any of these three latent defects, and the redhibitory recourse was not taken within the time of the limitation, all which tend to negative the *demande*, whilst there is another objection in the refusal of Teasel to warrant the soundness of the horse under any consideration; upon this Guyot says if by the agreement the vendor was not a warrantor of any *vice*, or of a particular one, then there is no redhibitory action, unless it be proved, not that the seller had doubts, but actually knew the legal *vices*. As to this Teasel is not charged with such knowledge. Our own law which controls this case also absolutely requires that the thing sold should be returned so that the parties may be "remises au même etat qu'ils etaient auparavant la vente." In every view of our jurisprudence the action of the respondent is untenable. It might suffice to stop here, but it would be uncourteous at least, not to consider the case as it has been submitted under its English form. By the English rule, it is for the purchaser to use his eyes, taste and senses, which must be his protection, where no warranty is given; because it is for him to know if the form of the horse is such as would render it likely to suit his purpose, and he should try him sufficiently to ascertain his natural strength, endurance and manner of going. This is laid down by Oliphant at page 27, who continues, if the purchaser is deceived he must impute it to his own fault, for he had perfect liberty to institute inquiries, by competent persons, of the truth of the representations made.

As to the averment of the horse suiting the respondent, that was no representation: it was at best a simple recommendation, but if it were a representation it could not be extended further than under a warranty which never without express agreement attaches to the condition of the animal beyond the time of sale. 4 Taunt 785; 3 Bl. Com. 165; similar in this respect to the French law as to the legal warranty, as shown by Galisset. So also as to the alleged unfitness of the horse, which is also limited to the time of sale, and it is held in 2 East 321, that if the horse has gone quietly with persons of ordinary skill there will be a strong presumption that it answers its fitness: such was the fact here.

The real contention rests upon the alleged subsequent lameness of the animal, and the endeavor has been to give effect to it retro-actively to the time of the sale: unfortunately for the respondent the amount of unsoundness was connected with the horse's legs, and although Alloway considered them a bad style of legs, Baron Alderson held in M. and Rob. 229 that mere badness of shape could not be unsoundness. Unsoundness is defined to be some alteration in the structure of the horse, whereby it is rendered less fit to perform its duty, or else there must be some disease, 9 M. & W. 670, 2 M. & Rob; but to support this action, it must be clearly proved that the seller knew of the unsoundness, 4 Car. P. 45. There was no such proof in this cause.

The following was the judgment of the Court:—"The Court, *** considering that the said Respondent, plaintiff in the Court below, hath not establish-

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ed the material averments of her declaration in this cause fyled; Considering that the said horse, the subject of contention in this cause, was not warranted in any way at the time of the sale thereof by the said appellant to the respondent, nor by him represented to her as by her, is averred and alleged in her said declaration; Considering that, at the time of the said sale of the said horse by the said appellant the said horse was fit for the purpose required by her, and was made and became lame by ill-treatment received in her employ and use; Considering that it is not proved that the said horse was affected by any of the defects and diseases which according to law render the vendor the legal warrantor thereof for the space of time after delivery thereof limited by law, and that the said respondent caused the said horse to be sold on her own account long after the said space of time, so limited by law, had elapsed; Considering that in the judgment in this cause, rendered by the said Circuit Court on the tenth day of June, eighteen hundred and sixty-seven, there was error: doth reverse the said judgment, and, proceeding to render such judgment as the said Circuit Court should have rendered, doth dismiss the said action of the said appellant with costs in his favor, against the said respondent of the said Circuit Court and also of this Court of Appeals.

Judgment of the Circuit Court reversed.

Strachan Bethune, Q. C., for Appellant.
A. & W. Robertson, for Respondent.
(S. B.)

IN THE SUPERIOR COURT, 1868.

MONTREAL 5TH MARCH, 1868.

Coram BERTHELOT, J.

No. 901.

Hudon et al vs. *Solman et al.*

Held: That under the Code of Civil Procedure of Lower Canada, art. 159, a sheriff's return of service of a writ of summons may be contested on motion without improbation.

The defendants made the following motion: "The defendants declaring that they contest the sheriff's return in this cause written, move to be allowed to contest without improbation the said sheriff's return as to the service of summons in this cause upon them, and that upon any *enquete* to be had upon their exception *à la forme* fyled in this cause, they be allowed to prove (without more formal improbation) that the said returns of the sheriff is untrue in stating that the sheriff, served the defendants with the writ in this cause *entre l[illegible]*, defendants being at liberty.

(The defendants undertaking that the sheriff shall have previous notice of any such *enquete*.)

Per Curiam.—Under the Code of Civil Procedure of Lower Canada art. 159, a sheriff's return can be contested on motion. The motion is therefore granted.

Motion granted.

J. J. [illegible], Q. C., for Plaintiffs.
Mac[illegible] & Austin, for Defendants.
(J. L. M.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9TH JUNE, 1868.

In Appeal from the Superior Court, District of Montreal.

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

ISABELLA MACINTOSH *et al.*,

(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

THOMAS BELL,

(*Defendant in the Court below,*)
RESPONDENT.

SUBSTITUTION—REGISTRATION.

HELD:—1o That the sale made of a substituted property for debts created by the author of the substitution, or for other debts or charges anterior to the substitution, is a valid sale, and purges the substitution.

2o That the institute can legally become purchaser of the property *delaissé* by him for the debts of his *auteur*.

3o That registration of substitutions only became law in 1855; 18 Vic., Cap. 101; and previous registration would not avail.

By their declaration the plaintiffs alleged that on the 14th of March, 1865, they sold at public auction (John Leeming & Co., auctioneers) to the defendant a certain immovable property described in the declaration and situated in Montreal, for £1325, one-fourth to be paid in cash on passing of the deed, the balance in four annual instalments, interest at 7 per cent., &c., &c. That an agreement in writing to that effect was signed, in which it was stipulated that the deed of sale should be executed on or before the 24th March, 1865.

That defendant had since refused to carry out the agreement and to execute a title deed, although on the 15th of May, 1865, the plaintiffs through Stuart, N.P., tendered a title deed to him duly signed by them.

The plaintiffs by the prayer of their declaration prayed *acte* of their willingness to deliver possession of the premises, and that it be declared that the agreement of purchase was in full force and obligatory on the defendant; and that he be ordered to pay the plaintiffs $1325, one-fourth of the purchase with interest at 7 per cent., from 15th May, 1865, and within a delay to be fixed by the Court, ordered to sign and execute a title deed of the property, subject to the conditions of the agreement, &c., &c., and in default of so doing, the judgment of the Court avail as title deed to the property, &c.

To this action the defendant pleaded that by the memorandum in writing, of the 14th March, 1865, it was amongst other things stated, that the property consisted of "a two-story cut stone house, belonging to *the heirs late Peter MacIntosh*," and that "*the title is from the Sheriff to the present owner by whom a warranty deed will be given.*" That the property so described as "belonging to the heirs late Peter MacIntosh" is part of the real estate which belonged to the late Peter MacIntosh, and which by his will before Doucet, &c., of 10th November, 1832, he gave and bequeathed *not* in full and absolute property to his heirs, to wit, "his

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children then born and to be born," but did by his will burthen the said property with substitution thereof after the death of his daughters, to wit, Isabella and Frances MacIntosh, *two of the plaintiffs*; and that the property was not therefore, as falsely alleged in the memorandum in writing, the absolute property of, to wit, belonging to the heirs of the late Peter MacIntosh, and could not therefore be legally sold as such by them.

That as to the share of his daughters, to wit: *the said plaintiffs*, the said late Peter MacIntosh declared it to be his will, that the same be invested in landed property, "*including* the house and premises I now possess and occupy in the "City of Montreal at the foot of the current St. Mary's" (to wit, the property in question), "which will make part of their lot, and for which they will account "to my other legatees after the evaluation of three disinterested persons named "by my executors, or by the advice of seven friends and relatives, homologated "by the competent authorities at the time in case my executors should disagree "or should have departed this life."

"And I expressly forbid that any part of the shares of my said children, being "daughters, be in any wise engaged, *aliened*, attached or otherwise diverted from "the intention I have to leave the shares of my daughters for their support, their "education and *the education of their children, to whom I substitute the said pro-* "*perty after their death.* I also expressly forbid that any part of the said pro- "perty make part of matrimonial conditions, and that they will enjoy, manage, "receive rents and do all things thereto relative, without the control, authoriza- "tion or participation of their said husbands respectively."

"I appoint *the said Patty Bent*, my wife, Neil MacIntosh, my brother, and "Robert Morris, my friend, to be the executors of this my last will and testament, "and I revoke all former wills or codicils I may have made previous to the date "hereof."

That the said will of the late Peter MacIntosh was and is enregistered in the Registry Office for the County of Montreal, to wit: was *so duly enregistered on the 3rd September*, 1844, as would appear by the certificate of the Registrar, on the copy of said will, fyled by the defendant to form part of his plea.

That the plaintiffs, Isabella and Frances MacIntosh, upon the death of their father, the said late Peter MacIntosh, which took place in 1833, accepted the estate so bequeathed to them by his will, with substitution in favour of their children, and entered into possession thereof under the restrictions of his will as to alienations, substitutions, &c., and that having so acquired it, they could not alienate or divert it, &c., and that neither at the date of the said memorandum in writing, nor at any other time, had they any legal right or title in and to the said property in question, to sell and dispose of it, or to authorize the said John Leeming & Co. to sell the same by auction as belonging to the heirs of the said late Peter MacIntosh.

That as to the allegations of the plaintiffs' declaration, that at the date of the memorandum in writing the plaintiffs were seized as proprietors of the property in question as having acquired the same by Sheriff's sale on 9th November, 1857, for $800, that that pretended acquisition by them under Sheriff's title was made under a previous concerted arrangement between them and their mother, the said Patty

Bent, after she became the wife by her second marriage with James Court, solely with a view to relieve the said property from *the burthen of the substitution to which it was subject under the will of their father, the late Peter MacIntosh, and without any necessity existing by reason of any indebtedness of the late Peter MacIntosh to sell the same, the estate of the late Peter MacIntosh being amply sufficient to pay all debts, independent of the said property, &c.*

That under that concerted arrangement, an action was brought in the name of their mother, the said Patty Bent, and the said James Court against the plaintiffs, Isabella and Frances MacIntosh, for a debt for which they were personally bound; and which had commenced to accrue more than 13 years after the death of their father and their acceptance under his will, in which action they allowed a judgment to be rendered under which they permitted the property to be seized and sold, and at the sale thereof by the Sheriff they became nominally the purchasers *and bought in the same for* £200, when it was well known by the plaintiffs and the said Patty Bent and James Court that the property *was worth more than* £1000. That in fact, had it not been that it was represented at the Sheriff's sale that the sole object of the parties was to purge the property of the substitution and buy it in for themselves, it would have sold for over £1000.

That by the inventory taken by the said Patty Bent at the death of the late Peter MacIntosh, the property in question was inventoried and valued at more than £1000.

That, moreover, if the property had been brought to sale without any such concerted arrangement existing, yet there was no necessity for the plaintiffs to permit the property to be sold; and in becoming the purchasers, being the natural guardians of their children, the *substitutes* under the will, and the legatees in trust of the property for their children, bound to watch over and protect their interests, the plaintiffs could acquire under the pretended Sheriff's title no greater right or title to the property than they previously held under the will.

The defendant therefore prayed that the plaintiffs' action might be dismissed with costs.

Plaintiffs answered in effect:—1st. That by marriage contract between said late Peter MacIntosh and said Patty Bent, made on the 4th of March, 1825 (long previous to the making of the will creating substitution), said Peter MacIntosh granted to Patty Bent an annuity of £25, during her life, to be paid by half yearly instalments of £12 10, and to secure payment of the same, hypothecated all his estate, real and personal.

That this marriage contract was duly registered in the registry office, at Montreal, on the 3rd September, 1844.

That in a suit in the Superior Court, on the 28th February, 1857, it was adjudged that a lot of land, to wit, the same as in question in this cause, was charged and hypothecated for the payment of the sum of £250, with interest from the 11th January, 1827; the sum of £250 being ten years arrears of an annuity of £25, created in favor of said Patty Bent, under her said contract of marriage, and the defendants were jointly condemned to pay the said sum, unless they chose rather to quit and deliver up the said lot to be sold in due form of law.

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That they did, on the 16th April, 1857, make a *délaissement* of said property.

That under said judgment, said land was, in due course, sold by the Sheriff to the now plaintiffs, and the plaintiffs' title under which they sold the same to defendant is the title so acquired by them from the Sheriff under the said judgment.

That said debt, for the payment of which the property was sold, being a debt created by the said Peter MacIntosh long anterior to the disposition of his last will, the purchase by the plaintiffs of said property, in the possession of a curator, from the Sheriff, was a just and lawful purchase, and cannot be disturbed.

The plaintiffs also pleaded a general answer to the plea of the defendant.

The Court dismissed plaintiffs' action by the following judgment:—The 31st March, 1866. MONK, J.

"The Court, &c., &c., &c., considering that in and by their action and *demande* the said plaintiffs seek not only that the defendant be condemned to take the title by them tendered, but also that he be adjudged and ordered to pay them the sum of one thousand three hundred and twenty-five dollars currency, being the first instalment or one fourth part of the purchase money for the lot of land and premises purchased by defendant, with interest thereon from the 15th day of May, one thousand eight hundred and sixty-five, until paid: Considering that the defendant, by the facts disclosed by the evidence adduced, has just cause to fear that he will or may hereafter be troubled by a revendicatory action, or otherwise by deed on behalf of the *appelés* to the substitution created by the last will and testament of the late Peter MacIntosh.

"Seeing that the defendant has not demanded security against the consequences of such trouble, and that the plaintiffs have not offered or tendered such security.

"Considering that the Court hath not the power to order such security under the issues joined in this cause; and seeing finally that the said defendant cannot by law be compelled to pay the said sum of one thousand three hundred and twenty-five dollars, and interest as aforesaid, until and after the security above mentioned be given, and that consequently no condemnation for the payment of the same can legally issue or be given in this cause, doth dismiss the plaintiff's action, &c., &c.

Torrance, Q. C., for the appellants, said:—The issues in this cause may be fairly raised by one concise question, viz., was the property in question charged with any substitution having legal effect under the will of the late Peter MacIntosh. Reference to the law as existing between the time of the death of the late Peter MacIntosh in 1833, when his will came into operation, and 1855, when the law was changed, will shew (the facts of the case being in full view) that the question as above must be answered in the negative, and that the substitution clause in the will never took effect. According to the law between 1833 and 1855, in order to give effect to the rights of *substitués* under an *acte*, it was absolutely necessary that the *acte* should be *insinué* and published in open Court. No other formality could take the place of this. Registration would not do, for the law did not prescribe or recognize it. The statute substituting registration for insinuation and publication only came into force on 30th May, 1855. 18 Vic., c. 101, Consol. St. L. C., cap. 37, S. 29. Up to that time the will in question had never been insinuated, and since the passing of the Act it has never been registered. The will was registered in 1844, but that formality could not avail to protect the rights of parties claiming to be *substitués*, as the law then declared insinuation and publication necessary. The defendant in this case can-

not even urge the lame defence that parties pretending to be *substitués* can say that they remedied the defect of non-insinuation and publication by registration after the Act of 1855 came into force, for the will has never since been registered. The registration of 1844 cannot be declared to have been done under the Act of 1855. It seems certain then that the substitution clause never had any legal or binding effect, and that the plaintiffs as legatees of their father, even without the Sheriff's deed, which they subsequently acquired, had a good and absolute title. Consequently, from this point of view alone, the judgment appealed from is bad and ought to be reversed. Again, supposing for argument's sake all formalities complied with, the substitution which otherwise might have been in force ceased to have effect, owing to the fact that the property was sold under a judgment obtained by Patty Bent, the wife of the testator, for an annuity settled upon her by marriage contract made in 1825, registered in due course, creating a prior hypothequo upon the property, for the annuity. In these two ways then the plaintiffs submit they have demonstrated that the property never was charged with substitution. 1st. Because of want of formality in the substitution, by non-insinuation of the will. 2nd. Because the property was sold to satisfy a prior charge. It was pretended at argument by the counsel for defendant, that the sale under the judgment of Patty Bent to the plaintiffs was made for the purpose of defeating the intention of the testator and purging the property of the charge of the substitution, but the very reverse appears by the evidence. It is expressly declared in the will of the late Peter MacIntosh that the shares of his daughters were for their support and education, as well as for that of their children; but Mr. Court and Mr. Watt in their depositions, state that the property, owing to its position, was unproductive and quite inadequate to the support of the children. All interested were agreed that it would be much more advantageous for them to sell the property and invest the money more remuneratively. Any one acquainted with the city is well aware, that when the testator made his will, property in the east was much more valuable than now, for it was then in the centre of the city. The tide of building has long since gone westward, and property in the east has deteriorated. The sale therefore was manifestly carried out in the spirit of the will, in order to the support of the testator's

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AUTHORITIES ON BEHALF OF PLAINTIFFS.

1. That registration of substitutions only became law from and after 1855: 18 Vic., cap. 101, Con. Stat. L. C., cap. 37, sec. 29.

2. That the sale made of a substituted property for debts created by the author of the substitution, or for other debts or charges anterior to the substitution, is a valid sale, and purges the substitution.

Ricard, T. 2, p. 493-4. Guyot, Rep. de Juris. *vo.* Substitution, sec. 27, § 2, p. 527. Denisart *vo.* Substitution, No. 99.

3. That the plaintiffs could legally become purchasers of the property *délaissée* by them. Nouv. Pigeau 2, 138.

4. That it was of no consequence whether the property was sold at its full value or not. Guyot, Rep. *vo.* Substit. sec. 28, pp. 533-4.

5. That where a purchaser has JUST CAUSE to fear a *trouble*, his only course is to demand security against the trouble. Con. Stat. L. C., cap. 36, sec. 31.

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daughters. It was made in the utmost good faith, in the belief that the testator himself would have approved of it if alive. The plaintiffs had no intention to buy the property, but eventually did so, to prevent its being sacrificed, as the evidence establishes. The judgment of the Court below, although it does not at all touch the question raised, seems to indicate the only defence that the defendant could have made if he had *just cause* to fear trouble. Under the statute (Con. Stat. L. C., cap. 36, sec. 31), he should have demanded security against the consequences of such trouble. As he did not do this, he had no other defence to an action of this kind by plaintiffs, having a clear title under Sheriff's deed, and otherwise, and the plaintiffs' action ought to have been maintained.

Day, Q. C., for the respondent, said:—The respondent's evidence consisted of the following exhibits: 1° Will of Peter MacIntosh with certificate of enregistration thereon; 2° Copy of the writ and declaration in Bent et vir. vs. MacIntosh et al. 3° Copy of admissions in *ditto*; 4° Copy of *Tutelle* appointing *Patty Bent Tutrix to Plaintiffs, 1st March*, 1833; 5° Copy of *Tutelle* appointing *James Court, who had been previously after his marriage with his wife Patty Bent Joint Tutors, tutors to the plaintiff, 3rd of August*, 1844; 6° Copy of the inventory of estate of the late Peter MacIntosh taken by *Patty Bent as Tutrix to the plaintiffs* in 1833; by which it appears that the assets of the estate of the later Peter MacIntosh in debts due to and real property belonging to his estate were valued.....£9891 9 7

Whilst the debts due by the estate amounted only to..... 943 6 11

Shewing a surplus.....£8848 2 8

That in that inventory the property in question stands evalued at £1500 and £32. That, *besides* the above assets of £9891 9s. 7d., the household furniture, &c., appears by the said inventory to have been valued on pages 10, 11 and 12, at £290 8s. 3d. and £61 11s. 9d., together making £361. Of the admissions of appellants as to the identity of the property mentioned in the inventory and pleading, and that plaintiffs were the only daughters of the late Peter MacIntosh, Frances MacIntosh being now the wife of David Allen Poe Watt (also one of the appellants), and that appellants accepted as legatees of their father under his will, and took possession of their shares of his estate left by the will, including the property in question; and of the depositions of David Allen Poe Watt, one of the plaintiffs, James Court and John MacIntosh; all three witnesses examined by defendant. David Allen Poe Watt says he attended the sale by the Sheriff on the 9th of November, 1857, on behalf of the MacIntosh family, and *bought the property in for £200 for the family to prevent it being sacrificed*. That he signed the Sheriff's Book in which the entry of the sale was made. That he had not then received the names of the family in whose name the title was to be taken. That the blank was afterwards filled up with the names of Isabella MacIntosh and Frances MacIntosh as the purchasers, through him as their agent. That the property was well worth £1000 at the time. Thinks, taking unto account the buildings upon it at the time, worth £1250. That the suit was an amicable one. That when the suit was brought Mr. Court

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and his wife were occupants of the premises, and had been for a number of years. Believes they occupied them for the consideration of £60 a year. James Court says he and his wife Patty Bent, the mother of the plaintiffs, resided in the premises from 1848 to 1858, and must have accounted to the plaintiffs for the rent during that period. That the proceedings to bring the property to sale were taken after legal advice; that it could be legally done under a judgment if obtained for his wife's annuity, and were, therefore, amicable; that the intention was to obtain the sale of the property, but as to the ultimate intentions of the plaintiffs with respect to purging the property of the substitution he could not speak with certainty. Thinks it was £60 or £70 per annum he and his wife allowed the plaintiffs for the rent during the ten years they occupied the premises. Should think the property was worth £1250 at the time it was sold by the sheriff. John MacIntosh, brother of the plaintiffs, says that he and his sisters consulted together on the subject of the sale of the property, and after taking legal advice found it could be legally sold under the annuity granted under the marriage contract to his mother Patty Bent, wife of James Court, and consequently came to the conclusion to have it sold. That Mr. Court and his mother had for several years occupied the property; that the difficulty which existed in respect to the sale was, that by the will of his father it was substituted and could only be legally sold under a debt contracted by his father, and that the opinion of their legal advisers was that it could be sold and a good title obtained under a judgment obtained on his mother's marriage contract, and that he authorized their legal advisers to take the necessary steps to attain that object. That the suit was consequently instituted for that purpose, and that upon the judgment rendered the property was seized and sold by the sheriff as mentioned in the sheriff title. That he attended the sale. Mr. Watt was not there that he recollects. That it was sold for £200. Has noticed that Mr. Watt signed the sheriff sale book, signed his name as the purchaser of it for his sisters; that the object of the sale was to obtain a title according to the legal opinions given; considered the property at the time was worth £1250. Was aware the sheriff commission would be augmented according to the price at which the property was sold, and that it may have been a reason for having the property sold so low to save expense; thinks the property was *bought in at the sale* by a student or clerk in Mr. Torrance's office. By what authority afterwards Mr. Watt put in his sister's name he does not know; that it *was in order to make the property available for sale afterwards if it did not fetch its value at the time that it was allowed to be sold, and was bought in by the student in consequence*, understood it was legally sold, and that the sheriff title thus obtained was available for future sale. His objection to the production of the inventory of his father's estate is that he is not bound to furnish papers to help the defence; that there were moneys realized from the sale of lands in Upper Canada which went to pay off Mr. Court's advances. The only evidence adduced by appellants in rebuttal was that of the same John MacIntosh, brother of the plaintiffs, to prove that the inventory exhibited a much larger estate than was received by those who took under the will of his father. That his uncles William MacIntosh and Neil MacIntosh became insolvent before they paid the sums mentioned in the

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inventory as due by them, but he says that *his co-heirs and himself ranked upon their estates through their tutor* for about £8000, and received in all about seven pence half penny in the pound. That over and above the real estate, the estate of his father did not realize over £1400 to his children. In cross-examination this witness stated he had heard that *some mortgages were given by his uncles on lands in Upper Canada as security for the moneys they owed his father's estate*, but what the lands were, and to what extent, he was unable to say; that he *presumes they were sold, and must have been accounted for before they could rank on their uncle's estates. That they were taken at an evaluation at that time. It was done in the usual way. Does not remember the value they were taken at. Cannot tell where the information can be got. Thinks Mr. Court rendered an account to the heirs, but is not positive.* That under such circumstances and with such evidence the Court below should have considered that the plaintiffs could not give a good and sufficient title to the defendant, and have dismissed the appellant's action, respondent submits, might reasonably have been expected. The appellants in instituting this appeal have submitted that the issues in this cause may be *fairly* raised by one concise question, viz.: Was the property in question charged with any substitution having legal effect under the will of the late Peter MacIntosh? And they answer that question 1st by the following subterfuge, *not pleaded or thought of at the argument*, viz., "that as the law stood between 1833 and 1855, "to give effect to the rights of *substitués*, it was necessary that the *acte* should "be *insinué* and published in open court; registration would not do; that the "statute substituting registration only came into force on 20th May, 1855." Whether the will was insinuated or not, and whether the enregistration previous to the sheriff's sale was equivalent to insinuation, were not put in issue by appellants. If not insinuated the appellants cannot invoke *for their own benefit in fraud of their children.* But the statute made the registration a sufficient substitute for the insinuation. The will was enregistered by the *plaintiffs in* 1844, that enregistration is *their title*, and it would be absurd to say that there existed the necessity to re-enregister after 1855, as the publicity was then there. A search at the registry office would show that, after 1855, as well as before, the sale effected *to purge the property of the substitution* was made *after* 1855, namely, in November, 1857. The statute simply states that the enregistration shall be equivalent to insinuation.

2nd. The appellants hope to have succeeded in shewing that they had contrived *to purge the property of the substitution* by concerting with their *tutors* and *mother* to bring the property to sale by the sheriff under a judgment amicably obtained *at their own instance* for a pretended debt which the assets of the late Peter MacIntosh were ample to meet, *buying in* the same for the *nominal* sum of £200, when it was notoriously worth £1250; and when the assets of the estate of their father shewed by the inventory an amount of nearly £10,000 after deduction made of the liabilities.

Such unjust pretensions the respondent submits will not be countenanced under the appeal. The authorities cited by the appellants under such circumstances can have no application to the case; and the respondent therefore confidently relies upon the judgment of the Court below being confirmed.

BADGLEY, J., rendering judgment in appeal, said:

The late Peter MacIntosh, the father of the plaintiffs, married Patty Bent, and by contract of marriage he endowed her with an annuity of £25, to take effect after his death. There were several children of their marriage, of whom the plaintiffs were two, whom their father by his last will made usufructuary legatees of the lot of land and premises, the subject of this contestation, the property whereof was to belong to their children after their decease. The will was dated on 10th November, 1832, and appointed executors for the administration of the estate; the father died in 1833, leaving his said two daughters, minors at the time, and his widow Patty Bent, him surviving, who was duly appointed their tutrix on the 1st of March, 1833. She afterwards married James Court, and she and her second husband were appointed joint tutors to the said minors in 1844. In January, 1857, Patty Bent, authorized by her husband Court, sued the appellants, then of age, by an hypothecary action, as in possession of the said property as special usufructuary legatees under the said will, for ten years of arrears of the said annuity, amounting to £25, for which judgment was obtained against them on 28th Feb., 1857. As the judgment was hypothecary, the legatees abandoned and *délaissèrent* the property, which was duly seized and taken in execution by the sheriff in the possession of a curator to the *délaissement*, and adjudged by the sheriff direct to the appellants, as purchasers, who received the Sheriff's title therefor, and became proprietors of the lot in question, individually, as *adjudicataires* thereof. On the 14th March, 1865, having publicly advertised the same, they caused the land in question to be offered for sale upon the following conditions: "1st. The property is sold commuted; 2nd. The title is from the Sheriff to the present owners, by whom a warranty deed will be given; 3rd. Possession to be given on 1st April, 1865; 4th. The deed to be executed by the purchaser on the 24th March, expense of deed and of one copy for registration to be paid by purchaser, who is to pay one per cent. for expenses of sale on signing the conditions; 5th. The terms of payment, one quarter cash on passing the deed, balance payable in four annual instalments with interest at seven per cent." The sale was effected for £1325, ($5300); the respondent was the purchaser, and signed the conditions of sale at their date as above, but having afterwards declined to execute the deed of sale tendered by the appellants, drawn and prepared in conformity with the conditions of sale, they instituted this action. The respondent's plea is in substance that the land specially bequeathed to them was substituted to their children, and that they had no power of themselves to alienate it; that they colluded with their mother, giving her a judgment and allowing it to be enforced against the property after their collusive *délaissement* of it, and that their subsequent purchase of it, by Sheriff's sale and adjudication, did not free the property from the effect of the substitution, or make them absolute owners under the Sheriff's deed, and therefore that they could not give him a good deed, the will having been registered in 1844. The pleading and denegation are of course against the affirmation of the appellant's power to give the deed as stipulated in the conditions of sale, and it will be observed finally that the respondent concludes his defense *tout simplement* by demanding the dismissal of the plaintiffs' action without praying for any adjudication against their alleged pro-

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prietary right to sell the property as legatees under the will or against their proprietary title under the Sheriff's sale, that title being allowed to remain valid and binding on them.

It has doubtless escaped the notice of the respondent, that the bequest of these particular landed premises in usufructuary enjoyment to the testator's daughters, with the property over to their children after their decease, was a special bequest in their favour, altogether irrespective of his general estate, and became vested in them upon their coming of age, for their support and maintenance, as a limited legal proprietary right, irrespective of the executors or the administration of the estate, whether it was represented as more or less by the inventory. It is also in evidence, as matter of fact, that this estate did not carry out the figure of the inventory, and that over and above the specially bequeathed real estate, the testator's estate did not realize over £1400 for his children. Whatever the amount of the realized estate might be, this bequeathed property was beyond its effect, except as being liable for the payment of any debts that might be due by the estate, and all the averments of the plea as to the *force de l'inventaire* are of no importance.

The respondent has also appeared to have not attended to the distinction between the insinuation required by law for substituted property and the registration of mortgages. These are not legally identical, the former being *le droit public* for the special purpose of interfering with substitutions or entails of real estate and facilitating its general and current disposal, whereas by the hypothecary registration the charges and cumbrances upon real estate were made publicly known. The insinuation was *de droit public*, and the want of it could be objected at any time, and even in the *Cours d'Appel* if not objected to in the *Cours Originaires*. The enregistration of the will in 1844, under the Mortgage Registry Act, was not the equivalent of the necessary insinuation of the *droit public*, which only had effect pro futuro in 1855. The plaintiffs are not therefore in any way open to the charge of subterfuge in this respect.

It is quite true that the power in the appellants to sell, under the terms of the will, could be only precarious and limited to their life. The law clearly allows the *grévés*, the institutes, to alienate the substituted property according to their life interest in it, and conditioned to become an absolute title in the purchaser upon their decease without children, because in that event the precariousness of the right would become an absolute property in the *grévés*, and the *espérance* of the *substitut* could have no fruition, and hence there would have been no substitution; even thus, the power of alienation is in the appellants, and their deed would be a good deed to the purchaser, but it would give him the exception arising from *trouble*. It may also be observed that the non-insinuation of the will containing the substitution is a legal protection to the purchaser, because he is not bound to know that it is substituted property unless there is insinuation. Hence to divest the *grévé* the substitute must survive him, and if there be *défaillance*, no survivor, it is *au profit du grévé*; so also this applies *toutefois au défaillance par l'inexistence, incapacité ou refus de l'appellé*. Thevenot, No. 301, "La propriété appartient au grévé jusqu'à ce que la condition dont le fidéi-commis depend, soit arrivée, jusque cela, le grévé est véritablement et plei-

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nement propriétaire; tous les lois y sont formelles. Thevenot, No. 577, 579; Pothier, Subst. 541; Guyot, Rep. Verbo. Subst. p. 522, and it is only if the condition do happen, that the property of the grévé is *revoquée* but not *ab initio, sed ut exnunc non ut ex tunc*. See also Thevenot, Nos. 666, 715. The publication by insinuation was a special requirement of the Ord. d'Orleans in 1560, and was specially enforced by that of Moulins of 1566. The non-insinuation would protect purchasers and creditors *à raison de leur bonne foi* and *aliénations* are declared to be irrevocable.

The knowledge of the substitution by the purchaser does not affect him if he has not acquired it by the insinuation. No. 813, Poth. 495.

Thevenot says, No. 790, what is mere common sense, that the testator cannot tie up his property by a substitution to the exclusion of the payment of his debts, and therefore that the alienation of the "biens institués est permise quand ils sont vendus pour l'acquittement des dettes auxquelles ils sont sujets; la vente est alors de nécessité, elle a une cause valable et perpétuelle en sorte qu'il n'y a ni revendication contre les acquéreurs ni repétition contre le grévé." Pothier above, see also Anc. Denizart Vo. Subst. p. 596, par. 99. "La substitution ne saurait préjudicier aux créanciers de celui qui la fait; ainsi ces créanciers peuvent, nonobstant toutes les dispositions de leur débiteur, faire saisir et vendre ceux de ses biens auxquels ils jugent à propos de s'addresser, sans que les appellés ni le grévé puissent exiger que les créanciers choisissent une espèce plutôt qu'une autre." From the record it is manifest that Mrs. Court's debt was a legal and just debt by the testator, having its origin before the date of his will and enforceable at any legal time after his decease. The judgment, therefore, which was rendered in her favour, being for a just debt, and the property proceeded against *hypothécairement* being property within her power to attack, the sale of this property became a legal necessity, and its decret satisfactory. What was the legal result of this sheriff's sale? It conveyed the property independent of its substitute character and solely as that of the testator, by the mere effect of the adjudication, and rendered the appellants, its purchasers, its absolute owners free from substitution, Pothier, Sub. p. 551. Si l'héritage sujet à la substitution avait été décrété pour les dettes de l'auteur de la substitution, il n'est pas douteux que l'héritage passe en ce cas, sans aucune sujétion à la substitution, car la substitution n'a pu empêché l'aliénation forcée de cet héritage pour cette cause. See also Guyot, Rep. Vo. Sub. 527; 1 Pigeau, p. 776. L'adjudicataire under a legal title is protected against all non-opposants, mineurs, &c., "et l'intérêt public est favorable d'avantage." Under these authorities the law has given to the appellants a legal, absolute and clear title, and they were justified in offering as the condition of sale: "*the title is from the Sheriff to the present owners, by whom a warranty deed will be given.*" The respondent purchased under these conditions. There was a Sheriff's title and they offered a warranty deed. His plea is out of all question bad, and by not objecting in his conclusions against the title or against the conditions of purchase which he accepted, he has agreed to their validity. His only possible plea would have been that of trouble, suggested by the Superior Court, and yet that Court, inconsistent with its own suggestion, dismisses the action upon the terms of a bad

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plea. The judgment of the Superior Court is not correct, and the appellants' action should have been maintained.

The judgment in appeal was motivé as follows:—

The Court * * * Considering that the said immoveable property in the said declaration of the appellants described and set forth was bequeathed to the substitutes of the said appellants by the late Peter MacIntosh their father, in and by his last will and testament referred to in the declaration and pleadings in this cause, which said immoveable property was charged and liable notwithstanding such substituted bequest with and for the payment of the debt and mortgages thereon, created by the said Peter MacIntosh, and remaining undischarged at his decease; considering that the said property was seized and adjudicataires taken in execution by the Sheriff of the District of Montreal, under a writ of *fieri facias de terris* issued against the said property in virtue of a judgment of the Superior Court for the said district, for a debt due by the estate and successor of the said late Peter MacIntosh, by him created before his death, and was by the said Sheriff in due form of and according to law adjudged to the said appellants as adjudicataires and purchasers thereof, and a title therefor, bearing date at Montreal on the thirtieth day of April, one thousand eight hundred and fifty-eight, was by the said Sheriff then executed and delivered by him to said appellants, whereby the said appellants thenceforward became, and were the absolute legal owners and proprietors of the said property; considering that the said last will and testament containing the said substitution was not insinuated and published according to and as required by law, and that the registration thereof on the 3rd day of September, 1844, previous to the Sheriff's adjudication aforesaid, could not by law disturb or in any way interfere with the proprietary rights in the said property acquired under the Sheriff's adjudication by the said appellants; considering that the said respondent did, by the agreement of purchase *sous séing privé* dated fourteenth day of March, one thousand eight hundred and sixty-five, in this cause fyled, purchase the said property from the appellants, and for which a deed of sale was to be executed between them on the twenty-fourth day of the said month for the price and upon the terms and conditions therein mentioned; considering that the said respondent did refuse to execute the said deed of sale by the appellants tendered to him on the fifteenth day of May of the year last aforesaid, and hath refused to complete and carry into effect his said purchase; considering that the respondent hath not by his said pleadings to the action and demand of the appellants specially objected trouble or apprehension of trouble by reason of the sale of the said property nor any other ground in law or in fact against their said action and demande; considering that in the judgment rendered by the said Superior Court in this cause at Montreal on the thirty-first day of March, one thousand eight hundred and sixty-six, there was error; doth reverse and set aside the said judgment; and proceeding to render such judgment as the said Superior Court should have rendered, doth adjudge and declare the said agreement of purchase of the said property signed and executed by the respondent to be valid and binding upon him, and of full force and effect at and for the price of thirteen hundred and twenty-five pounds payable thereby, one fourth part thereof on passing the deed of sale

of the said property to be executed on the said twenty-fourth day of March, one thousand eight hundred and sixty-five, and the balance in and by four annual instalments and semi-annual interest at seven per cent., and doth condemn the respondent to pay to the said appellants the said sum of thirteen hundred and twenty-five dollars by them demanded by their action, with interest thereon at seven per cent. from the fifteenth day of May of the year last aforesaid till paid, being the said fourth part of the said price of the said property as aforesaid; and doth further order and adjudge the said respondent, within the delay of fifteen days from and after the service of this judgment upon the respondent, to sign and execute to and in favour of the said appellants a deed of and for his said purchase of the said property, for the price and upon the terms and conditions in the said agreement of purchase contained, failing which, this judgment shall avail to the said appellants against the said respondent as a title deed by him to them of the said property, the Court granting *acte* to the appellants of their willingness to deliver possession of the said property to the respondent at and previous to the institution of their action. The whole with costs of the Superior Court, as also of this Court against the said respondent.

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Torrance & Morris, for appellants. Judgment reversed.
Day & Day, for respondent.
(F.W.T.)

MONTREAL, 29TH FEBRUARY, 1868.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., CARON, J., DRUMMOND, J., LORANGER, J., *ad hoc*.

WILLIAM EDMONSTONE *et al.*,
(*Plaintiffs in the Court below*),
APPELLANTS;

AND

WILLIAM S. CHILDS *et al.*,
(*Defendants in the Court below*),
RESPONDENTS.

INCORPORATED COMPANY—STOCKHOLDERS—LIABILITY.

HELD:—That the defendants at the date of the promissory note in question in this cause were co-partners with certain other persons in a certain joint stock company, called "The Montreal Railroad Car Company," of unlimited liability, and as such jointly and severally responsible with all their co-partners for all the liabilities assumed by the company.

This was an appeal from the judgment of the Superior Court, Montreal (BADGLEY, J.), on the 25th February, 1858, dismissing the action of the appellants. The action was brought against William S. Childs, John Leeming, John Young, James George Shipway, and Francis L. B. Noad, for the recovery of the sum of £886 5*s.* 4*d.*, currency, the amount of a promissory note alleged to be made by them as co-partners, carrying on business under the name of "The Montreal Railroad Car Company," in favour of one Thompson, who endorsed it to plaintiffs.

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The note was in the following words and figures:—

MONTREAL RAILROAD CAR COMPANY—CAPITAL STOCK, £40,000.

£886 5s. 4d., Cy.

Montreal, October 26th, 1854.

Three months after date, for value received, the Montreal Railroad Car Company promise to pay to the order of *A. C. Thompson*, at the Bank of Montreal, the sum of *eight hundred and eighty-six pounds five shillings and four pence*, currency.

JOHN LEEMING,

President.

J. G. SHIPWAY,

Trustee.

The note was in print with the exception of the words in italics which were in writing.

The declaration set forth that the plaintiffs were merchants and co-partners doing business at Montreal, under the name and firm of Edmonstone, Allan, & Co., and that the respondents were all of the city of Montreal, merchants, contractors and manufacturers, carrying on business there with divers persons unknown to the plaintiffs in co-partnership as such contractors and manufacturers under the name, style and firm of the Montreal Railroad Car Company. The portion of the declaration setting up the promissory note was in the following terms:—

"And whereas also heretofore, to wit, at Montreal aforesaid, on the twenty-sixth day of October, eighteen hundred and fifty-four, the said defendants, acting by and through the said John Leeming, one of them, and one of the acting members of the said co-partnership, and duly authorized by the other defendants and his other co-partners in that behalf, and styling himself trustee of the said Montreal Railroad Car Company, also duly authorised in that behalf, made, executed and signed the certain promissory note in writing of the said defendants, co manufacturers and co-partners as aforesaid, bearing date at Montreal aforesaid, the day and year last aforesaid, whereby three months after date, to wit, after the date of the said promissory note for value received, the defendants, by the name and style of the Montreal Railroad Car Company promised to pay to the order of A. C. Thompson, to wit, to the order of one A. C. Thompson of Bytown, in that part of this province heretofore known as Upper Canada, merchant and trader, at the Bank of Montreal, to wit, at the office, in Montreal, of a certain banking institution carrying on the business of banking at Montreal, under the name and style of the Bank of Montreal, the sum of eight hundred and eighty-six pounds 5s 4d., cy., to wit, five shillings and four pence current money of this Province, and then and there, for value received, the said Montreal Railroad Car Company delivered the same to the said A. C. Thompson, who also then and there, for like value received, endorsed and delivered the said note to the plaintiffs, who are now the true and lawful owners and holders thereof."

The demand of payment also, the dishonour and protest of the note were set forth in the usual manner. The declaration also contained account for goods sold and delivered and the usual money accounts.

By their *first* plea, the defendant pleaded :—

That the defendants now pleading were not at and before the institution of this action, nor are they now, merchants, manufacturers and contractors, carrying on business in co-partnership as alleged in plaiotiff's declaration; nor did they, the said defendants, contract with the plaintiffs in manner as the said plaintiffs have in and by their said declaration set forth and declared, nor were they ever as such co-partners, parties to or bound for any of the contracts set forth in their declaration, and the said defendants deny all, each and every of the allegations of the said plaintiffs in their said declaration set forth, as fully to all intents and purposes, as if the said allegations had been herein copied, and expressly and specially denied.

The second plea was the ordinary *défense en fait*.

The plaintiffs fyled a general answer to the first plea, and a general replication to the *défense en fait*.

It appeared in evidence that the defendants were members of a company which it was intended to incorporate under the provisions of 13 and 14 Victoria, Chapter 28, and the issue between the parties was whether the incorporation had been effected at the dates in question.

The circumstances of the organization of the Company were these:—

The articles of Association are dated the 22nd July, 1854. In them the defendants state that *they* (not for themselves and *others* as the Act contemplates) form a Company for the purpose of carrying on the manufacture and sale of Railroad Cars, &c.

These articles appear to have been registered in the Registry Office at Montreal the same day, but they are not transmitted to the Provincial Secretary until the 2nd March, 1855, when the following notification appears in the *Canada Gazette*:

"SECRETARY'S OFFICE,

"*Quebec, 2nd March*, 1855.

"Notice is hereby given, that 'The Montreal Railroad Car Company,' to be "conducted under the provisions of an Act of the Parliament of this Province, "13th and 14th Vict., cap. 28th, intituled, 'An Act to provide for the forma- "tion of Incorporated Companies for Manufacturing, Mining, Mechanical, or "Chemical purposes,' for the purpose of carrying on the manufacture and sale "of Railroad Cars, have duly complied with the formalities prescribed by THE "THIRD clause of the above mentioned Act.

"By Command,

(Signed,) "GEO. ET. CARTIER, Secretary."

It will be observed that by the 1st Section of the Act in question, it is provided that when any five or more persons form a company, they shall execute the declaration therein specified in duplicate. "And one of the duplicates of "every such statement or declaration shall be filed by such Registrar or Regis- "ter, or his Deputy, and an entry thereof shall be made by him in a Book to

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"be kept for that purpose, and the other of the said duplicates, with a proper "certificate of acknowledgment, filing and registration thereof as aforesaid, "endorsed thereon, shall forthwith be transmitted to and fyled in the office of "the Secretary of this Province." And by the 2nd Section it is enacted that "*when the formalities prescribed in the foregoing Section shall have been com-*"*plied with, the* persons who shall have signed the said statement or declaration, "and their successors; *shall be a body politic and corporate.*"

A simple reference to dates will shew that at the time the plaintiffs' note was given, the defendants had not complied with the requirements of the Act.

The note was dated the 25th October, 1854, and became due the 29th January, 1855.

The articles of Association were not even transmitted to the Secretary until the 22nd February, 1855, and were not published until the 2nd March of that year.

It was contended by the plaintiffs that until these formalities were fulfilled the defendants could not claim to be a body politic and corporate, nor evade individual liability in respect of contracts entered into by them.

But apart from this view of the case, the plaintiffs said that even supposing that the preliminary requirements had been kept, the defendants were still jointly and severally liable under the 11th Section, which enacts—

"That all the stockholders of any Company that shall be incorporated under "this Act shall be jointly and severally liable for all debts and contracts made "by such Company, until the whole amount of the Capital Stock of such Com-"pany, fixed and limited in manner aforesaid, shall have been paid in, and a "certificate to that effect shall have been made and registered as prescribed in "the next Section of this Act, &c."

It is true that by the 16th Vic., c. 172, any shareholder paying up the calls on his stock in full, and fyling a certificate to that effect, is exempted from liability *quoad* his own stock, but these certificates were not registered by the defendants until the 18th January, 1855, long after the date of the plaintiffs' note.

The judgment of the Superior Court (BADGLEY, J.) was *motivé* as follows:

"The Court having heard the parties, &c., &c., and considering that the said promissory note was made by 'The Montreal Railroad Car Company,' to wit, an Incorporated Joint Stock Company, established and existing before the date of such note, and that the said defendants are not personally liable for the payment of the same in and by this action, which is hence dismissed, and the Court doth reject the plaintiffs' motion for the rejection of certain evidence produced by the defendants, the whole with costs."

The judgment in appeal was *motivé* as follows:

"Considering that the defendants at the time of the date of the promissory note, upon which the action in this cause is founded, were co-partners with several other persons, in a certain Joint Stock Company of unlimited liability, known as the Montreal Railroad Car Company, and as such responsible, jointly and severally, with all their co-partners for all the liabilities assumed by the said company.

"Considering that the makers of the said note at the time of the date thereof were duly authorized by the said Company to sign all such notes, one as President, the other as Secretary of the said Company;

"Considering, therefore, that in the judgment rendering in the Superior Court in this cause, on the twenty-seventh day of February, one thousand eight hundred and fifty-eight, there is error, this Court doth set aside, reverse, and annul the said judgment;

"And proceeding to pronounce the judgment which the Court below ought to have rendered, this Court doth adjudge and condemn the respondents, jointly and severally, to pay and satisfy to the appellant the sum of eight hundred and eighty-six pounds eighteen shillings and one penny, to wit: eight hundred and eighty-six pounds five shillings and four-pence, amount of the said note, and twelve shillings and nine-pence costs of protest, together with interest on eight hundred and eighty-six pounds five shillings and four-pence, from the twenty-ninth day of January, one thousand eight hundred and fifty-five (date of protest), and on twelve shillings and nine-pence currency, the fifteenth day of September, one thousand eight hundred and fifty-five (date of assignment of process), and costs in both Courts."

Judgment reversed.

Rose & Ritchie, for appellants.
A. & W. Robertson, for the respondents.
(F. W. T.)

COURT OF REVIEW, 1867.

MONTREAL, 29TH OCTOBER, 1867.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 632.

The Eastern Townships Bank vs. *Humphrey* et al.

HELD:—That a promissory note for $1000, given on the 15th of February, 1864, as a renewal note of one dated 23rd May, 1862, which had been discounted by the plaintiff in American greenbacks taken at par at the ordinary rate of 7 per cent. per annum, and the payment in addition of a commission of ten dollars to cover alleged trouble connected with renewals, is null and void, as being tainted with usury.

This was a hearing in revision of a judgment rendered by MR. JUSTICE SHORT, in the Superior Court, at Sherbrooke, in the district of St. Francis, dismissing the plaintiff's action.

The action was brought to recover the amount of a promissory note for $1000 cy., dated 15th February, 1864, signed by the defendants in favour of the plaintiff.

The defendants fyled several pleas, to the effect that the note was a renewal of one dated 23rd May, 1862, which had been usuriously discounted by the plaintiff, by deducting, in addition to the legal interest, a certain commission or *bonus*, and by paying over the proceeds of the discounting in U. S. greenbacks (which were taken at par) instead of in current funds.

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The following was the judgment of the Superior Court, at Sherbrooke: "The Court * * * considering that the defendants have established that the promissory note declared upon by the plaintiffs was given by the defendants to the plaintiffs for and in consideration of a loan by the plaintiffs to John Humphrey, one of said defendants, of one thousand dollars in Bank Bills of the United States of America, and that at the time of the said loan said plaintiffs reserved, exacted and received from said John Humphrey, besides the legal interest of seven per centum per annum on the account of the said loan, the sum of ten dollars as a commission; and considering that the taking by said plaintiffs of the sum of ten dollars by way of commission (they not being legally entitled to charge any commission whatever) cannot be otherwise regarded than as a device and contrivance to evade the law, and exact and take from the said John Humphrey for said loan of one thousand dollars a higher rate of interest than seven per centum per annum, doth in consequence adjudge and declare the said promissory note usurious and utterly void, and doth dismiss plaintiffs' action with costs."

Dorman, for plaintiff (appellant):—This is an action for $1000, founded upon a promissory note signed by defendants jointly and severally in favor of plaintiffs. It has been dismissed by the Superior Court at Sherbrooke, on the ground that the note sued upon was based upon a former debt which was tainted with usurious consideration and therefore void. Before remarking upon the particulars of the case the plaintiffs respectfully submit that under the law as it existed when this contract (note) was made, no contract was made void by reason of usurious consideration, except to the extent of the usurious consideration. By ordinance 17 Geo. III., c. 3, all contracts, whereby a greater sum as interest than six per centum per annum was reserved or taken, were made utterly void. By 16 Vic., c. 80, the 5th section of 17 Geo. III. c. 3, which was the only section of said ordinance then in force, was absolutely repealed. It was unconditionally repealed. By this repeal the penalty of rendering a contract void by its being tainted with usurious consideration was abrogated. By 22 Vic., c. 85, special provision was made with reference to Banks, allowing them to take 7 per centum in advance, and forbidding their reserving or taking more for the loan of money than this rate. It will be observed that if the ordinance 17 Geo. III., c. 3, had not been previously repealed, it ceased to apply to Banks, because by this ordinance the penalties and forfeitures were for reserving more than 6 per centum, while by the 22nd Vic., c. 85, Banks were permitted to take seven per centum. By the 16 Vic., c. 80, the penalties for stipulating for a higher rate of interest than six per centum were abolished. By 22 Vic., c. 85, all parties, except banks and certain loan companies, were permitted to stipulate for any rate of interest they pleased. Banks were only permitted by this last Act to take 7 per centum. It is submitted that with this state of the law, Banks, in reserving more than 7 per centum, only forfeited the excess above 7 per centum. In the consolidation of the Statutes, Con. Stat. Ca., c. 58, the consolidators have erroneously brought up the ordinance of 17 Geo. III., c. 3, as if it were then in force with reference to Banks, or they seem to have intended to have done so. It is contended that power was not given the consolidators to enact new laws, but only to bring up

and declare the existing law. Vide Con. Stat. Ca., c. 29, sec. 8. It is true that section 9 seems to make against this proposition, but it is claimed that when there was in the statutes brought up a doubtful signification, the wording of the Consolidated Statutes is the interpretation to be taken, but where there is manifest error, and the interpretation given is really a new law, it is imperative. The argument so far is this, that by the law as it was when the statutes were consolidated there was no provision rendering contracts of banks reserving more than 7 per centum void except as to such excess.

The reasoning here adopted is sanctioned by the deliverance of C. J. Lafontaine, Nye vs. Malo, 7 L. C. Rep. 405. He holds Ord. 17 Geo. III., c. 3, to be repealed, and resorts to the common law (French Law) as a basis for interpreting the law of 1853.

In the next place it is contended that by the wording of the 9th section of the Con. Stat. Ca., c. 58, the contracts of banks reserving more than seven per cent are not made void. It was doubtless intended so to be, but it is not susceptible of such construction. By that section the exception of contracts rendered void by reason of being tainted with usury expressly excludes Banks. It reads thus:—"Except as otherwise authorized and provided by this Act, or by some other Act or law, no corporation or company, or association of persons, *not being a bank*, authorized by law before the fifteenth of August, 1858, to lend or borrow money, shall upon any contract take directly or indirectly for loan of any moneys, wares, merchandize, or other commodities whatsoever above the value of six dollars for the advance or forbearance of one hundred dollars for a year, and so after that rate for a greater or less sum or value, or for a longer or shorter time, *and except as aforesaid* (which exception applies to corporations and companies "not being a bank"), all bonds, bills, promissory notes, contracts, and assurances whatsoever made or executed in contravention of this Act, whereupon or whereby a greater interest is reserved and taken than authorized by this Act, or by some other Act or law, shall be utterly void, &c."

The note in suit represents a debt for which a note was given the 26th May, 1862, by J. and S. A. Humphrey, S. A. Humphrey, Lewis Hanson, and H S. Humphrey. The note was renewed several times, running over a period of more than two years. The defendants plead that the original discount was made upon a corrupt and usurious agreement between the plaintiffs and John Humphrey, one of the defendants, to the effect that the said John Humphrey should receive United States bank notes that were only worth ninety-five per cent. at one hundred and one per cent., and also to pay in addition for said loan the usual discount of seven per cent., and that, in fact, the said John Humphrey agreed to give and the plaintiffs to accept the said original note for $1,000, at ninety days, thereby receiving sixty dollars usurious interest. The evidence of the defendants consists entirely of deposition of William Farwell, jr., cashier of plaintiffs, and the answers of plaintiffs *sur faits et articles*. The defendants' plea is entirely unsustained by the evidence. The facts proved are these:—That John Humphrey asked Benjamin Pomroy, the President of the Bank, for discount, and he replied that the bank was not then discounting and could not let him have the money. Humphrey then asked him if he could not let him have States money, saying that

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would answer his purpose just as well, and he wanted the money by renewal three months' notes for a year. Pomroy told him that all the States money they had taken at par. It was agreed to let him have the States money at par. At that time it is shewn that United States bills were quoted in brokers' circulars at 2½ or 3 per cent. discount, but it is established in evidence that States money was received at par in all business transactions, and even in Montreal, in payment of traders' bills. It is proved by the bank books, and by the testimony of Farwell, that Humphrey received from the cashier $982 in United States Bank Bills, being $1000, less the ordinary discount thereon for three months, being $18. After this transaction took place, the said John Humphrey, in consideration of the loan not being an ordinary transaction of the bank, but a loan to extend over a year, and for the extra trouble which he, said Farwell, would be put to, in letter writing and renewing the notes, paid to said Farwell ten dollars as a commission. It is established in evidence that Humphrey was always very irregular in his mode of doing business, and never attended to his paper promptly, and much trouble and labour was occasioned in writing letters and drafting renewal notes and putting his paper in proper form, and that, in fact, the labour was actually performed in this instance.

It is clearly established that there was no usurious agreement. The ten dollars was paid *after* Humphrey had received his discount, and was paid as a commission. Whether Mr. Farwell had a right to this sum as a commission or not, simply resolves itself into a question as to his right to the ten dollars only. It negatives any presumption of usury, for it was not agreed to be paid, nor exacted, nor reserved for the use of the money, but as a commission. It is also to be remarked that there is no proof whatever of the bank's having received this ten dollars. There must be a usurious intent to constitute usury. 2 Parsons, on Bills and Notes, 404: "To constitute a usurious transaction there must be a loan; and there must be a usurious intent, and both parties must confer in this intent."

Idem, Note, per Johnson, J., in Nichols vs. Fearson, 7 Pet. 103, "usury is mainly a matter of intention." Per Perkins, J., Gale vs. Grannis, 6 Ind. 140: "The ground and foundations of all usurious contracts is the corrupt agreement." In Tousey vs. Robinson, 1 Met. Ky. 663, "it was held that a note given in the purchase of land was not usurious, although bearing interest at the rate of 8 per cent., this being more than the legal rate, for, say the Court, the rate of interest was a part of the consideration of the purchase, and was not for the loan or forbearance of money." "But the contract must be made at the time."

Mitchell vs. Griffith, 22 Misso. 515. Byles on Bills, 75. "To constitute usury there must further be a corrupt intention, not perhaps to evade the statute, for a man may not know that there is such a law, but his ignorance of the law here, as in other cases, is no excuse, for it is one (as Selden observes) every one might make, and nobody could tell how to refute him, *but there must be a corrupt intention to take exorbitant interest.*" Smith, on Contracts, 153-4. The case of the usury law is cited to illustrate a "distinction between an illegality stipulated for—contemplated by the contract, and illegality occurring in-

cidentally during the course of its performance." ..... "The effort of the Court was in every case to strip off the external covering of form and get at the intent and real import of the transaction, if that were tainted with usury the contract was held void." As to the right of bankers to receive reasonable commission there can be no doubt in England; and the usury laws in England are more stringent and specific in their terms than were our old Ordinance of 17 Geo. III., c. 3. Chitty on Bills 84: "Bankers who discount a bill or note payable at another place may, in addition to the legal interest or discount of five pounds per cent., take a customary or reasonable sum for remitting the bill or note for payment, and other necessary and incidental expenses," "and the right to receive this additional remuneration does not appear to be confined to cases where the bill is payable at a different place from that where the banker resides, *but extends to bills payable at the same place*, and though it has been considered that the case of bankers is dissimilar to that of other persons, on account of the nature of their business and of the peculiar expense attending it, yet it seems that a merchant or other person may, under circumstances, legally receive commission on discounting bills, as where he has considerable trouble *in keeping accounts for the party so charged.*"

Idem, p. 86: "In all cases where bankers make any charge by way of commission for extra trouble or expense they may be put to in transacting the business of a party, *it is advisable to detach the charges for trouble of keeping the account from the charge of interest for forbearance;* and if a banker undertake to conduct any transaction *not in his ordinary mode of business*, and stipulate for a certain charge to be made by him in consideration for such extra trouble and expense, independently "of all charges, costs, damages and expenses that he may be put to by means of the premises," it is not usurious, for trouble is not necessarily to be intended as a colorable reservation of further interest beyond the legal interest, but as a compensation for trouble not comprehended within the words "costs, charges, damages and expenses."

Comyn on Usury, 135: "A reasonable commission beyond legal interest for extra incidental charges, as for agency in remittance of bills for acceptance and payment, is not usurious." Parsons on Notes and Bills, Vol. 2, p. 410: "If the lender actually sustain loss or expense, *or any special labour*, by reason of the loan, he may make a reasonable charge for this, and if this charge be included in the note so as to make it apparently usurious, it will not be really so." Byles on Bills, 74: "A merchant, banker, or other person, may, in addition to the discount, take a commission for drawing or accepting bills, *whether the bills be payable in the same place or not.* No precise rate of commission in such case is fixed by law, but the usual rate sanctioned by decisions is five shillings per cent., usually written 5s. per cent." This doctrine has been sanctioned in Canada. Pollock et al. vs. Bradbury, 3 L. C. Rep. 171. Before Judicial Committee of the Privy Council. Sir John Patterson: "We do not therefore see upon the facts of this case sufficient to justify us that this was merely a cloak for usury," *i. e.* 5 per cent. commission charged by plaintiffs for labour in keeping accounts as bankers of loans at different periods. This was a very large commission, and it was held not usurious. Attention is particularly

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solicited to the stress laid upon the fact of commissions having been charged openly. The fact that it was thus done, is received as proof of strong indication that the claim was *bonâ fide*, and not a cover for usury. Comyn on Usury, 150: "Where the defendants were sued by their banker for a balance of account, and it appeared that every quarter the bankers struck a balance, in which were included the principal sum of money advanced, *all interest due upon it*, and a commission of five shillings for every one hundred pounds advanced, which balance at the end of the quarter having been handed to the defendants was converted into principal, and made to carry interest; the Court of Exchequer declared themselves strongly of opinion that this case was not usurious." Chitty on Contracts, 709: "A banker, bill broker, or other person discounting a bill, or an agent procuring the acceptance and payment of bills, may lawfully charge and take a reasonable commission or remuneration, besides legal interest for his *bonâ fide* and necessary expenses and trouble." It has been argued by the defendant that because our statute allows banks to take commission for acceptances or discounts payable at another place than the place of discount, it implies an exclusion of all other commissions. The statute in granting this permission only sanctions a universal bank custom in England and elsewhere.

To show that the law of usury in England upon which these authorities are based (12 Anne, c. 16), we cite it at length as given in Comyn on Usury, p. 6: "That no person from and after the 29th September, 1714, upon any contract made after the said 29th of September, "shall take directly or indirectly, for loan of any moneys, wares, merchandize or other commodities whatsoever, above the value of £5 for the forbearance of £100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts and assurances whatsoever, made after the time aforesaid, for the payment of any principal, or money to be lent or covenanted to be performed upon or for any usury whereupon or whereby there shall be reserved or taken above the rate of £5 in the hundred, shall be utterly void; and that all and every person or persons whatsoever, which shall upon any contract to be made after the said 29th day of September, take, accept, and receive by way or means of any corrupt bargain, loan, exchange, chevisance, shift or interest of any wares or merchandize, or other thing or things whatsoever, or by any deceitful ways or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing above the sum of £5, for the forbearing of £100 for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter term, shall forfeit and lose for every such offence the treble value of the moneys, wares, merchandize, and other things so lent, bargained, exchanged, or shifted."

"All and every scrivener and scriveners, broker and brokers, solicitor and solicitors, driver and drivers of bargains for contracts, who shall, after the said 29th day of September, take or receive, directly or indirectly, any sum or sums of money, or other reward or thing for brokage, soliciting, driving, or procuring the loan, or forbearing any sum or sums of money over and above the rate of five shillings for the loan or forbearing of £100 for a year, and so rateably or

above twelve pence, over and above the stamp duties, for making or renewing of the bond or bill for loan or forbearing thereof, or for any counter bond or bill concerning the same, shall forfeit for every such offence £20 with costs of suit.

2 Parsons, Notes and Bills, p. 408 in edition of 1867.

Bank of United States vs. Waggener, 9 Petors 378.

7 Comyn's Digest, p. 609.

Carstons and Stem, 4 Maule & Selwyn, p. 192.

Pollock and Bradbury, 3 L. C. Rep., p. 171.

Kelly on Usury, pp. 44 and 45, being pp. 33 and 34 of Edition in Library.

Having in view the above authorities, and the facts of this case as in evidence as respects the $10, which really is the only debatable point in this case, the following inferences are taken:

1. There is no evidence whatever that the bank received it.

2. The payment of the $10 by Humphrey to Farwell was a voluntary act after the loan from the Bank had been completed, for special services which were rendered necessary and which were performed.

3. The receipt of the $50 by Mr. Farwell, whether the responsibility attaches to the bank or to him personally, was as a commission for labour occasioned by a loan outside of the ordinary mode of bank business, giving rise to extra trouble, for which this commission is proved to be a very moderate remuneration, and in any event cannot be held to be a cloak of usury.

As respects the other point raised by defendants' plea, that Humphrey *was compelled* to take U. S. bills which were 5 per cent. below par, it is contrary to fact. He received these bills, which were only nominally 2½ per cent. below par, at his own request, stating that they were as good to him as current Canada funds. 2 Parsons on Notes and Bills, 434, Note: "In Slossum vs. Duff, 1 Barb. 432, it was held that where the discount upon uncurrent money is very trifling, *and the same passes current in the way of trade*, its reception at par is no violation of the statute." "In Gale vs. Grannis, 9 Ind. 140, it was held that the taking of such depreciated paper is not usurious, *unless the taking is made a condition of a loan of money, or is resorted to as a device to cover usury.*"

Chitty on Bills, 88: "Where in discounting a bill a proposal is made that goods shall be taken *although such proposal originate with the plaintiff, yet* if the other party *readily accede to it*, the presumption is that the goods are fairly charged, and it lies upon the defendant to prove the contrary, if he would impeach the plaintiff's title to the bill upon the ground of usury." The same doctrine is held under the old laws of France. Pothier, Traité de l'Usure, No. 87: "Pour qu'il y ait usure, il faut trois choses: 1. Il faut qu'il soit intervenu un contrat de prét; 2. Il faut que le preteur retire un profit du prét; 3. *Il faut qu'il ait été exigé de l'emprunteur.*" It was permissible under the French law after the completion of a loan for the borrower to make a present to the lender (Pothier, Traité de l'Usure, No. 98) when it was voluntarily given. As respects the substantial merits of this case, they are as follows:—John Humphrey, leading partner in firm J. and S. B. Humphrey, wanted and applied for the United

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States funds, to pay debts for which he could dispose of the same at the same rate as Canada current funds, and it is proved that he actually did dispose of four hundred dollars of this money to Mr. Buckland for current Canada funds, and there is no question but that he received par value for the whole. He was to have the loan one year; it continued for two years by 3 months notes, and was never but once regularly renewed when due, and repeatedly letters were written to him to notify him, and he frequently sent incorrect amounts for interest, requiring other letters to obtain a correction of the errors, and finally the debt is sued, and he comes forward after its being six times renewed, and in every instance but one a long time after due, and pleads usury, and asks that this 7th note be declared void, and he permitted to depart with the $990 because of the payment of ten dollars to Mr. Farwell in the manner before explained. The whole of the evidence on both sides is printed herewith, and plaintiffs submit that they are entitled to ask a judgment in their favour.

Felton, Q. C., for defendants (respondents):—The proof of the transaction as pleaded was, after great difficulty and many denials on the part of the plaintiffs, fully made out, and showed beyond doubt, by the evidence of the cashier of the bank and other officers, and by the answers of the plaintiffs on *faits et articles*, that the plaintiffs in discounting the note of the 23rd of May 1862, for $1000,

Retained in cash a bonus of	$10.00
Under colour of interest on $1000	18.00
5 per cent. discount on $982.00, amount of payment in United States money	41.00
Amounting in all to	$69.00

While in law they were only entitled to interest on $1000, at seven per cent. for 90 days, or $17.50.

The Act respecting interest, Ch. 58 Consolidated Statutes of Canada, pages 683–4, contains the following provisions, Sect. 4: "No bank incorporated by any Act of the Legislature of this Province, etc., may stipulate for, take, reserve or exact a higher rate of discount or interest than seven per centum per annum; and any rate of interest not exceeding seven per centum per annum may be received and taken in advance by any such Bank," etc.

Sect. 5: "Any Bank," etc., "may, in discounting at any of its places of business," etc., "any note," "payable at any other of its own places of business," "receive and retain, in addition to the discount, any amount not exceeding the following rates per cent." "to defray the expenses attending the collection of such note."

Under 30 days	½ per cent.
30 days and over, but under 60 days	¾ do
60 do do do 90 days	¾ do
90 days and over	½ do

Sect. 7: "Any Bank" "may, in discounting any note," "payable at a place different from that at which it is discounted and other than its own places of business, charge, in addition to the discount, one half per cent. on the amount thereof, to defray the expenses of agency and exchange in collecting the same."

Sect. 9: "Except as otherwise authorized and provided by this Act, or by some other Act or Law, no Corporation or Company or Association of persons, not being a Bank, authorized by law before the sixteenth of August, 1858, to lend or borrow money, shall upon any contract take directly or indirectly for loan of any moneys, wares, merchandise, or other commodities whatsoever, above the value of six dollars for the advance or forbearance of one hundred dollars for a year, and so after that rate for a greater or less sum or value, or for a longer or shorter time; *and except as aforesaid, all bonds, bills, promissory notes, contracts and assurances whatsoever made or executed in contravention of this Act, whereupon or whereby a greater interest is reserved and taken than authorized by this Act, or by some other Act or law, shall be utterly void,* and every Bank or Banking institution, and every Corporation and Company and Association of persons not being a Bank, authorized to lend or borrow money as aforesaid, which directly or indirectly takes, accepts and receives a higher rate of interest, shall forfeit and lose for every such offence treble the value of the moneys, wares, merchandise, or other commodities lent or bargained for, to be recovered by action of debt in any Court of competent jurisdiction in this Province, one moiety of which penalty shall be paid to the Receiver-General for the uses of Her Majesty towards the support of the Civil Government of the Province, and the other moiety to the person who sues for the same."

Sections 4 and 5 of the "Act respecting Interest" are repetitions of the 109th and 110th sections of the "Act respecting Banks and Freedom of Banking," C. St. C., Ch., 55, page 665.

The appellants admit that it was the intention of the Legislation to void contracts tainted with usury, but that the intention is too vaguely expressed to be effective. The respondents contend that the terms of the Act above quoted in italics admit of only one meaning, and amount to a clear and precise enactment that all obligations taken by Banks and bearing interest at over 7 per cent., and all obligations bearing interest at over 6 per cent., taken by corporations and associations for lending money, shall be utterly void. The appellants further pretend that the 16th Vict., Ch. 80, which repealed the 5th section of the ordinance 17 Geo. III., Ch. 3, limited the forfeiture for usury to the excess of interest over 6 per cent. A conclusive answer to this objection is formed in the 4th section of the 16 Vict., Ch. 80, which is in these words:

"Nothing in this Act shall be constrained to apply to any Bank or Banking "Institution, or to any Insurance Company, or to any corporation or association "of persons heretofore authorized by Law to lend a sum of money at a rate of "interest higher than 6 per cent."

The same general provisions with respect to the partial repeal of the usury Laws, as contained in the 16 Vict., Ch. 80, and the same express exception as to Banks and lending Corporations, are also reproduced in the 1st and 2nd Sections of "the Act respecting Interest" above quoted. (C. S. C. p. 682).

The next pretension of the appellants is that the transaction was a loan, not for 3 months, but for one year. This pretension could only be supported by legal proof; and there is no proof which can be admitted to vary the original written contract between the parties of the 3 months note. There is no *preuve*

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par écrit nor *commencement de preuve par écrit*, by means of which the pretended agreement for a loan for one year can be established. But assuming that the loan for the longer date were legally proved, the usury would be still the same infraction of the law, though the amount of excess of interest would be then reduced to one-fourth of the $69 actually received. The legal crime of usury consists in taking any amount in excess of the legal interest, and makes no distinction whether that excess be great or small. But again the appellants affirm that the excess of interest taken does not exceed one per cent. on the sum lent, and that this is justified by the English and American decisions which they quote. In answer to this it may be remarked in the first place that the facts are wholly against them. It has been shown that the appellants commenced by taking for interest on $1000 for 8 months,..... .....$69.00
The respondents paid interest on three renewed notes, $17.50 each 52.50

Making total received by appellants for 12 months..... 121.50
When they were only entitled to interest at 7 per cent. for 12 months... 70.00

Or leaving an excess of..... 51.50

Or at the rate of 14 per cent. per annum within a fraction.

In the second place the authorities cited show that it has been customary to allow in England to Bankers for expenses of collection about *one-quarter* of *one per cent.*, that is applying in this custom to the case before the Court, about $2.50. And thirdly, while these authorities are not binding ones, it is proper to observe that our Legislature has been careful to define in section 5 the circumstances under which Banks may take some remuneration for extra trouble, and the exact amount of such extra remuneration. Upon this point the respondents refer to a decision in Upper Canada in the case of Bank of Montreal vs. Reynolds et al. (U. C. Queen's Bench Rep. Vol. 25, p. 352), under the very Statute in question.

The plaintiffs, in order to screen an extra charge of ⅛th of one per cent. under the fifth section, insisted upon the discounted note being falsely dated at a place other than that where it was actually made, and where it was payable. And it was held that this excess of ⅛th of one per cent. taken over the 7 per cent. was usury, and the note was declared void under the Statute.

The respondents also refer to the following authorities:

In the case of deed, Davidson vs. Bernard, 1 Esp. 11. Kenyon, J., held that "if upon negotiation for a loan, the lender insisted on the borrower taking stock at a rate exceeding a market price, it was usury."

An agreement on discounting a bill that the party should take in part payment another bill which had time to run, as cash, although the full discount was taken, was usurious. Parr and Elliason, 1 East 92.

If a country banker discounting a bill takes interest for the whole time it has to run, and instead of paying money for the bill, gives notes payable in London at 3 days after sight, such banker is guilty of usury. Kenyon, J., in case of Mantren q t. vs. Griffiths, Peake, N. P. Rep. 200, also cited in Bosanquet and Puller, 155, note.

If a party, on discounting a bill of exchange, substitute goods of certain ascertained value for money as more than such ascertained value, he is guilty of usury. Pratt and Willey, 1 Esp. 40.

In an action on a bill of exchange, if it appear that the plaintiff discounted it for defendant, and required him to take the whole or part of the amount in goods, the *onus* lies upon the plaintiff to prove that the goods were of the value at which they were taken, for the purpose of rebutting the presumption that the transaction was usurious. Davis and Hardacre, 2 Camp. 375.

A security given in lieu of a former security, which was tainted by usury, is void, unless in the second security a deduction is made of all sums paid usuriously under the former security. Wickes and Gogerty, 2 Carrington and Paine, p. 397; 1 Ryan and Moody, 123.

A new security, given for the balance of a debt originally usurious, is also usurious. Pickering and Banks, Forest 72.

The respondents respectfully submit that they have substantiated their pleas of usury, and pray that the judgment already rendered in their favour in the Superior Court, maintaining their pleas and declaring void the note sued upon, and dismissing the action of the plaintiffs with costs, be affirmed with costs.

The Court of Review unanimously confirmed the judgment, as rendered by MR. JUSTICE SHORT.

Judgment of S. C., confirmed.

Sanborn & Brooks, for plaintiff.
S. W. Dorman, counsel.
Felton & Felton, for defendants.
(S. B.)

[Reporter's note.—This case is now *en délibéré* before the Court of Appeals.]

COURT OF QUEEN'S BENCH, 1868.

MONTREAL, JUNE 9TH, 1868.

In appeal from Superior Court, District of Montreal.

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

ALEXANDER M. DELISLE,
(*Defendant in the Court below*),
APPELLANT;

AND

WARWICK H. RYLAND,
(*Plaintiff in the Court below*),
RESPONDENT.

The judgment in Appeal is reported at p. 29 of this volume.

AYLWIN, J., desired to state that he was absent when the judgment in *Ryland* vs. *Delisle* was given last term, and he now wished to record his dissent therefrom.

SUPERIOR COURT, 1867.

MONTREAL, 25th NOVEMBER, 1867.

Coram BERTHELOT, J.

No. 2104.

Roberts vs. *Harrison et al.*, & Divers Opposants.

DISTRIBUTION OF MONEYS—REGISTRAR'S CERTIFICATE.

HELD:—That by the terms of 27 & 28 Vic., C. 40, the Registrar, on the requisition of the Sheriff, need not include in his certificate hypotheques registered more than ten years before the sale of the property by the sheriff unless the hypotheques have been renewed.

In this case the Registrar, on the requisition of the Sheriff, furnished a certificate of incumbrances on the land sold extending beyond ten years before the sale, and the plaintiff moved to have an amended certificate furnished in the terms of 27 & 28 Vic., C. 40.

PER CURIAM. "Upon the motion of Messrs. A. & W. Robertson, counsel for the plaintiff; It is ordered, inasmuch as the Registrar of District of Montreal in giving to the sheriff of this district the certificate fyled in this cause, as to the hypotheques existing of the property sold therein, hath not complied with the requirements of the statute, in that behalf made (27 & 28th Vic., C. 40), but hath given a certificate extending back beyond the period fixed by law for such certificate to cover, inasmuch as no new registrations have appeared; that the Registrar of the said county do take back the said certificate, and amend the same or furnish a new certificate according to law, for the purposes of said sale so made in this cause, and that said certificate so amended, or such new certificate, be held to be applicable to the distribution of the moneys levied in this cause with costs."

Motion granted.

A. & W. Robertson, for plaintiff.

(R. W. T.)

SUPERIOR COURT, 1865.

MONTREAL, 9TH DECEMBER, 1865.

Coram MONK, J.

No. 723.

The Honorable GEORGE E. CARTIER, Attorney General pro regina,
Petitioner.

vs.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
Defendants.

FRANCHISE—USURPATION.

The petitioner complained that the defendants exercised the occupation of carters in and within the limits of the City of Montreal, and carried and transported for hire, goods and merchandises from their depot, to and from the stores and residences of the citizens of the City of Montreal, and that they exercised an undue advantage, privilege and monopoly, injurious to the carters of Montreal, and to the citizens thereof, and the petition prayed for an injunction against the defendants.

HELD:—1st. That it was not proved that the carters, had suffered or had been directly aggrieved to an extent, or from such illegal courses directly affecting them, as would justify the issuing of an injunction in the present case.

2nd. That the facts of collecting and delivering by carters exclusively employed to that effect by the defendants, was not injurious, but on the contrary advantageous to the public.

3rd. That the defendants had a right as common carriers, and in prosecution of their lawful business as such to employ exclusively any carter or carters they might in their discretion select to collect from and deliver freight to their customers; and that such exclusive employment of particular carters is not a violation of their charter, inasmuch as the act itself was essential or incidental to their business as common carriers.

4th. That no injunction in law could issue to restrain the defendants from illegal acts, by and from which the petitioners were not shown to be directly aggrieved; and which were not at the same time proved to be injurious to the public.

5th. That none of the individuals or parties using the defendants' road, and paying their charges for cartage has complained in the present case, and for all these reasons the petition must be refused.

The proceedings which gave rise to the present litigation were taken under the 9th section of the 88th chapter of the Consolidated Statutes of Lower Canada. This section (p. 824 Con. Stat. L. C.) provides that, "Whenever any association or number of persons act within Lower Canada as a Corporation, without having been legally Incorporated, or without being recognized as such Corporation by the Common Law of Lower Canada—and whenever any Corporation, Public Body or Board offends against any of the provisions of the Act or Acts, creating, altering, renewing or re-organizing it, or violates the provisions of any law in such manner as to forfeit its charter by mis-user — and whenever any such Corporation, Public Body or Board has done or omitted any act or acts, the doing or omitting of which amounts to a surrender of its corporate rights, privileges and franchises—and whenever any such Corporation, Public Body or Board exercises any franchise or privilege not conferred on it by law — it shall be the duty of Her Majesty's Attorney General for Lower Canada, whenever he has good reason to believe that the same can be established by proof, in every case of public interest, and also in every such case in which satisfactory security is given to indemnify the Government against all costs and expenses to be incurred by such proceeding, to apply for and on behalf of Her Majesty to the Superior Court sitting in the District in which the principal office or place of business of such persons so un

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lawfully associated together, or of such corporation, Public Body or Board is situate, or to any Judge of such Court in vacation, by an information, declaration or petition (requête libellée) supported by affidavit to the satisfaction of such Court or Judge, complaining of such contravention of the law, and praying for such order or judgment thereon as may be authorised by law."

The Petition in the name of Her Majesty's Attorney General for Lower Canada set forth.

That, by an Act of the Legislature of this Province passed in the session held in and during the sixteenth year of Her Majesty's Reign, intituled an Act to Incorporate the Grand Trunk Railway Company of Canada, it was enacted that certain persons therein mentioned, together with such persons as should legally become proprietors of any share or shares in the Railway thereby authorized to be made, and their several and respective heirs, executors, administrators and assigns, being proprietors of any share or shares in the said Railway, should be a Company according to the rules, orders and directions thereinafter expressed, and for that purpose should be one Body Politic and Corporate, by the style and title of the Grand Trunk Railway Company of Canada.

And the said petitioner further represents, that, among other things, it was therein enacted, that the several clauses of the Railway Clauses Consolidation Act, with respect to the first, second, third, and fourth clauses thereof, and also the several clauses of the said Act with respect to "Interpretation," "Incorporation," "Powers," "Plans and Surveys," "Lands and their Valuation," "Highways "and Bridges," "Fences," "Tolls," "General Meetings," "Directors, their "Election and Duties," Shares and their Transfer," "Municipalities," Share-"holders," "Actions for Indemnity, and Fines and Penalties and their Prose-"cution," "Working of the Railway," shall be incorporated in this Act to wit: the said sixteenth Victoria, with the following modification of the ninth provision in the clause of the said Act with respect to "Plans and Surveys," that is to say: that lands to the extent of twenty acres may be taken for stations, depots or fixtures, in any city or town containing more than five thousand inhabitants, without the consent of the proprietor thereof, with the exception of the sixth provision in the clause of the said Act, with respect to "General Provisions," in lieu of which it was therein enacted, that in the event of the Railway, thereby authorized to be made, not being commenced within one year from the date of the passing of this Act, or not being completed before the first day of January, one thousand eight hundred and fifty-seven, it should be lawful for the Governor in Council, by Proclamation, to revoke the Charter contained in this Act, and the same should thereupon become and be null and void, and of no effect whatever, in so far as regards so much of the Railway, thereby authorised to be made, as should not at the date of said Proclamation be completed and open for public use; and with the further exception of any enactment in the said clauses which may be inconsistent with the express provisions and enactments of this Act in like matters; and the expression "this Act," when used therein, shall be understood to include all the clauses of The Railway Clauses Consolidation Act which are incorporated with this Act.

And the said petitioner further saith, that in and by the Railway Clauses Con-

solidation Act, passed in the 14th and 15th years of the reign of Her Gracious Majesty, and incorporated in the Grand Trunk Railway Act, it is enacted among other things, in the Interpretation, or Seventh Clause, that the word "toll" shall include any rate or charge or other payment payable under this Act or the special Act, for any passenger, animal, carriage, goods, merchandize, articles, matters or things conveyed on the Railway, the word "good" shall include things of every kind conveyed upon the said Railway, or upon steamers, or other vessels connected therewith.

And the said petitioner further saith, that by the Ninth Clause thereof "Powers" it is amongst other things enacted, that the Company shall have power and authority to take, transport, carry and convey persons and goods on the Railway, to regulate the time and manner in which the same shall be transported, and the tolls and compensations to be paid therefor, and to receive such tolls and compensation.

And the said petitioner further saith, that by the fourteenth clause thereof, it is among other things enacted that Tolls should be established as follows:

Firstly. — Tolls shall be from time to time fixed and regulated by the By-laws of the Company or by the Directors, if thereunto authorised by the By-laws or by the Shareholders at any general meeting, and shall and may be demanded and received for all passengers and goods transported upon the Railway, or in the steam vessels to the undertaking belonging, and which shall be paid to said persons and at such places near to the Railway, in such manner and under such regulations as the By-laws shall direct; and in case of denial or neglect of payment of any such tolls or any part thereof, on demand to such persons, the same may be sued for and recovered in any competent Court, or the Agent or Secretary of the Company may, and they are hereby empowered, to seize the goods for or in respect whereof such tolls ought to be paid, and detain the same until payment thereof; and if the said tolls shall not be paid within six weeks, the Company shall thereafter have power to sell the whole or any part of such goods, and out of the money arising from such sales to retain the tolls payable as aforesaid, and all charges and expenses of such detention and sale, rendering the surplus, if any, of the money realized from such sale, or of such of the goods as may remain unsold, to the person entitled thereto; and if any goods shall remain in the possession of the Company unclaimed for the space of twelve months, the Company shall thereafter, and on giving public notice thereof by advertisement for six weeks in the *Canada Gazette*, and in such other papers as they may deem necessary, have power to sell such goods by public auction, at a time and place to be mentioned in such advertisement, and out of the proceeds thereof to pay such tolls and all reasonable charges for storing, advertising and selling such goods; and any balance of such proceeds shall be kept by the Company for a further period of there months, to be paid over to any party entitled thereto; and in default of such balance being claimed before the expiration of the period last aforesaid, the same shall be paid over to the Receiver General, to be applied to the general purposes of the Province, until such time as the same shall be claimed by the party entitled thereto, and all or any of the said tolls, may, by any By-law, be lowered and reduced and again raised as often as it shall be deemed

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necessary for the interest of the undertaking, provided that the same tolls shall be payable at the same time, and under the same circumstances, upon all goods and persons, so that no undue advantage, privilege or monopoly, may be afforded to any person or class of persons by any By-laws relating to the tolls:

Secondly. — In all cases, a fraction in the distance over which goods or passengers shall be transported on the Railway, shall be considered as a whole mile; and for a fraction of a ton in the weight of any goods, a proportion of the tolls shall be demanded and taken according to the number of quarters of a ton contained therein, and a fraction of a quarter of a ton shall be deemed and considered as a whole quarter of a ton.

Thirdly. — The Directors shall, from time to time, print and stick up, or cause to be printed and stuck up in the office, and in all and every of the places where the tolls are to be collected, and in every passenger car, in some conspicuous place there, a printed board or paper exhibiting all the tolls payable, and particularizing the price or sum of money to be charged or taken for the carriage of any matter or thing.

Fourthly. — No tolls shall be levied or taken until approved of by the Governor in Council, nor until two weekly publications in the *Canada Gazette* of the By-law establishing such tolls, and of the Order in Council approving thereof.

Fifthly. — Every By-law, fixing and regulating tolls, shall be subject to revision by the Governor in Council, from time to time, after approval thereof as aforesaid; and after an Order in Council, reducing the tolls fixed and regulated by any By-law, shall have been twice published in the *Canada Gazette*, the tolls mentioned in such Order in Council shall be substituted for those mentioned in such By-law, so long as such Order in Council remains unrevoked.

And the said petitioner further saith, that in and by the twentieth clause thereof, it is, among other things, enacted, that all By-laws, Rules and Orders, regularly made, shall be put into writing and signed by the Chairman or person presiding at the meeting at which they were adopted, and shall be kept in the office of the Company; and a printed copy of so much of them as may relate to or affect any party, other than the members or servants of the Company, shall be affixed openly in all and every passenger car, and in all and every of the places where tolls are to be gathered, and in like manner so often as any change or alteration shall be made in the same; and any copy of the same, or of any of them, certified as correct by the President or Secretary shall be deemed authentic, and shall be received as evidence thereof, and in any Court without further proof, Provided nevertheless, that such By-laws, Rules and Orders, shall be submitted from time to time, to the Governor General, or person administering the government of this Province, for approval.

And the said petitioner further saith, That certain other Acts of the Provincial Legislature were passed concerning the Grand Trunk Railway Company of Canada, but without repealing, amending or altering, the clauses of the act hereinbefore mentioned, and in part recited.

And the said petitioner further saith, That the Grand Trunk Railway Com

pany of Canada exercise the occupation of Carters in and within the limits of the said City of Montreal, and carry and transport for hire, goods and merchandize from their depots, to and from the stores and residences of the citizens of the City of Montreal.

And the said petitioner further saith, That the Grand Trunk Railway Company of Canada charge tolls for the transport of goods and merchandize from Montreal to places on their line of Railway, and that such tolls are uniform and the same, whether the said goods and merchandize are carted at the expense of the sender or receiver of the same, by his own carter or carters, or at the expense of the defendants by persons employed by them for that purpose, and paid by them from and out of the tolls so charged.

And the said petitioner further saith, That the defendants openly, publicly, and in violation of law, have used for a year and upwards, and do now use carts and sleighs with horses attached, for the transport of goods and merchandize to and from their depots with the letters G. T. R. painted thereon, to wit: Grand Trunk Railway, in and within the limits of the said City of Montreal and do and exercise the occupation of Carters in and within the said City.

And the said petitioner further saith, That the Defendants demand and obtain payment of tolls which are not payable at the same time and under the same circumstances [illegible] all goods; but on the contrary, they exercise an undue advantage, privile[illegible]onopoly, injurious to the Carters of Montreal and to the citizens of the said City of Montreal, and which could not by law be authorised by any By-law legally enacted or approved by competent authority.

And the said petitioner further saith, that the tolls exacted by the defendants for the transport of goods and merchandize on their Railway include cartage rates, and are levied without the authority of any By-law to that effect approved of by the Governor in Council, and that the same has not been published in the *Canada Gazette*, and that the defendants have not printed, or caused tobe printed and stuck up in the office, or place where the tolls are to be collected, or in every or any passenger car, a printed board or placard, exhibiting all the tolls payable, and particularizing the price or sum of money to be charged or taken for the carriage of any matter or thing.

And the said petitioner further saith, That the Grand Trunk Railway Company of Canada, by reason of the premises, and particularly by the occupation of common Carters, in and within the limits of the City of Montreal, and by the charging of tolls including cartage rates, and by the absence of any By-law authorizing any tolls to be collected, approved of by competent authority, have offended against the provisions of the Act and Acts, creating, altering, renewing or re-organizing them as a Corporation, and have exercised and assumed to exercise, franchises and privileges not conferred upon the said Corporation by the said Act or Acts, or by any law, and have exceeded the capacity and jurisdiction conferred by law on the said Corporation, and illegally assumed powers and privileges beyond, and in addition, and contrary to those which by virtue of the said Act or Acts, creating, altering and renewing, or re-organising said Corporation, were conferred on the said Corporation, thereby affecting the public interest for the following among other reasons:

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1. Because no authority was conferred upon the said Corporation to exercise the trade or occupation of Carters, in and within the limits of the City of Montreal.

2. Because no authority was conferred on the said Corporation to make a tariff of tolls for the transportation of goods and merchandize on their Railway, including therein charges for cartage to or from the depots to the places of business or domiciles of the citizens of the City of Montreal.

3. Because no power was given or conferred upon the said Corporation to establish tolls, unless the same were fixed and regulated by the By-Laws of the Company, and approved of by the Governor in Council, nor until after two weekly publications in the *Canada Gazette* of such By-law, and approval therefor by the Order in Council.

4. Because no By-law authorising the levy of tolls was ever passed or approved of by the Governor in Council.

5. Because the levying of tolls by the Company is not in virtue of any By-law legally passed and approved of by competent authority, but, on the contrary, the same are levied at the will and caprice of the person or persons directing the affairs of the said Company.

6. Because the acts of the defendants, hereinbefore mentioned and indicated are in direct violation of law, and without the semblance of the formalities required before any tolls can be collected by the defendants.

7. Because none of the provisions established by law for the establishment of tolls to be levied by the defendants have been observed.

8. Because the carting of goods and merchandize by the defendants in and within the limits of the City of Montreal, is a contravention of law and is wholly illegal, and was and is an exercise of a franchise and privilege not conferred upon the said Corporation by law.

That by reason of the premises, the said Superior Court, or one of Judges thereof, is authorised by law, to order the issue of a Writ of Summons commanding the said defendants to appear before the said Court, or before one of the Judges thereof, to answer this Petition and to abide by the judgment and decision to be made thereon.

That divers of the residents of the City of Montreal, being qualified voters and electors in the said City of Montreal, and particularly Robert Smith of the said City of Montreal, Carter, and Thomas Lilley of the same place, Carter, being also persons exercising the occupation of Carters in and within the limits of the City of Montreal, acting for themselves and for others of the said residents of the said City of Montreal, qualified voters and electors therein, have represented themselves as aggrieved, and have moreover given satisfactory security to indemnify the Government of this Province against all costs and expenses to be incurred by the proceedings to be had in the present Petition.

And the said petitioner further saith that the principal office or place of business of the Grand Trunk Railway Company of Canada is situated in the said City of Montreal and within the Jurisdiction and District of the Superior Court and of the Judges thereof, sitting in the said City of Montreal.

All which the said petitioner is ready to verify, prove and maintain when and

as this Honorable Court or any one of the Judges thereof may direct, and the petitioner refers to the affidavits herewith fyled in support of the Present Petition and the allegations therein contained.

Wherefore the said petitioner, for and on behalf of Her Majesty, prays that a Writ do issue commanding the Grand Trunk Railway Company of Canada to appear before this Honorable Court, or before any one of the Judges of this Court in vacation, upon such day as the said Court or Judge may fix and appoint, to answer the matters and things in the present Petition set forth and contained, and that by the Judgment to be rendered on the said Petition, it be adjudged and declared that by reason of the premises the Grand Trunk Railway Company of Canada have exercised a franchise and a privilege not conferred by law, and the said Corporation have offended against the provisions of the Act or Acts creating, altering, renewing or re-organizing the said Corporation, and have exceeded the power, capacities, franchises and jurisdiction conferred upon them; and the said petitioner, on the behalf aforesaid, further prays that the imposition of tolls, including the cartage of the goods and merchandize in and within the said City of Montreal, may be declared illegal and in contravention of the law:

And the said petioner further prays that the imposition of tolls for the carriage of goods and merchandize on their Railway, without the authority of a By-law approved of by the Governor in Council, and published in the *Canada Gazette*, may be declared illegal, and in contravention of the law: and the said petitioner, on the behalf aforesaid, further prays, that it may be declared that the said defendants carry on the business and occupation of common carters in and within the limits of the said City of Montreal, and that such business and occupation by them so carried on is illegal and in contravention of the law, and that the said Grand Trunk Railway Company of Canada may be enjoined to abstain from using the occupation of carters in and within the limits of the City of Montreal, and that they be restrained from carrying and carting, the goods and merchandize from and to their depots, to and from the residences and stores of the citizens of the City of Montreal, in and within the limits of the said City, as illegal and in contravention of the law. The petitioner reserving to himself, on the behalf aforesaid, to take such other and further conclusions as may be necessary and allowed by law, and the whole with costs.

The defendants met the action by a motion to quash the Writ and Petition, by a special demurrer, *défense en fait*, and two other pleas denying all the allegations of the Petition and alleging that their actions and proceeding were regular and legal. The reasons of the motion and demurrer (omitting the first reason) are as follows:

2. Because the said allegations of the said Petition are wholly vague, uncertain and indeterminate, and the pretended offences or contraventions of law therein alluded to are not particularized or specified as to time, place or circumstance, and no specification of the alleged acts or omissions, intended to be proved or relied on, is contained in the said Petition,

3. Because it is not alleged in the said Petition that any person or persons was or were injured or defrauded, or, if so, in what manner any such person or persons was or were injured or defrauded, by any of the alleged acts or omissions of the defendants.

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4. Because the said Petition illegally combines and includes several pretended illegal acts and omissions of defendants; some of which are properly the subject of a Writ of Mandamus, and others of a process or proceeding in the nature of a Writ of Prohibition, and which require separate pleas and issues, and call for separate and distinct orders or judgments, and cannot, by law, be combined in one complaint or petition.

5. Because no interest whatever is disclosed by the said Petition, on the part of the private person named therein, in the pretended illegal acts or omissions of the defendants, nor in the maintenance of the conclusions of the said Petition.

6. Because the conclusions of the said Petition are wholly vague and insufficient, and judgment and orders are thereby illegally demanded, not upon alleged distinct and defined acts, defaults or omissions of the defendants, but upon general abstract questions of law, in the decision and determination of which no interest is alleged by the said Petition on the part of any person or persons, and a judgment upon which questions would be of no practical force or effect.

7. Because the defendants were and are, by law, common carriers for hire of goods and passengers, and, as such, had and have the right, for the convenience of the persons employing them, as well as for their own convenience, in the ordinary course of their business of common carriers, and as incidental thereto, at any place in Montreal, to receive goods for carriage, or deliver goods which have been carried on the Railway.

8. Because, in and by said petition, no infraction is shown on the part of the defendants, of any of the rights conferred, or obligations imposed upon them by the Acts incorporating or referring to them, such as to justify the conclusions of the said Petition.

After hearing upon the motion, as well as upon the demurrer, a judgment was rendered by His Honor, Mr. Justice Monk,* on the 26th day of April, 1865.

The parties accordingly proceeded to evidence and were heard on the merits.

MONK, J., giving judgment said:—This is an application made to me at the instance of the Attorney-General against the Grand Trunk Railway Company of Canada for an injunction to restrain that Company from the exercise of the business of common carters within the limits of the city of Montreal. It would appear from the evidence adduced, that the Grand Trunk Railway Company employ, exclusively, a Mr. Shedden to collect and deliver freight within and near the city of Montreal. That the master carters of this city [redacted] excluded from all participation in the business of collecting and delivering for the Grand Trunk; and consequently it is sought, upon the ground to be hereafter fully stated, to restrain the company from the exercise of this privilege or monopoly, carried on in this way through the instrumentality of Mr. Shedden.

Before proceeding to develope the particular facts of this case (which is one of considerable importance to the parties in the cause, and also to the public), and to adjudicate upon the points submitted, it may be proper to remark that in England this proceeding is by rule, and the cases are tried upon affidavits. In this country we have special legislation on the subject. These provisions of law are found in the 88th chapter of the Consolidated Statutes of Lower Canada, and are to the following effect:

* *Vide* p. 159.

"Whenever any association or number of persons act within Lower Canada as a Corporation, without having been legally incorporated, or without being recognised as such Corporation by the Common Law of Lower Canada, and whenever any Corporation, Public Body, or Board offends against any of the provisions of the act or acts creating, altering, renewing, or reorganizing it, or violates the provisions of any law in such manner as to forfeit its charter by misuser; and whenever any such Corporation, Public Body, or Board has done or omitted any act or acts, the doing or omitting of which amount to a surrender of its corporate rights, privileges, and franchises; and whenever any such Corporation, Public Body, or Board *exercises any franchise or privileges not conferred on it by-law*;—it shall be the duty of Her Majesty's Attorney-General to Lower Canada, whenever he has good reason to believe that the same can be established by proof, *in every case of public interest*, and also in every such case in which satisfactory security is given to indemnify the Government against all costs and expenses to be incurred by such proceeding,—to apply for and on behalf of Her Majesty to the Superior Court sitting in the district in which the principal office or place of business of such persons so unlawfully associated together, or of such Corporation, Public Body, or Board is situate, or to any judge of such court in vacation, by an information, declaration, or petition, *requête libellée*, supported by affidavit to the satisfaction of such court or judge, complaining of such contravention of the law, and praying for such order or judgment thereon as may be authorised by law." Thereupon a writ issues, and the defendants are called upon, as in all other cases, to answer the declaration or petition, and the subsequent proceedings are similar to those in ordinary suits at law.

Thus it will appear that an essential difference exists between the course adopted in England, and that which is incumbent upon parties seeking to enforce this remedy in Lower Canada. Though the mode of proceeding is to this extent modified, and is more completely adapted to our usual forms of procedure, and although the statute contains some very special provisions, yet the common law, in so far as its principles are applicable to the present case, may be stated to be the same here as in England.

The Grand Trunk Railway Company of Canada was incorporated, altered, and amended under a variety of statutes to which it is not necessary to refer at the present moment; and to this Corporation the clauses of the Railway Consolidation Act, 14 and 15 Vic. cap. 51, are applicable, and some of which will have to be considered hereafter.

After these preliminary observations (rendered in some degree necessary to test and fully comprehend the decisions and the authorities to be referred to in the sequel), we come to the consideration of the important case before us. And here I may remark, that I consider it proper to review the pleadings and evidence at greater length than in ordinary cases, because the question is new here, and of public importance; and moreover it is desirable, if new in fact, that the parties whose rights and interests are to be affected by my judgment, should rest satisfied that no essential point has escaped the attention of the Court.

The Petition sets forth several distinct charges against the Grand Trunk Railway Company. Some of these charges are general—some specific; and they may be succinctly stated to be as follows, viz.:

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1st. That the Grand Trunk Railway Company of Canada exercise the occupation of carters in and within the limits of the city of Montreal, and carry and transport for hire, goods and merchandize from their depots to and from the stores and residences of the citizens of Montreal.

2nd. That the Company charge tolls for the transport of goods and merchandize from Montreal to places on their line of Railway, and that such tolls are uniform, and the same, whether the goods and merchandize are carted at the expense of the sender and receiver of the same, by his own carter, or at the expense of the defendants by persons employed by them for that purpose, and paid by them from and out of the tolls so charged.

3rd. That the defendants openly, publicly and in violation of law, have used for a year and upwards, and do now use carts and sleighs, with horses attached, for the transport of goods and merchandize to and from their depots, with the letters G. T. R. printed thereon, to wit: Grand Trunk Railway, in and within the limits of the city of Montreal, and do exercise the occupation of carters in and within the city.

4th. That the defendants demand and obtain payment of tolls, which are not payable at the same time and under the same circumstances upon all goods; but that, on the contrary, they exercise an undue advantage, privilege and monopoly, injurious to the carters of Montreal and the citizens, and which could not by law be authorised by any By-law, legally enacted or approved by competent authority.

5th. That the tolls enacted by the defendants for the transport of goods and merchandize on their Railway include cartage rates, and are levied without the authority of any By-law to that effect, approved of by the Governor in Council, and that the same has not been published in the *Canada Gazette*.

6th. That the defendants have not printed and stuck up in the office or place where the tolls are to be collected, or in every or any passenger car, a printed board or placard exhibiting all the tolls payable, and particularizing the price or sum to be charged, for the carriage of any matter or thing.

And the conclusions of the Petition ask for seven different orders or judgments, viz., that it should be adjudged and declared,

1st. That the company have exercised a franchise and a privilege not conferred by law.

2nd. That the company have offended against the provisions of the Act or Acts creating, altering, renewing or re-organizing the said Corporation.

3rd. That the defendants have exceeded the powers, capacities, franchise and jurisdiction conferred upon them.

4th. That the imposition of tolls, including the cartage of the goods and merchandize, in and within the limits of the city of Montreal, may be declared illegal, and in contravention of the law.

5th. That the imposition of tolls without the authority of a By-law, approved of by the Governor in Council, &c., be declared Illegal.

6th. That it be declared that the defendants carry on the business and occupation of common carters within the limits of the city of Montreal, and that their doing so is illegal.

7th. That the company be enjoined to abstain from using the occupation of

carters within the city of Montreal, and be restrained from carrying goods and merchandize from and to their depots to and from the residences and stores of the citizens of Montreal.

The defendants met the action by a motion to quash the Writ and Petition, by a special demurrer, and by three other Pleas amounting to the general issue. It is necessary to advert to this preliminary plea. The reasons assigned in the demurrer, (omitting the first reason) are:—

2nd. Because the said allegations of the said Petition are wholly vague, uncertain and indeterminate, and the pretended offences or contraventions of law therein alluded to are not particularized or specified as to time, place, or circumstance, and no specification of the alleged acts or omissions, intended to be proved or relied on, is contained in the Petition.

3rd. Because it is not alleged in the Petition that any person or persons was or were injured or defrauded, or, if so, in what manner any such persons or persons was or were injured or defrauded, by any of the alleged acts or omissions of the defendants.

4th. Because the Petition illegally combines and includes several pretended illegal acts and omissions of defendants; some of which are properly the subject of a writ of *Mandamus*, and others of a process or proceeding in the nature of a writ of a prohibition, and which require separate pleas and issues, and call for separate and distinct orders and judgments, and cannot by law be contained in one complaint or Petition.

5th. Because no interest whatever is disclosed by the Petition, on the part of the private persons named therein, in the pretended illegal acts or omissions of the defendants, nor in the maintenance of the conclusions of the Petition.

6th. Because the conclusions of the Petition are wholly vague and insufficient, and judgments and orders are thereby illegally demanded, not upon alleged distinct and defined acts, defaults, or omissions of the defendants, but upon general abstract questions of law, in the decision and determination of which no interest is alleged by the Petition on the part of any person or persons, and a judgment upon which questions would be of no practical force or effect.

7th. Because the defendants were and are, by law, common carriers for hire of goods and passengers, and, as such, had and have the right for the convenience of the persons employing them, as well as for their own convenience, in the ordinary course of their business of common carriers, and as incidental thereto, at any place in Montreal, to receive goods for carriage, or deliver goods which have been carried, on the Railway.

8th. Because in and by the Petition, no infraction is shown on the part of the defendants, of any of the rights conferred, or obligations imposed upon them by the Acts incorporating or referring to them, such as to justify the conclusions of the Petition.

After hearing upon the motion as well as upon the demurrer, I gave the following judgment on the 26th of April last:—

"Having duly considered the motion of the 12th day of April instant, made "on behalf of the said defendants, that the writ of summons issued, and the Pe- "tition fyled in this matter, and each of them, be quashed and set aside. Having

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"examined and considered the reasons urged in support of the said motion and "heard the parties by their respective counsel upon the said motion, I do dis- "miss the said motion with cost; and, having considered the special demurrer or "*défense en droit* pleaded by the defendants, to the Petition, and demand of the "said Petitioner, and heard the parties, I do order, *avant faire droit* upon the "said demurrer, that evidence be adduced."

I was then, and I am still of opinion, that the motion to quash should be rejected, and I have no hesitation in saying that the special demurrer is likewise unfounded. So far as this complaint goes, I think the Petition is prepared with great skill and with marked ability. The allegations set forth the whole case with force, clearness and precision. It may be that here and there, in the statement of the facts, and, the matter of complaint in some vagueness and want of detail may be apparent, and a slight redundancy of averment occasionally may be found. But this superabundance of allegation—the accumulation observable in the conclusions of the Petition, do not, in my judgment, impair or weaken the point and effect of the whole. The case is fairly and fully stated, and in such a way as legally to force the Company upon their defence, and to bring the cause up for adjudication upon its merits, more particularly as all the points of law urged in this preliminary plea come up under the general issue.

The special demurrer is therefore dismissed with costs. There remain the three pleas above referred to, and the answers to them, which are general.

Upon this issue the parties have proceeded to *Enquete*.

Several witnesses were examined on the part of the Petitioner, and they are generally of opinion that the system is objectionable:

On the part of the defendants a very extended *enquete* was made, and their witnesses are, I may say, unanimously of opinion that the system complained of by the petitioners has proved and still proves a great benefit and convenience to the public. After considering this conflicting testimony with great care, I have no hesitation in expressing the opinion that it is proved that the collecting and delivering freight, merchandize, packages, &c., by the company's carters, is a convenience and beneficial to the public. It must, I think, be obvious to every dispassionate and unbiassed mind, that, if not absolutely necessary to carry on the business of the company, yet that their system in this particular, and wholly irrespective of some very objectionable features to be adverted to hereafter, must be highly useful to their customers; and it appears to me, moreover, that this opinion is fully corroborated by the evidence adduced by the defendants. But the complainants contend that public convenience alone is not the question here. Assuming that the public at large are benefitted by this arrangement, there still remains the complaint by the petitioners, viz. That the Grand Trunk, particularly by the occupation of common carters in and within the limits of the city of Montreal, and by the charging of tolls including cartage rates, and by the absence of any By-law authorizing any tolls to be collected approved of by competent authority, *have offended against the provisions of the Act and Acts creating, altering, renewing, or re-organizing them as a corporation, and have exercised and assumed to exercise franchises and privileges not conferred upon the corporation by the Act or acts*—by any law, and have exceeded the capacity and juris-

diction conferred by law on the corporation, and illegally assumed powers and privileges beyond, and in addition, and contrary to those which by virtue of the act or acts, creating, altering and renewing or re-organizing said corporation, were conferred on the corporation, thereby affecting the public interest to an extent sufficient for all the purposes of this Petition. Cartier vs. G.T.R.Comp'y.

Before proceeding to consider at length the arguments and the authorities offered by the respective counsel of the parties, it may be proper to dispose at once of one point in this case. It was formally alleged by the complainants that the company have no By-law regulating and establishing the tolls upon their line of road, and that if such By-law have ever been passed they have never been submitted to or been approved of by the Governor in Council. To this the company replied that such By-law had been passed and sanctioned by the Governor according to law. Now the defendants have wholly failed to sustain this averment by proof, and, in the absence of such proof, I must assume as true, that there has been a great and serious omission here.

This, no doubt, is a very grave irregularity, amounting to a violation of law, and the sooner it is remedied, and the express requirements of the statute are complied with, the better.

It has been urged, however, by defendant's counsel, that I have nothing to do with this alleged infraction of the law on the present occasion.

But without anticipating opinions which will receive a more suitable expression as the authorities and decisions applicable to the case are more fully developed and examined, I come now to the consideration of the law as presented at the argument by the respective counsel who have submitted the case with so much ability and learning.

Mr. Stuart's propositions upon the facts, as proved on the behalf of the petitioners, may be stated as follows, viz:

1st. It is clearly proved that the company, through Mr. Shedden, their subordinate agent, or *employé*, exercise and use the occupation of carting for hire to and from their depots within the limits of the city of Montreal.

2nd. That in doing so, it is established as a matter of fact, that the company is guilty of an infraction, a violation of law, because their charter does not confer on them any such right, privelege or franchise, but, on the contrary, limits their operations to their line of railroad.

3rd. That in addition to this violation of law, it will be seen that they in this way exercise a monopoly which is directly detrimental to the master carters of Montreal; and both for that reason, and because such an occupation is a violation of law, the case is one of public interest, and concerns the master carters and the public at large.

4th. That the carrying on the business of carters by the company under the system pursued by them, and as proved, necessarily involves a variety of distinct violations of the law, such as are fully enumerated in the conclusions of the Petition, and each and all of which, whether considered separately or combined, in one continuous open and public transgression of their charter, brings the acts of the company under the provisions of the statute, and imposes upon me the duty to restrain them from a course of proceeding at once illegal and of the highest in-

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terest to the public generally, and to the master carters of this city in particular.

5th. That whether these open and public violations of the law conduce to the advantage of the public, or be or be not, in the opinion of a majority of the citizens, a convenience to the community, the infraction of the law alone justifies the application of the restraining power of the Court.

Upon the first point, it is unnecessary to say more than that the fact asserted by the petitioners is clearly and conclusively established. Mr. Shedden is the agent or *employé* of the Grand Trunk, and is employed in the manner and for the purpose set forth in the Petition. It is quite true the company derive no pecuniary advantage from this arrangement, but it is equally certain that the company have granted to Shedden an exclusive preference, and that he is exclusively employed by them. Whether this proceeding on the part of the company be in itself illegal or not, and if it be so, whether it is an infraction of the law which the present petitioners can have stopped by an injunction, will come up for consideration in the sequel of these remarks. I may also state that the company's system of charging, generally, cartage in the regular tolls, on their road, without distinguishing between these charges, is proved as alleged by the petitioners, but no instance is given, or brought under my notice. It is, moreover, established as a matter of fact that the company are in the habit of charging cartage for collection and delivery, whether the work be done by their own carters, or by those of the consigner or consignee. But here again the petitioners have failed to allege or prove a single instance in which this has been done. It is likewise clear, in my opinion, from the evidence adduced, that in the charge for cartage of freight, to and from their depots, the company exact the same amount for carting one or two miles that they do for the shortest distance; that in other words the tariff or carting is uniform, irrespective of distance. But, again, no cases are shown where this has occurred. From this peculiar mode of doing business and dealing with their customers, I think it cannot be denied that, as a matter of fact sufficiently proved, there must inevitably result something very anomalous; that is inequalities, perhaps unreasonable preferences in the tolls and rates which the company charge the public. Finally, it is proved that a highly respectable body of men are almost entirely, if not entirely, excluded from all participation in a branch of business very extensive and important, and which they contend should be free to them and open to competition. Upon the law of this case a great number of decisions and authorities from England, France and America, in support of the claimant's pretentions, have been cited.

Most of the cases cited by Mr. Stuart go to establish the nature and effect of the written injunction, and point out the cases in which such a remedy will apply; he has also cited authorities to show the limited power of corporations.

"A corporation being the mere creature of law possessing only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Trustees of Darmouth College vs. Woodward, 4 Wheaton, 518: 4 cond. rep. 526—(see page 443.) "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it will not be denied. The exercise of the corporate franchise being restrictive of indi-

vidual rights, cannot be extended beyond the letter and spirit of the Act "of Incorporation." Beatty vs. Knowler, 4 Peters, 152, (see page 444.)

The first case cited was that of the company of proprietors of the Navigation of the River Dun, against the North Midland Railway company. There it was held by the Lord Chancellor "that when it was clearly shown that a public company is exceeding its powers the Court cannot refuse to interfere by injunction." The special circumstances of that case were very different from the present. But what was there held is, no doubt, good law.

The next citation is from Shelford on the law of Railways vol. 1, p. 100. He says, "If a railway or other companies go beyond the powers which the Legislature has given them, and in a mistaken exercise of those powers interfere with the property of individuals, the Court of Chancery is bound to interfere for the purpose of keeping such companies within those powers (Agar vs. Regent's Canal Co., Coop. 77) "of course it must be a case in which the Court is very clearly of opinion that the company are exceeding the powers which the Act has given them. [River Dun Navigation Co. vs. North Midland 1 Railway C. 154.] "This is a most wholesome exercise of the jurisdiction of the Court, because, great as the powers necessarily are to enable the companies to carry into effect works of magnitude, it would be most prejudicial to the interest of all persons with whose property they interfere, if there were not a jurisdiction continually open and ready to exercise its power for the purpose of keeping them within that limit which the Legislature has thought proper to prescribe for the exercise of their powers whenever a proper case for it is brought before the Court," otherwise the result may be that after property has been taken and destroyed, after a house has been pulled down and a railway substituted in its place, the owner may have the satisfaction at a future period of discovering that the Railway Company were wrong [River Dun Navigation Co., vs. North Midland Railway Co., 1 Railway C. 153, 154; Kemp vs. London and Brighton Railway Co., 1 Railway C. 399, note.] "Where a railway company had by its charter the exclusive right to transport and carry persons, produce, merchandize and all other things.

"That injunctions in substance mandating, though in form merely prohibitory, have been and may be granted by the Court is clear. This branch of its jurisdiction may be one not fit to be exercised without particular caution, but certainly it is one fit and necessary under some circumstances to be exercised, under what circumstances it should be exercised must be matter for judicial discretion in each several case. Per Bruce V. C. Great North of England, &c., June. Railway Co., vs. Clearance Railway Co., 1 Coll. E. C. 521. In that case a mandatory injunction was granted, which in effect compelled a railway company to pull down walls which they had built, in order to prevent another railway company from crossing their line.

The next case is taken from the Georgia Reports, page 221, and would seem to bear directly upon the question under consideration, in the case by the Mayor of Macon against Macon and the Western Railroad Company, in which it was held "that where a railroad company had by its charter the exclusive right to transport and carry persons, merchandize and all other things over their road

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from Atlanta to Macon, yet the charter conferred no power upon the company to engage in the business of transporting produce through the city of Macon, across OeMulgee Bridge," of their customers (Mayor of Macon vs. Macon and Western Railroad Company, Georgia, 221) I shall have occasion to consider this case hereafter. I come now to the consideration of the case of Baxendale against the Great Western Railway Company. Much reliance was placed upon the case at the argument of the petitioner's counsel. I find the Report to be as follows:—

The Railway Company make one general charge for the conveyance of goods, whether they are delivered at their station at Paddington, whether they are delivered at their receiving-house in different parts of London, or whether they collect them from house to house in their own waggons. The plaintiffs are the great carriers, Pickford & Co., and they brought this action to recover back sums of money which they had paid for tolls and for carrying their goods on the railway, but which, they contended, included, in fact, charges for the collection and conveyances of goods to or from the different receiving-houses of the company, but which they, as carriers, collected to the Paddington station. When the case was argued in the Court of Common Pleas, Lord Chief Justice Erle delivered a judgmen in favor of the defendants, but the rest of the Court differed from him, and the decision was, therefore, in favor of the plaintiffs. To this was a Writ of Error. The Court of Appeal, which assembled in the Exchequer Chamber, consisted of Lord Chief Justice Cockburn, Justices Crompton, Blackburn, and Mellor Barons Martin, Channel, and Pigot. At the close, the Chief Justice said that they were all agreed that the judgment of the Court below must be affirmed. The matter appeared to turn, not on the Traffic Act, but upon the company's own Act, which contained a clause for equality of charges, which were afterwards renewed. It is said that the charges should be made equally, and the construction had been upon it in a case in the Court of Common Pleas, which applied to a case like the present, and it will not be competent for a railway company to superadd by the tolls they were entitled to charge another charge for collection of conveyance to or from the railway, inasmuch as in doing that they were imposing upon those who did not require their service for such collection or conveyance, and a charge which might be a reasonnable charge, as regarded those who require the service, but unreasonable as regarded those who did not, therefore it was an equal charge. That construction having been put upon the Act by the Court of Common Pleas, this Court were all of opinion that that was the right view, and that the judgment was correct, and they hoped that in future a charge for those services might not be under the guise or disguise of tolls on a railway.—Judgment affirmed.

It is worthy of remark, indeed it is essential that the fact should be borne in mind, that this was an action at law brought by the party aggrieved to recover back from the company sums of money paid them for services they had never performed. It may perhaps be considered astonishing that the case should have ever admitted a doubt.

In the present case this application is for a writ of Injunction against the Grand Trunk Company, and complaint is not made by parties who use the road —at least that does not appear from the evidence—or by persons who have

employed the company and suffered by irregularity and inequality in the rates and tolls—this case, therefore, cannot be held to have any direct application to the one under consideration.

A number of *arrets* rendered in France on railway cases during the past fifteen years were cited by Mr. Dorion. After a careful examination of these decisions I do not see that they throw much light upon the questions raised in the present proceedings. The first case cited was that the company *du chemin de fer de Strasbourg à Bâle, Pflug & Cie.*, (Dalloz R. P. 1852 part 1 p. 204) Pflug & Cie. had obtained an *arret* prohibiting the Railway Company from carrying beyond their line, but this decision was reversed by the *Cour de Cassation* as a violation of art. 5 of the Code Napoleon. If this authority have any bearing, it seems to be somewhat against the pretentions of the petitioner. Three other cases were cited by the first of which (Dalloz R. P. 1852, part 1, p. 226) it was held that a consignee has a right to receive his goods at the station and to do the cartage at his own expense, the *cahier de charges* of the railway expressly reserving to him the right; and by two other cases (Dalloz R. P., 1860, part 2, p. 175, and 1861, part 1, p. 317), the same right in the consignee was recognized, notwithstanding the agreement between the company and consignor, as shown by the *lettre de voiture*, was that the goods should be conveyed to the consignee's domicile. The reasons given for these judgments were that the consignor is not the agent of the consignee, and that the *cahier de charges* reserved to the latter the right to receive his goods at the station.

The *arrêt* cited from Dalloz R. P., 1854, vo. *Chemin de fer*, 110, part 4, seems to have held that the Railway Company had violated a provision expressly prohibiting them from giving special advantages to one company over another. The facts do not appear to correspond with those in the present case, and the question was, in a great measure, one of interpretation of the Company's character.

The only other French *arrêt* cited which remains to be noticed is found in Dalloz R. P., 1850, part 1, p. 197. In that case damages were recovered by a rival carrier from a railway company for having lowered their tariff without giving the notice and observing the formalities required by law.

Many of the principles laid down in these *arrêts* it would be impossible successfully to combat, but it is to be observed that they are all applied in cases of a private nature, and where the ordinary legal remedies were sought, by parties bringing actions against railway companies for specific acts. The only decision granting a general prohibition (that first cited above) was reversed by the *Cour de Cassation*.

The value of these modern French authorities will, however, depend much upon the terms of the particular laws establishing the Railway Companies which were parties to the cases—none of which enactments have been laid before me.

I may remark that in referring to the foregoing *arrêts* my attention was arrested by a case reported in Dalloz R. P., 1854, part 1, p. 221, and which was not cited on behalf of the defendants. It was there held that Railway Companies, in establishing offices in cities for the forwarding of merchandise, only exercise a right conferred on them by the *droit commun*, and that their doing

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so gives rise to no claim for damages on the part of *commissionaires de transport* existing in the same cities, based upon the injury done by the Railway Company to the business of such *commissionaires*.

Upon a careful review and examination of the decisions and authorities above cited by the learned counsel for the complainants, it will, I believe, be found that none of these cases involved or turned upon the question raised here, unless it be that the one in Georgia may be considered as bearing directly upon the point. But the circumstances upon which that decision rests are not given, nor has the charter of that company been laid before me. It may be that in it were some provisions which restricted the operation of the Company, or impliedly prohibited the extension of their business beyond their line of road. I would not, moreover, feel justified in following this precedent, if found to conflict with the decisions in the English or other American courts.—With insufficient knowledge of the facts, and amidst a various and fluctuating jurisprudence, such a ruling would scarcely be an authority which I could safely adopt. If it be true, as contended by the petitioner's counsel, that the real complaint in this case is that the company impose the payment of tolls for a service not authorized by their charter, namely, for the carriage of goods in carts within the limits of the city of Montreal, and beyond the limits of their railway, thus offending against the acts creating them, and also exercising a privilege and franchise not conferred by law, then he contends—the imposition of tolls, including the cartage of goods not allowed by law, is a matter of public interest, requiring the interposition of the public authority. Besides, that the carriage of goods by the carters of the company, is a necessary consequence of this imposition of tolls for such service, and the judgment declaring such tolls illegal must be followed by an interdict preventing them from carting as a clear contravention of the law. This, no doubt, is complained of in the Petition; and I am asked to declare that these acts of the company are illegal; but I am not required to restrain them from the perpetration of these acts. The question as to the legality of these tolls and the mode of imposing them, incidentally arise; and I have no hesitation in saying that no railway company have the right to impose a charge for the conveyance of goods and merchandise to and from their stations when their customers do not require such service to be performed; and more especially is this true, when, as a matter of fact, the cartage is not done: and an action at law would lie at the instance of parties aggrieved, to recover back such an illegal charge. It was so held in the case of Baxendale against the Great Western Railway; and in Garton against the same company; also in a more recent case of Garton against the Bristol and Exeter Railway Company. This is a plain infraction of law; but to what extent it has occurred in this branch of the Grand Trunk Company's business, if it exist at all, the evidence does not disclose. Adopting the views of the petitioner's counsel, with certain limitations and reserve, I would go further, and declare it to be my opinion, that the system adopted by the Grand Trunk Company of including the charge of cartage in their regular railway tolls, and as they do in most cases,—omitting to distinguish the charge for cartage from the toll on the road,—in fact including both charges in one block sum, is a mode of doing business which the law can hardly

sanction. It is, in fact, as contended by the petitioner's counsel, or it might become a means of systematic coercion; and is obviously calculated, in a manner more or less direct, to cause unjust and perhaps unreasonable preferences, and likewise to destroy that perfect equality in the business transactions of the company, which as a corporation, they are bound to exercise, and strictly to observe towards the public. I will go further, and add that, had I been required at the instance of persons who had suffered wrong, to issue an injunction to restrain the company in the two particulars last mentioned, I should have probably done so, assuming always that, in addition to individual cases of injustice and hardship distinctly alleged, and as clearly proved, this course was demonstrated to be injurious to the public. The same remark would apply to an application to restrain the company from levying tolls not sanctioned by the Governor, as directed in the statute. But if there be any parties who have suffered from these objectionable modes of working the road, they do not complain to the courts. They seem, from apathy or indifference, or perhaps because the public do not in reality suffer, willing to allow the company to follow its own course. As to the present complainants, they show no direct personal interest in restraining the company from the commission of these illegal acts. I cannot concur in opinion with their counsel that these infractions of law are the necessary consequences of their doing, through Mr. Shedden, their own cartage. Each violation of the law rests alone, and must be viewed separately, and the complainants should have shown that they are directly interested, and also that the public are injured. This they have not done. And as regards these special grounds of complaint, I would also remark here that they do not set forth or prove a single instance in which the law has been violated in these respects; nor in regard to any of these illegal acts and omissions of the company, is there any specification of time, place, or circumstance. In order to enable me to issue an injunction ordering the company to desist from these illegal acts, all this was absolutely necessary. Without such allegation, and without such proof, even supposing all the other conditions of individual wrong and public injury to have existed, I could not have interfered. This pretension, therefore, of the petitioner is, in my judgment, unfounded.

But it is contended that the company usurp a franchise and privilege not conferred by their Charter, in exercising the business of carters within the limits of the city of Montreal. Now I feel satisfied, whether this right be or be not essentially necessary to their business of common carrier or not, that this is not franchise or a privilege in contemplation of the statute, and that upon that ground alone I cannot issue the injunction prayed for.

The case, then, in my opinion, is narrowed down and limited to this: The company, by their own carters exclusively, or through Shedden, carry goods and merchandize for their customers to and from their depots, and to and from the stores and residences of the city of Montreal. And I have to determine whether this course of proceeding be legal or illegal; and if illegal, can I restrain them from doing so. And this brings me to the chief grounds of defence taken up by the defendants.

The objections urged by the defendants may be considered under the following heads:—

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1. The complainants, by their petition and the proof adduced, do not disclose a case of public interest, nor any right or interest, on the part of the private persons referred to in the petition, to initiate or carry on the present proceedings.

2. The company have, as common carriers, a right which is incidental to their principal business, to take delivery of, or to deliver outside of the limits of their road, goods which are intended to be or which have been carried upon the railway, and, consequently, that their employment of Mr. Shedden is no violation of law.

In support of the first proposition, it was urged that the statute, under which the Writ in this matter was issued, provides an extraordinary remedy in cases of public interest, in which Corporations are guilty of certain acts or omissions. It will not be denied that complaints of a private nature against corporate bodies or those arising from illegal acts or omissions affecting individual interest only, cannot properly be brought under the Act. It was argued by Mr. Ritchie that a very grave ground of objection against the Petition in this cause is, that it contains no allegations disclosing illegal acts or omissions on the part of the defendants in any way prejudicial to the public interests, nor in what way the rights or interests of the public are affected. Also, that the petition is equally defective in not showing any legal interest on the part of the carters named in it, whether considered as acting for themselves or as also representing others following the same occupation. These persons, it is contended, do not show in what way they have been injured by the alleged course of the defendants. The tolls said to have been illegally exacted by the Company have not been paid by them; and even if excessive, which they are nowhere stated to be, the carters are not prejudiced. That there is nothing in the petition but the vague inference that, if the Grand Trunk Railway Company were not to collect and deliver freight, the carters in whose interest these proceedings are carried on might obtain an increase of business; nor is there anything to show that judgments or orders such as prayed for would be in any degree beneficial to the promoters of the present action. This line of argument bears strongly on the case, for we find that in England it is held that the Court will not interfere to grant an injunction at the instance of the Attorney-General, except in cases of manifest danger or injury to the public interests. The first case cited in support of this view was that of the Attorney-General and the Birmingham and Oxford Railway Company—7, Railway and Canal Cases, p.972. In that case the Lord Chancellor said: "The Attorney-General appears here in order that the defendants *may be stopped from doing that which is not expressly forbidden by the Act of Parliament*, but unless I was prepared to say that the Attorney-General is entitled, in every case where the public interests may be or are alleged to be neglected, to come into equity, I must hold that in the present case no sufficient grounds have been shown for his interference. Undoubtedly the Attorney-General has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief; and, in the course of the argument, several authorities were cited to show that such interference is recognised in equity; but the informations, in all these cases, were directed to the repression of acts which the parties had no legal right to do, and which were not only not authorised to be done, but were,

in fact, acts of public nuisance." Even where there has been a manifest violation of law, but no serious injury results, the Court of Chancery will not maintain an injunction. In the case of the Attorney-General vs. the Eastern Counties Railway Company (3 Railway and Canal Cases, p. 337, V. B. Knight Bruce said: "I think there has been an infraction of the law, and that, too, without any favourable circumstances. No case of any great practical inconvenience has been made out, and I do not think it necessary, considering all the matters before me, nor do I think necessarily the duty of the Court, to interfere by injunction."

In the case of Morton against the Great Eastern and Midland Railway Companies, Chief Justice Cockburn and the other Judges expressed themselves to the following effect:—

"COCKBURN, J.—I am of opinion that no case has been made out by the complainant for the interposition of the Court, and consequently that the rule should be discharged. I agree that to justify a party in calling upon the Court to enforce the provisions of this act, it is not indispensably necessary to show a case of individual grievance; but it is clear that a case of public inconvenience must be made out. It does not appear, even upon Mr. Barrett's affidavit, that there is any complaint of a want of sufficient accommodation on the part of the public: and it is clearly shown by the affidavits filed in opposition to the rule that no complaints have been made. I can quite understand that two competing companies may so arrange the departures and arrivals of their respective trains as to operate injuriously to the shorter line and inconveniently to the public. In such a case the Court would be justified in interposing under this Act. But it appears here that abundance of accommodation is provided on the Midland line; and though the distance travelled over is somewhat longer no additional cost is incurred, nor any materially greater loss of time sustained by the public. And one very striking fact is that the Great Northern Railway Company, the parties by far the most likely to be injuriously affected by it, so far from complaining, are satisfied with the arrangement existing, and appear by their counsel to oppose the rule. I think we must discharge the rule with costs.

WILLIAMS, J.—I also think that we can only be justified interfering where it is made out to our satisfaction that the public convenience requires it. The application of the affidavit shows very slender grounds for the rule; and the affidavits filed in opposition to the rule entirely remove all shadow of pretext for the motion. If the complainant had satisfied me that public convenience did really require that which he asks, and that the accommodation sought could reasonably be granted, I should have paused considerably before I assented to the rule being discharged. But this he has altogether failed to do. Rule discharged with costs.

The case of Beadell against the Eastern Counties Railway Company is as follows:

Prentice moved for a writ of injunction against the Eastern Counties Railway Company, under the Railway and Canal Traffic Act, 17 and 18 Vic. c. 31, s2, to restrain them from giving an undue preference to one Clark, and imposing an undue and unreasonable prejudice on the applicant, under the following circumstances:—The complainant was the proprietor of two cabs, which were duly

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licensed as hackney-carriages; and he complained that the Eastern Counties Railway Co[illegible] refused to permit him to ply for passengers at their station at Shoreditch, they having for a consideration of £600 per annum paid to them by Clark, granted him the exclusive privilege of taking up passengers within their station. It appears from the affidavits upon which the motion was founded that the company allowed all cabs to enter the station for the purpose of setting down passengers at the booking office, but that, having set down the persons thus brought to the station, they were compelled to leave the yard. Reference was made to the case Marriott 1, C. B. N. S. 499, (E. C. L. R. Vol 87) as a case very nearly in point. There, the London and South-Western Railway Company made arrangements at one of their stations, with the proprietor of an omnibus running between the station and Kingston to provide omnibus accommodation for all passengers by any of their trains to and from Kingston, and allowed him the exclusive privilege of driving his vehicle into the station yard for the purpose of, taking up and setting down passengers at the door of the booking office, and it was held that, in the absence of special circumstances showing it to be reasonable, the granting of such exclusive privilege to one proprietor, and refusing to grant the like facilities to the plaintiff, who also brought passengers from Kingston as well as from other places, was a breach of the prohibition and against the granting of undue and unreasonable preference, contained in the statute. (CRESSWELL, J.—That case is very far from being an authority in your favor. WILLIAMS, J.—There is no grievance here as there was in that case, that there is not ample accommodation for the public.) There is not; but it is submitted that it is contrary to the spirit of the Act, to give such an exclusive privilege to one cab proprietor, to the prejudice of all others. (WILLIAMS, J.—In Marriott's case, the decision rests expressly upon the inconvenience inflicted upon the public, not upon the particular grievance to the applicant. CRESSWELL, J—Besides, there the applicant was prevented by the company from setting down his passengers at the door of the booking office. Here, the only complaint is, that the applicant is not permitted to ply for hire in the station yard. The case of Barker *vs.* The Midland Railway Company, 18 C B 46, (E. C. L. R. Vol 80, has some bearing upon this. The Court there held that an omnibus proprietor who carried passengers and their luggage for hire to and from a railway station, could not maintain an action against the company for refusing to allow him to drive his vehicle into the station yard. I am of opinion that the applicant has made out no case for the exercise of our jurisdiction under the statute.

WILLIAMS, J.—The affidavits upon which this motion is founded do not show that the agreement with Clark is not highly beneficial to the public as well as to the company. And it has been expressly laid down, in a case which has not been cited, In re Barret, 1 C. B. N. S. 423 (E. C. L. R., Vol 87) that the statute in question was passed for the benefit of the public, and not for that of individuals.

WILLES, J.—Concurring, rule refused.

The case of Painter against the London and Brighton—

The motion was founded upon the affidavit of the complainant, [illegible] stated that the directors of the company or their officers at Brighton [illegible] granted to five fly-proprietors at that [illegible], owning together about [illegible] flys, cer-

tain privileges and advantages for the entry of the whole of their flys into the terminus at Brighton, for the conveyance of passengers arriving there by all the down trains, in priority and exclusion of all the flys belonging to the other proprietors in the town; the arrangement being that, until the whole of the flys in attendance of the above named persons had entered and obtained fares, no other flys were permitted to enter or approach the platform, or take up passengers, which virtually was almost a monopoly of the traffic, as only on occasions when their trains arrived were more flys required than the persons above named could supply. That the fly proprietors generally considered the preferential arrangement above described so made with the persons named, not only unfair towards them, but also very disadvantageous and prejudicial to the passengers by reason of its preventing a proper supply of flys at the terminus, as the fly owners who had not the same privileges, and were prevented entering the station in due turn of arrival, could not afford to wait on the bare chance of a sufficient number of flys of the privileged persons not being there, or of the passengers by any train being more numerous than could be accommodated by the flys of the privileged persons; the consequence of which had frequently been that many passengers had been detained at the station a considerable time, namely until the privileged flys which had obtained fares had been and set down and then returned to the station, or other flys had been sent for and brought up to the terminus. The affidavit then went on to detail particular instances of obstruction offered to the complainant by the servants of the company, and refusal to permit him to enter into the arrival part of the station for the purpose of obtaining fares, and alleged that the above described arrangement was also prejudicial to the interests of the public, as in many instances it compelled the passengers, although the weather might be wet or cold, to ride in open carriages against their wishes. That the fly proprietors were willing, and had frequently offered to conform and abide by any general rules of the company for enforcing order and regularity; that if the station were open to all flys without preference, and all were allowed to enter in due course of arrival, the complainant's fly would be in the habit of attending, and complainant believed the flys of the other owners would attend also, and that there would be a much better supply of flys, and that the public would not be subjected to the inconvenience they were often put to under the existing arrangement; and that the complainant believed that the company's station at Brighton was large enough to admit many more flys and carriages than the privileged parties usually had been in the habit of sending there to meet the trains, and that it would be no inconvenience to the company if all cabs and flys, without distinction, were allowed to enter in turn to take up fares in the same manner as the deponent was informed, and believed they did at the Central Station in London.

There were also the affidavits of six other fly proprietors who were similarly excluded from the railway station, and who deposed generally to the inconvenience sustained by passengers from such exclusion.

It was submitted that the affidavits disclosed a clear violation of the statute.

(CRESSWELL, J.—Referred to *in re* Beadell, where a similar application was made on behalf of a cab proprietor against the Eastern Counties Railway Company,

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and refused.) The counsel there agreed that the circumstances of that case were totally different from those here; no inconvenience to the public being there shown to have arisen from the arrangement into which the company had entered; whereas here it is distinctly shown that the public are inconvenienced by the preference shown by this company to the five favored proprietors of flys. It appears that, at the terminus in London, all vehicles are allowed to enter the company's premises in turn without any partiality or preference; and it is sworn that the same arrangement might be made at the Brighton station without any inconvenience or obstruction to the company.

CRESSWELL, J.—I am of opinion that no ground is presented to justify the interference of the Court. Before we put the powers of the Act in motion, we must be satisfied that there is some substantial injury or inconvenience to the public, and that the complaint is *bona fide* made on behalf of the public.

WILLIAMS, J.—The complaint must come from those who use the railway.

These decisions, in my opinion, bear directly upon the question under consideration. I think they show clearly that a case of public inconvenience or injury must be made out, and that the peculiar remedy sought by the petitioners can only be enforced in cases of public interest, and was not created for the benefit of individuals. It will not, and cannot be applied to remedy private grievances. It is true that the complaints in this case allege several instances in which it is contended that the company have violated their charter, and that these infractions of the law are the consequences, more or less direct, of their doing the business of common carters within the limits of the city of Montreal. But I must take care that this application is made *bona fide* in the interest of the public, and in doing so, I must not only not confound the private grievances of the complainants with those of the public, if it has any, but I am bound to discriminate between the interests of individuals and those of the public. In this case the public interest seems to be at variance with that of the petitioners. The latter do not, in point of fact, suffer; they have not suffered from the company's mode of imposing and levying tolls and cartage, nor from the illegality of the company's system of carrying on their business; unless, indeed, their employing their own carters exclusively in the collection and delivery of freight, and their refusal to employ the complainants be contrary to law; and this brings us to this important, really the chief, point in the case.

In support of the second proposition, it is urged that the defendants do not rely solely upon the absolute want of legal interest which the public, or the private persons more immediately concerned, have in its prosecution. The defendants assert, that the course adopted by them in the collection and delivery of freight at Montreal, and other places in this Province, is, in every respect, legal; that, in adopting it, they conform to the well-established usage of railway companies in England and other countries; and that, besides being supported by settled legal authority, it conduces, in a great degree, to the public convenience, and that it enhances the usefulness of the Company as a public body whose interests are closely identified with those of the country at large. The question of convenience to the public is always of paramount importance, in cases where the exercise of equity jurisdiction is demanded. It is to that I must make continual

reference in forming my judgment upon the case presented. To establish the right of the company to convey goods beyond the limits of their road, reference was made to several authorities. Since the case of Muschamp vs. Lancaster and Preston Railway Company, (8 M. & W. 421), establishing the liability of railway companies for goods which they undertake to carry beyond the limits of their line, the right of such corporations to contract for the carriage of goods beyond the *termini* of their road has never been doubted. Judge Redfield (the highest American authority) in his work on Railways, (Chapt. XVI, Section 12 and 13), reviews the cases, both English and American, relating to the question, and fully acquiesces in the holding of the English Courts. He says (§136):

"It was for many years regarded as perfectly settled law that a common carrier, "which was a Corporation chartered for the transportation of goods and passen- "gers between certain points, might enter into a valid contract to carry goods de- "livered to them for that purpose beyond their own limits. Most of the Ameri- "can cases do not regard the accepting a parcel marked for a destination beyond "the terminus of the route of the first carrier a *prima facie* evidence of an under- "taking to carry through to the point. But the English cases do so construe "the implied duty resulting from the receipt.

"But the cases, until a very recent one, do hold that a Railway Company "may assume to carry goods to any point to which their general business extends, "and whether within or without the particular state or country of their locality. "And it has generally been considered, both in this country and in the English "Courts, that receiving goods destined beyond the terminus of the particular "Railway, and accepting the carriage through, and giving a ticket or check "through, does import an undertaking to carry through, and that this contract "is binding upon the company.

"The case of Hood vs. The New York and New H. Railway assumes the dis- "tinct proposition that the conductor could not bind the company by such "contract, because the company had no power to assume any such obligation. The "case is not attempted to be maintained upon the basis of authority, but upon "first principles, showing therefrom the innate want of authority in the company. "It must be admitted the reasoning is specious; so plausible, indeed, that if the "matter were altogether *res integra* it might be deemed sound.

"But it must be remembered that in the construction of all legislative grants, "many things have to be taken by implication as accessory to the principal "thing granted. And, if we are not allowed to assume such indispensible in- "cidents as are necessary to the exercise of the powers conferred in such a man- "ner as to accomplish the main purpose, in a reasonable and practical mode, we "shall necessarily be led into inextricable embarrassments. Hence we conclude "this case may have assumed possibly too narrow grounds, and such as might "render the principal grant of the company to be common carriers of freight "and passengers, from New York to New Haven, less useful to the public, con- "sistently with the security of the company than the circumstance required. "The strict and undeviating requirements in all cases, that all Railways shall be "restricted in their contracts for transporting persons, parcels, baggage and goods, "to the line of their own road, and a safe delivery to the next carriers, and that

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"nothing like co-partnership in the business of a particular route, consisting of "different companies, could exist would certainly be throwing serious hindrances "in the way of business, and without any adequate advantage."

"The same decision was maintained by the Supreme Court of Vermont in the case of Noyes vs. The Rut[illegible]ington Railway, (27 Vt. R. 10). The grounds of the decision [illegible] It seems to be now well settled "that Railway Companies, as [illegible]riers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, in no sense under the control. Muschamp vs. L. and P. Junction Railway Co., (8 M. and W, 421); Weed vs. Saratoga and Schenectady Railway Company, (19 Wend, 534); Farmers and Mechanic's Bank vs. Champ. Trans. Co. [illegible]

"It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract, bind themselves to deliver parcels and merchandize beyond the strict limits of their line, in town and country; and in such case could only exonerate themselves by a personal delivery. [23 Vt., 185,] and cases there cited.

"It seems to us in principle, that these two propositions control the present case. For, if a Railway Company may contract for carrying merchandize and goods beyond the limits of their line, where the carriage is by porters, stages, by steamboats or other water-craft, or by other Railways, and this is to be justified upon the grounds of usage and convenience, or common understanding or consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of their charter. But the time is now past when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true that such Corporations, even as to strangers, are not allowed to assume obligations beyond the general objects of their incorporation, as if they should assume to build steamboats or other railways, perhaps. But, within the general business of their creation, a very considerable latitude is allowed in contracts with strangers. This is done for the advantage of the company as well as others, and to avoid embarrassments in the common business of life, which must be constantly liable to occur upon any such limited construction of the powers of Corporations."

In Crouch vs. the London and North Western Railway Co., (25 English Law and Equity R., 287;) the question came before the Court of Common Pleas in a new aspect. The plaintiff sued the defendants for refusing to carry packed parcels from London to Sheffield and Glasgow. The defendants' road extended only a part of the way from London to the respective places, but they had arrangements with the intermediate companies, so that cars from their road passed over the whole distance without the interference of the other companies. The defendants were in the habit of receiving packed parcels to carry to Sheffield and Glasgow, and they had agents in the places to distribute the parcels when received. The defendants refused to receive parcels from the plaintiff to carry to these places, though they offered to carry them to the terminus of their line.

The plaintiff brought an action for the refusal, and the defendants contended that they were not bound as common carriers to carry beyond the limits of their own line. But the Court held that, like natural persons, Railway Companies were bound to discharge the duties of the charters which they assumed, and if they held themselves out as carriers to a place beyond their line they were liable for refusing to carry." (2 Am. Railway cases, 478 Note.)

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"The English Courts have thus refused to consider the liabities of Railway Companies as being in any way limited to the line of their road, but hold them liable upon their contracts, which are to be ascertained by the verdict of a Jury.

The doctrine that the cartage of goods may be done by Railway Companies is also well settled in France.

"Cependant, *il n'est point interdit* de déroger à cette faculté par des conventions particulières *et de stipuler que le camionnage sera opéré par les soins de la Compagnie.*" Blanche, Contentieux des Chemins de Fer p. 150—Cour. de Cass. 13 Juillet, 1859, Gibiat C. Chemin de fer d'Orléans.

"La remise ou livraison des marchandises se fera donc, soit en gare, soit au domicile du destinataire, selon l'énonciation de la lettre de voiture, &c."—*Id.*

Lorsque l'expéditeur a fait au chemin de fer la remise de la marchandise, en indiquant le destinataire sans dire *en gare* ou *gare restant à tel point désigné du parcours*, il a laissé croire à la compagnie qu'elle était chargée de livrer à domicile. Or, les conventions faites par l'expéditeur *doivent nécessairement lier le voiturier, aujourd'hui le chemin de fer, qui remplace l'ancien mode de transport.* Ces conventions tiennent lieu de loi entre l'expéditeur et le voiturier, et ne peuvent être modifiées au gré du réceptionnaire, qui refuserait de payer le prix du camionnage." Tribunal de commerce d'Orléans, 11 Juillet, 1849, Rebu et Brière C. Compagnie du chemin de fer de Paris à Orléans.

In the general tenor and rulings of these decisions and authorities, in so far as they apply to the present case, I fully concur. I am clearly of opinion that the exclusive employment of any particular carter or carters by the Grand Trunk is incidental, if not absolutely essential, to their business of common carriers, and that, therefore, the company does not, in this particular instance, stand charged with an illegal act. This I hold to be true under the facts as approved in this case, in so far as this exclusive employment by Mr. Shedden goes. I think, moreover, that this right rests upon principles of the common law. But, by a provision in the Railway Clauses Consolidation Act, the company are empowered to do all things necessary or requisite for the more effectually fulfilling and carrying out the objects of their charter, and I incline strongly to the opinion that this is one of the means of attaining such a result, impliedly granted to the company. It has been said that although this course may be essential in other localities, yet that it is not so in the city of Montreal, where hundreds of carters are ready, willingly and effectually to perform all the cartage in collecting and delivering for the company. In point of fact, this may be true, but in my view of the law, it is clearly incidental to their business as common carriers, and if so, the company must, in the administration of the important interests confided to their charge, in their extended and responsible relations to the public, be the sole judges, whether they will follow their present system or revert to the old course

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of business. They collect and deliver now under special contracts with their customers. In my opinion these contracts are legal; I cannot declare them illegal, and even if they were illegal, I could not set them aside under a proceeding like the present. So long as the public at large are not injured, and do not complain, I cannot interfere by injunction as prayed for by the petitioners. The motives of this decision, as embodied in the final judgment of record, will concisely disclose the grounds in law and in fact, upon which my refusal to issue the injunction rests.

The judgment is entered up in the following terms:—

"Having heard our Sovereign Lady the Queen, represented by the Honorable "the Attorney-General, and the said defendants, by their respective Counsel, as "well upon the merits of the petition *Requête libellée* returned and fyled on the "11th day of March last past, as upon the special demurrer *défense en droit* "pleaded by the said defendant to the said petition *Requête libellée*, having exa- "mined the said petition *Requête libellée*, the pleadings, evidences and document "produced and fyled by the parties in this cause; and having maturely delibe- "rated, doth dismiss the said special demurrer, and proceeing to adjudicate "upon the merits of the said petition *Requête libellée*, and considering that the "petitioner has not established by legal and sufficient evidence, such a case of "public interest as is required by the statute, authorizing the present procee- "ding; considering, moreover, that it is not proved by the evidence adduced in "this cause that the complainants have suffered, or have been directly aggrieved "to an extent, or from such illegal causes directly affecting them as would jus- "tify the issuing of an injunction in the present case as prayed by their petition; "Seeing that it results from the evidence adduced that the fact of collecting and "delivering by carters, exclusively employed to that effect by the defendants, is "not injurious, but, on the contrary, advantageous to the public; considering "that the defendants have the right, as common carriers, and in the prosecution "of their lawful business as such, to employ exclusively any carter or carters, "they may, in their discretion, select to collect from and deliver freight to their "customers; and that such exclusive employment of particular carters is not "a violation of their charter, inasmuch as the act itself is essential or incidental "to their business as common carriers: Considering that no injunction can by "law issue in this case to restrain the defendants from illegal acts, by and from "which the petitioners are not shewn to have been directly aggrieved, and which "are not, at the same time, proved to be injurious to the public: And consi- "dering that none of the individuals or parties using the defendant's road and "paying their charges for cartage, have complained in the present case, I, the "said Judge, do refuse the said petition with costs."

Petition refused.

H. Stuart, Q. C., A. A. Dorion, Q. C., & R. Roy, Q. C., for petitioners.

T. W. Ritchie, for defendants.

(P. W. T.)

COURT OF QUEEN'S BENCH, 1868.

MONTREAL, 9TH MARCH, 1868.

In appeal from the Superior Court, District of Montreal.

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

THE HONOURABLE GEO. E. CARTIER, ATTORNEY GENERAL, *PRO REGINA*
(Petitioner in the Court below,)
APPELLANT.

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(Defendants in the Court below,)
RESPONDENTS.

FRANCHIZE—USURPATION.

HELD:—Inasmuch as the corporation impleaded, was the corporation erected under the Provincial Act, known as "The Grand Trunk Railway Act of 1854," and inasmuch as the corporation complained of, and alleged to have been formed under the Provincial Act, instituted "An act to incorporate the Grand Trunk Railway Company of Canada" has no existence, therefore the petition and writ in this cause were irregular and illegal, and not within the requirements of the Consolidated Statutes of Lower Canada, Cap. 88.

The facts of this case fully appear from the report; pp. 149—176 of this vol.

The appellant in his factum, stated his grievances as follows:—

The Petitioner relies upon the reversal of the present Judgment for many reasons. Because the 12 Vict. C. 41, S. 8, authorises the issue of a Prerogative Writ at the instance of the Attorney General, on behalf of Her Majesty, in every case of public interest whenever a Corporation shall offend against any of the provisions of the Act or Acts creating, altering, renewing or reorganizing such corporation or also in case a corporation shall exercise a franchise or privilege not conferred upon it by Law, such prerogative writ shall be accompanied by a petition supported by affidavit to the satisfaction of such Judge complaining of such *contravention of the Law* and praying for such Judgment thereon as may be allowable by Law. The proceeding differs essentially from the English in the particular that the trial in England was upon the affidavits produced by the respective parties, in this Country by an issue and regular enquête thereon. The affidavit being required to prevent a writ being issued improvidently, but certainly not limiting or controlling the allegations in the petition.

The Petitioner complains that the company impose rates on tolls for a service not authorised by their Charter, namely for the carriage of goods in vehicles within the limits of the City and beyond the limits of their Railway, thus offending against the acts creating them, and also exercising a privilege and franchise not conferred by Law.

The imposition of tolls, including the cartage of goods, is a matter of public interest and if imposed illegally requires the interposition of the public authority to restrain them. The cartage of goods by the carters of the Company is a necessary consequence of the imposition of tolls for such service and the Judgment declaring such tolls illegal must be accompanied by an interdict preventing them from carting, as a contravention of the Law.

The 14 and 15 Vict. C. 51, Railway Consolidation Act, Sect. 7, describes the

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word toll to mean and include any charge, payable for any goods and conveyed on the Railway or upon steam and other vessels connected therewith.

By the 9 Sect. the power of the company is limited to take, transport, carry and convey persons and goods on the Railway, and the tolls to be paid therefore.

By the 14 Sect. the tolls shall be fixed and regulated by the By-laws of the company, or by directors if authorised by the by-laws, and may be demanded for all passengers and goods transported upon the Railway or in the steam vessels, to the undertaking, belonging, &c. Provided that the same tolls shall be payable at the same time and under the same circumstances, upon all goods and persons, so that no undue advantage, privilege or monopoly may be afforded to any person or class of persons by the by-laws relating to the tolls.

No tolls to be levied until approved of by the Governor in Council, nor until after two weekly publications in the *Canada Gazette* of the by-law and of His Excellency's approval.

The 21 Sect. enacts that the trains shall start at regular hours and shall furnish sufficient accommodation for the transportation of all such passengers and goods as shall within a reasonable time previous thereto be offered for transportation *at the place of starting*, and at the junction of other Railways and at the usual stopping places established for receiving and discharging way passengers and goods from the trains, and such passengers and goods shall be taken, transported and discharged *at, from, and to such place* on the due payment of the toll, freight or fare legally authorised therefor.

It is clearly proved that the Company have imposed tolls under colour of the privilege conferred by their charter upon goods transported by carters in the City of Montreal beyond the limits of their Railways. It is also proved that they exercise a monopoly and do not demand payment of tolls payable at the same time and under the same circumstances upon all goods transported by them on their Railway. It is also proved that there is no by-law authorising the imposition of any tolls whatever approved of by the Governor in Council and published in the *Canada Gazette*.

For the respondent it was argued as follows:

The statute, under which the proceedings in this case are taken, provides a remedy, at the instance of the attorney general, in four distinct cases, viz:—

(1.) Where an association acts as a corporation, without being incorporated, or recognized as such by the common law;

(2.) Where a corporation offends against its act of incorporation or any law *so as to forfeit its charter by mis-user*;

(3.) Where a corporation does or omits any act involving a surrender of its corporate rights;

(4.) Where a corporation exercises a *franchise or privilege* not conferred on it by law.

Every case brought under the statute must be one of *public interest*.

Upon reference to the petition it will be seen that the allegations it contains are only such as to bring the present proceeding under the *fourth case* contemplated by the statute. The first and third instances provided for by the statute have no application, and allegations of the petition are insufficient to bring the

proceedings under the *second* case, as it is not alleged that the acts complained of involve *a forfeiture of the company's charter by mis-user.*

If the respondents' reading of the act relating to the present proceedings be correct, the only questions to be decided upon the present appeal are the following;

1. Has a case of *public interest* been sufficiently alleged and established in evidence? In other words, has it been shewn that the cartage system complained of is *prejudicial to the interests of the public*?

2. If the first question be answered affirmatively, the question still remains: Does the charge that the Grand Trunk Railway Company *do cartage for hire within the City of Montreal* involve the exercise of a "franchise or privilege" not conferred by law?

Referring to the arguments made use of, and the authorities cited in their factum in review, and especially to the elaborate judgment of the Honorable Mr. Justice MONK, in which the whole subject is treated in a comprehensive manner, the respondent will here merely state briefly the main points upon which they rely for their defence.

1. The present case is not one of public interest within the meaning of the statute. The allegation in the petition as to the injury done to the public is vague and defective, and the manner in which the public is prejudiced by the present cartage system is not specified. In evidence, the case of the petitioner wholly failed upon this point, for by a large preponderance of testimony it is established that the system conduces to the convenience of the public, as well in the increased facilities afforded as in the reduction of the rates of freight, and is essential to the proper conducting of the large freight business of the Company.

2. The collection and delivery of goods in the city of Montreal, as charged against the respondents, is not the exercise of a "franchise or privilege." 2 Blackstone's Coms., p. 37, Angell and Ames, Corpns., §4.

3. The proceeding adopted by the petitioner cannot have a wider scope than that contemplated in the complaint made to the attorney general, and the affidavits which form the basis of the action, both of which are formally referred to in the petition. The only substantive charge in these documents is that the Railway Company *illegally exercise within the City of Montreal the occupation of carters for hire*, i. e., for a profit which accrues to their benefit. This charge is completely disproved, it being established in evidence that the company derive no pecuniary advantage from the present cartage system.

4. There is no legal interest in the persons, at whose instance the present proceedings have been taken. They are not seeking *bonâ fide* to redress a public grievance (it being proved that none exists) but are endeavoring to promote their own private interests solely.

5. The collection and delivery, in Montreal, of goods for carriage, or which have been carried, on the Railway, has, invariably, been *matter of contract* between the company and the consignors. These contracts the respondents had a right to make. The rates charged have been voluntarily paid, and none of the parties so paying have ever claimed to be repaid any amount for cartage.

5. The cartage of goods to and from the Railway Station in Montreal, is incidental to the business of the Grand Trunk Railway Company, as common carriers. As such it is within the implied powers of the corporation.

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BADGLEY, J. Giving this judgment. An application in writing was made on behalf of certain persons, alleged to be the Carters of Montreal, to the then attorney-general for Lower Canada, complaining against the respondents, and requesting his official interposition, under the provisions of the 9th sec. 88 cap. consolidated statutes of Lower Canada. This enactment, previous to the last codification of the Lower Canada provincial statutes, formed part of the act 12 Vic. cap 41, commonly known as the prerogative writ act, having relation to corporation matters, and to prerogative writs of *Mandamus*, *Quo Warranto*, and others. The enactment gives no denomination to the writ to be issued under its authority, but in its nature and properties are to be found, the main characteristics of the writ of *Mandamus*, the advantages of which are thereby secured for the public benefit and for the advancement of justice, under a simplified course of procedure now well-known to suitors, and without the tedious and expensive practice in use in England, in such cases.

The jurisdiction incident to the writ, and the proceedings to be adopted under the enactment, are indicated in its terms, and are specially limited to the purposes, as well as to the causes and reason for their adoption provided in the act itself, and which, among other things, has enacted, that "Whenever any association or "number of persons act within Lower Canada as a corporation, without having "been legally incorporated, or without being recognised as such corporation by "the common law of Lower Canada; and whenever any corporation, public body, "or board offends against any of the provisions of the act or acts, creating, alter-"ing, renewing or recognizing it, or violates the provisions of any law in such "manner as to forfeit its charter by misuser; and whenever any such corpora-"tion, public body, or board has done or omitted any act or acts, the doing or "omitting of which amounts to a surrender of its corporate rights, privileges and "franchises; and whenever any such corporation, public body, or board *exercises* "*any franchise or privileges not conferred on it by law*;—it shall be the duty "of Her Majesty's attorney-general for Lower Canada, whenever he has good "reason to believe that the same can be established by proof, *in every case of* "*public interest*, and also, in every such case, in which satisfactory security is "given to indemnify the government against all costs and expenses to be incurred "by such proceeding, to apply for and on behalf of Her Majesty to the superior "court sitting in the district in which the principal office or place of business of "such persons so unlawfully associated together, or of such corporation, public "body or board is situate, or to any judge of such Court in vacation, by an in-"formation, declaration, or petition, *requete libellee*, supported by affidavit to the "satisfaction of such court or judge, complaining of such contravention of the law, "and praying for such order or judgment thereon as may be authorised by law."

The application made on behalf of the carters for the purpose of this contention, addressed to the Attorney-General was as follows:—

MONTREAL, 7TH JANUARY, 1865.

SIR.—The carters of Montreal complain that the Grand Trunk Railway of Canada exercise the occupation of carters for hire in and within the city of Montreal contrary to the provisions of their Acts or Incorporation, and in contravention of law.

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The Statute 12 Vic. chap. 41 having made it the duty of the Attorney-General whenever he shall have good reason to believe that the same can be established by proof, in every case of public interest, and also, in every other such case in which satisfactory security shall be given to indemnify the Government of this Province against all costs and expenses to be incurred by such proceeding, to apply, for and on behalf of Her Majesty, to the Superior Court, for an information complaining of such contravention of the law, and praying that the G. T. R. Co. may be restrained from engaging in the business of cartage in the city of Montreal.

The carters of Montreal offer the names of Peter Redpath, of the city of Montreal, Esq., President of the Board of Trade, and Benj. Lyman, of the same place, Esq., merchant, as such security, which they trust will be considered satisfactory, and in accordance with the provisions of the Statute.

They would further request that you will authorize Mr. Pominville, or such other professional gentleman as you may select, to sign your name as Attorney-General prosecuting the same.

We have, &c.,

(Signed) HENRY STUART,
ROUER ROY.

The Hon. G. E. Cartier,
Attorney General.

The answer whereto was as follows:

CROWN LAW DEPARTMENT.

Quebec, Jan. 11th, 1865.

SIR:—I am directed by the Hon. the Atty. General for Lower Canada to acknowledge the receipt of your letter of the 7th inst., and in reply inform you that he has no objection to his official name being used by you jointly, or either one of you in the proceedings to be taken against the G. T. R. Co., provided that no claim whatever be made against the Government for any costs by either party, and that a bond to that effect be executed to the satisfaction of F. P. Pominville, Esq., Advocate, the whole without any costs to the Government.

I have, &c.,

GEO. FUTVOYE,
C. C. L. Dep't.

And thereupon the petition fyled in this cause was prepared and signed by the two named counsel for the carters, as delegates of the Attorney General, and by them application was made to the Superior Court for the issue of the writ.

The parties on the face of the petition are described as follows:—

"The petition of the Honorable George E. Cartier, of the City of Quebec, in the province of Lower Canada, Her Majesty's Attorney General for Lower Canada, complaining of the G. T. R. Co. of Canada, duly incorporated and existing under and by virtue of Legislative enactments of this Province—SHEWETH."

The clause of the Statute and the introductory proceedings taken to bring the contention before the Court, have been given *in extenso*, to prevent any mistake

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of their terms. It will be observed that the Act expressly provides that it shall be the duty of the Attorney General of Lower Canada, whenever he has good reason to believe that the complaints adverted to against such corporations can be established by proof, &c., to apply for and on behalf of Her Majesty to the Superior Court by information, declaration and petition, which should show that the prosecutor is not merely the person officiating for the time being as Attorney General for Lower Canada but the Sovereign as the protector of the public interests, and therefore by the Law, it is not a mere complaint of the Chief Law Officer of the Crown for himself or in his own name as holding that office, but a prosecution by that officer for and on behalf of Her Majesty. It is Her Majesty whom the law contemplates as interested in repressing its contravention, and not Her official, and yet in this case, with the terms and requirements of the Statute plainly and precisely expressed, and moreover specially expressed in the application to the Attorney General, Her Majesty has been absolutely and altogether ignored in the proceedings, and the petition has been drawn as the petition of the individual, the Hon. G. E. Cartier, of the city of Quebec, &c., Her Majesty's Attorney General for Lower Canada, complaining, &c., and without averment either that the Attorney General prosecutes for or on behalf of Her Majesty, or that Her Majesty has any interest in the matter of the complaint or of the prosecution.

This is a grave informality fatal to such exceptional proceedings, and which the Court cannot overlook or pass over, without overlooking the Statute itself. The requirement is not of mere direction but of substance. The majority of this Court concur in considering this informality as radically bad. But the case is of so much importance that the Court thinks it necessary to go beyond this informality and to examine the case more fully, that it may not be charged either with want of appreciation of the grievances of the complainant or of disregard to the arguments at the bar.

These proceedings have been limited by the Statute to the particular corporations or quasi corporations specially guarded against by the statutes as therein set forth, in substance as follows:—1. Where an association of persons acts as a corporation without being incorporated or recognized as such by the common law. 2. Where a corporation offends against its act of incorporation or any law so as to forfeit its charter by misuse. 3. Where it omits or does any acts involving a surrender of its corporate rights, and 4. Where it exercises a franchise or privilege not conferred on it by law; any complaint not included within these contraventions is beyond and not within this peculiar statutory remedy. Yet, although these cases are exceptional, they rest upon the broad ground of public interest, the interest of the general public, the contravention of which alone gives existence and activity to the remedy for the Sovereign, and not the interests of individual members of society, which are left in their own safe keeping and find ready protection from the judicial tribunals of the country upon their individual complaint. The charges contained in the petition may be summarized as follows:—

1st. That respondents carry goods as carters for hire within the city, without right and against the law.

2nd. That they have no uniformity of charge on goods carried on the Railway whether carted to or from it by carters employed by the parties interested or by the carters of the respondents.

3rd. That they have so carted for 18 months by their own carters.

4th. That they demand tolls, not uniformly payable, upon all goods so carried on the Railway, whereby they exercise an advantage, privilege and monopoly injurious to the carters and to the citizens of Montreal, and without legal authority.

5th. That the tolls for the carriage of goods in the Railway include cartage rates, and are levied without authority of a by-law sanctioned by the Governor in Council, and are unpublished in the *Gazette*.

6th. That the placards exhibiting the tolls payable are not stuck up in their passenger cars.

Upon these the Court is prayed to adjudge:

1st. That the Company have exercised a franchise and a privilege not conferred by law.

2nd. That the Company have offended against the provisions of the acts creating, altering, renewing or re-organising the said corporation.

3rd. That the defendants have exceeded the powers, capacities, franchise, and jurisdictions conferred on them.

4th. That the imposition of the tolls, including cartage of goods and merchandize in Montreal, may be declared illegal and in contravention of the law.

5th. That the imposition of tolls, without the authority of a by-law approved of by the Governor in Council, &c., be declared illegal.

6th. That it be declared that the defendants carry on the business and occupation of common carters within the limits of the city of Montreal, and that their doing so is illegal.

7th. That the Company be enjoined to abstain from using the occupation of carters within the city of Montreal, and be restrained from carrying goods and merchandize from and to their depots to and from the residences and stores of the citizens.

Now looking at the particular charges before detailed, with the special conclusions prayed for in the petition, it is proper, in the first place, to inquire whether these charges are the specific contraventions of law, for the restraint whereof application was made to the Attorney General, and whether they are included within any of the four statutory cases of public interest so specially provided for and particularized in the enactment; because, if in the first case the petition sets out what is without or beyond the application to the Attorney General, and the consent given therefor by that officer, or, if, in the other case, the contraventions complained of are not within the statutory contraventions of the public interests, the proceedings must fail in either case. As to the first point, the application has been already given in *extenso*. It is only necessary to extract such part as applies to this point, which is as follows:

MONTREAL, 7th January, 1865.

SIR,—The carters of Montreal complain that the Grand Trunk Railway of Canada exercise the occupation of carters for hire in and within the city of

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Montreal, contrary to the provisions of their acts of incorporation, and in contravention of law.

And the remedy sought, is

"That the Grand Trunk Railway Company of Canada may be restrained engaging in the business of cartage in the city of Montreal."

The application and prayer are both equally precise and specific, namely, that the respondents cart for hire within the city contrary to their charter and against law, and that they should be restrained, so that the application so made and the consent given, were for one special and particular object, and for no other purpose or object. Comparing then the specific charge in the application and the specific restraint to be imposed, prayed for in the applicoion, with the conclusions prayed for in the petition or *requête libellée* submitted by the complainant, it is undeniable that the charges averred are much enlarged beyond the application, nor are the enlargements things merely incidental to the specific charge of illegal cartage, but are special enlargements to subjects of complaint, which the Attorney General probably did not contemplate, and for the prosecution of which by the carters in and by their petition, he gave no consent whatever. In every case the mere assumption of power beyond that granted by the public officer must be jealously scrutinized and is altogether unjustifiable; in such a case it would be reprehensible in courts of justice to sanction such ultra proceedings. The delegated consent might be readily conceded for a known and particular grievance of a public nature, but it cannot be conceived, that individual applicants with limited powers of action should be allowed to go beyond them *ad libitum*, question, discredit at their pleasure and jeopardize the existence of public corporations under the assumption of really unconceded authority. Hence, therefore, the necessity as well as the propriety of stating to the Attorney General the precise nature of the complaint thereby limiting the extent of the official consent given, and this indicates an analogous proceeding of the English practic in England for obtaining the issue of the writ of *Mandamus*. The writ is ordered by there Court threto issue upon the grounds stated in the rule granted by the Court, but when the writ is not in strict accordance with the grounds of the rule, it is quashed at once. Thus, where a *Mandamus* differed from the rule, not merely by adding things incidental to the object of the writ, but materially enlarging the terms thereof, it ought not to be proceeded with, and the Court quashed the writ (11 A. E. 2 L. J. N. S. Q. B. 127 2 Smith 54.) This supervision is imposed upon the Courts there in the public interest, and the Courts here, under the terms of the Statute, having the same supervision, can exercise no discretion in allowing such enlargements as those contained in this petition. This defect is also radically prejudicial to the proceedings.

It may now be asked, do the charges set out in the petition come within any of the four specified cases set out in the Statute? Clearly not the first, because the respondents are a legally constituted corporation, and certainly not the second and third cases, because the conclusions, which, in law, make the action or prosecution, do not pray for the forfeiture of the charter for *misuser* or for its surrender for commissions or omissions of acts amounting to surrender; and

therefore if any where, the contravention must be sought in the fourth case of the Statute, the exercise by a corporation of a franchise or privilege not conferred on it by law.

It will be observed that the fourth case does not refer to any charter contravention, but goes beyond, and applies to the exercise of a franchise or privilege not granted to the Corporation by law. The contravention of this class must be sought then in the *common or statute law of* the Province, independent of the charter. And here it may first be asked, if the occupation of a carter for hire is what is known within the technical terms "franchise" or "privilege," used by the statute. Cartage for hire is doubtless a respectable and useful employment in society, but it is to all intents and purposes a labor occupation which any person in the city is competent to exercise if he can procure the use of a cart and horse and pay the municipal tax. There can be no exclusion of any one from that labor nor is the permission given for using it what is known legally as a "privilege." This common occupation is no more a franchise or privilege than any other paid manual occupation within the city. It is not possible to connect the carter or drayman technically with the owner of a franchise or a privilege; and in this case, that connection not being apparent, it seems therefore that the respondents are not brought within the fourth class. But has not the law, not the charter, really interfered by its general principles or by direct enactment to prevent the respondents from receiving and delivering by particularly selected carters, who cart for them, the goods carried over their railway? It is clear that there is no charter objection, and also there is no statutory objection against their employment of particular carters, if their business is thereby facilitated, and the public do not suffer. Being common carriers, their receipt and delivery of goods by cartage, even by their own carters, is incidental to their business as such. Moreover, our common law no where interferes with the right of the respondents to make contracts with their customers for the cartage of their goods to and from their warehouses, upon terms agreed upon between them, and of this no legal complaint has been put of record against the company; whilst in concurrence with our common law upon this point, both the English and American authorities allow contracts provided there is uniformity of charge; and the modern French authorities are entirely favorable. There is no proved case in the record of such want of uniformity, though it is mentioned hypothetically. Now these contracts for cartage are not franchises or privileges nor do they approach to that character, and they cannot be brought within the fourth clause of the act. But this brings up another question. Is the occupation of a carter within the enactment such a case of public interest for the contravention whereof, and its necessary repression by the judgment of the Court, these exceptional proceedings must be adopted? The record gives no information respecting the real complainants. They are called the carters of Montreal, who notoriously are not a corporate body, and are mere individual laborers, and yet only four of them are examined or appear in the cause; and each of them individualizes his own personal grievance. Now, none of these nor any others of them, are proved to have applied to participate in this cartage, and none are proved to have been refused by respondents; their very charge is an implied admission

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that the public interest is not involved in their complaint, whilst it is solely the public interest which the enactment contemplates, and here there is no such interest contravened. In this case under the Statutory procedure, as also in accordance with the English practice for the *Mandamus*, the proceeding is not and cannot be applicable as a redress for mere private wrongs; nor is it grantable to give an easier or more expeditious remedy for merely private greivances. These proceedings, therefore, not being within the clause of the law as applicable to cases of public interest, must fail and be set aside.

Now, it has been shown that the proceedings are obnoxious to the fatal objection of not having been taken for and on behalf of Her Majesty by Her Attorney General, prosecuting as such on her behalf; that the charges brought against the respondents, are serious enlargements of the precise complaint, and of the consent given by the Attorney General; that the contravention particularly complained of is not a franchise or privilege; and, finally, that the charge or complaint is not made in a case of public interest. But should all these objections be untenable, it is necessary to be quite certain as to the parties to the contention; because the prosecutor must not only show for himself that he is entitled to the right, properly the subject of the proceedings, but must also show that it is legally demandable from the party against whom the proceedings have been directed, otherwise the Court must refuse to interfere. Of course the parties can only be sought for in the body and averments of the petition itself, because the remedy can only be sought for from those whom the petition has declared to be chargeable for the contravention of the law, and, therefore, legally bound to carry the judicial injunction against that contravention into full effect. It is therefore essential that not only the name of the Corporation complained of should be stated, pursuing therefor, by averment, the act of incorporation; but their proper legal capacity to act under the particular statute should also be averred. Now, the petition, after stating the name of the Attorney General as complaining against the Grand Trunk Railway Company of Canada, proceeds at once to aver, "That by an Act of the Legislature of this Province, passed in the session, held in and during the sixteenth year of Her Majesty's reign, intituled an Act to incorporate the Grand Trunk Railway Company of Canada, it was enacted that certain persons therein mentioned, together with such persons as should legally become proprietors of any share or shares in the Railway thereby authorized to be made, and their several and respective heirs, executors administrators and assigns, being proprietors of any share or shares in the said Railway, should be a Company, according to the rules, orders and directions thereinafter expressed, and for that purpose should be one Body politic and corporate, by the style and title of the Grand Trunk Railway Company of Canada." This is the only averment of the statutory creation of the Corporation complained of. But this act, 16 Viet., 1853, was the first act for the Construction of a particular railway, to be called The Grand Trunk Railway of Canada, which was to extend only from Toronto, through Kingston to Montreal, inclusive, and that act erected the company into a corporation to be known as the G. T. R. Co. of Canada averred in the petition as complained against. But a great number

of other railways having been established with statutory charters, given and held for their undertakings respectively, including that of the Victoria Bridge, the subsequent Act, 18 Viet., chap. 33, was passed in 1855, and designated in itself as "the Grand Trunk Railway Act of 1855," whereby all these several corporations, including that incorporated under the 16 Viet., averred and mentioned in the petition, were amalgamated into one company with all their several undertakings to be thenceforth together known as the G. T. R. Co. of Canada; and by the 3rd section of this latter act, the 18 Viet., it was enacted, that the said united companies formed by the amalgamation of the said several named companies and undertakings set out in the preamble of this last act, including the company formed and erected under the said 16th Viet., thenceforth from the passing of the act "shall be known and designated as, and shall constitute, the G. T. R. of Canada." It is most plain therefore, from this latter statute, that the present and existing G. T. R. Co. of Canada incorporation, viz., the respondents against whom the writ and proceeding in this case have been directed and upon whom they have been served, are not the company named in the petition and incorporated under the Act 16 Viet., and therefore it must be manifest that any judgment against the said last mentioned incorporation averred in the petition, would be worthless and contrary to both law and fact, that company having had no actual existence since the coming into force of the Act 18 Viet. in 1855. Hence, therefore, it would be idle for the court to make any order or judgment against the non-existing company, incorporated under the 16 Viet. whilst it is equally plain that no order or injunction can be made against the respondents, the existing incorporation under 18 Vic. Without entering further into the case, considering that the objections above referred to, and more particularly the first and last objections stated, are fatal to the validity of the proceedings adopted in this cause, the judgment of the Superior Court, refusing the said petition be affirmed.

The judgment in appeal was *motivé* as follows:

"The Court, &c., &c., considering that the petition in this cause filed, and the writ thereupon issued, were not made and issued for and on behalf of Her Majesty in conformity with the special requirements of the Provincial Statute, to wit: the eighty-eighth chapter of the Consolidated Statutes of Lower Canada therein intituled, an Act concerning the protection and enforcement of Corporate rights. Considering that the Corporation complained of, in and by the said petition, was therein averred and alleged to be a Corporation created and incorporated under an Act of the Legislature of this Province, passed in the sixteenth year of Her Majesty's reign, intituled, "an Act to "incorporate the Grand Trunk Railway Company of Canada." Considering that the Corporation so erected under the said cited Act together with several other Railroad Companies and undertakings, including the construction of the general Railway Bridge over the River Saint Lawrence, at or in the vicinity of the City of Montreal, were amalgamated together, and formed into one Company, and by the Provincial Statute, passed in the eighteenth year of Her Majesty's reign, known as the Grand Trunk Railway Act of one thousand eight hundred and fifty-four, it was provided that the united Company formed by the amalga-

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mation of the said several Companies, including the said Corporation under the said first cited Act should be known and designated by the name of the Grand Trunk Railway Company of Canada, and the said Corporation complained of, has thenceforth had no existence. Considering that the respondents who have been proceeded against and impleaded by the petition and writ in this cause, are the Corporation erected under the said Grand Trunk Railway Act of one thousand eight hundred and fifty-four, and not the Corporation complained of, alleged to have been erected under the said Act, passed in the sixteenth year of Her Majesty's reign, to wit, in the year one thousand eight hundred and fifty-two; considering that the said petition and writ thereupon are irregular and illegal, and are not within the provisions of the said eighty-eighth chapter of the Consolidated Statutes of Lower Canada, nor in accordance with the requirements of the last mentioned enactment; Considering, therefore, that in the judgment rendered on the ninth day of December one thousand eight hundred and sixty-five rejecting the said petition and writ, there is no error, doth for the causes aforesaid confirm and maintain the said judgment, and doth dismiss the appeal in this cause with costs.

Mr. Justice DRUMMOND concurs in this judgment, upon the ground that the Corporation complained of as incorporated under the said Act of the sixteenth Victoria is not in existence, and that the respondents impleaded in these proceedings are a different Corporation erected under the Grand Trunk Railway Act of one thousand eight hundred and fifty-four.

H. Stuart, Q.C., *A. A. Dorion*, Q.C., and *R. Roy*, Q.C., for appellant.

T. W. Ritchie, Q.C., for respondents.

(F.W.T.)

MONTREAL, 29TH FEBRUARY, 1868.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF OTTAWA.

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

DOUGLAS L. WHITE et al.,
Opposants in the Court below,
APPELLANTS,

AND

THE BANK OF MONTREAL,
Plaintiff in the Court below,
RESPONDENTS.

DELIVERY.

HELD:—That the constructive delivery contained in the following words "said timber to be deliver "ed at Ottawa, where the same shall be manufactured, and to be considered as delivered "when the same is sawed and then to belong to, and to be the property of the parties of the "second part," is not valid as regards a third party, without notice and actual delivery.

This was an appeal from a Judgment rendered on the 21st April, 1866, by the Superior Court, in the District of Ottawa—dismissing the appellant's opposition *afin de distraire*, with costs.

On the 16th October, 1863, the Bank of Montreal issued an action, in the Superior Court at Aylmer, returnable the 2nd November, against one

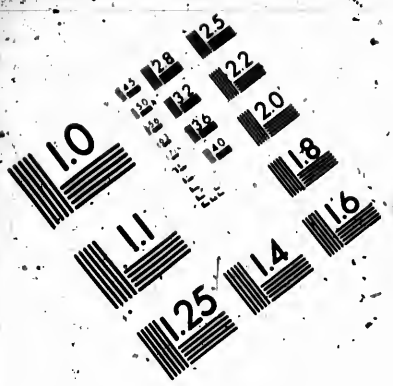
William McCarthy, of the township of Hull, in the district of Ottawa, lumber merchant, and one James Walker, of the township of Eardly, lumberer and trader, to recover the sum of $350—amount of McCarthy's Promissory Note, endorsed by Walker, dated at Ottawa, the 18th of May, 1863, payable three months after date; due the 21st of August and protested for non-payment. White et al and The Bank of Montreal.

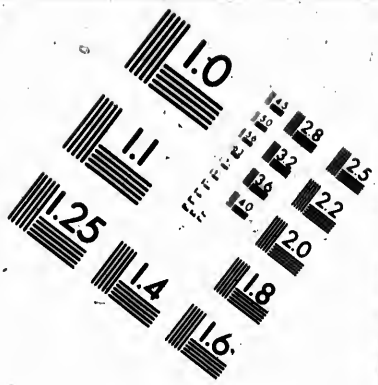
On the 2nd December, 1863, judgment was obtained in vacation by the Bank of Montreal against both defendants.

On the 26th October, 1864, a Writ of ex[illegible]nst them for the satisfaction of the said judgment, by vir[illegible]ff seized, as belonging to McCarthy, twenty-seven piles of [illegible]ning about two hundred thousand feet, more or less, marko[illegible]

To this seizure, the appellant's filed an opposit[illegible]*traire*, accompanied by the required affidavit, by which they claimed [illegible]owners and proprietors in possession of the said twenty-seven piles of sawed lumber, and alleged for reasons in support of their opposition the following, to wit: That at Corning, in the State of New York, on the 31st March, 1863, Hiram Pritchard, one of the opposants, and one John N. Hungerford, also of Corning, aforesaid, Trader, and the said defendant in this cause, William McCarthy, made and entered into a certain contract or agreement in writing, *sous seing privé*, containing in substance and effect the following stipulations, on the one side and the other, to wit: The said William McCarthy agreed to sell to the same Hiram Pritchard and John N. Hungerford, two millions feet of white pine timber, to be manufactured by him, the said McCarthy, and to be sawed in a good and workmanlike manner into twelve inch blocks, one and one eight inch in thickness, to be measured as inch; and all siding better than box timber, to be sawed one and quarter, one and half and two inches in thickness; said lumber to be delivered at Ottawa, Canada East, where the same should be manufactured *and to be considered as delivered when the same should be sawed and piled, and then to belong to and be the property of them the said Hiram Pritchard and John N. Hungerford* at the sum or price of eleven dollars per thousand feet, exclusive of culls, and for culls, if any, four dollars per thousand. And the said McCarthy further agreed to sell to the said Hiram Pritchard and John N. Hungerford, to be manufactured and delivered and to belong to the said Hiram Pritchard and John N. Hungerford, as above provided, all clear and extra clear Shingles, which he, the said McCarthy, should manufacture, at Ottawa, aforesaid, at the price of three dollars per thousand, and the said McCarthy *further agreed* to deliver the said lumber and shingles, at the City of Albany, to such party as the said Hiram Pritchard and John N. Hungerford should direct, at a price for freight and all charges of transportation not to exceed five dollars and fifty cents per thousand feet for the said lumber, and not to exceed fifty cents per thousand for the said shingles.—

And the said Hiram Pritchard and John N. Hungerford agreed to purchase the said lumber and shingles, and to pay to the said McCarthy for the same and for the transportation thereof, the prices hereinbefore named, and to advance him on account of the said contract, two thousand dollars, on the pass-





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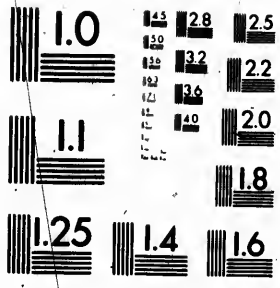

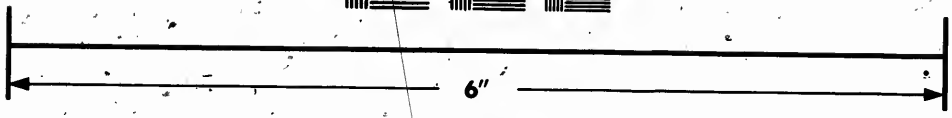

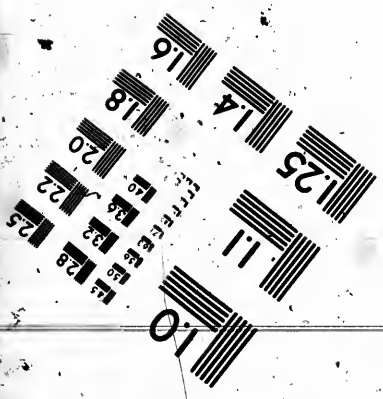

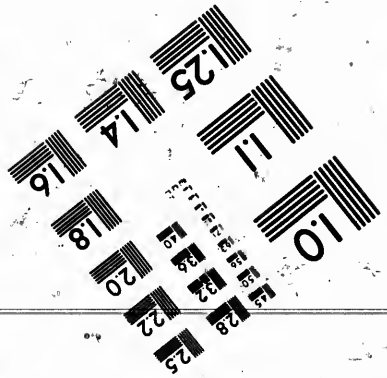

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White et al and The Bank of Montreal.

ing of the said contract, one thousand dollars on the fifteenth day of April, then next, and one thousand dollars, by the 30th of the said last mentioned month of April; and such further amount in drafts at three months on the consignee of said lumber, in the said city of Albany, as fast as the lumber should be delivered at that place, as the parties should agree. The said McCarthy to invest the advances to be made as above specified in logs for the manufacture of such lumber, and such logs to belong to and be the property of the said Hiram Pritchard and John N. Hungerford.

And the said McCarthy *further agreed* to deliver at Albany, aforesaid, five hundred thousand feet of the said lumber, by the first day of June, 1865, five hundred thousand feet by the first of July, of same year, and the balance as fast as the same should be in shipping order, so that the whole would be delivered by the first day of November of the same year. And it was further agreed, in and by the said contract, that if the said defendant should manufacture more than the above amount of two million feet the then present season, the same should be subject to the provisions of the said contract.

And having made the said agreement respecting the manufacture, sale and delivery of the said lumber and shingles, and of the said advances to be made, the said parties made and executed *sous seing privé* at Corning aforesaid, on the said 31st of March, 1863, a contract of the heads and substance of their said argeement. That at Corning aforesaid, the 8th of June, 1863, he, the said John N. Hungerford, by and with the knowledge and consent of the said Hiram Pritchard and the said McCarthy, for value received, assigned, transferred and made over by an instrument in writing, *sous seing privé*, at the foot of the said contract, all his, the said John N. Hungerford's, rights, titles and interests, in and upon the said contract hereinbefore recited, without any recourse to himself, to and in favor of the said firm of White, Loveland & Co., the said opposants, present and accepting thereof.

That all the stipulations in the said contract specified have been fully complied with both on the part of the said Hiram Pritchard and John N. Hungerford, as on the part of the said White, Loveland & Co., subsequent to the said last mentioned transfer, and that in conformity with the said contract, and for the purposes therein mentioned, they, the said Hiram Pritchard and John N. Hungerford, up to the 5th day of June, 1863, had paid and advanced to him, the said McCarthy, the sum of $6,380 20, and that since the said last mentioned date, they, the said firm of White, Loveland & Co., also in conformity with the said contract and for the purposes therein mentioned, had paid and advanced him the further sum of $1,700 00, making a total sum $8,080 20 which he, the said McCarthy, has been paid and advanced on account of the said contract.

That it was fully understood and agreed to by and between them, the said John N. Hungerford and the said McCarthy, and the said firm of White, Loveland & Co., that he, the said McCarthy, should fully reimburse and repay to the said firm of White, Loveland & Co., all his, the said John N. Hungerford's, shares of advances and payments theretofore made by him and the said Hiram Pritchard, to him, the said McCarthy, for and on account of the aforesaid con-

tract, to all which he the said McCarthy, agreed to and promised to do, the said firm of White, Loveland & Co., present and accepting thereof.

That the said twenty-seven piles of sawed lumber seized and taken in execution in this cause, form part and parcel of the sawed lumber manufactured as aforesaid by the said McCarthy, for the said opposants, under the terms of the aforesaid contract, and for which the said advances of $8,080 20 were paid him to enable him to get out logs, and to carry on his operations for the manufacture of the said lumber, in accordance with the terms of the said contract.

That he, the said McCarthy, hath not fulfilled on his part, the stipulations and conditions specified in the said contract, and hath always neglected and refused to comply with the terms thereof. That long before and at the time of the seizure in this cause of the said 27 piles of sawed lumber, he, the said McCarthy, had been paid by the said opposants the price and value of the same, and had delivered the same to them, the said opposants, in accordance with the stipulations and terms of the said contract.

That the said McCarthy, with the view and in order further to secure to the said opposants all the sawed lumber manufactured by him under the aforesaid contract, did, on or about the 30th October, 1863, in the presence of witnesses, make to the said opposants a further delivery of all the sawed lumber so manufactured by him under the aforesaid contracts, and then lying and being in piles in the Township of Hull, in the District of Ottawa, Canada East, and of which said sawed lumber, so last delivered as aforesaid by the said McCarthy to the said opposants, the said twenty-seven piles of sawed lumber seized in this cause, formed part and portion.

Wherefore opposants prayed to be declared sole owners and proprietors of the lumber seized, &c., &c.

The opposants fyled with their opposition a true copy of the said contract, which by consent of parties is to be taken and received as the original of the said contract mentioned in their opposition.

The plaintiff contested the opposants' opposition, and by first contestation, alleged:—That at all the times and periods mentioned in the said opposition, and more particularly at the date of the said pretended agreements between the said Hiram Pritchard and John N. Hungerford, of the one part, and William McCarthy, one of the said defendants, of the other, and the transfer by the said Hiram Pritchard to the said Douglas L. White, Ralph A. Loveland, and Samuel W. Barnard, the said William McCarthy was insolvent *en déconfiture*, and unable to pay his just debts. And that the said opposants never became or were *bonâ fide* proprietors of the said lumber seized in this cause or any part thereof, and that the said pretended delivery alleged and set forth in the said opposition was simulated, and fraudulent and illegal, being made for the purpose of giving the said opposants a fraudulent preference over the other creditors of the said defendant Wm. McCarthy.

Wherefore, &c., praying that agreements, transfers and pretended delivery, be declared fraudulent, illegal, null and void, with respect to plaintiff, and be set aside, &c.

And by 2nd contestation the plaintiff alleged:—That the said opposants had

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long before the seizures in this cause been paid and reimbursed the several amounts or sums of money by them advanced, or pretended so to be, by the price and value of other large quantities of shingles and lumber, then and there and before that time by the said defendant, Wm. McCarthy, sold and delivered to the said opposants.

And further, the said plaintiff saith, that for the said amount so by the said opposants alleged to have been advanced to the said Wm. McCarthy, they were long before the institution of this action paid and compensated by the price and value of certain real estate sold and delivered to the said opposants, and that the said opposants moreover held security on real estate, situate in the State of New York, one of the United States of America, mortgaged and hypothecated to them by the said defendant long before the institution of this action for the amount of the said pretended advances.—Wherefore plaintiff prays for the dismissal of opposants' opposition, &c.

And, finally, for 3rd contestation, the plaintiff fyled a general denegation, denying, &c.

The opposants answered generally to the first contestation, and generally and specially to the second, and, finally, by general replication to the *Defense en fait*

By the said special answer, the opposants, not confessing or acknowledging any of the allegations of the said contestation, alleged, that, if they held security on real estate in the State of New York, given them by the said William McCarthy, before the institution of this action, the same was merely as collateral security for the due performance by him of the contract mentioned in the opposants' opposition, and of the advances in money to be made to him under the term of the said contract.

The issues being closed, the parties and the cause having been heard on the merits, the Court on the 18th November, 1865, rendered the following judgment:

"The Court having heard the parties by [redacted] respective Counsels, on the "merits of the opposition, fyled in this cause by said opposants, and on the "contestation thereof by the said plaintiff, examined the proceedings and proof "of record, and having deliberated thereon, considering the informal delivery "made by the said defendant to the said opposants, of a large quantity of sawed "lumber, whereof the twenty-seven piles of sawed lumber in this cause seized "form part, was so made to the prejudice of the creditors of the said defendant, "who then was *en état de déconfiture*, maintaining the said contestation of the said "opposition, declare such delivery to be fraudulent, illegal, null and void, with "respect to the said plaintiff; and further the opposition of the said opposants, "the material allegations whereof not having been substantiated, the same is "hereby dismissed with costs, &c., &c."

The opposants went to review at Montreal, and the parties having been heard, the Court, on the 31st March, 1866, gave the following Judgment, confirming the Judgment of the Court below (His Honor Mr. Justice Smith dissenting) which Judgment was afterwards received by the Prothonotary of the District of Ottawa, on the 21st April, 1866, and stands as the Judgment of the Superior Court, as if originally rendered on the said last mentioned day.

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PRESENT—The Honorables Messrs. Justices Smith and Berthelot, and Assistant Justice Monk.

The 31st day of March, 1866.

"The Court now here sitting as a Court of Review, having heard the parties, opposants and plaintiffs, contesting by their respective counsel, upon the judgment rendered in the Superior Court, sitting in the District of Ottawa, on the 18th of November, 1865, having examined the record and proceedings had in this cause, and maturely deliberated, considering that there is no error in the said judgment, doth in all things confirm the said judgment, with costs, distraits, to Messrs. Fleming and Church, Attorneys for plaintiff and contestants.

"The Honorable Mr. Justice Smith, dissenting."

Delisle, for the appellants, said:—It will be seen that the only ground alleged in the judgment of the Court below, for the dismissal of the appellants' opposition, is the pretended informal delivery of the lumber in question, made by McCarthy to the opposants, at a time when he, McCarthy, was *en déconfiture*. The question is purely one of *delivery*. Pothier, in his "*Traité des Obligations*," vol. 1, page 88, No. 207. says: "*Les conditions devant s'accomplir de la manière dont les parties contractantes l'ont entendu.* McCarthy, by his contract of the 31st March, 1863, sells to appellants two million feet of white pine lumber, to be thereafter manufactured by him at Ottawa, Canada West, during the season, and to be considered as delivered when and as the same should be sawed and piled, and then to belong to and be the property of the appellants at prices specified. By a further agreement in the said contract, McCarthy obliges himself for the price stipulated therein, to deliver at Albany 500,000 feet of said lumber by the 1st day of June, 1863, a like quantity on the 1st day of July, 1863, and the balance as fast as in shipping order, so that the whole should be delivered by the first of November then next; and further, that if McCarthy should manufacture more than two million feet that season, the same should be subject to the provisions of the said contract. It will be here remembered that McCarthy's note, upon which the respondent obtained judgment against him, bears date the 18th May, 1863, more than six weeks posterior to the date of the said contract, and long after the said sum of $6000 had been paid him. Certainly no sale by McCarthy the 31st March, 1863, was to the prejudice of the respondents the 18th May, 1863, as the bank was not then a creditor. At the date of the contract not a foot of lumber sold under it had been manufactured by McCarthy, and it is admitted that the lumber seized was manufactured by him for the appellants, under the terms of that contract. It is clear that the lumber sold, not being manufactured at the time of the contract, no immediate delivery of the same could take place. Toullier, Droit Civil Français, vol. 7, page 50, sec. 40, says:—"Le seul consentement des parties équivaut à la délivrance des effets mobiliers si le transport ne peut pas s'en faire au moment de la vente; ainsi je vous ai vendu la récolte de mes vignobles avant la vendange; la vente est irrévocable, même à l'égard de mes créanciers par notre seul consentement, parceque le transport des vins et des grains ne peut ce faire au moment de la vente. Mais ces créanciers ne pour-

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"ront donc saisir la récolte, sous prétexte qu'elle n'a pas été livrée ou la pré-"sence et possession de l'acheteur." Civil Code of Lower Canada, page 279, art. 1025—"The obligation of the seller to deliver is satisfied when he puts the buyer in actual possession of the thing, or *consents to such possession being taken by him.*" By the contract McCarthy consented that the lumber should be considered as delivered, so soon as *sawed and piled*; and it is admitted that it was in piles when it was seized, and McCarthy in his deposition as a witness for respondents, says that he never objected to the appellants getting the lumber—it had been made for them under the contract. Guy Pape, *decis.* 112—maintains that a feigned delivery transfers the domain and property of a thing as really and as truly as a real delivery, even against third parties, and from this principal concludes that a first buyer to whom feigned delivery of the thing is made, may reclaim it against a second buyer, who is in the real possession of it. Pothier, Traité du Contrat de Vente, vol. 1, p. 587, No. 321, is of the same opinion, with this limitation: "Pourvu que la preuve de la tradition soit établie par un Acte authentique, ou "si l'Acte est sous signature privée pourvu que l'antériorité de la date, à la tradition réele fait au second acheteur, *ou à la saisie faite par les Créanciers du vendeur*, soit suffisamment constatée.

It will be remembered that the contract was executed on the 1st March, 1863, and that the writ of execution, under which the lumber was seized, was only issued on the 24th October, 1864—a period of seventeen months after the date of that contract. The lumber seized, at contract price, is only worth $2200, and McCarthy had received $6000 previous to the signing by him of the promissory note, for which judgment was obtained against him by the bank. With respect to the pretended insolvency of McCarthy, the appellants aver that no proof was ever adduced to show his insolvency at the time of the execution of the contract, nor that he was insolvent at the time of the signing, or maturing of the note, for which the judgment was obtained against him; and further, that at no time whatsoever was any insolvency on the part of McCarthy ever brought home to their knowledge, and it was but fair to presume that the appellants would not have advanced him so large an amount of money had they ever doubted his solvency.—*Vide* Toullier, vol. 6, page 379, No. 352.

Fleming, for the respondents, said:—There is no evidence of even the semblance of delivery. But independently of the want of evidence to establish delivery of any kind, the plaintiff relies upon the following facts which are not denied by the opposants:—1. That the lumber was by McCarthy agreed to be sold to the opposants at so much per thousand feet; 2. That it was not measured at the time of the alleged delivery; 3. That it was then under seizure; 4. That McCarthy was, at the time of this pretended delivery, reputed to be insolvent; 5. That McCarthy was then indebted to the plaintiff in the sum for which judgment was subsequently obtained, and to other parties in sums amounting to three thousand four hundred and seventy-five dollars, of which $2475 was still due on the 16th June, 1865; 6. That the whole of the personal property of the defendant was and had been for some time before the pretended delivery to the opposants, under seizure. By the well known principles of law regulating delivery in force at the time mentioned in the oppo-

sition; effects sold by measurement required to be measured before any valid delivery could be made. Therefore in this case there was no valid delivery.—*Vide Lemesurier & Logan*, Revu de Législation, page 176. "But on the sale of "goods by admeasurement, which goods happen to be destroyed by fire, the "loss is on the seller. Stipulations of admeasurement at a certain place and "time" (as was the case here) "render the sale conditional and incomplete "until the occurrence of these events, and in the meantime the risk *periculum "rei venditæ* must be borne by the vendor." The defendant, being insolvent, could not validly transfer his property or any part of it to one creditor to the prejudice of the others, all his property being the gage of his creditors. There was no deplacement.

BADGLEY, J., delivering the judgment of the Court, said: The seizure in this case has been opposed by the opposants (appellants) upon the following grounds: that by written contract, filed of record and executed in the State of New York on the 31st March, 1863, between McCarthy, and Richard and Hungerford, he agreed to sell to them two million feet of white pine timber, to be by him manufactured and sawed at Ottawa, and to be considered as there delivered and be their property when sawed and piled, with the further special covenant and agreement, that it should be delivered by McCarthy to Richard and Hungerford at Albany, in the State of New York, during the following summer and fall, not later than the first of November, or to such parties at Albany as Richard and Hungerford should direct: that the latter should make advances in money to him in making the lumber, and that the balance should be paid by drafts on the consignees at Albany, as the lumber should be delivered there. Subsequently on the 8th June, 1863, Hungerford assigned to the opposants (appellants) all his right and interest in the contract. McCarthy, during the months of May, June and July, 1863, sawed and piled at Ottawa the 21 piles the subject of this contestation. He had received considerable advances in the interval from Richard and Hungerford, and since the assignment to the opposants had also received moneys from them: he was, however, it seems, in a state of utter insolvency, several suits at law were instituted against him, and legal attachments had been issued as early as the 4th of August, 1863, under which the piles of timber had been seized, some of which remained undischarged at the time of the issue of the writ of execution against McCarthy by the Bank of Montreal, under which they were again seized by the Sheriff. The issue presented to this Court has been limited to the legal effect of the alleged constructive delivery at Ottawa to the opposants, under the terms of the contract. The actual delivery averred by the opposants to have been made to them at Ottawa on the 31st of October, 1863, has not been proved, and could not possibly have been made to, or received by them without first having removed the seizures and attachments upon the piles of lumber; and indeed the opposants by their factum, p. 6, have abandoned that delivery altogether. They rest upon the constructive delivery which is in "these terms of the contract: "Said timber to be delivered at Ottawa, where "the same shall be manufactured, and to be considered as delivered when the "same is sawed and piled, and then to belong, and to be the property of the "parties of the second part."

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Now it is clear, that until the lumber was manufactured, there could be nothing of which delivery could be made, and that until made and filed in May, June, and July, there was no actual change or divestment of McCarthy's possession; and hence, therefore, it is argued by the opposants that the constructive delivery to them vested the lumber in them, because although a bargain and sale might be so far incomplete and imperfect as not to operate of itself an immediate transfer of property sold, yet the engagements which naturally result from the contract exist as soon as it has been entered into. But that principle is not valid without actual delivery, as regards a third party without notice. In general where there is a completed sale, but no change of possession, this retaining of possession by the vendor is a badge of fraud and will avoid the sale in favour of a party who subsequently acquires title to the property in good faith, and with no knowledge of the prior sale, and this principle of law doubtless includes the right of an attaching creditor. This is a question of fact, to which the circumstance of continued possession by the vendor is of great importance. Although the delivery may be symbolical, the presumption is not to be favoured, because there must not only be a good delivery, but there must be an acceptance of the delivery. In this case there is no proof of either, both ownership and possession apparently being in McCarthy. The opposants (appellants) assert that the piling was a constructive delivery, but to make that sort of delivery valid, there must be action of some sort by both parties, vendor and purchaser, because we are told by the books that constructive delivery is, when by some act of the seller, the thing has been placed in the buyer's control, and placed at his disposal with his knowledge of the fact, provided that nothing but delivery remained to be performed by the vendor: but if the thing remains with the vendor, the mere circumstance that he had placed it at the vendor's disposal would not afford even *prima facie* evidence of delivery, and certainly much less when the opposants (appellants) are not proved to have had any knowledge of it, indeed they never thought of their contract at all, until the 31st of October, when their first and only attempt to obtain delivery was found to be unavailing, the lumber being attached, and in *custodia legis* for other creditors of McCarthy, and he himself then refusing absolutely to make the delivery. Now the fact of delivering determines whether or not a change of possession and ownership has taken place, because it is a clear principle of law that change of possession is requisite to constitute acceptance and receipt of goods by a purchaser. And certainly the mere placing of goods at the disposal of the purchaser will not in any case constitute a delivery, if the vendor retain a lien or possess any dominion or control over them. Without recurring to McCarthy's lien for price, he certainly had such dominion or control over the piled timber as would have enabled him, before the attachments to sell and deliver to any third person, whose possession would have been his protection for holding the goods. Independent of these positive objections against the alleged constructive delivery, the terms of the contract are clear, that the delivery was to be effected by McCarthy himself to the contractors or consignees at Albany, and the evidence of their agent, Barnard, proves conclusively that McCarthy had not divested himself of the lumber, and this is corroborated by McCarthy's testimony as follows:

"I have had lately, (to wit) about the month of March last, (eighteen hundred and sixty-five) a conversation with Mr. White, one of the opposants, in the office of the firm White, Laveland & Co., in Albany, in the State of New York, and obtained from them a written statement of their claims or account current against me. By that statement they do not give me any credit for the lumber seized in this cause as having been delivered to them; they made no mention of it," and this has not been contradicted.

The judgment of the Court below, dismissing the opposition of the appellants) must be confirmed upon the ground that the lumber had never been divested out of McCarthy's possession, and not upon the ground of his insolvency, or of the informal delivery mentioned in the judgment (of the Court below), which in fact was not the case.

Judgment confirmed.

John Delisle, for the appellants.
Fleming & Church, for the respondents.
(F. W. T.)

MONTREAL, 9TH JUNE, 1868.

IN APPEAL.

FROM THE CIRCUIT COURT, MONTREAL CIRCUIT.

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

LOUIS RENAUD *et al.*,
(*Opposants in the Court below,*)
APPELLANTS;

AND

THOMAS D. HOOD,
(*Plaintiff and Contestant in the Court below,*)
RESPONDENT.

GOODS STORED—LANDLORD'S PRIVILEGE.

The goods seized in this cause in the warehouse owned by the respondent were at the time of the seizure the property of the appellants, and had been by them placed therein for temporary storage, under an agreement, at a certain rate therefor by the appellants, with the tenants of the respondent, in occupation of the warehouse, for the purposes of such storage.

HELD:—That the privilege of the landlord of the warehouse, for rent accrued, due to him, and unpaid by his tenants at the time of the said seizure, did not affect the said goods, except for the amount of such storage rate as might be legally due by the owner of the goods stored to the tenant.

On the 28th February 1865, the Respondent instituted an action by way of *Saisie-Gagerie* in the Circuit Court at Montreal, against William A. and Benjamin S. Curry, trading together as co-partners under the firm of Curry, Brothers & Co., to recover £45. 0 0 for 3 quarters' rent due on the 1st February 1865 for the use and occupation by them under a verbal Lease made between them and Respondent on the 15th April 1864, for one year from the 1st May 1864 to the 1st May 1865, of "the two basement stories or "lower flats with access from Fortification Lane, of that certain Building "fronting on Great Saint James Street, in the City of Montreal, bounded in "rear by Fortification Lane, on one side by the Wesleyan Methodist Church "and on the other side by the property of one Muir," and for which they

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had agreed to pay Respondent the Rent of £60 for the year, by quarterly payments of £15; and to preserve his privilege as Lessor, Respondent caused to be seized, under the said writ of *Saisie-Gagerie*, in the said premises about 97 Crates of Crockery "*Paniers remplis de vaisselle*," being all the effects that could be found on the premises to secure the payment of the Rent.

On the 27th March 1865, Judgment was rendered in the said action maintaining the seizure of the 97 Crates of Crockery under the writ of *Saisie-Gagerie*, condemning Curry, Brothers & Co., to pay the Rent sued for with interest and costs and ordering the sale of the effects seized, for the payment of the Rent.

Under this Judgment, Respondent on the 13th April 1865, sued out execution to sell the effects seized under the *Saisie-Gagerie*, and the Appellants opposed the sale on the grounds stated in their opppsition, alleging that the 97 Crates of Crockery were their property placed there for *Storage*, and were not liable for Rent except to the extent of $39.06, which they were ready to pay as the balance due by them to Curry, Brothers & Co., for Storage; that they had previously paid all the Storage that had become due, as also by anticipation what would become due up to the 1st February 1865; and that Respondent never had any right or privilege on the effects seized for the payment of the Rent due or to become due to him by Curry, Brothers & Co., except to the extent of what the Opposants might owe Curry, Brothers & Co., for the *Storage* of their goods.

This opposition was contested by Respondent who contended that the effects seized were liable, and that he had a privileged right and *lien* thereon, for the payment of the Rent due and to become due to him; that the effects seized were the goods and merchandize and the only goods chattels and effects where with the said premises were stocked and furnished "*garnis*" at and after the seizure; and that even according to Appellants' own allegations, the premises had been occupied and used for the Storage and safety of the said goods and merchandize since the 3rd November 1864.

The Judgment of the Circuit Court, from which the present appeal has been instituted, was rendered by The Honorable Mr. Justice Monk, on the 29th December 1866, as follows:

"The Court having heard the Opposants and the Plaintiff contesting by their Counsel upon the merits of the *opposition afin d'annuller*, made and fyled by the said opposants to the writ of execution *de bonis* issued against the Defendants in this cause on the 13th day of April 1865, and the contestation thereof by the said Plaintiff, having examined the proceedings, proof of record and upon the whole duly deliberated, doth maintain the said contestation and in consequence doth dismiss the said opposition with costs.

Cassidy Q. C. for the appellants said; 1°. L'Intimé n'a aucun lien sur la marchandise des Appellants pour le paiement des trois quartiers de loyer qu'il réclame et devenus échus au 1er Février 1866, vu que les Appellants (avant la date de sa saisie et avant qu'ils le connussent comme propriétaire des magasins) ont payé de bonne foi (suivant quittances qu'ils représentent) le prix de leur location jusqu'au 3 Mars 1865, à Curry & Frère dont ils étaient sous-locataires.

2° L'Intimé ne peut exiger des Appellants que le loyer dont il sont devenus

débiteurs de Curry & Frère, subséquemment à la date de la saisie. Or ce loyer, $39.6, lui a été offert par les Appelants qui en ont consigné le montant au greffe de la cour, malgré que ce loyer ne fut pas tout échu lorsqu'il fut offert par leur opposition.

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3° D'après l'action que l'Intimé a intentée, il appert que le 1er Novembre 1864, l'Intimé était créancier de Curry & Frère de deux quartiers de loyer, s'élevant à £40 0 0. Pour se faire payer de ces deux quartiers de loyer l'Intimé n'a pu compter sur la marchandise des Appelants puisque ce n'a été que le 3 Novembre 1864, que les Appelants ont commencé à occuper partie des magasins possédés par Curry & Frère.

La cour de première instance devait donc dans tous les cas, ce nous semble, déclarer que l'Intimé n'avait aucun privilége sur la marchandise des Appelants pour le paiement de ces deux premiers quartiers de loyer.

4° Les Appelants étaient des sous-locataires. Ayant produit les quittances de leur loyer qu'ils ont payé de bonne foi, ils devaient obtenir main levée de la saisie de leurs marchandises, sauf à payer à l'Intimé leur loyer à échoir; or ils ont offert leur loyer à échoir et cette offre a été refusée.

Day, Q. C. for the respondents, said: That the Appellants were not "*Sous Locataires*," they did not *themselves* occupy the premises under Curry Brothers; the latter did not sub-let any part of the premises to them. The appellants had no key, no possession, they placed their goods in the possession of Curry Brothers, in thepremises, the latter agreeing they say, to store them for them for a pecuniary consideration; and for ought we know perhaps to sell them for their account.

Respondent had every reason to believe the goods belonged to Curry Brothers. There were no indications of "*sous location.*" From the time Curry Brothers entered into possession of the premises until the seizure of the goods by *Saisie Gagerie* the premises had been stored "*garnis*" with goods and merchandizes placed there by *Curry Brothers* some of which were from time to time taken away; and the premises replenished, freshly stored, "garnis" with other goods by them. Curry Brothers used the premises as a place of Storage for goods as other merchants who keep a stock on hand, and are constantly selling, removing and sending away goods and replenishing their Store "*Magasin*" with other goods. Whether any part of the merchandize which so came into the premises and was Stored there, was received by Curry Brothers for Sale on Commission or for safe keeping, in other words for Storage as the property of others, and did not actually belong to them, is a fact, that for the first time was made known to the Respondent upon the Appellants fyling their opposition to the Sale of the Goods seized. The Respondent was never notified by the Appellants nor informed by Curry Brothers or in fact by any one that the goods, which, it now appears, Curry Brothers from time to time Stored there for the Appellants, belonged to them and were sent there merely for Storage.

It would be unreasonable therefore to assimilate the present case to that of the "Sous-Locataire:" There can be no "Sous Locataire" *in good faith* whose existence may not be known to the principal lessor. The latter therefore can

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protect himself if his tenant has sub-let a part of the premises and has no effects, himself to secure the Rent in the part retained by him. In the present case the Respondent was justified in considering that the Goods seized were merchandize with which the premises were "*garnis.*" He was never notified nor knew of *any circumstance* that could modify, restrict or deprive him of the privilege and *lien* which by law he had on the goods in the premises as goods with which the premises were "*garnis.*" The whole premises were occupied by the Goods seized, there were no other goods in the premises to secure the Rent. The Goods might belong to third persons but nevertheless liable for the Rent. The following authorities fully sustain the Respondent's pretentions:

Pothier, verbo, Louage Nos. 241, 242, 246 and 249. Troplong, verbo, Privilèges No. 151. Rousseau De la Combe, V. Bail, sec. 3, No. 3. Journal du Palais, Judgment 5th May 1828. Case of Desetables Royer et al., C. Moreau. The Respondent would also cite a Judgment of the Superior Court at Quebec in *Review* in the case Parke vs. Maxwell et al., and Berry Intervenant rendered 4th May 1867, *Coram*: Chief Justice Meredith & Justices Stuart & Taschereau. A ship seized on the stocks for Rent of ship yard. Berry claimed it, the privilege of Landlord for the Rent of the ship yard maintained.

BADGLEY, J., gave the judgment in appeal:—Hood, the landlord, leased to Curry Brothers & Co., by verbal lease, the warehouse and premises mentioned in the declaration, at the rate of £60 per annum, from 1st May, 1864, to 1st May, 1865. The rent was payable by quarterly payments.

On the 3rd November, 1864, the tenants, Curry Brothers & Co., agreed with Renaud & Co. to give them storage room for a certain quantity of crockery, at the rate of 19 cents for the first month of storage and 18 cents for each subsequent month. By the receipts produced and by the words of the written agreement the sub-occupation and lease was payable monthly.

Rent paid—25th Nov., 1864,	to 3rd Dec., 1864,	first month,	- -	$39.71
27th Dec., "	to 3rd Jan., 1865,	second month,	full to 3rd Jan.	
4th Jan., "	to 3rd Feb., "	third "	- -	$28.62
1st Feb., "	to 3rd March, "	fourth "	- -	26.10

As between the sub-tenants or occupiers, Renaud & Co. and Curry Brothers & Co., there appears to have been no fraud or shirking of the engagement of the former, but on the 2nd March, 1865, the landlord, Hood, issues *saisie-gagerie* against his tenants, Curry Brothers & Co., for three quarters of rent, due to him up to first Feb., 1865. The service is of 2nd March, 1865. His tenants, who received the sub-rent, but dishonestly withheld their rent from their landlord, allow judgment to go against them by default, upon which execution issued, and the sub-tenants' goods were proposed to be made responsible for the dishonesty of Curry Brothers & Co. and for the negligence of the landlord himself, in allowing the rent to run over to the 2nd March, 1865. When the writ issued on the 2nd March, there was no storage due, the payment for the month up to the 3rd March having been paid by Renaud & Co. Renaud & Co. opposed this appropriation of their goods for Curry's rent, and setting out their sub-tenancy and their payments made, offer their rent as per their agreement for what was due from 3rd March—$39.6 for storage to 1st May, 1865. The opposition is dated 29th April, 1865. They consign and ask *main-levée.*

The landlord's power to *saisie-gager* the effects of the sub-tenants results from their occupation of the premises, because there is no contract express or implied between the sub-tenant and the landlord, nor is the sub-tenant bound to know any landlord but his own immediate landlord from whom he sub-lets; the original landlord cannot therefore however, be in any better position than the immediate tenant, the original lessee, and is bound by the contract between the latter and his sub-lessee, and therefore the article of the Custom 162 which regulates this matter, whilst it allows the *gagerie* of the sub-tenant's effects, gives him the privilege of their *main-levée*, upon payment of what sub-rent may be due, or upon proof that it has been honestly paid by the sub-tenant before the *gagerie*. I say *honestly paid* to meet the provision of the Fr. Code de l'proc. 820; Code Civil, 1753, adopted into our Code No. 1639. "The under-tenant is held towards the principal lessor for the amount only of the rent which he may owe at the time of seizure. He cannot set up *payments made in advance*." 6 Carré, ch. p. 341, par. 2803, art. 820. "Les paiements "sont réputés faits par anticipation toutes les fois qu'ils ont été effectués contra "les clauses du bail ou contre l'usage des lieux, chaque fois en un mot, disent "les auteurs du praticien, qu'ils paraissent avoir été faits à dessein d'enlever au "propriétaire le gage et la sureté que la loi lui confère. Et au reste c'est à la "sagacité des juges à pénétrer la conscience des sous locataires ou "fermiers, et à apprécier leurs titres, pour savoir s'il y a véritablement "fraude de leur part, et dans le doute, il faut présumer que le paiement est "sincère, suivant l'axiome *fraus non præsumitur*. (Cette opinion est incon-"testable.") See also 4 Carré, pro. Civ. Art. 820, p. 561, where the above is copied verbatim. And see also 2 Thomine Desmazures, p. 417, under Art. 820, He comments as follows p. 946) L'art. 1753, du C. C. porte que le sous locataire n'est tenu envers le propriétaire que jusqu'à concurrence du prix de la sous location, dont il peut être débiteur au moment de la saisie; et qu'il ne peut être inquiété pour les paiements qu'il a faits en exécution de son bail ou de l'usage des lieux, que seulement il ne peut opposer des paiements faits par anticipation. Le Cod de Proc. interprète cette disposition en ce sens, que le sous locataire pourra demander main levée de ses meubles saisis en remplissant ses obligations personnelles; ainsi il n'est pas nécessaire que le propriétaire agisse directement contre le sous locataire; il n'est pas obligé de le connaitre ni de changer de débiteur; il a droit de saisir gager les meubles étant dans sa maison sans s'embarrasser de celui à qui ils peuvent appartenir; il ne résulte de l'art, 1753 et de cet article rien autre chose, sinon que le sous locataire peut obtenir main levée de la saisie gagrie, pour ce qui le concerne, en offrant *payer à proportion de ce qu'il occupe ou en justifiant qu'il a payé sans fraude et sans anticipation*; see also the article of the custom as explained in 2 Gr. Com. de Ferière The plaintiff's counsel has forgotten to apply the exception in favour of the sub-tenant and it has also occupied the attention of the Superior Court.

The opposants, Renaud & Co., are honest in this transaction throughout, the payment for the last month to 3rd March, has nothing fraudulent in it, and their offer is all they could require to pay to secure *main-levée* of their goods. The judgment of the Superior Court is not correct, it must be reversed, the

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opposants must be maintained in their opposition and *main-levée* granted, and the amount consigned ordered to be paid to plaintiff, with costs to opposants in both Courts.

The judgment in appeal was *motivé* in the following terms:

"The Court, &c., considering that the goods and merchandize seized and attached in this cause, in and upon the warehouse and premises of the respondent in the proceedings described, were at the time of the said seizure, the property of the said appellants and had been by them placed therein for temporary storage, under agreement at a certain rate therefor by the appellants with the tenants of the said respondent in occupation of the said warehouse and premises, for the purposes of such storage; considering that the privilege of the said respondent as proprietor of the said warehouse and premises, for rent accrued, due to him and unpaid by his tenants at the time of the said seizure and attachment, did not affect the said goods, except for the amount of such storage rate as might be legally due by the appellants to the said tenants; considering that the said appellants did tender and offer to the respondent by their opposition in this cause filed, the sum of $39.6 for storage rate to accrue, due by them since the said seizure, all the previous storage rate accrued, having been paid by the said appellants in good faith to the said tenants; considering that in the judgment of the Circuit Court rendered in this cause, at Montreal, on the 20th of December, 1866, there was error, doth reverse and set aside the said judgment, and proceeding to render such judgment as the said Circuit Court should have rendered, doth, for the causes aforesaid, maintain the said tender so made to the said respondent by the said appellants of the said sum of $39.6 for storage, to accrue as aforesaid, and doth dismiss the contestation raised by the said respondent to the opposition of the said appellants, and doth grant *main-levee* to them of the seizure and attachment of their said goods and merchandize, with costs of said Circuit Court and of this Court.

Judgment reversed.

Leblanc, Cassidy, & Leblanc, for appellants.
Day & Day, for respondents.

F. W. T.

MONTREAL, 9TH MARCH, 1868.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

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

GEORGE D. FERRIER,
(*Opposant in Court below,*)
APPELLANT;

AND

ROBERT G. H. DILLON,
(*Plaintiff in the Court below,*)
RESPONDENT.

OATH PUT OFFICIALLY.

HELD:—That the Court of Queen's Bench in appeal has the same right to submit the *serment judiciaire*, to one of the parties in a cause, as a Court of original jurisdiction.

This appeal was from a judgment of the Superior Court, dismissing an opposition *à fin de distraire*, filed by the appellant, to the seizure of a number of

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pictures, seized in execution as belonging to H. Seymour, one of the defendants, in a case of *Dillon* vs. *Harrison et al.* These pictures were seized along with a good many others in Seymour's possession. Mr. Ferrier, by his opposition, claimed to be the owner of them. His opposition, however, was dismissed, on the ground that the evidence was insufficient.

The appellant's counsel, in arguing the case on the appeal, admitted that much of the evidence adduced in support of the opposition was unsatisfactory, principally because the witnesses had not had the pictures seized pointed out to them before giving their evidence, and could not therefore speak positively as to their identity. The appellant relied, however, on the evidence of the witnesses Carter and Wilson, as speaking positively to the ownership of the pictures by the opposant, and the fact that Seymour had been well known for a number of years as a picture restorer, and in that capacity had from time to time received pictures from Mr. Ferrier and others to be cleaned and restored. This would account for his having a large number of pictures not belonging to himself in his possession at the time of the seizure.

The respondent's counsel relied on the unsatisfactory nature of the evidence generally. On the 7th March, [illegible], the Court rendered an interlocutory judgment, ordering the appellant, *avant faire droit*, to appear before the Court, on the 9th, and answer such questions as should be submitted to him on the *serment judiciaire*. The following remarks were made by Mr. Justice Caron in delivering the opinion of the Court:

CARON, J.—Les effets du nommé Seymour ayant été saisis à la poursuite de Dillon, Ferrier, l'appellant a produit une opposition à fin de distraire, réclamant un nombre de tableaux désignés dans le procès-verbal sous les numéros 41, etc., évalués par l'opposant à la grande somme de $20,000. Dillon a contesté cette opposition en en niant toutes les allégations. L'opposant a fait entendre quatorze témoins, et le contestant, trois seulement. C'est d'après ces témoignages que la cause doit être décidée. Le jugement a été contre Ferrier, renvoyant son opposition. Le Juge en Cour Inférieure en rendant ce jugement est rapporté avoir dit:—"That he found that the opposant had "proved nothing whatever—not even that he was the owner of a single pic-"ture." J'ai examiné avec attention le témoignage rendu de part et d'autre, et sans être parfaitement satisfait, sur la nature de cette preuve, je ne puis cependant dire que je trouve que l'opposant n'a rien prouvé du tout en faveur de ses prétentions. Deux faits me paraissent suffisamment établis:—le premier que Seymour, le défendeur, sur lequel la saisie a été faite, était notoirement occupé à réparer et restorer des tableaux et peintures pour les personnes qui l'en chargaient;—le second que Ferrier était amateur de tableaux, en achetait et faisait acheter beaucoup, et qu'il en faisait, quelquefois du moins, restorer par Seymour. Ces deux faits sont clairement établis par plusieurs témoins et entr'autres par Wilson, Ash, et Carter. Quant à l'identité et à la propriété de chaque peinture spécifiquement, il ne faut pas se cacher que, sous ce rapport, la preuve n'est pas aussi satisfaisante qu'on pourrait le désirer; mais l'on ne peut nier pourtant que les témoins Wilson et Carter identifient plusieurs de ces peintures et en établissent la

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propriété dans la personne de l'opposant. Wilson surtout est très positif; Carter ne l'est guère moins. Quelques autres témoins corroborent certaines parties du témoignage de ces deux témoins, qui au reste ne sont aucunement contredits par la preuve du demandeur contestant.

De plus, l'on doit être frappé du fait que, si les tableaux sont de la valeur alléguée, il est peu probable que Seymour, dans les circonstances pécuniaires où il parait être, aurait pu être propriétaire de peintures aussi dispendieuses, et que cependant il se laisserait exécuter pour une somme comparativement peu considérable. N'est-il pas plus probable que ces objets d'art et de valeur étaient la propriété de quelqu'un qui, comme Ferrier, jouissait de moyens et paraissait être un amateur.

L'on observera aussi que, vu la nature des objets saisis et les circonstances où ils paraissent avoir été achetés, la preuve de l'identité de la propriété était d'une grande difficulté. L'opposant pouvait avoir des raisons pour ne pas acheter ces objets en son nom. Comment Seymour se serait-il procuré les moyens de payer ces achats, si l'argent ne lui avait pas été fourni par quelqu'un plus riche que lui?

Sous ces circonstances je suis d'avis que la preuve, sans être tout-à-fait suffisante pour accorder main-levée à l'opposant, démontre, cependant, que partie du moins des tableaux qu'il réclame lui appartient, et que le cas où il se trouve est un de ceux où le serment judiciaire devrait être référé. Je pense que ce serait le seul moyen de voir justice faite à qui elle est due; car si, comme l'on prétend, Ferrier est sans intérêt, et qu'il ne s'occupe nullement de cette affaire qui aurait été conduite exclusivement par Seymour et dans son intérêt, eh bien! Ferrier le dirait sous serment, et la chose serait décidée. Avec la preuve telle qu'elle est, je pense qu'il serait injuste de maintenir le jugement qui renvoie en entier l'opposition de l'appellant.

Reste maintenant la question de savoir si cette cour a le pouvoir de soumettre le serment judiciaire.

En France la chose ne faisait pas difficulté. Les tribunaux d'appel avaient ce droit tout aussi bien que ceux de première instance. (Voir *Poth. Oblig.* No. 927, aussi le 6e vol. Dict. de Législ. vo. serment supplétoire, p. 395 et suiv., ainsi que les auteurs qu'il cite).

La raison de douter si cette cour possède le droit en question résulte uniquement du fait que l'on ne trouve pas de précédent où elle en ait fait usage. Mais il faut aussi dire que si l'on ne trouve pas d'exemple où le serment supplétoire ait été soumis par la Cour d'Appel, l'on ne trouve aucun cas non plus où la question se soit présentée et ait été décidée négativement. Sous ces circonstances,—me fondant sur le droit commun qui, en permettant au juge de soumettre ce serment dans les cas convenables, ne fait aucune différence entre les divers tribunaux—et aussi sur la jurisprudence française antérieure et postérieure au code qui reconnait ce droit dans les tribunaux d'appel comme dans ceux de première instance,—je crois que l'on doit profiter de l'occasion pour établir un précédent sur lequel on pourra se guider à l'avenir.

Si malgré ces raisons le droit de la Cour sous ce rapport était douteux, ce doute devrait disparaître en référant à l'article onze de notre nouveau code de pro-

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cédure civile, [illegible]cable à l'espèce et conférant ou reconnaissant à tout tribunal sans exception le droit d'exiger le serment judiciaire lorsqu'il le croit nécessaire. Cet article, l'on remarquera, fait partie des dispositions générales du code applicables à tous les tribunaux de la province, à notre cour comme aux autres.

Pour ces raisons le jugement serait entré avant faire droit ordonnant que l'appellant paraisse devant cette Cour pour répondre aux questions qui lui seront soumises.

The following are the terms of the interlocutory judgment:

La cour, considérant que par la preuve au dossier il est constaté que l'appelant, opposant en cour inférieure, a, sur certains des tableaux (pictures) saisis en cette cause et réclamés par le dit appelant en sa dite opposition, un droit de propriété indubitable, quoique cette preuve soit insuffisante pour permettre de se prononcer d'une manière certaine et satisfaisante sur l'identité et le nombre des dits tableaux appartenant ainsi au dit appelant.

Considérant que dans l'espèce la preuve faite est de nature à autoriser la cour à interroger le dit appelant sur le serment judiciaire ou supplétoire.

Considérant que cette cour, autorisée à juger comme aurait du faire la cour inférieure, a droit d'interroger le dit appelant, et que les fins de la justice exigent qu'il en soit ainsi dans l'espèce, ordonne, avant faire droit, que le dit appelant comparaisse devant cette cour, lundi le neuf du mois courant à 10 heures du matin pour alors et là répondre aux interrogatoires qui lui seront soumis, pour, sur les réponses qui y seront données, être fait ce que de droit.

On the 9th of March, the appellant having appeared and been sworn, a series of written questions were submitted, and his answers were taken down in writing by the Clerk of the Court. After the members of the Court had taken communication of these answers, Mr. Justice CARON proceeded to render the judgment of the Court in the following terms:

Conformément à cet ordre qui a été donné, l'appelant a comparu, des questions lui ont été soumises, et sur les réponses qu'il y a faites et les autres preuves dans la cause, le jugement de la Cour Inférieure a été infirmé, l'opposition de l'appelant maintenue, et main-levée accordée de la saisie des tableaux y mentionnées avec dépens dans les deux cours.

La Cour, en rendant le jugement final, a déclaré qu'après y avoir réfléchi de nouveau, et surtout après avoir examiné avec attention l'article onze du code de Procédure civile, il ne lui restait aucun doute sur son droit de soumettre le serment supplétoire dans tous les cas où ce droit compète aux tribunaux inférieurs; que ce point établi—après avoir pris communication des réponses de l'appelant qui jure positivement que tous les tableaux mentionnés dans son opposition lui appartiennent légitimement, la Cour a été d'avis que cette déclaration complétait la preuve déjà faite dans la cause, et la rendait suffisante pour justifier l'octroi de la main-levée demandée.

The Chief Justice, while expressing the opinion that the evidence in this case was not sufficient to warrant the Court in submitting the *serment judiciaire* to the appellant, at the same time expressed his entire concurrence with the views of his colleagues in regard to the right of the Court to adopt this proceeding.

The following is the final judgment:

"La cour, après avoir entendu les parties par leurs avocats respectifs, examiné

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la procédure, la preuve, et les réponses faites par l'appelant aux questions qui lui ont été soumises en vertu de l'interlocutoire rendu par cette cour le 7 du courant, et sur le tout mûrement délibéré.

Considérant que par les dites preuves et réponses, il est suffisamment établi que plusieurs des tableaux saisis sur le nommé Harry Seymour, défendeur, comme lui appartenant à la poursuite du dit Robert G. H. Dillon, demandeur, savoir tous ceux indiqués dans le procès verbal de saisie sous les numéros suivants, savoir, No. 41, one painting, Hunting Scene, by Cuyp, No. 42, &c., &c., n'apparte, naient pas au dit Harry Seymour mais étaient bien et duement la propriété de l'appelant et que partant l'appelant doit être déclaré propriétaire des dits tableaux et obtenir main levée de la saisie d'iceux, tandis que par le jugement dont est appel son opposition a été renvoyée et que partant dans ce jugement, savoir, dans le jugement de la Cour Supérieure en date du vingt neuf Septembre 1866, il y a erreur, casse et annule le susdit jugement et procédant à rendre celui qui aurait dû être rendu, déclare l'appelant propriétaire des dits tableaux saisis et réclamés par son opposition. Ordonne que main-levée de la saisie et remise d'iceux lui seront faites, condamne l'intimé aux dépens sur la contestation tant en cour inférieure que sur le présent appel et ordonne que le dossier soit remis à la cour de première instance."

Judgment reversed and appellant's opposition maintained.

Cross & Lunn, for Appellant.

Perkins & Ramsay, for Respondent.

(A. H. L.)

COUR SUPERIEURE, 1868.

MONTREAL, 28 MARS, 1868.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 116.

Clarke vs. *Kelly et le Maire et le Conseil de la Ville de Sorel, Opposants.*

JUGE:—Que s'il y a lieu à statuer sur des intérêts qui paraissent affecter les droits de la Couronne; la Cour a droit d'ordonner qu'avant faire droit, avis soit donné au Procureur Général aux fins qu'il adopte tels procédés que de droit.

Les parties ayant été entendues sur le mérite de l'opposition afin de distraire, produite en cette cause par les opposants qui réclament la propriété d'une ruelle dans la ville de Sorel et la cause ayant été prise en délibéré, la Cour rendit un jugement interlocutoire comme suit.

La Cour Supérieure, siégeant à Montréal, présentement en Cour de Révision, ayant entendu les parties intéressées par leurs avocats respectifs sur l'inscription faite et produite en cette cause, par les opposants pour revision du jugement rendu en cette dite cette cause le trente-un octobre, mil huit cent soixante et six par la Cour Supérieure du district de Montréal, ayant examiné la procédure et délibéré; ordonne avant faire droit, qu'avis soit de suite donné par le greffier de cette Cour, de la présente instance, à l'Honorable Procureur Général de la Province de Québec, aux fins qu'il adopte à cet égard tels procédés qu'il appartiendra.

A. & W. Robertson, avocats des demandeurs.

Lafrenaye & Bruneau, avocats des opposants.

(P. E. L.)

MONTREAL, 6TH JULY, 1868.

IN CHAMBERS.

Coram MONK, J.

In the matter of the will of the late William Yule, deceased, *and the Reverend Joseph Braithwaite*, Co-Executor, Petitioner.

HELD: That the testamentur executor who has accepted the office, can renounce it on the authorization of a judge for sufficient cause; the heirs and legatees, and other executors, being present or duly called. C. Code of L. Canada, Art. 911.

The allegations of the petitioner were:

"That at Chambly aforesaid, on the fourteenth day of May, one thousand eight hundred and forty-two, William Yule, of Chambly, made his last will and testament, leaving certain bequests and legacies, therein mentioned, and therein and thereby appointed

Philo Letitia Ash, his wife, John Yule his son, Richard Brock Hatt, his son-in-law, William Plenderleath Christie, and your petitioner, or any two, and the survivors and survivor of them, his fiduciary trustees and executors and executor."

"And your petitioner further represents that in, and by the said last will and testament, the said William Yule declared and directed that his said trustees and executors and their respective heirs, executors, and curators, should be charged and chargeable, only, every of them, for and with his respective receipts, payments, acts, and wilful defaults, and not otherwise, and shall not be charged or chargeable with or for any sum or sums of money other than such as shall actually and respectively come to his and their hands by virtue of his said will, nor with or for any loss or damage, which may happen in and about the execution of all or any of the trusts, thereby in them reposed without his or their respective default.

"And your petitioner further represents that the said William Yule on the seventh day of September, one thousand eight hundred and forty-three, at Chambly aforesaid, made a certain codicil to his last will making certain dispositions and bequests in some manner and to some extent altering his said last will and testament. And the said petitioner further saith that the said William Yule died at Chambly aforesaid, on or about the eighth day of September, one thousand eight hundred and forty-three."

"That your petitioner, together with Philo Letitia Ash and Richard Brock Hatt, on the eleventh day of November, executed a power of attorney in favor of their Co-Executor and Trustee, John Yule, to manage the affairs of the estate generally."

"And your petitioner further said he did in no manner or way meddle or interfere with the management of the said estate, that he has received no monies belonging thereto, and consequently kept no accounts and is in possession of no vouchers."

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"That the said John Yule has prepared an account which has been examined by James Court, Esq., and is believed by your petitioner to be satisfactory, and that the said account has been prepared for a long period of time, and offered to the interested parties for examination, and no objection to the knowledge of your petitioner has been made thereto."

That your petitioner never contemplated accepting any responsibility in this matter, and believed that he was acting merely as a friend of the family."

"That your petitioner has reached an advanced period of life and is subject to ill health, and that it is utterly impossible for him to devote any time to the active discharge of the duties of an executor and trustee.

"And your petitioner further saith that there are now in certain banks of this City, dividends waiting the action of the trustees and executors, and that it is absolutely necessary in the interest of the legatees, that the dividends should be withdrawn and applied to the payment of the several legacies, and for that purpose your petitioner is desirous of being discharged from the duty and office of an executor and trustee under the said will and codicil in order that the other surviving executors and trustees or executor and trustee may be enabled to discharge the trust duties and obligations imposed upon them by the said will and codicil."

"Wherefore your petitioner respectfully prays that by an order or judgment to be pronounced in the above matter by the Honorable Judge, the said Rev. Joseph Braithwaite may be declared to have desisted from the charge and office of Co-Executor and Trustee, and henceforward that he has ceased to be such Co-Executor and Trustee as aforesaid, and that he be relieved and discharged from the duties of such Co-Executor and Trustee for the future, and that he may be declared to be discharged and free from any liability for the acts and acts in future of the party or parties who may administer the estate and property of the said late William Yule."

H. Stuart, Q.C., presented the petition, which was supported by the affidavit of the petitioner, and notice of the petition had been given to the parties interested. Counsel cited Civil Code of Lower Canada, Art. 911.

MONK, J. Having seen and examined the foregoing and above written petition, and the affidavit in support thereof, and no objection having been made to the said petion, I, the undersigned Judge, do grant the conclusions of the said petition and declare the said Reverend Joseph Braithwaite to have desisted from the charge and office of Co-Executor and Trustee, and henceforward that he has ceased to be such Co-Executor and Trustee, for the future, and he is hereby declared to be discharged and free from any liability for the act and acts in future of the party or parties who may administer to the estate and property of the said late William Yule.

Petition granted.

H. Stuart, Q,C., for Petitioner.

(F.W.T.)

COURT OF REVIEW, 1867.

MONTREAL, 28TH DECEMBER, 1867.

Coram MONDELET J., BERTHELOT J., MONK J.

No. 412.

Lynch vs. Ellice, & Divers, T. S.

HELD:—That in the case of an attachment before judgment, *en main tierce*, the omission to state, in the affidavit, that the defendant was "personally" indebted to the plaintiff, and to state also the cause of debt, and that the defendant hath or had an intent to defraud his creditors and the plaintiff in particular, is fatal, and that the attachment in such case will be quashed on motion.

This was a hearing in review, of a judgment rendered by the Superior Court, at Beauharnois, on the eighth day of November, 1867, granting the defendant's motion to quash the writ of attachment issued in the cause. The reasons which prompted the motion are apparent in the arguments of the counsel, on the hearing in review.

Robertson, Q. C., for plaintiff:—The writ in this cause was issued on the 28th September, 1867, and was made returnable on the 30th of November following.

A large number of garnishees were named in the writ. On the 7th of November, the defendant presented a petition praying that the writ be ordered to be returned forthwith, which by judgment of the 8th November was ordered to be returned on the 13th of that month, which was accordingly done, and on the 13th of November, a motion was made to quash the writ, which motion was granted by judgment of the 15th November, now brought up in review.

The grounds of the judgment were:—

1. The omission in the affidavit of the word "personally" as to the indebtedness.

2. Because the cause of the indebtedness, or the grounds of action were not set up in the affidavit.

3. That the affidavit did not allege "that the defendant hath or had an "intent to defraud his creditors and the plaintiff in particular."

On the *first* ground, as to the omission of the word "personally," it is submitted that it is not necessary either by the Code of Procedure, or by the statute previously regulating seizures *en main tierce*, to use that word in the affidavit. The word "personally" is not used in the form of affidavit, provided by the Con. Stat. of L. C. chap. 83, Sec. 46, p. 717.

It is used in the case of *arrêt simple* in the 834th article of the Code of Procedure, but this article does not apply to seizures *en main tierce*, which are governed by article 855, and the sections therein referred to.

The word "personally" is required in case of Capias. The Art. 858 states that in cases of seizures in the hands of third parties, the writ is clothed with the formalities of ordinary writs, "and is subject to the provisions of Arts. 838, "839, 840, 842, 845, 846," but nothing is said of its being subject to the Art. 834. Hence the Code does not require the word "personally."

The Art. 855 seems to contemplate writs against the defendant of *arrêt simple*, and writ of *Garnishment*, being taken together by one and the same writ, and not cases like the present, where no *arrêt simple* has been taken.

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The writ of seizure *en main tierce* is left under the provisions of the Consolidated Statutes, chap. 83. sec. 46, or at least if under the Art. 855, the writ may be taken alone, without an *arrêt simple*. The Art. 834 is not mentioned or referred to as governing seizures *en main tierce*, but the other articles mentioned in it, none of which require the word "personally" to be used as qualifying the indebtedness.

The argument from the Article on Capias, Code of Procedure, Art. 798, is not applied to seizures *en main tierce*, nor is the provision of Art. 834 to be applied to them.

It will be seen from the form No. 45 in the Code of Procedure, which applies to writs taken before Commissioners, that the word "personally" is not used, nor is it used in the Con. Stat. Chap. 83, Sec. 46.

As to the necessity of stating the cause of indebtedness in the affidavit, the case relied on is that of *Beaufield and Wheeler*, 5 L. C. J. 44, which is an isolated case.

Besides, it was a case of *arrêt simple*, and not a seizure *en main tierce*, nor has there been any judgment in appeal, sanctioning such a judgment, which manifestly is not sanctioned by the words of the statute.

The law requires only an affidavit of indebtedness—the cause, origin, and circumstances of the debt are not required, as in a case of capias, by the effect of certain judgments to that effect.

It is submitted that the third ground of the judgment, that the affidavit did not state that the defendant intended to defraud his creditors, and the plaintiff in particular, is not well founded.

The affidavit states that the defendant "was immediately about to secrete his "estate, debts, and effects, with intent to defraud deponent and his creditors." There is some ambiguity as to whose creditors the word "his" applies, but if the defendant intended to defraud the plaintiff, it is sufficient to warrant the issuing of the writ: then there were other matters alleged, that the defendant had no domicile in the Dominion, that he had sold, and is immediately about to transfer and sell his real and personal property in the Province of Quebec "with intent aforesaid."

Even in the case of a *Capias*, Art. 798, Code of Procedure, an affidavit that the defendant is about to leave "with intent to defraud his creditors in general, or the plaintiff in particular" is sufficient.

An additional ground for quashing the seizure, was set forth in the motion, but is not made a ground of the judgment, namely that the plaintiff does not swear that without the benefit of a writ of attachment, *saisie-arrêt*, before Judgment, he verily believes he will lose his debt or sustain damage.

The affidavit states "that without the benefit of a writ of attachment *saisie-arrêt* before Judgment to attach &c., he the said deponent *will* lose his debt, "*and sustain* damage," words which include those used in the law, and are used not as a matter of belief, but as a statement absolute, and in the *conjunctive* form, and which it is submitted fully comply with the Statute.

Another question arises whether the Code authorises the Judge to order the writ in question to be returned before the return day.

The Art. 865 provides that the writ of garnishment may be contested in the manner provided for the writs of *capias*, that is by a petition to the Court or to a Judge.

Here the recourse is urged by motion, and besides, the Art. 820, which authorizes the immediate return of a writ of *capias*, is not applicable to the writ of *saisie-arrêt*, nor has the practice previous to the Code sanctioned the return of writs of attachment before the return day.

Attention is also directed to the affidavits fyled on the part of the plaintiff, to show that certain of the *Tiers Saisis* had not been served at the time the original writ was returned into Court. After the writ had been returned no service could validly be made, the Sheriff no longer having any authority under the writ.

Ritchie, Q. C., for defendant.

The action of the plaintiff was commenced by a *saisie-arrêt* before judgment, there being some two hundred garnishees named in the writ, most of whom have been served. The plaintiff made his action, which was instituted on the 28th Sept. last, returnable on the 30th November, and although all the parties who could be served, had been served before the 1st of that month, the plaintiff resisted an application made by the defendant, to have the writ returned before the return day fixed. However, in accordance with the plain rules of law, the plaintiff was compelled to anticipate this long delay, and did, in fact, return the writ on the 13th day of November last. On that day, the defendant moved that the writ of *saisie-arrêt* be quashed on the ground of the insufficiency of the affidavit upon which it was issued. It is from the judgment rendered on the 15th November last, quashing the said writ, and from that only, that the plaintiff has now inscribed for hearing in review.

The law requires (Code de Procedure, Arts. 834 et 855,) before a plaintiff can obtain a writ of *arrêt simple* or *saisie-arrêt* before judgment, that an affidavit must be fyled "*establishing* that the defendant is *personally* indebted to the plaintiff in a sum exceeding five dollars, &c."

Article 834 differs from the previous statutory enactment (Con. Stat. L.C., cap. 83, sec. 46, p. 717,) in using the word "personally;" the Code de Procédure having made the requirements in an affidavit for *saisie-arrêt*, as to personal indebtedness, to correspond with those established for the Writ of Capias. (Code de Procédure, Art. 798.) This assimilation of the law makes the decisions requiring a *personal debt* to be clearly set forth in an affidavit for *Capias*, applicable to this case upon the motion to quash.

The law as well as the constant jurisprudence of the country for many years, requires in an affidavit such as that now in question, clear and distinct allegations showing:

1. That the debt claimed is a personal debt of the defendant.
2. The cause of action, with reasonable certainty.

The affidavit in this case is singularly defective in these respects, for there is a total omission of any allegation that the defendant is "personally indebted," as well as of any thing to point out, even in the vaguest manner, the cause of action.

1. The decisions of our Courts for the past seventeen years have been uniform

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in requiring great strictness in affidavits for *Capias*, issued under 12th Viet. cap. 42, sec. 2, the terms of which, as before stated, are identical with Article 834 of the Code de Procédure, as to the allegation that the defendant is *personally* indebted to the plaintiff. The first decision was that rendered in the case of Cuthbert *vs.* Barrett, 1 L. C. Reports, 212, where, following the ruling in the English cases cited in the report, Duval J., said: "In this case a most important "omission has occurred in the very commencement of the affidavit. It is not sta- "ted that the defendant is *personally* indebted to the plaintiff, although the Sta- "tute expressly mentions the word; and when I view that omission, in conjunc- "tion with the others referred to by the defendant, it is impossible not to feel "the full force of Lord Ellenborough's language in the case of Taylor *vs.* Forbes, "cited by the defendant's counsel. It is absolutely necessary, not only that de- "fendants should be guarded against perjury, but also, that no misconception of "the law should exist in the mind of the person who makes the affidavit."

Judge Meredith remarked that, "perhaps the omission of the word *personally* "might not be fatal to the affidavit, were it otherwise *sufficiently shewn therein*, "that the cause of action was *personal*." The case did not, it is true, turn wholly upon the omission of the word "personally," but both the Honorable Judges were of opinion that the debt must be shewn to be a personal one. The next case is that of Alexander *vs.* McLachlan, 1 L. C. Jurist, p. 5, (Day, Smith and Badgley, JJ.) where the only defect in the affidavit was the omission of the word "*personally*," and yet its absence was held to be fatal and the *Capias* was quashed. The only case in a contrary sense is that of Lampson *vs.* Smith, decided at Quebec, (7 L. C. Reports, 425,) where the personal indebtedness of the defendant being otherwise clearly shewn in the affidavit, the omission of the word "personally" was held not to be fatal.

2. All the cases cited agree in declaring that the affidavit must disclose the cause of action and that such cause of action must be *personal*. Where the cause of action is partially but imperfectly stated the writ will be quashed. In the case of Cuthbert *v.* Barrett, cited above, the omission to state that the board, lodging, and clothing were furnished to the defendant *by the plaintiff*, was held to be fatal. The case of Beaufield *v.* Wheeler, 5 L. C. Jurist, p. 44, is in the same sense. The omission there was to state that the goods were sold and delivered *to the defendant*. In the case of the present plaintiff, fortunately for his safety, as respects an indictment for perjury, but unfortunately for his attachment in the hands of his two hundred garnishees, *he states no cause of action whatever in his affidavit*. He contents himself with swearing that the defendant is indebted to him in "the sum of six hundred and forty-two pounds twelve shillings, "current money of Canada." It is too manifest that such an affidavit cannot be maintained. It establishes nothing. The plaintiff wisely locks up all information as to the nature of his claim in his own breast, and there is no process known to the law by which it can be reached. But the penalty for such unusual reticence is the quashing of the attachment, affording the plaintiff time to reflect upon the proverb: "Experience is a dear school, &c."

If any argument were required to establish the proposition, that an affidavit so utterly void as that of the plaintiff must be set aside, it is to be drawn from Ar-

ticle 835 of the Code de Procédure. This article contains a provision, introduced as new law by the Code, that where the claim "is founded on unliquidated damages, the writ of attachment cannot issue without the order of a judge, &c." Of course, if in an affidavit before the Prothonotary, under article 834, it is unnecessary to state *any cause of action*, Article 835 becomes nugatory, and it was a waste of time for the Legislature to enact it.

The gross error into which the plaintiff has fallen in this case, is probably to be explained by the similarity of his affidavit to form No. 45 of the appendix to the Code de Procédure. This form is intended for use in connection with articles 842 and 843, providing that Commissioners of the Superior Court may issue attachments to detain moveable effects *for the period of twelve days from the seizure*, so that a writ of attachment, preceded by the regular affidavit, may issue from the proper court. These articles merely repeat the statutory provisions to be found in the Revised Statutes, page 138, and Cons. Stat. L. C. cap. 83, sec. 53, and have no reference to a writ issued in the ordinary manner by the Prothonotary. There are similar provisions and similar forms in cases of *Capias*. Never having seen the original affidavit fyled in this case, the defendant cannot say whether it is the production of the plaintiff personally, but if so, the result may prove a lesson to him in a matter of such importance, in future to seek professional assistance and not trust to his own unaided genius.

The affidavit is defective in another particular. The law requires (Art. 834, C. de P.) that the plaintiff shall establish that the defendant is secreting his property &c., *with intent to defraud his creditors and the plaintiff in particular*. The plaintiff's affidavit contains no such allegation, but in equal defiance of law and grammar, asserts that the defendant has "*an intent to defraud the said deponent and his* (i. e. deponent's) *creditors*.

From the extraordinary terms of the notice appended to the Inscription of this case for hearing in Review, it would appear that the plaintiff intends to question the right of the present counsel to represent the defendant. If this question were one, which it is not, that could concern the plaintiff, he has waived any objection. He has not moved to reject the appearance, but on the contrary, has returned the writ in obedience to the order of the Court, and has, by his counsel, argued the motion to quash, made on behalf of the defendant.

The Court of Review unanimously confirmed the judgment of the Court below.

Judgment of Superior Court confirmed.

A. & W. Robertson, for plaintiff.

Thos. W. Ritchie, Q. C., for defendant.

(S. B.)

MONTREAL, 24TH SEPTEMBER, 1868.

IN REVIEW FROM THE SUPERIOR COURT, MONTREAL.

No. 1168.

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

The information of *Jean Louis Beaudry*, Petitioner in the Superior Court, and *William Workman*, Defendant.

HELD:—That there is no appeal to the Court of Review from a decision of the Superior Court in matters relating to municipal corporations and offices.

The defendant inscribed in review of a judgment of the Superior Court dismissing an exception à la *forme* which he had fyled to the information of the petitioner. The petitioner made a motion to reject the inscription. It was held (Mondelet, J., dissenting) that there was no review of these judgments, *vide* C. C. P. Art. 1033, and the prothonotary was enjoined not to receive any inscription for review of a judgment in a matter relating to municipal corporations and offices.

Motion granted.

H. W. Austin, for petitioner.
J. J. C. Abbott, for defendant.
(J. L. M.)

SUPERIOR COURT, 1868.

MONTREAL, 3RD NOVEMBER, 1868.

Enquête Sittings.

Coram TORRANCE, J.

No. 1836.

Angers v. *Lozeau, et vir*, and *Lozeau et vir, Opposants.*

HELD:—That where the Attorney *ad litem* is witness for his own client in a cause, and an objection is taken by the other side to a question put to the witness on his examination, the witness cannot himself appear before the Court to maintain the pertinency and relevancy of the question, but the client must be represented in Court by another counsel.

Objection maintained.

Perkins & Ramsay, for plaintiff.
Barnard & Pagnuelo, for defendant.
(J. K.)

MONTREAL, 25TH SEPTEMBER, 1868.

IN REVIEW FROM THE CIRCUIT COURT, ST. HYACINTHE.

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

No. 1192.

Jacques vs. *Lussier*.

HELD:—That an inscription for review and deposit made on the eighth day after a judgment, is sufficient, though notice of them be only given on the following day.

A motion was made to reject an inscription for review on the ground that though the inscription and deposit were made on the eighth day after judgment, yet the notice of them was only given to the opposite attorney on the following day. The motion was rejected; because though the code of procedure required the inscription and deposit to be made within eight days, yet it only required notice to be given forthwith afterwards.

Motion dismissed.

Bourgeois & Bachand, for plaintiff.
Mercier & Sicotte, for defendant.
(J. L. M.)

MONTREAL, 24TH SEPTEMBER, 1868.

IN REVIEW FROM THE CIRCUIT COURT, MONTREAL.

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

No 448.

Robinson et al. vs. *Watson*, & qual.

HELD:—That on an inscription of judgment for review in an action instituted under the Lessors' and Lessees' Act, in which the pleadings do not by the amount of rent, or annual value, show any jurisdiction, in the Court of Review, the inscription for review will on motion of the respondent be discharged and the appeal dismissed.

Motion granted.

Carter & Hatton, for (defendant) plaintiff in review.
Laflamme & Laflamme, for (plaintiff) defendant in review.
(J. L. M.)

MONTREAL, 24TH SEPTEMBER, 1868.

IN REVIEW FROM THE SUPERIOR COURT, MONTREAL.

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

No. 2626.

Boudreau vs. *Lanctot* and *Lanctot*.

HELD:—That where the attorney of the defendant had deceased, the plaintiff was well founded in praying the Court by motion that the defendant be held to appoint another attorney.

The defendant's attorney having died, the plaintiff moved the Court that the defendant be ordered to name another attorney. The defendant, by *Doutre, Q.C.*, objected that the Rules of Practice No. 22, required the nomination to be made by *rule nisi*.

THE COURT held that a motion with notice, as was the case here, was quite sufficient without the rule.

Motion granted.

Cartier, Pominville & Bétournay, for Plaintiff.
J. Doutre, Q.C., for Defendant.
(J. L. M.)

SUPERIOR COURT, 1868.

INSOLVENT ACT OF 1864.

MONTREAL, 12TH MAY, 1868.

IN CHAMBERS.

Coram MONK J.

No. 1345.

THE BANK OF TORONTO *vs.* HINGSTON *et al.*, AND ALLAN *et al.*, Petrs.

HELD: | 1. That the expression "fifteen days after the sale," in the 1998th Article of The Civil Code of Lower Canada, means after the sale and delivery.

2. That the delivery of goods sold in England to a shipping agent there, employed by the vendees, who forwards them to the vendees carrying on business in Montreal, is not such a delivery as is contemplated by the 12th Section of the Insolvent Act of 1864, and that such goods may be legally revendicated by the unpaid vendors in the hands of the Grand Trunk Railway here, although more than fifteen days have elapsed since such delivery to the shipping agent.

This was a petition, by James Allan & Co., of London, England, claiming the restitution to them of certain goods sold by them to Hingston, Telfer & Co., of Montreal, whose estate was attached under the writ issued in this cause under the provisions of the Insolvent Act of 1864.

The petition alleged as follows:

"That your petitioners sold to the defendants about February last, a quantity of goods, which were packed and shipped from London aforesaid to Portland in the State of Maine, one of the United States of America.

That the packages containing the said goods were and are marked H. T. & Co. M. and numbered respectively 704, 705, 706, 707, 708, and, on their arrival at Portland aforesaid, were transported thence by Grand Trunk Railway, in Bond, to the city of Montreal, where they have remained ever since their arrival, and still are in the possession of the Grand Trunk Railway Company of Canada.

That the said goods were and are of the value of two hundred and nineteen pounds six shillings sterling (that being the price at which they were originally sold to the defendants; and of which no part hath been paid to the petitioners and are still in their original unbroken packages and undelivered to the defendants.

That the said defendants are insolvent, *en état de déconfiture.*

That James Court, of the city of Montreal, Official Assignee, in his quality of *gardien* to the estate and effects attached under the writ of attachment issued in this cause, hath entered said five packages of goods in his inventory, as if they belonged to the defendants' estate.

That as the unpaid vendors of said goods, your petitioners are legally entitled to the possession of said goods, and to sell and dispose of the same as their own property, on paying such freight and custom duties as may be owing and payable in respect thereof."

The petition was contested by the plaintiff on the following grounds:—

1st. Because this Court and no judge thereof has authority under the said Act, under a summary petition of the nature of the one fyled by the said petitioners, to order the removal of goods and their delivery from the possession of the guardian who holds the same by virtue of the writ of attachment regularly issued in this cause, to them the said petitioners.

Because the said petitioners will be entitled to urge their claim, if any they have, against the estate of the said Insolvents, when the same shall have vested in the possession of the Official Assignee.

Because the said petitioners establish by their petition that more than fifteen days have elapsed since the sale, by them made to the defendants, of the goods by them claimed.

Because the said petitioners do not allege that the said goods were by them sold for cash, and that they have not settled for the same by drafts or bills by them received from the defendants.

Because the said petitioners have on the 29th day of February last, and on the 6th day of March last, delivered the said goods to Wingate & Johnston, agents for the defendants, as will appear by reference to the invoices herewith fyled, and the said Wingate & Johnston at Liverpool, in England, did ship the said goods on board the steamer *Hibernian* for and on behalf of the said defendants, who then and there were seized and possessed of the same, as the whole will more fully appear by reference to the letters, memoranda and bills of lading herewith fyled.

Because, moreover, the said petitioners did receive from the said defendants, and did take from them previous to the delivery of the said goods, bills of exchange and promissory notes in settlement of the price of said goods, as the said plaintiffs are ready to establish.

Because the said defendants were in possession of the said goods as the sole lawful owners and proprietors, and have so been for more than one month previous to the petition made by the said petitioners."

The parties agreed to and signed the following admissions:—

"The parties admit the genuineness of the several exhibits fyled by plaintiff with answer to petition, and that the signatures thereto are respectively in the handwriting of those by whom they purport to have been signed; also that the defendants gave petitioners their promissory note for the amount of the invoices forming part of said exhibits, and that petitioners received the same. That the said goods were delivered to Wingate & Johnston, shipping agents employed by the defendants, and by them put on board the steamers mentioned in the answer, at the dates therein mentioned, to be delivered at Montreal to the defendants, according to the bills of lading referred to and fyled by the said plaintiff, with their answer to the petition. And that the goods referred to in said invoices and petition have been ever since their arrival in Montreal, and still are in the same unbroken packages in which they were originally shipped, and in the physical possession of the Grand Trunk Railway Company of Canada, as belonging and deliverable to the said defendants, although entered in the guardian's inventory."

Per curiam. This is a petition in Insolvency by unpaid vendors to obtain possession of certain goods now in the possession of the Grand Trunk Railway Company in Montreal, which were purchased by the defendants in England, in February last, on credit, and settled for by a promissory note. The goods were delivered in England to the shipping agents of the defendants, and were forwarded by them to their destination at Montreal.

The Bank of Toronto vs. Hingston et al.

All the facts of the case necessary to found a decision were fully established in evidence by the admissions of the parties, and otherwise. That the property of foreign creditors should in such a case, before the goods have come into the actual possession of the Insolvents, at the place of their final destination, go into the bankrupt estate, would be a case of extreme hardship, and had I any doubt as to the vendors' right to stop and obtain delivery of the goods, I should feel disposed to give them the benefit of that doubt. But I have no doubt. The goods are still in bulk, and have never come into the stock or actual possession of the defendants, and the unpaid vendors' right of stoppage *in transitu*, or whatever it may be called, undoubtedly still exists.

It was contended at argument by the plaintiff, that delivery to the shipping agents of Hingston and Telfer was delivery to the defendants themselves to all intents and purposes, and defeated the rights of the unpaid vendors.

But there is no question that delivery in England must be determined by the laws of England, and by those laws such a delivery is not a delivery to defeat the right of the unpaid vendors. Looked at also by our own laws, the agents were not such to take actual and final delivery of the goods, but merely to transport and forward them; so that whether viewed by the laws of England or the laws of Lower Canada, no such actual or constructive delivery has taken place as to defeat the right of the unpaid vendors.

It was also contended that the petitioners could only exercise their rights within the delay of 15 days from the sale, provided in the 1998th article of the Civil Code.

But the expression 'sale' in this Article of the Code, clearly means sale and delivery; and, therefore, the delay can only run from the time of delivery, and no actual physical possession having taken place in this case, it has not yet begun to run. Had the defendants transferred or pledged the goods or titles to them, the right of the petitioners might have been defeated, but they have not done so, and I am consequently not called upon to adjudicate that question. I may also add, that there is a well considered judgment of the Superior Court which, in case of doubt, would have had weight with me in coming to my decision; but in this case I do not require to be guided by any other decision, as I have no doubt of the petitioners' right to obtain possession of the goods.

I therefore order that the goods be delivered to the petitioners, on their giving security as is usually done in like cases, and as they have offered in fact to do by their petition.

Petition granted.

R. & G. Laflamme, for plaintiff.
Strachan Bethune, Q. C., for petitioners.
(S. B.)

COURT OF REVIEW.

MONTREAL, 30TH JUNE, 1868.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 1168.

Beaudry vs. *Workman.*

HELD:—That the Superior Court has no jurisdiction in revision of an *interlocutory* judgment, which is not appealable.

On the 22nd of June, 1868, the petitioner, Jean Louis Beaudry, made a motion before the Superior Court, sitting as a Court of Review, for the rejection of the inscription for review, on the ground that the case is not appealable.

BERTHELOT, J.—The difficulty which presents itself is owing to the silence of the law, which failed to specially declare that interlocutory as well as final judgments in municipal matters should be barred from appeal. In view of the intention of the Legislature, the mere omission of the word interlocutory is not a sufficient cause for allowing a revision. To adjudge otherwise would cause great confusion and endless delays in the administration of the law. The Courts have repeatedly refused appeals of a similar kind, since they would, if allowed, give a Mayor or Councillor the means of retaining the contested seat until the next election. The case of Dubord vs. Lanctot, the case of Laberge decided at St. Johns, and other precedents, show that the practice has always been to refuse any appeal, no matter upon what point, in cases of this kind. It is only in this way that a prompt settlement of municipal contests can be secured, and the Court now orders that the inscription fyled should be rejected.

MONDELET, J.—The case comes up on a motion to have the Court of Review take cognizance of a decision that had been given by a Judge (Monk, J.,) in chambers upon an *exception declinatoire* calling his authority in question. The objection was overruled, and the petitioner now sought that the question should be adjudged *in Banco*. The judgment was of an interlocutory nature. But articles 1033 and 1115 refer merely to final judgments; it conclusively follows that when interlocutory judgments are not specially included, this Court has authority to take cognisance of them. This right of revision is one *ex necessitate*, since the question is one of jurisdiction. Those who repel the appeal do so by reasoning from analogy, since the law gives them no direct right to reject such an inscription as has been here fyled. In all cases of ambiguity, it behoves the Court to assert the intention of the Legislature so far as it may be interpreted, and I am strongly of the opinion that the Legislature would have made special provision for the non-appeal of interlocutory judgments had it been desired to place them under the same prohibitions as those which existed to prevent appeals from final judgments. I have been met by the remark that if revision of these questions were permitted there would be no end of appeals. The argument would not prevent me from holding that a judge in Chambers should not have the power of finally deciding an objection that brought his own right to hear the case into issue. I have carefully examined the cases cited, but I could not see that any one of them decided as to a question of jurisdiction.

Beaudry vs. Workman.

The law speaks only of final judgment, and it is only by analogy that it is brought home to this case.

MONK, J.—I have little to add to the motive of judgment given by my learned colleague, Mr. Justice Berthelot. I confess to some feeling of regret at being bound by previous decisions to refuse an appeal to this Court. It is a logical sequence that the Legislature in refusing the right of appeal from final judgments intended to include those of an interlocutory nature. I cannot go to the extent of believing that the Legislature was entirely silent upon the subject. Their intention was to compel celerity in proceedings of this nature, and the Court would infringe upon the intention were it to say that revision is possible.

The judgment of the Court of Review is as follows:—"The Court now here sitting as a Court of Review, having heard the parties by their respective counsel upon the motion of the complainant of the twenty-second day of June instant, that the inscription of this cause for the revision by this Court of the judgment of Mr. Justice Monk, rendered on the thirtieth of June instant, be discharged as having been illegally and irregularly made, no Review lying from such a judgment, having examined the proceedings and deliberated, doth grant the said motion and doth reject the said inscription for Review, with costs for the defendant.

The Honorable Mr. Justice Mondelet, *dissentiente.*

Inscription for Revision set aside.

Abbott, attorney for petitioner.

McKay & Austin, attorneys for defendant.

(P. R. L.)

MONTREAL, 28 FEVRIER, 1868.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 330.

Lynch vs. *Duncan.*

JUGE.—Que l'inscription en faux peut être faite en tout état de cause suivant les dispositions de l'article 164 du code de procédure civile du Bas Canada, et que cet article a abrogé toute règle de pratique contraire.

Cette action fut intentée en Février 1867, devant la Cour Supérieure à Beauharnois, et fut rapportée en Mars 1867. Lors du rapport de la cause le demandeur produisit un acte de transport sur lequel il bâsait sa demande.

Le 17 Octobre 1867, après la contestation liée, le défendeur demanda la permission de s'inscrire en faux contre cet acte de transport.

Le demandeur s'y objecta en s'appuyant sur la régle de pratique promulguée le 13 Janvier 1864, qui exige que l'inscription en faux soit faite dans les quatre jours de la production de la pièce arguée de faux.*

Le défendeur cita l'article 164 du Code de Procédure Civile qui a étendu ce délai.

Le jugement de la Cour Supérieure à Beauharnois qui avait refusé la

* *Vide* 12 L. C. R., p. 90, Seymour and Horner, 6 L. C. J., p. 243, Perry vs Milne.

demande de l'inscription en faux, fut renversé par la Cour Supérieure siégeant en Revision à Montréal qui a motivé son jugement comme suit : Lynch vs. Duncan.

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 the District of Beauharnois, on the fourteenth day of November, one thousand eight hundred and sixty-seven, having examined the record and proceedings had in this cause, and maturely deliberated ;

Considering that there is error in the judgment appealed from, to wit, the said judgment of the fourteenth day of November, eighteen hundred and sixty-seven, rejecting the petition by defendant fyled on the thirteenth November last, praying that said defendant be permitted to inscribe *en faux* against the *minute* of a certain deed of transfer, in the said petition mentioned and described, fyled in this cause by plaintiff, inasmuch as the prayer to the Court, as in said petition, was regularly made and was supported by a power of Attorney in due form, from defendant to his Attorney *ad litem* in said cause ;

Considering further, that the Court below should first have granted defendant *acte* of his *interpellation* to plaintiff to declare whether he made use of said transfer ;

Considering lastly, that no adjudication in the matter should further have been had, until after the defendant had produced his *moyens de faux*, and the parties heard upon their sufficiency or insufficiency as the case might be, and the same had been considered by the Court ;

This Court doth reverse, annul and set aside the said judgment, and proceeding to render the judgment which the Court below should have rendered ; It is ordered that *acte* be and it is hereby granted to defendant, of the *interpellation* by him in his said petition made to plaintiff, to declare whether he makes use of the said transfer, a copy whereof is by plaintiff in this cause fyled ; and thereupon that the parties may and do proceed as to law and justice may appertain with costs against plaintiff, as well of the said Superior Court as of this Court of Review.

And this Court doth order that the record be remitted to the said Superior Court in the District of Beauharnois.

Branchaud, attorney for plaintiff.

Elliot, attorney for defendant.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 28 AVRIL, 1868.

Coram BERTHELOT, J.

No. 969.

Delisle vs. *Beaudry*.

JUGE :—Que le défendeur peut, en réponse à une action en dommages pour injures verbales, plaider spécialement : que tout ce qu'il a pu dire au sujet du demandeur diffère d'avec les allégations de la déclaration et que tout ce qui sera prouvé qu'il a pu dire, est vrai.

Le défendeur plaida à cette action pour dommages résultant de certaines injures verbales que le demandeur prétend que le défendeur a proférées contre lui,

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inter alia, dans sa seconde défense, ce qui suit: "That anything he ever spoke "of defendant, particularly on the occasion referred to in the plaintiff's declara- "tion, was different from what is alleged by the plaintiff.....and that all that "can be proved that he said was and is true."

Le demandeur fit motion le 17 Mars, 1868, comme suit:

Motion on behalf of the said plaintiff that the portion of the plea in this cause secondly pleaded by the said defendants, commencing with the words "*and that anything that*" in the seventh line of the second page of the pleas filed, and finishing with the words "*and defendant says that all that can be proved that "he said was and is true*" in the twenty-sixth, twenty-seventh and twenty-eighth lines of the said page,—be struck out of the said plea and be rejected from the record with costs, subject to such order as to repleading as this Honorable Court may be pleased to make, for the following among other reasons:

1o. Because the said portion of the said plea is not an answer in whole or in part to the declaration and action of the said plaintiff.

2o. Because the said portion of the said plea neither denies the slanderous words charged in the said declaration, nor sets up matter or facts in justification of the same.

3o. Because if the allegations contained in the said portion of the said plea remain of record, they will require to be enquired of by the jury; and that such inquiry will be useless and ineffectual, and would have no effect whatever with respect to the judgment to be pronounced in this cause upon the declaration and action therein.

Motion renvoyée.

Abbott, avocat du demandeur.

Corbeille & Beaudry, avocats du défendeur.

(P. R. L.)

AUTORITES DU DEMANDEUR.

Larkin et Kemp, décidé à Montréal, *coram* Day, J., Smith, J., Chabot, J.

AUTORITES DU DEFENDEUR.

No. 2667, Desbarats vs. Esdaile, à Montréal, *coram* Badgley, J.

MONTREAL, 28TH MARCH, 1868.

Coram MONDELET, J.

No. 289.

Wilson vs. *Demers*.

PROMISSORY NOTE—PRESCRIPTION—LEX CONTRACTUS.

HELD: That the prescription of a promissory note made in a foreign country and payable there, is to be governed by the *lex loci contractus* and not by the *lex fori*.

Incidents in this case have already been reported, 10 L. C. Jur. 261, and 11 L. C. Jur. 105.

MONDELET, J.—This action is for the recovery of the sum of $1120.47, amount of a promissory note made and signed by defendant, and his brother, then trading in partnership, under the name of Demers Brothers, dated at the city of New York, and payable to L. O. Wilson & Co., merchants of that city, the said note payable at the Bank of the North West, at *Fond du Lac*, Wis

consin, at four months after date. The note was duly transferred to plaintiff who is the bearer thereof. The note was protested for non-payment, at its maturity. It seems that the two Demers left *Fond du Lac*, and for some time, plaintiff vainly made search as to where they had gone, when as late as or about the 17th of April, 1868, it was ascertained they were in Lower Canada, where they now are. The two brothers have dissolved partnership, and it is pretended by plaintiff, that by the laws of both the State of New York and the State of Wisconsin, the fact of the two Demers having been absent from the States aforesaid, at the time of the maturity of the said note, without its being paid, suspends the Statute of Limitation existing in those States. The plaintiff having brought the present action against Joseph Demers, we have now to inquire into the issue as raised.

The defendant fyled a *défense en droit* on the ground that the note is prescribed by the *Statute of Limitations* of Lower Canada.

The learned Judge, to whom that question was submitted, maintained the demurrer and dismissed the action.

That judgment was appealed from, and the Court of Appeals reversed it on the ground, that there were matters of fact in the case, which required proof, before the questions raised in law could be disposed of.

The parties having, in consequence, been sent back to the Superior Court, evidence was adduced, and now, the case is ripe for final adjudication.

The point now to be determined, is whether the case is to be governed by the *lex fori* of defendant, or by the *lex loci contractûs*, and if not, by the law of the place where the note was made payable.

It may as well be observed, at once, that should it be the *lex fori*, the case is met by the fact that our limitation act was not in force at the time the note became due and payable, and besides, applies only to notes payable in Lower Canada.

Now as to the questions whether the *lex fori*, or the *lex loci contractûs* or that of the place where the note was made payable, is to be the rule, this Court is of opinion, that it is not the *lex fori*, but that it is the *lex loci contractûs*.

It is useless to recapitulate here, the numerous opinions and authorities which are to be found on this point; suffice it to say, with Felix (Droit International Privé, Vol. 1, Art. 96, p. 209) that "*Les lois romaines ont déjà consacré le principe que la matière du contrat, est règlée par la loi du lieu où il a été passé.*" And when the contract is to be executed elsewhere, then it must be governed by the law of the place of execution, as he says, at page 214, "*ce principe a été emprunté à la loi romaine* 421, *de oble. et act. Elle repose sur la circonstance qu'en fixant un lieu pour l'exécution du contrat, les parties sont censées avoir voulu faire tout ce que prescrivent les loix du même lieu.*"

It is true, that Merlin (*Quest. de Droit*, vo. *Prescription*) expresses the opinion that the *lex fori* or that of the domicile of the debtor, will govern a case like the present, but as he has failed to take into account the circumstances of a debt being due and payable in a particular place, and that he speaks of a debt made payable generally, we have to refer to those writers who have not omitted the distinction between one and the other case. Boullenois, t. 1 p. 530, 2. p. 488,

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and Pardessus, Droit Comm. No. 1495, clearly draw the distinction, and hold that when the contract is to be executed in a particular place, it is the law of that place which is to govern. Felix cites as holding that opinion, Christin, Burgundus, Mantica and Fabre.

On reviewing most of those writers, one finds, especially with Savigny, that the true doctrine is, that the prescription of the place of payment must govern, and where the place of payment is not specified, then that of the place where the contract was created. We may join *Troplong* with the others, for he says: "*L'action personnelle se prescrit par la loi en vigueur au lieu où doit se faire le paiement.*" True, Pothier is of a different opinion, whereupon Troplong says: "*Pothier est le seul qui soutienne que la prescription est réglée 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). Pardessus, Droit Comm. t. 6, art. 1495, p. 383, is very explicit on that point: "*Ainsi lorsqu'un débiteur oppose la prescription, le droit d'user de ce moyen, et la durée de cette prescription, seront réglés par le droit du lieu où il a promis de payer.*"

The result of the above, is that it is immaterial as to the note in question, whether we are governed by the laws of the place where the contract be made, or by the laws of the place where it is to be executed, inasmuch as in the State of New York as well as in that of Wisconsin, the law is the same, and in each and both, the operation of the statute or law of limitations, is suspended in consequence of the absence or absconding of the debtor.

Our statute c. 64, C. S. L. C., is the only law in Lower Canada since the 1st August, 1849, and it refers only to notes payable in Lower Canada, and therefore is inapplicable to the present case.

As to the decisions in England, it is hardly necessary to remark, that they do not bear upon this case.

With respect to the art. 2190 of the Canadian Code, it cannot avail the defendant, inasmuch as the present action was instituted before the coming into force of the Code; and the fact that the article is in brackets shows, that it was considered by the Commissioners, that the principle it lays down was not the law heretofore.

I am, therefore, upon the whole, of opinion, that the note now sued upon, is not prescribed, and that plaintiff should recover according to the conclusions of his declaration.

The judgment was *motivé* in the following terms:

"The Court, having heard the parties by their counsel, upon the merits of this cause, examined the proceedings, the evidence and proof of record, and having upon the whole, duly and maturely deliberated, considering that the plaintiff hath proved the material allegations of his declaration, and, namely, that the defendant is indebted to him, in the sum of seventeen hundred and seventy-three dollars and eighty cents, currency, for the causes in his declaration alleged and set forth, to wit, by and in virtue of the promissory note in said declaration described, in principal, interest thereon, and costs of protest, as in and by said declaration set forth, which note was made and signed by defendant and his brother, Hector Demers, then carrying on business at *Fond du Lac*, in the State of

Wisconsin, under the name and style of "Demers Bros.," to wit, Brothers, said note so made and signed, in the city of New York, on the twelfth September, one thousand eight hundred and fifty-seven, in favor of the firm of L. O. Wilson & Co., to wit Company, at four months after date payable to said firm or order, at the Bank of the North West at *Fond du Lac* aforesaid, which note was duly transferred to plaintiff, who is the legal owner thereof:

Considering that the defendant hath failed to prove the material allegations of his *exception péremptoire*, and namely, that the said note is prescribed and is to be considered and taken as absolutely paid and satisfied, inasmuch as the law applying to this case, is that of the place where said note was made, to wit, the law of the State of New York as also the law of the State of Wisconsin, where the said note is made payable, and not the *lex fori* or of the domicile of defendant, who after having left the State of Wisconsin aforesaid, was discovered only some time subsequent, to wit, on the nineteenth day of April, one thousand eight hundred and sixty-six, to have come to Lower Canada, and that in consequence of defendant's absence from the aforesaid States of New York and Wisconsin, at the time of maturity of said note, and non-payment thereof, the operation of the laws of limitation, with respect to such note, was suspended, and the said note was not and is not prescribed, either by the laws of the State of New York or those of the State of Wisconsin:

Considering further, that the Statute of Limitation of Lower Canada, to wit, chapter sixty-four (64) of the Consolidated Statutes of Lower Canada, is inapplicable to the present case, inasmuch as it refers to promissory notes due and payable in Lower Canada, and that the present action was instituted rightly against the defendant:

This Court doth dismiss the said *exception péremptoire*, and doth condemn the defendant to pay and satisfy to the plaintiff, the sum of one thousand seven hundred and seventy-three dollars and eighty cents, currency, with interest on the sum of one thousand one hundred and twenty dollars and forty cents, from the twenty-second day of May, one thousand eight hundred and sixty-six, the day of service of the writ and declaration, and costs of suit, whereof *distraction* to John Popham, Esq., plaintiff's attorney.

Judgment for plaintiff.

John Popham, for plaintiff.
D. Girouard, for defendant.
(J. L. M.)

MONTREAL, 24TH SEPTEMBER, 1868.

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

IN REVIEW.

No. 570.

Whalley vs. *Kennedy*.

HELD:—That the delay of eight days, stated in the 21st section of 27 and 28 Vic. chap. 39, does not run during the vacation of July and August.

The final judgment in this cause was rendered on the 9th July, 1868.

Whalley vs. Kennedy.

The plaintiff inscribed for review on the 7th September, 1868, and then made the required deposit.

The defendant on the 22nd December, 1868, moved the Superior Court sitting in review, as follows:

"Motion on behalf of the defendant, that the inscription upon the roll *de droit* for hearing in review of the judgment in this cause rendered on the ninth day of July last past, by the said Superior Court, to be revised by three honourable judges of the said Superior Court, and sitting in review in and for the district of Montreal, be struck, *rayée*, from the said roll, and for amongst other reasons the following:

1st. Because the said inscription is irregular and illegal.

2nd. Because the said inscription has not been made within the delays prescribed by law and the rules of practice of this Honourable Court.

3rd. Because the said inscription has not been made within eight days from the date of the judgment complained of, to wit, of the judgment of the ninth of July last past.

4th. Because the parties pretending to be aggrieved, to wit, the plaintiffs, had not within eight days from the date of the judgment complained of, deposited with the prothonotary of the Superior Court, in and for the district of Montreal, having the custody of the record in this cause, the sum of twenty dollars, currency, as required by law.

5th. Because the parties aggrieved, to wit, the plaintiffs, deposited the said sum only on the seventh day of September instant.

The plaintiffs cited the article 463 of the Code of Civil Procedure.

The defendant relied on the provisions of the Statute 27, 28 Vic. chap. 39:

The Superior Court rejected this motion on the 24th September, 1868, and maintained the inscription.

The judgment is in the following words:

The Superior Court now sitting at Montreal as a Court of Review, having heard the parties by their counsel upon the defendant's motion of the 22nd of September instant, that the inscription upon the roll for hearing in review of the judgment in this cause rendered on the 9th July last past, by the said Superior Court be, for the reasons mentioned and set forth in said motion, struck, *rayée*, from the said roll, having examined the record and proceedings in said cause, and duly deliberated, doth reject the said motion (1).

Inscription maintained.

R. & G. Laflamme, attorneys for plaintiff.
Kelly & Dorion, attorneys for defendant.
(P. R. L.)

(1). Booth vs. The Montreal and Bytown Railway Company, 4 L. C. J., p. 296.

IN CHAMBERS.

MONTREAL, 17TH SEPTEMBER, 1868.

Coram TORRANCE, J.

No 1968.

The Quebec Bank vs. Steers et al. and *Hiram Seymour*, et al. T. S.

HELD:—That in the case of a *saisie-arrêt* before judgment, where an *exception à la forme* had been fyled against the *saisie*, and subsequent to the fyling of the exception, a petition had been fyled contesting the validity of the *saisie*, in the manner provided for the contestation of writs of *capias*, the *enquête* of the petitioner on the petition, may be proceeded with independent of the contestation on the exception *à la forme*.

TORRANCE, J. The plaintiff sued out a writ of *saisie-arrêt* before judgment against the defendants. The defendants met the *saisie* by an exception *à la forme*, fyled on the 4th Sept. 1868, upon which a contestation has been joined. The defendants also on the 8th September presented a petition to obtain the discharge of the seizure, in the manner provided for the discharge of defendants arrested on a writ of *capias*, and the plaintiffs have answered the petition both generally and by raising formally in writing the question whether the defendants can proceed on their petition without making option between it and their exception *à la forme* based upon the same grounds. By Article 854 of the Civil Code of Procedure, a simple attachment may be contested in the same manner as writs of *capias*, and by article 821, referring to contestations of writs of *capias*, if the contestation is founded upon the falsity of the allegations, issue must be joined upon the petition of the defendant and in the ordinary course, and independently of the contestation upon the principal demand, unless the exigibility of the debt depends upon the truth of the allegations of the affidavit, in which case the writ *may* be contested together with the merits of the case. This exception is not the case in the present instance. The petitioner may therefore proceed with his *enquête*.

Enquête ordered.

Welch & Bullock, for Plaintiff.
B. Devlin, for Defendants.
(J. L. M.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 5 SEPTEMBRE, 1868.

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

No. 3.

EDWARD SPELMAN, *et al.*, APPELANTS;

vs.

TOUSSAINT ROBIDOUX., INTIMÉ.

JUGE:—Qu'il est loisible aux parties litigantes, qui ont plaidé séparément dans le procès mu et pendant devant la cour de première instance, de ne faire émettre qu'un seul writ d'appel du jugement rendu contre eux.

L'intimé fit motion le 1er Septembre 1868, en ces termes.

Motion, "qu'attendu que la demande formée par l'intimé devant la Cour

Spelman vs. Robidoux.

"Supérieure pour le District de Montréal était basée sur un billet promissoire "signé par le dit Edward Spelman, et endossé par le dit Joseph A. Hébert, les "appelants; qu'attendu que les dits appelants ont plaidé séparément à la dite "demande, et que leur dite contestation était incompatible, le dit Edward Spel- "man ayant plaidé qu'il n'avait reçu aucune valeur pour consentir le dit billet, et "le dit Joseph A. Hébert ayant plaidé que son endossement avait été forgé.

"Et attendu que les dits appelants ont irrégulièrement et illégalement appelé "du jugement final qui a renvoyé leurs exceptions respectives et maintenu l'ac- "tion du demandeur, le tout par un seul et même writ d'appel.

"Que le dit writ d'appel émané en cette cause soit déclaré irrégulier et illé- "gal, et qu'il soit annullé en conséquence, et qu'ordre soit donné au Greffier de "cette Cour de transmettre le dossier en cette cause au tribunal inférieur, à "moins que les appelants fassent option et déclarent à quelle contestation le "présent appel devra s'appliquer, et en cas de telle option, que le présent appel "soit déclaré comme non avenu et renvoyé à l'égard de la partie à laquelle il ne "s'appliquera pas; le tout avec dépens distraits au soussigné."

Per curiam. L'émission d'un seul writ est légale. Les parties pourront fournir leurs griefs séparément, si le cas y échet.

Motion renvoyée.

Kerr, avocat des appelants.
Girouard, avocat de l'intimé.
(P. B. L.)

EN APPEL.

MONTREAL, 9 MARS 1866.

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

No. 79.

DAME E. JOUBERT, *et vir*, APPELANTS;

vs.

JOSEPH RASCONY, INTIMÉ.

JUGE:—Qu'on appel, la cour du Banc de la Reine peut ordonner la mise en cause d'un tiers qui a quelqu'intérêt dans l'issue de l'instance portée en appel.

Après l'audition des parties sur l'appel, la cour a rendu le jugement interlocutoire suivant.

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 délibéré.

Considérant que quant à la somme de six cent piastres avec intérêt à huit par cent depuis le dix juillet mil-huit cent soixante et un, qui forme la principale partie de la demande en cette instance et que l'intimé prétend lui être due en vertu d'une obligation consentie par l'appelant au Révérend Joseph Maurault, prêtre (qui était au dix-sept février mil-huit cent soixante et trois, s'il ne l'est pas encore aujourd'hui, curé de la paroisse de St. Thomas de Pierreville,) laquelle obliga-

tion est mentionnée dans un certain acte désigné, Acte de transport par le dit Révérend Joseph Maurault au dit intimé, reçu devant Maître Pitt et collègue, Notaires, le trente septembre mil-huit cent soixante, le dit Révérend Joseph Maurault est le véritable demandeur, et le dit Joseph Rascony n'est qu'un prête-nom et le demandeur simulé en ce, en autant que le dit transport a été consenti par le dit Révérend Joseph Maurault au dit intimé; "pour pareille somme que "le dit cessionaire promet et s'oblige de payer au dit cédant aussitôt que le dit "cessionnaire l'aura collectée," ainsi qu'il est textuellement exprimé au dit prétendu acte de transport, lequel ne doit être considéré tout au plus que comme une procuration spéciale pour le recouvrement dans l'intérêt du dit Révérend Joseph Maurault, de la somme mentionnée, cette cour, s'abstenant de prononcer sur le mérite de cet appel, ordonne que le dossier soit renvoyé à la cour de première instance afin que le dit Révérend Joseph Maurault soit mis en cause comme le demandeur véritable en cette instance en autant que le montant de la dite obligation y est concerné et pour l'adoption de tels autres procédés que de droit; le tout avec les dépens de cette cour contre le dit intimé.

L'Honorable Jean François Joseph Duval, Juge en Chef, et l'Honorable M. le Juge Meredith, *dissentientibus*.

A. D. Bondy, avocat des appelants.

Lafrenaye & Bruneau, avocats de l'intimé.

(P. B. L.)

MONTREAL, 9TH JUNE, 1868.

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

No. 21.

ANTOINE MALLETTE,

(*Defendant in Court below,*)

APPELLANT.

AND

JOHN WHYTE, *esqualité*.

(*Plaintiff in Court below,*)

RESPONDENT.

COMPULSORY LIQUIDATION—REVENDICATION BY GUARDIAN—SALE BY INSOLVENT.

HELD:—1. That after the advertisements of issue of writ of attachment in Insolvency, the public is bound to know the incapacity of an Insolvent to sell any of his property.

2. That this incapacity continues and the public is bound to know it, during the pendency of an appeal from a judgment which quashed the attachment.

3. That a sale made by Insolvent of property, even when not seized under the attachment, in consequence of its being then secreted, is absolutely null and not annulable only.

4. That the Guardian to the attachment under the writ can revendicate in the hands of the purchaser such property when so sold.

5. That the purchaser cannot claim to be reimbursed the price paid to Insolvent.

This was a conservatory process (*saisie revendication*) instituted by a guardian to an attachment under a writ of attachment in insolvency. It will be necessary for the proper understanding of the case, to narrate certain proceedings by which it was preceded.

On the 23rd of August, 1866, Henry Morgan & al. as plaintiffs, caused to be issued from the S. C. Montreal, a writ, No. 711, being process of attachment in compulsory liquidation under the Insolvent Act of 1864, against the

Mallette and Whyte.

estate of Joseph Gauvreau as defendant. To the seizure made by the sheriff thereunder John Whyte, an official assignee, now Respondent, was named guardian.

Upon the return of the writ, Gauvreau appeared and in terms of the act contested the attachment; upon that contestation judgment was rendered on the 20th October, 1866, dissolving the attachment and dismissing the action. Morgan appealed from that judgment, which on the 5th March, 1867, the Queen's Bench reversed in the following terms: "Considering that said writ of attachment was duly issued, and the seizure and proceedings thereunder were duly had and made, and considering that there was error in the judgment of the Court below, doth reverse and set aside the same, and reject and dismiss the petition of said Joseph Gauvreau, and maintain and confirm the writ of attachment issued against his estate and the seizure and proceedings thereon, with costs." The case is reported 11 L. C. Jurist p. 113.

On the 7th March, 1867, the present action was instituted under the Insolvent Act of 1864, Amendment Act of 1865 (29 Vict. Ch. 18, Sec. 9), upon affidavit in the form usual for *saisie revendication*, and with the permission of a judge obtained by petition.

The declaration alleges the appointment of Whyte as guardian to the seizure made under the above narrated attachment in Insolvency, Morgan vs. Gauvreau. That at Montreal at the date of the issue of said writ of attachment, and till within a few days past, a valuable brown horse of the value of $250, formed part of the estate and effects of said Gauvreau, and subject to seizure and attachment, as such. That a few days before the issue and service of said writ, said horse was by Gauvreau fraudulently and secretly removed from this city, and placed elsewhere out of reach of seizure and in parts unknown to said Whyte, and in consequence said horse could not be, and was not seized and attached. That after the completion of the seizure the horse returned to the possession of Gauvreau, and so remained pending the proceedings on said writ of attachment in the Queen's Bench. That within the past week said horse had come into the possession of Antoine Mallette, defendant, without right or title, who refuses to deliver up said horse to plaintiff, who is entitled to demand and have the same as part of the effects and estate of said Gauvreau. That he, Whyte, is entitled to the benefit of conservatory process against Mallette, and to the possession of said horse, for the benefit of Gauvreau's creditors, and for the protection of his estate.

Conclusions in usual form of actions *en revendication* and praying that the horse be declared to have formed part of, and to be part of the estate and effects of Gauvreau, and to be the property of said estate, and of plaintiff as guardian thereto, and that defendant be ordered to deliver up the horse to plaintiff without delay, and that in default he be condemned to pay $250, as the value thereof and costs.

The defendant pleaded.

1st. That on the 5th March, 1867, he bought the horse from Gauvreau, who offered it for sale in a public place in Montreal, where he, defendant, who was a horse dealer, paid therefor $112, the highest price offered and the full value thereof. That he acted in good faith and was ignorant of the insolvency of Gauvreau. That in any case before delivering the horse to Whyte, defendant

is entitled to be reimbursed the $112 so paid, with costs of keeping the horse; conclusion accordingly.

2nd. That at the date of the attachment in insolvency, the horse was not in Gauvreau's possession, was not seized thereunder, and that Whyte was never in possession thereof and consequently cannot revendicate.

3rd. Reciting the proceedings against Gauvreau; the quashing of the writ in S. C.; that judgment in appeal reversing was rendered only on the day of the purchase of the horse. Alleges good faith of defendant, &c., and concludes as in 1st, that before delivering the horse, he be repaid by plaintiff the $112 and the cost of keeping.

4th. *Défense en fait.*

The plaintiff answered generally. After issue completed, Whyte, having in the interval been appointed at the meeting of creditors held in terms of the Insolvent Act, official assignee to Gauvreau's estate, made a petition as such *assignee* to take up the instance, his functions as *guardian* to the seizure, having by said new appointment ended.

On the 9th July, judgment was rendered in the S. C., (Monk, J.), whereby considering that previous to and at the time of the attachment in Insolvency, the horse was the property of Gauvreau, and formed part of his estate; and that it was proven that Mallette had no legal title to or ownership in said horse; the seizure thereof was declared good, and Mallette ordered to deliver the same to Whyte forthwith, and in default thereof defendant was condemned to pay $250 as the value thereof and costs.

The defendant inscribed the case for review, but the judgment was confirmed. Whereupon the present appeal was taken.

Lanctot for appellant.

1. It appears by the *procès verbal* of seizure made by Whyte as guardian to Gauvreau's estate that no horse was seized under that attachment. During the contestation thereon, and the pendency of the appeal, the horse was in Gauvreau's possession, and never was in Whyte's. This is admitted by the declaration. He cannot revendicate that of which he never was in possession. Revendication is a process to *re*-cover lost possession of property.

2. If Whyte as guardian can revendicate, he cannot obtain possession of the horse without repaying to appellant the price paid and the expenses of keeping the horse, as from the evidence it is clear that appellant was ignorant of Gauvreau's insolvency, which was only confirmed in appeal the very day of the purchase. He acted in good faith and purchased in a public place. The sale was made in presence of many persons in a place frequented by horse dealers, the street in front of the American House, in Montreal, and after Gauvreau had before unsuccessfully offered the horse for sale at the same price, which was its full value. No fraud or collusion between Gauvreau and Mallette is proven. The sale is therefore not *null*, the most respondent can claim is, that it is *annulable*, and that only on repayment of price and expenses, &c. Even this the appellant denies, as the sale was made in a public place, *marché ouvert*.

3. After *enquête* closed on the issue between Whyte, as guardian, and the Appellant, Whyte obtains his appointment as assignee, and in that capacity takes up the instance of Whyte as *guardian*. This was no doubt done on perceiving that

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his position in the contest as a guardian was untenable. This should not be allowed to cover the defects in the procedure of Whyte as *guardian*, to which Mallette had previously taken exception as above. If appellant was correct in the points raised with the guardian, he should not after the *reprise d'instance* be condemned to costs.

Perkins for Respondent.

1. Respondent had a right to revendicate in his own name. The present proceeding is in strict accordance with the statute, 29 V. Chap. 18, §9, where it is enacted "that the guardian appointed under the writ of attachment shall have the "right in his own name, and in his capacity as such guardian, but only after "judge's order obtained, to institute any conservatory process that may be neces- "sary for the protection of the estate."

2. Appellant cannot pretend ignorance of Gauvreau's insolvency. The issue of the writ was advertised in the required form and constitutes legal notice of the fact. Though quashed in the S. C. the attachment remained in force during the pendency of the appeal, which at once followed. The notice to the world of Gauvreau's insolvency held good.

3. The horse was sold to Mallette on the afternoon of the day judgment was rendered in appeal in the case of Morgan *vs.* Gauvreau, by Gauvreau, who was not proprietor and who could not sell or pass property. The sale was made in fraud, the horse, which is proved in evidence to be a fancy trotting horse, to Mallette's knowledge worth $250, was bought below its real value, and upon the street; not in a public fair or market; and without any previous view, trial or examination. Even when a horse was lost and purchased *bona fide* in the usual course of trade in a hotel yard in Montreal where horse dealers were in the habit of buying and selling horses, it was held that it did not become the property of the purchaser as against the owner who lost it. Hughes vs. Reid, 6 L. C. Jurist 294. See also Matthews vs. Senecal, 7 L. C. Jurist 222; and Starke and Henderson, 9 L. C. Jurist 238.

BADGLEY, J., in rendering the judgment of the Court, 9th of June, 1868, said:

On the 23rd of August, 1866, a writ of attachment in compulsory insolvency was issued by Morgan et al., against Gauvreau, under which seizure was made as required by law, and Whyte, one of the official assignees, was made guardian. The seizure was reported in the *procès verbal*. Gauvreau contested the writ, and by judgment of the Superior Court of 20th October, 1866, the contestation was maintained and the writ was quashed, but on the 5th of March, 1867, the judgment in appeal reversed that judgment and maintained the writ, thereby validating the writ and seizure from its date, and operating the divestment of the insolvent of all his estate and effects from the issue of the writ.

On the *same* day, 5th of March, 1867, the insolvent Gauvreau in the public street in the afternoon offered the horse in question in this cause for sale for $112. It was purchased by Mallette, and the price paid to the insolvent.

The horse was the property of the insolvent at the time of the issue of the writ, but *was not then seized*, as it was not in his actual possession and as admitted by Mallette, "its whereabouts was unknown to the said John Whyte" (vide Mallette's admission). The horse was a fancy horse, *un trotteur*, and worth from $300 to $400.

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On the 7th March, 1867, the guardian obtained the required judicial order for the institution of conservatory process for the seizure of the horse, and caused *saisie revendication* to issue, under which the horse was seized. This proceeding was adopted under 29 Vict., ch. 18, sec. 9, of the Insolvent Amendment Act, "whereby the guardian appointed under a writ of attachment shall "have the right in his own name, and in his capacity as such guardian, but only "after Judge's order obtained, to institute any conservatory process that may be "necessary for the protection of the estate."

On the 20th of April, 1867, Whyte, the *guardian*, being one of the official assignees, was duly chosen *assignee* of the insolvent estate of Gauvreau, and by the effect of his appointment "the whole of the estate and effects of the insol- "vent existing at the date of the issue of the writ, and *whether seized or not* "*seized* under the writ of attachment, vested in the said assignee, in the same "manner and to the same extent as if a voluntary assignment of the estate of "the insolvent had been at that date executed in his favour by the insolvent, [*vide* "*Insolvent Act of* '64, sub-sect. 22 of sect. 3 and *Abbott, pp.* 28-9. *Vide also as* "*to the effect of voluntary assignment, sect.* 3 *and sub-sect.* 7, *of sect.* 2, *Abbott* 14]"

On the 25th of April, 1867, Whyte the assignee intervened in this cause in support thereof, and claimed the horse as part of the insolvent effects at the issue of the writ of attachment, on the 23rd of Aug., 1866, and therefore vested in him from that date.

The pleas fyled by Mallette are, that the guardian Whyte, not having had the possession of the horse, could not revendicate it without paying to him its price, $112, the expense of its keep with costs incurred, and that having acted in good faith, he, Mallette, was entitled to this payment. By his factum, however, he confines his objection to the last, his purchase of the horse at a public sale, and his good faith, which entitle him in law to receive the price paid by him and the expense incurred for the keep of the horse.

Now the act of the guardian was a legal and correct one, necessarily contemplated by the law, because the attachment issued could only apply as a seizure to hold the estate and effects in the actual possession of the insolvent. This very case is a proof of the justice of giving power to arrest by conservatory process what the insolvent desired to withhold from his creditors, and the appointment of the assignee and his subsequent intervention in support of this conservatory process retroact to the legal act of the guardian authorized by the Judge's order.

The other question in point, that the purchaser's ignorance of the insolvency and his purchase in good faith entitle him to receive back the $112 and the keep of the horse, is met shortly by the fact that the law had publicly divested Gauvreau of the horse, whether seized or not seized, from the date of the issue of the writ; that the horse was the property of his creditors from the date of the issue. Gauvreau had no right from that time to or over the horse, and he having kept the horse concealed and beyond the knowledge of the guardian, could give him no more right than he had at the date of the issue of the writ. He could not sell what no longer belonged to him. The Sheriff's advertisement of the issue of the writ of attachment as required by sub.-sect. 8 of sect. 3 of Act of '64 (Abbott, page 23,) was as stated by the commentator to prevent third par-

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ties from permitting or participating in any attempt to make away with the estate, at all events it was a public notice under the requirements of the Act, which bound Mallette as well as others, as to Gauvreau being insolvent and as to the consequences of his position; nor does Mallette come within the only provision of the law which has reference to this part of his objections: see sub-sect. 2 of sect. 8, of the Act of '64, (Abbott 55,) which provides, "that a contract for consideration by which creditors are injured or obstructed, made by a "debtor unable to meet his engagements with a person ignorant of such inability "and before it has become public and notorious, but within thirty days next "before the execution of a deed of assignment or of a writ of attachment "under this Act, is voidable and may be set aside by any Court or upon such "terms as to the protection of such person from actual loss or liability by reason "of such contract, as the court may order." This protection to the ignorant contractor is for transactions before public insolvency or within thirty days of it. The language is quite plain and precise, and if the protection be allowed only under such limited circumstances, it must be manifest that absolute nullity follows when the contract is made with an insolvent, whose insolvency has been ordered and published in the advertisement of the writ of attachment for public information, that he is by the effect of the law deprived of all his estate and effects and cannot have any, even if they come or fall to him, until after his final discharge from the Insolvency proceedings, "*which may accrue to him by any title whatsoever, up to the time of his discharge under this Act.*" We think the judgment of the Superior Court is correct and should be confirmed.

CARON J., dissenting, said:

Il s'agit d'un cheval réclamé par saisie revendication par l'intimé en qualité de syndic à la banqueroute du nommé Gauvreau, cheval qui a été acheté et payé par Mallette de bonne foi, ainsi qu'il le prétend.

Nul doute que le cheval, lors de la faillite de Gauvreau, lui appartenait et que plus tard il ne pouvait en disposer en fraude de ses créanciers; que le syndic comme tel avait droit de revendiquer le dit cheval et le jugement qui déclare valable la saisie revendication qu'il en a faite entre les mains de Mallette, est correct; toute la difficulté roule sur la question, savoir, si Mallette a droit d'être remboursé de ces $112 qu'il a payées, ou s'il a été justement condamné à remettre le cheval sans remboursement et à payer les frais.

La vente faite par Gauvreau est sûrement entachée de fraude, les circonstances prouvées le démontrent clairement; lorsqu'il est tombé en mauvaises affaires et qu'il a craint la saisie, il a remis le cheval au nommé Pattenaude, avec lequel il parait s'être entendu pour le soustraire à la saisie. La vente s'en est faite le jour même où a été rendu le jugement qui déclarait Gauvreau en faillite. On ne peut douter que tout cela était fait dans l'intention frauduleuse de soustraire le montant de cette vente du contrôle du syndic. Une vente de cette espèce est réprouvée et déclarée nulle non seulement par le droit commun, mais spécialement par la clause 8 sect. 3, de l'acte de 1864, ch. 17, (Insolvent Act) mais cette nullité n'affecte l'acte quant aux tiers que dans le cas seulement où la personne avec qui il est fait, est en connaissance de la fraude. La loi sous cette réserve est positive, et d'ailleurs n'est autre chose que l'expression du droit commun auquel elle est

conforme. Si donc le tiers n'a pas participé à la fraude du vendeur, la vente qui a eu lieu est, d'après les circonstances, nulle ou bien annullable.

Dans l'espèce, la déclaration de la faillite ayant fait passer la propriété des effets du failli dans la propriété du syndic pour le bénéfice des créanciers, Gauvreau n'était plus propriétaire, ne pouvant vendre valablement le cheval en question suivant l'article 1489 du Code Canadien. Le syndic avait donc droit de les revendiquer et toute la difficulté qu'on a faite dans la cause, quant à sa qualité de gardien d'abord, et de syndic ensuite, sur la reprise d'instance ou intervention etc., tout cela n'est d'aucune force ou valeur. La saisie revendication devait être maintenue. Mais Mallette devait-il perdre l'argent payé, sous les circonstances prouvées? je ne le crois pas, et voici pourquoi. La fraude ne se présume pas et l'acte ne devait être regardé comme nul, que dans le cas où l'acheteur a participé dans la fraude, il était du devoir du syndic (Intimé) de prouver *aux* termes du statut (1864 ch. 17, s. 8, p. 3,) que la vente qui lui était fait était dans le but de frauder les créanciers; non seulement cette prétention n'est pas prouvée, mais le contraire est établi à mon entière satisfaction par le nommé Marchand et par Gauvreau lui-même entendus comme témoins. Il est établi que Mallette connaissait à peine Gauvreau lors de la vente, que de fait ils ne s'étaient jamais parlé; ce qu'ils disent tous deux exclut toute probabilité de collusion. L'achat n'est pas fait par Mallette lui-même, mais bien par Marchand, son agent ou homme d'affaires, qui prouve aussi que l'argent a été payé comptant par Mallette à Gauvreau en présence de Marchand, que la vente a été faite publiquement dans la place où se fait généralement la vente de chevaux, qu'il y avait alors dans cette place d'autres chevaux à vendre et un bon nombre d'acheteurs, que le prix payé était le plus haut prix offert et sous les circonstances de la vente de ce cheval; qu'en un mot il n'y a eu de la part de Mallette rien qui peut indiquer la fraude ou la connaissance de ce fait, c'est à dire, de la fraude pratiquée par Gauvreau.

Ces témoins qui sur tous ces rapports sont très positifs, ne sont contredits par aucune preuve de la part de l'intimé, qui ne fait entendre que Gauvreau qui est en faveur de l'appelant et le nommé Boudreau qui dans les transquestions parle du regret qu'à manifesté l'appelant d'avoir acheté le cheval, lorsqu'il a appris les circonstances sous lesquelles la vente avait été faite.

Sous les circonstances je suis d'avis que Mallette ayant agi de bonne foi dans toute cette transaction ne doit pas perdre le prix qu'il a payé. Le jugement aurait dû lui accorder acte de l'offre qu'il a faite de le remettre en lui remboursant, qu'en un mot la vente aurait dû être déclarée annulable seulement et non nulle de plein droit. J'infirmerais donc le jugement—je déclarerais le dit intimé propriétaire du cheval, j'ordonnerais au défendeur appelant de le lui remettre, mais seulement en par le syndic le remboursant de la somme payée avec dépens dans les deux cours, vu que l'appelant n'a pas contesté la propriété de l'intimé et le droit qu'il avait de réclamer le cheval.

Judgment confirmed.

CARON, J., *dissentiente.*

M. Lanctot, for Appellant.

Perkins & Ramsay, for Respondent.

(R.A.R.)

CIRCUIT COURT.

ST. HYACINTHE, SEPTEMBER, 1868.

Coram SICOTTE, J.

No. 9104.

J. O. Leclerc, plaintiff, *qui tam*, vs. *Z. Blanchard*, defendant.

HELD:—1st That the letters "C. C. S." do not legally express the capacity of a commissioner to receive affidavits if nothing more in the document attest the quality.

2nd. That such commissioner must indicate the District for which he is appointed.

3rd. That the 1st Sect. of Chap. 43, 27, 28 V. (1864) of the French version of the L. C. C. S. contains an error and a fatal discrepancy with the object of the statute, and the English version must be followed for the allegations of the affidavit required in *qui tam actions*.

Plaintiff claimed by his action the penalty of £50 enacted by chap. 65 of the L. C. C. S.

The plaintiff had fyled with his fiat the affidavit required by sect. 1. of 27, 28 V. chap. 43.

This affidavit purported to have been received at Montreal, before "J. A. Labadie, C. C. S." It was drawn in the French language and contained the words of the 1st sect. viz: "ni de se procurer à lui même (le déposant) aucun avantage."

The action was met by an exception "à la forme" grounded mainly on two points, viz:

1st. That the affidavit required by law for the issuing of the writ of summons did not appear to have been taken before any authorized officer.

2nd. That it did not contain all the allegations required by law.

After the fyling of said exception, a motion to quash the affidavit and to dismiss, founded on the above two heads, was presented, and the parties heard upon it.

It was argued on behalf of the defendant, that the only indication of Mr. J. A. Labadie's authority to receive the affidavit, was the letters "C. C. S." written below his name underneath the *jurat*. That these letters had no legal meaning by themselves. Supposing them, besides, to signify "commissaire de la Cour Supérieure," they were still insufficient. For sec. 10th of chap. 32 C. S. L. C. authorised the appointment of commissioners for particular districts as for bailiffs, and not for all the districts. Such commissioners can act only as commissioners for their respective district, although affidavits so taken may be used in any other district. Hence the necessity for a commissioner to mention the district for which he is appointed.

The allegation in the affidavit that the plaintiff did not intend to obtain any advantage for himself in bringing his *qui tam action*, although agreeable to the French version of the statute, was contrary to the object in view, and to the whole tenor of the law requiring such affidavit. There was evidently a mistake on that point in the French version (chap. 43, 27, 28 V. (1864); the English version was no doubt correct and must prevail.

The Court thought the above argument sound, and giving judgment accordingly, granted the motion and dismissed the action.

Nagle and Pagnuelo, Attorneys for plaintiff.

Chagnon, Sicotte and Lanctot, Attorneys for defendant.

(M. L.)

IN INSOLVENCY, 1868.

MONTREAL, 30TH SEPTEMBER, 1868.

Coram TORRANCE, J.

No. 617.

In re *Warminton* et al., Insolvents; *John Henry Jones*, Assignee, and *William Warminton*, Contestant.

WITHHOLDING MONEYS—29 VIC. CAP. 18, SEC. 29.

The Statute, 29 Vic. Cap. 18 (Sec. 29) renders an insolvent who withholds moneys from his assignee, without lawful right, liable to be imprisoned in default of delivery of the moneys.

HELD:—Where an insolvent received a sum of money during the time which intervened between date of notice of meeting of creditors and the appointment of an assignee, and refused to pay over the money to the assignee, that this was "retaining and withholding without lawful right" within the meaning of the Act.

TORRANCE, J.—A petition has been presented by the assignee praying for an order against the insolvent, William Warminton, that he do pay the sum of $143 to the petitioner, or go to gaol. The petition sets forth that a voluntary assignment was made by William Warminton and his brother, John Henry Warminton, to the petitioner on the 30th June last; that the usual advertisements had, for more than three weeks previously, been given by the insolvents under the Insolvent Act, calling upon the creditors to meet and appoint an assignee; that while the meeting was being called the said William Warminton sold a portion of the estate for $143, which the insolvent promised to deliver over to the assignee to be appointed, but which he neglected to do. The prayer of the petition is that the said insolvent be adjudged and ordered to deliver over to the petitioner the said sum of $143, and that in default of such delivery in conformity with the order to be made, the said William Warminton be imprisoned in the common gaol of this district for such time not exceeding a year as may be ordered.

The insolvent, William Warminton, answers the petition by alleging in substance that it is unfounded in law: 1st. Because it appears by the petition that the sum of money was not received after the assignment, or after the appointment of an assignee. 2nd. Because the facts set forth in the petition do not show any fraud on the part of William Warminton. 3rd. Because the allegations of the petitioner are insufficient in fact and law to justify the conclusions taken in it. 4th. Because the petition is unfounded in fact and in law.

Witnesses have been examined in support of the petition, and it appears that while the meeting of the creditors was being called, William Warminton acted as agent of the creditors, and promised them to account for and pay over all moneys which should be in his hands arising out of his gestion as agent, and that during this period, between the 15th and 27th June, William Warminton received $176.06 of which he has given no satisfactory account, nor any account whatever, and his attorneys have also fyled an admission, admitting the allegations of the petition, "sauf l'allégué ou le fait qu'il aurait touché des argents ou effets après cession faite à ses créanciers, et qu'il les retiendrait."

The petitioner relies upon 29 Vic. c. 18, s. 29, being the amendment to the Insolvent Act, in support of his demand, and it enacts, *inter alia*, that if an

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insolvent, on or after cession of his estate, retains and withholds from the assignee, without lawful right, any moneys, the assignee may apply for an order such as sought in the present case. I am compelled to give the order. The insolvent had the money between the 15th and 27th June, and I must assume that he continued to have it on and after the 30th June, as he has not pleaded anything in discharge of the demand.

The judgment is *motivé* as follows: Having heard the petitioner by his counsel, praying that William Warminton, one of the insolvents, be adjudged and ordered to deliver over to the petitioner the sum of $143, cy., and in default of such delivery in conformity to the order to be made in the premises, the said William Warminton be imprisoned in the common gaol of this district for such time not exceeding a year as may be ordered; having heard the said William Warminton, by his counsel, in support of his answer fyled to said petition; having examined the pleadings and evidence of record, and seen the admission of the said William Warminton, and duly deliberated; considering that the said William Warminton and the firm of Warminton Brothers, on and before the 15th June last, were in a state of insolvency, and so continued to be till on and after the 30th of June last, date of the assignment mentioned in said petition: considering that the said insolvents before the said 15th June last had duly convoked a meeting of their creditors to elect an assignee to whom the said assignment might be made:

Considering that during the delays which ran while the said meeting was being called, and especially between the 15th and 27th June last, the said William Warminton acted as the agent of the creditors of the said firm of Warminton Brothers, and promised to said creditors to account for and pay over to the assignee to be appointed, any and all moneys which should come into his hands arising out of his gestion as such agent:

Considering that during said period between 15th and 27th June last, the said William Warminton received of said moneys a sum of $176.06, of which he hath rendered no account, and hath refused to pay over and deliver to the petitioner in his said capacity the sum of $143, demanded by the said petition, portion of the said sum of $176.06, although thereunto requested, and therefore that the said William Warminton retains and withholds from the said John Henry Jones, the petitioner, in his said capacity of assignee, the said sum of $143, without lawful right:

Therefore, I, the undersigned judge, do order the said William Warminton to deliver over to the said John Henry Jones, in his said capacity, the said sum of $143, cy., within eight days from the date hereof, and in default of such delivery in conformity with the present order, I do order and adjudge that the said William Warminton be imprisoned in the common gaol of the district of Montreal for and during the term and period of three calendar months.

Petition granted.

A. N. Charland, for Insolvent.
J. A. Perkins, jr., Counsel.
D. Girouard, for Assignee.

(J. K.)

IN INSOLVENCY.

MONTREAL, 8TH OCTOBER, 1868.

Coram TORRANCE, J.

No. 127.

In re *Andrew Macfarlane* et al., Insolvents, and *James Court*, Official Assignee, Petitioner, and *A. B. Stewart*, contesting.

ASSIGNMENT BY COPARTNERSHIP.

HELD:—That an assignment made by a copartnership vests in the assignee the separate estates of the partners, as well as the copartnership estate; and that the removal of the assignee at a meeting of the creditors, (called under sect. 11, sub-section 3) has the effect of removing him with respect to the separate estates as well as the copartnership estate.

TORRANCE, J.—This matter comes up before me on the petition of James Court, Official Assignee, alleging that on the 1st of September last, A. B. Stewart, Official Assignee, to whom the assignment in this cause was made, was removed as such assignee, and the petitioner appointed in his stead, and that the said A. B. Stewart was then ordered by the creditors to deliver over to the petitioner the estate of the insolvents as well as copartners as individually; that A. B. Stewart had failed to make such delivery. The conclusion of the petition is that the performance of A. B. Stewart's duties should be enforced, and he be ordered to deliver to the petitioner the estate of the insolvents, as well as copartners as individually, within such time as may be fixed, and that, in default of his so doing, the said A. B. Stewart be declared in contempt of Court, and that he be imprisoned in the common gaol of the district, &c.

A. B. Stewart has fyled a written answer, and alleges: 1st. That the insolvents, Andrew and Robert Macfarlane, carried on business in copartnership.

2nd. That A. Macfarlane had a private estate and private debts to persons who were not creditors of the partnership, and for part of these debts his individual estate was hypothecated.

3rd. That on the 22nd February, 1868, A. Macfarlane made an assignment individually, under the Insolvent Act and amendments, to A. B. Stewart.

4th. That on the 17th day of the same month, the copartnership executed an assignment to the same assignee.

5th. That the meeting of creditors mentioned in said petition was a meeting of creditors of the copartnership, and not of the individual creditors of Andrew Macfarlane, and the individual creditors were not present nor called on that day, &c.

6th. That the said meeting of creditors was not called or held for the purpose of removing the assignee, and the creditors present had no power to remove him.

7th. That A. B. Stewart was desirous, and offered to resign the office of assignee of the copartnership, retaining his office as assignee of the estate of A. Macfarlane individually.

8th. That even if A. B. Stewart had desired to resign his office of assignee to the individual estate, he had no power or authority to do so at the said meeting, which was not a meeting of the individual creditors.

A. Macfarlane et al., James Court, and A. B. Stewart.

9th. That the said A. B. Stewart was duly appointed assignee of the individual estate of the said Andrew Macfarlane: that he has never been removed from, nor has he resigned such office, and that he is still the assignee thereof, and that the said James Court has no right to meddle therein.

I am of opinion to grant the prayer of the petitioner. I consider that the assignment of the 17th of February had the effect of conveying to and vesting in the assignee the separate as well as the copartnership estate of the insolvents. As to the assignments of the 22nd of February, as showing the intention of the insolvents, they availed nothing, if, as I conceive, the assignment of the 17th of February had the effect of conveying the separate as well as joint estates. I would refer counsel to the following clauses of the Insolvent Act of 1864: sec. 2, §§ 7 and 9; sec. 3, §§ 9 and 22; sec. 4, §§ 8 and 13, which imply that there is one assignment, and one only, to vest all the estates of the insolvents in the assignee. In addition to the authorities cited at the bar, I would refer to the following in the same sense: Lindley, partnership, pp. 929, 930, and note; Gow on partnership, p. 267; Story on partnership, § 376, n. (1); Collyer, partnership, § 853; Henley on Bankruptcy, cap. 4, § 4. To cite from one of these authorities: Gow says, "Therefore after such assignment no property of any kind remains in the bankrupts; and nothing can be taken by the assignees under a separate commission subsequently sued out against any one of them."

It was admitted at the argument that the nomination of Mr. Court as assignee of the copartnership was regular, leaving for the judgment of the Court the one question whether the assignment of the 17th February vested in the assignee the separate as well as the joint estate. I am of opinion that the one assignment of the 17th February was sufficient, and have prepared a written order in the following words:

Having heard the petitioner, James Court, by his counsel, on his petition fyled on the 6th of September last, praying for an order addressed to the said A. B. Stewart to deliver to the petitioner the estate of the insolvents as well as copartners as individually, and having heard the said A. B. Stewart in answer thereto, having examined the pleadings and evidence of record, and duly deliberated:

Considering that the insolvents, Andrew Macfarlane and Robert Macfarlane, both of the said city of Montreal, dry goods merchants and copartners, carrying on business as such in Montreal aforesaid, under the name, style and firm of Andrew Macfarlane & Co., on the 17th February last, made an assignment under the provisions of the Insolvent Act of 1864, of all their estate and effects, real and personal, of every nature and kind whatsoever:

Considering that the said assignment of the 17th February had the effect in law of assigning and conveying to the said A. B. Stewart, as such assignee, as well the separate and individual estates and effects real and personal of the insolvents as their copartnership estate:

Considering therefore that the several assignments by the said Andrew Macfarlane and Robert Macfarlane respectively made on the 22nd of February last to the said A. B. Stewart, had no legal effect or validity:

Considering that at the hearing of this petition the said A. B. Stewart, by his counsel, did declare himself to be ready to obey the order of the Court as

regards the partnership estate of the insolvents, and the only question between the parties was and is whether the assignment of the 17th of February last, did convey to and vest in the said A. B. Stewart, as such assignee, the separate and individual estates of the said Andrew Macfarlane and Robert Macfarlane respectively:

Considering that the said petitioner, A. B. Stewart, was, on the 1st of September last, duly removed from his office as such assignee of the joint and separate estates of the insolvents, and the said James Court was then duly appointed as such assignee in his place:

I, the undersigned judge, do order the said A. B. Stewart to deliver up to the petitioner, the said James Court, in his said capacity of assignee, the said estate of the insolvents, as well as copartners as individually, within eight days from the day of the date hereof, the whole with costs, payable out of the estate according to its sufficiency.

Hon. J. J. C. Abbott, Q.C., for *A. B.* Stewart. Petition granted.
Girouard, for Official Assignee.
(J. K.)

IN INSOLVENCY, 1868.

MONTREAL, 30TH SEPTEMBER, 1868.

Coram TORRANCE, J.

No. 137.

In re *Macfyrlane* et al., Insolvents, *Stewart*, Assignee, and *Macfarlane* et al., Contesting parties; and *Court*, Petitioner, *en reprise.*

ADJOURNED MEETING OF CREDITORS.

HELD:—That a meeting of creditors duly convened under the Insolvent Act may be lawfully adjourned to a subsequent day, without repeating the advertisements and notices required by the Insolvent Act for meetings of creditors.

TORRANCE, J.—This is a petition by James Court, official assignee, setting up that by a resolution of the creditors of the insolvents, at a meeting duly called for the purpose, to wit, at an adjourned meeting duly called for the public examination of the insolvents and for the ordering of their estate generally, Alexander Buchanan Stewart, the assignee, was, at his own request, removed, and the petitioner appointed assignee. The petition prayed *acte* of the *dénonciation* of the removal of Mr. Stewart, and that the petitioner be allowed to take up the *instance* in his place.

The answer to the petition was general on the part of the insolvents, who were the only parties notified.

It appears that a meeting was duly called by advertisement for the public examination of the insolvents, and for the ordering of the affairs of their estate generally, to take place on the 12th May. The meeting was then held and formally adjourned to the 9th June, when it was again held and adjourned to the

In re Macfarlane et al., Stewart, and Macfarlane et al., and Court.

23rd of June, and then again it was held and adjourned to the 1st September, and on this day the removal of Mr. Stewart and the nomination of Mr. Court took place.

The insolvents at the hearing took two objections to the petition. 1st. That Mr. Stewart should have had notice of it, which he had not. 2nd. That the adjournment to the 1st September, having taken place without advertisements and notices such as required by the Insolvent Act of 1864, Sec. 11, the removal of Mr. Stewart and the appointment of Mr. Court on that day was a nullity.

As to the first objection, I do not think that any notice to Mr. Stewart was necessary.

As to the second objection, I have always been under the impression that an adjournment duly made at the original and subsequent meetings was sufficient to render valid the adjourned meeting without any notices. Our Act is silent on the subject, and I find an authority in the Exchequer and House of Lords cases which I consider quite in point and against the pretension of the defendants, Scadding vs. Lorant, 15 Jur. 955, A.D. 1851. The conclusions of the petition are therefore granted.

The judgment is as follows:

Having heard the petitioner, James Court, in his quality of assignee, &c., and the insolvents in answer thereto, by their counsel; having examined the pleadings and evidence in this matter, considering that the meeting of the 12th May ast was duly called for the public examination of the insolvents, and the ordering of the affairs of their estate generally, and that said meeting was then duly held, and that the removal of A. B. Stewart as assignee at that meeting would have been valid:

Considering that the said meeting was formally adjourned to the 9th June, last, and from that day to the 23rd June last, and thence to the 1st September instant:

Considering that in law the adjourned meetings may be regarded as the same meeting as the meeting of the 12th May last; I do grant the prayer of the petitioner, James Court, and do grant *acte* of his *dénonciation* of the removal of the said A. B. Stewart, and do allow the petitioner, as such assignee, to take up the *instance, reprendre l'instance,* in lieu of the said A. B. Stewart, and finally that the *instance* be taken up, *reprise,* pursued and determined in the name of the petitioner, as such assignee, in due course of law.

Petition granted.

D. Girouard, for the Petitioner.
S. Bethune, Q.C., for the Insolvents.
(J. K.)

MONTREAL, 5 MARS 1868.

Coram MONK, J.

No. 2271.

Pratt et al., vs. *MacDougall et al.*

JUGE:—1o. que le chèque est susceptible d'un aval comme le billet promissoire.
2o. Que l'engagement par aval est une question de fait et de droit et semble être plus de droit que de fait.
3o. Que B. ayant endossé en blanc un chèque payable au porteur généralement tiré par A. et livré par ce dernier à C. pour valeur reçue, est un donneur d'aval et non pas un endosseur.
4o. Que le donneur d'aval n'a droit à aucune diligence et qu'il n'a pas d'autres exceptions que celles de la personne qu'il a cautionnée, leurs obligations étant solidaires.
5o. Que le tireur d'un chèque est responsable jusqu'à ce qu'il ait acquis la prescription, et qu'il n'a droit à aucune diligence, pas même à celle de la présentation, à moins qu'il n'établisse que ce défaut de diligence lui a causé des dommages, comme si la banque, où il eût des fonds, eût failli.

Cette cause, d'un intérêt minime quant au montant ($220), donne néanmoins naissance à plusieurs questions sur les chèques d'une haute importance pratique pour les banquiers et le commerce en général, questions nouvelles sur lesquelles, au rapport des Codificateurs, *Lois Commerciales*, p. XIII, "on ne trouve en France aucun texte de loi, et que les rapports des décisions des tribunaux anglais et américains ne traitent que d'une manière vague."

Un chèque est tiré comme suit:

LA BANQUE JACQUES-CARTIER.

No. 275. *Montréal*, 15 *Février* 1864.

Payez à——————————*ou au porteur*
deux cent vingt——————————*dollars.*
$220.

(*Signé,*) J. E. MALHIOT, *Agent.*
Au Caissier,
(*Endossé*) MACDOUGALL & DAVIDSON.

Ce chèque est originairement livré par le tireur Malhiot aux demandeurs, qui, sans voir les Messieurs MacDougall & Davidson, lui en donnèrent le montant comptant. Il ne fut présenté pour paiement qu'une douzaine de jours environ après qu'il fut reçu, et ce n'est que sept mois après, quelques jours avant l'institution de cette action, que les demandeurs informèrent les défendeurs du défaut de paiement de l'effet.

Un gros trait de plume couvre le blanc entre les mots "Payez à" et "ou au porteur."

Les défendeurs prétendent que n'ayant reçu aucun avis de protêt ou au moins de non-paiement, le chèque n'ayant pas d'ailleurs été présenté à la Banque dans un délai raisonnable, c'est-à-dire, dans les vingt quatre heures de sa réception, ils sont libérés de leur engagement.

A cette défense les porteurs et preneurs Pratt répondent d'abord que Messieurs MacDougall & Davidson ne sont pas dans la position d'endosseurs d'une lettre de change ou d'un billet promissoire, mais qu'ils ont apposé leur signature au dos d'un chèque, mandat ou ordre sur un banquier, que l'on connaissait dans l'ancien droit sous le nom de *rescription* ou *mandement*; que comme tels, ils sont responsables comme le tireur; qu'enfin ils sont donneurs d'aval du tireur n'ayant droit à aucune diligence, la banque n'ayant pas failli.

Pratt et al., vs. McDougall et al.

Plusieurs caissiers de Banque et négociants ont établi que l'usage du commerce est de protester toutes les signatures au dos d'un chèque et de tout effet de commerce, et que l'aval, même sur un billet, n'est pas connu en pratique.

D'autres négociants ont établi que cet usage ne s'étend pas aux donneurs d'aval.

Le chèque fut plusieurs fois présenté à la Banque une quinzaine de jours après sa réception, et avis de non-paiement a été donné aux défendeurs environ sept mois après.

Immédiatement après la réception du chèque et durant les jours de la présentation, le tireur Malhiot avait des fonds à la Banque qu'il retirait aussitôt après le dépôt.

Il fut prouvé que les demandeurs donnèrent le comptant à Malhiot pour le chèque sans voir les défendeurs.

Les parties soumirent leurs prétentions respectives dans des mémoires écrits ou factums.

Mr. Girouard, avocat des demandeurs:

I. Comme l'enseignent tous les auteurs, de droit commun, tout endosseur est dans la position d'un nouveau tireur, n'ayant droit ni à un protêt ni à un avis de protêt; car de droit commun la solidarité est toujours présumée dans les affaires de commerce. Code B. C. art. 1105; et le chèque est encore soumis à cette règle du droit commun; Bornier, Ordon. de 1667, tit. 34, art. 4; Savary, Parf. Nég. t. 2. p. 169, Parère 20e tome 1, Part. 1 p. 241; Rogue, Jurisprudence Cons. vol. 2, p. 310; arrêt de Bordeaux, 4 juillet 1832.

Le statut de 1849 ne prescrit un protêt ou avis de protêt et des diligences en général que pour les lettres de change et les billets promissoires, et non pour les mandats ou chèques.

Mais dit-on, la raison pour laquelle les mandats n'étaient soumis à aucune diligence dans l'ancien droit français, se trouvait dans l'essence même des lettres de change, qui voulait qu'elles fussent tirées d'un lieu pour être payées dans un autre, caractère que n'avaient pas les mandements ou rescriptions. Or, continue-t-on, dans ce pays comme en Angleterre et aux Etats-Unis, la remise de place en place n'est pas requise, et le mandat étant placé sur le pied de la lettre de change, les diligences sont également requises pour l'un comme pour l'autre.

Le texte de loi qui a fait disparaître de notre jurisprudence la remise de place en place, c'est notre Code devenu en force le 1er Août 1866, qui ne frappe pas le chèque dont les Messieurs Pratt sont les porteurs, ayant été tiré en 1864. Les articles 2279 et 2280 du Code sont, en effet, à cet égard introductifs d'un droit nouveau, quoique non indiqués comme tels. Les Codificateurs l'admettent eux-mêmes dans leur rapport sur les *Lois Commerciales*, page VIII et IX, où ils ajoutent qu'ils n'ont pas cru devoir conserver l'ancienne distinction, parcequ'ils n'y voyaient aucun résultat pratique, *vu*, disent-ils, *que les lettres de change ne donnent plus lieu en Canada à la contrainte par corps.* Mais les lettres de change en France ne donnaient pas seulement ouverture à cette voie d'exécution, mais encore nécessitaient certaines diligences importantes, indispensables même dans certains cas, un protêt par exemple à l'égard des endosseurs. Ces diligences, comme aussi les dommages et autres droits de retour sur protêt prononcée par

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les articles 2336 et suivants, n'étaient-ils pas un motif suffisant pour engager les Codificateurs à conserver l'ancienne règle. Ils allèguent que la question de la remise de place en place aurait pu être soulevée assez souvent devant nos tribunaux, et ils citent la cause de Freer et Bréhaut, où cours et parties qualifièrent de lettre de change un ordre tiré et payable à Québec, sans s'occuper de la remise de place en place; mais même dans ce siècle de lumière et de progrès, le silence des cours de justice est-il assez puissant pour renverser les dispositions du droit commun, établir une jurisprudence. La question n'a jamais été soulevée; il n'y a donc pas de précédent; car, par précédent, il faut entendre une décision rendue avec connaissance de cause; et ainsi la règle de l'ancien droit français, que que l'on suit aujourd'hui en France, a encore toute sa force et sa vigueur quant aux actes antérieurs au Code.

On dit encore que le chèque est une introduction anglaise, et comme tel est régi par les lois anglaises. Le chèque doit son origine, ici comme ailleurs, aux besoins du commerce; et à cause de sa ressemblance avec la lettre de change, il a dû naître et grandir avec elle. Or, l'on sait que le papier négociable en général était fort en usage en Italie et dans la France méridionale, lorsqu'il était encore inconnu de l'Angleterre, parce que le commerce de cette nation, aujourd'hui si commerciale, était alors pour ainsi dire limité à son propre territoire, et que la lettre de change, etc., étant une *chose in action* n'était pas transférable suivant l'ancien droit commun anglais.

D'ailleurs, le chèque est toujours présumé tiré sur des fonds déposés en banque: et il est hors de doute que de nombreuses institutions de ce genre existaient en France, longtemps avant la cession du Canada à la Grande-Bretagne, non pour émettre du papier, mais pour négocier le change et recevoir les dépôts d'argent du commerce—trafic qui n'est guère praticable qu'à l'aide du mandat de paiement (Savary, Parère 17, p. 152); et Denizart, vo. Rescription, nous dit qu'on l'appelait alors comme aujourd'hui en France *rescription de banquier*. Toubeau, dans ses *Institutes*, affirme que même à la fin du 14e siècle il existait de tels établissements à Amsterdam, Marseille, Toulouse, Vénise et plusieurs autres villes de la France et de l'Italie; et à une date aussi éloignée que 1562 nous voyons Henry III exiger caution des étrangers qui voulaient exercer le commerce de banquier; et plus tard, en 1581 tous les bureaux de banque étaient tenus d'obtenir préalablement permission et congé du Roi. Bien plus, les ordonnances de François 1er (1535) et de Charles IX (1563) font à la fois mention des opérations de *banquier à banquier* et des *Rescriptions*, qui ne pouvaient être pour ce banquier que le chèque moderne. Enfin l'auteur déjà cité, Toubeau, parlant des paiements en banque qui se faisaient à cette époque reculée, vol. 2, p. 155, dit: "Si j'ai une lettre de change tirée et à recevoir "d'un marchand, lorsque je la lui présente, il la retient et fait un billet qu'il "adresse à la banque, par lequel il prie ces messieurs de me payer cette somme "et qu'il leur en rendra compte." (Voir aussi Savary, Parère 47, p. 376; Domat, Lois Civiles, ed. 1835, vol. 1, p. 354.) C'est précisément ce qui se passe tous les jours dans le commerce actuel; un billet, un compte, est payé par un mandat sur une banque, et il est impossible de ne pas trouver dans ce billet de Toubeau le caractère et l'objet de notre chèque moderne. Ainsi donc, qu'au-

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jourd'hui adoptant l'expression anglaise, on nomme cet ordre *chèque* ou autrement, il n'est que l'espèce du genre *rescription*, *mandement* ou *mandat*, et comme tel doit être soumis aux mêmes règles générales.

En vain veut-on tirer argument de l'article 2340 déclarant qu'en matière de *lettres de change*, l'on doit avoir recours aux lois anglaises en force le 30 Mai 1849 pour suppléer au silence du Code. Mais d'abord le chèque livré aux demandeurs n'est pas soumis aux dispositions du Code, ayant été tiré en 1864. En second lieu, cet article n'a rapport qu'aux lettres de change; et dût-il s'appliquer aux chèques, le Code n'est pas muet sur les diverses questions que présente cette cause; enfin, même sur tous ces points, la jurisprudence anglaise ne s'écarte pas des règles qu'il pose.

Hâtons-nous de dire que les Codificateurs, bien que faisant disparaître la remise de place en place, en ont néanmoins conservé dans un autre article le résultat pratique, en maintenant l'ancienne règle quant aux diligences à faire sur les mandats ou rescriptions; et c'est sans doute sous la réserve et dans la vue de ce dernier article, qu'ils déclaraient qu'il ne résultait, pour le Bas-Canada, aucun avantage pratique de la remise de place en place. L'article 2352 déclare ce qui suit:

Si le chèque n'est pas présenté pour paiement dans un délai raisonnable et que la banque tombe en faillite dans l'intervalle entre la réception et la présentation, le tireur ou l'endosseur est déchargé jusqu'à concurrence de ce qu'il en souffre.— (Voir Pothier, Change, No. 229.)

L'article 2353 du Code déclare ce qui suit:

"Sans préjudice aux dispositions contenues dans l'article qui précède, *le porteur d'un chèque qui l'a reçu du tireur, peut, sur refus par la Banque*, ou le Banquier, le renvoyer au tireur sous un délai raisonnable et recouvrir de lui la dette pour laquelle le chèque a été donné, ou bien il peut *garder le chèque et en poursuivre le recouvrement sans protêt.*

"Si le chèque a été reçu d'un autre que le tireur, le porteur peut également le renvoyer à la personne qui le lui a donné, ou bien il peut en poursuivre le recouvrement contre les personnes dont il porte les noms, comme dans le cas d'une lettre de change à l'intérieur."

Comme on le voit, cet article (2353) est *sans préjudice aux dispositions contenues dans l'article* 2352. Puis il ne parle de recours contre tous les noms *comme dans le cas d'une lettre de change à l'intérieur*, que si le *chèque a été reçu d'un autre que le tireur.* Mais dans cette espèce, le chèque a été reçu du tireur, et cet article 2353 dit que le porteur peut alors *en poursuivre le recouvrement sans protêt.*

II. Mais là n'est pas la principale proposition des demandeurs. Ils soutiennent que les défendeurs ne sont pas endosseurs, mais donneurs d'aval, n'ayant droit à aucune diligence.

Sans doute que les messieurs MacDougall et Davidson disent qu'ils n'entendaient jamais s'obliger que comme endosseurs; mais leur signature est là; il n'y a pas à se méprendre sur sa nature; c'est celle de l'aval, et comme l'a maintenu récemment un tribunal de la Louisiane, ils doivent s'imputer à eux-mêmes cette erreur de droit qui ne peut leur profiter. Smith vs. Gorton, 10 Louis. R. 374.

Mais, continuent les défendeurs sur faits et articles, Mr. Malhiot nous a demandé d'*endosser jusqu'au lendemain* (*to endorse until the next day*). Ces mêmes paroles font leur condamnation. La loi connait-elle des endossements "jusqu'au lendemain?" Très certainement non; tout endossement, étant une cession, un transport, est irrévocable, pour toujours. Messieurs MacDougall et Davidson ont endossé pour un jour; mais ils admettent par là même qu'ils l'ont fait par aval, l'aval à part les acceptations par honneur ou au *besoin* qui n'ont pu avoir lieu dans l'espèce actuelle, étant en matière d'effets de commerce la seule obligation qui puisse souffrir des restrictions et modifications. (*Bédarride*, Dr. Com. vol. 1 p. 468). Pourquoi alors les défendeurs n'ont-ils pas fait leur réserve sur le papier, écrit au-dessus de leur signature. "*We are responsible only for one day, or until the next day*," et ainsi averti les porteurs que leur garantie était restreinte? Ils doivent donc s'accuser eux mêmes si sept mois après, ils sont appelés à faire honneur à leur engagement illimité et valable jusqu'à ce que la prescription soit acquise.

Il est bon d'observer ici qu'en France, tant sous l'ancien que sous le nouveau droit, l'endossement en blanc ou irrégulier est prohibé; l'endossement régulier ou en plein, faisant mention de la personne à qui l'ordre est passé, de la valeur fournie et de la date, est seul autorisé; et tout propriétaire endossant purement [illegible]ne n'est censé que donner une procuration au porteur pour collecter le montant de l'effet; mais si l'endossement en blanc est donné par un tiers, il est considéré comme aval. C'est dans ce sens que s'expriment les autorités citées par les défendeurs, et que Savary, Parfait Négociant, vol. 1, p. 201, dit:—"Par tout ce qui vient d'être dit, la Cour voit que quand il se trouve plusieurs signatures en blanc au dos d'une lettre de change, elles sont réputées des avals ou cautionnements." Il fallait donc consulter les faits; mais en Bas-Canada l'endossement en blanc est permis et n'y peut servir comme procuration. Tout endossement en blanc est ou un transport ou un aval.

Rogue, Jur. Cons., vol 2, p. 354: "La signature en blanc, dit-il, au dos d'un billet au porteur sert de garantie au porteur à qui le billet est réputé lui appartenir." C'est précisément l'espèce posée devant la Cour dans cette cause.

Nouguier, Lettres de Change, vol. 1, No. 510, dit: "Une simple signature autre que celle du tireur, de l'accepteur, ou de l'endosseur, est même généralement considérée comme un aval."

"En effet, continue le même jurisconsulte, à quel titre ce tiers signe-t-il, si ce n'est pour s'obliger? Et s'il s'oblige, comment s'obligerait-il, si ce n'est à titre d'aval? Son intervention ne peut s'expliquer que par la volonté de cautionner." Voir aussi dans le même sens Pardessus, 2 Dr. Com. 256, No. 396; Massé, 4 Dr. Com., 526, No. 2725 (ed. 1862); Rivière, Répétitions écrites sur le Code de Com., p. 340 (ed. 1865); Namur, Dr. Com., vol. 1, p. 277 (ed. 1866); Bédarride, 1 Dr. Com., 473, sect. 360; Colmar, 22 nov. 1811; Bruxelles, 13 nov. 1830; Rejet, 30 mars 1819; Cassation, 25 janvier 1814; Cas. 4 mars et 31 décembre 1851; Dallos, vo. aval, No. 501; Répertoire du Palais, vo. aval, No. 25; Locré sur l'art. 142; Ponsot, du Caut., No. 418; Persil, de la Lettre de Change, p. 223; Merlin, Répertoire, vo. aval; Vincens, Lég. Commerciale, t. 2, p. 222; Goujet et Merger, vo. aval, No. 11.

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Il est bon de remarquer que toutes ces autorités, même celles qu'opposent les défendeurs, sont unanimes dans le sens que nous soutenons, et font également loi dans tous les pays qui, comme le Bas-Canada, se trouvent régis par les lois françaises, et où il n'y a aucune disposition statutaire au contraire. Aussi, il n'est pas étonnant de retrouver dans la Louisiane, cette autre colonie française qui, comme le Canada, a passé à une nation, régie par la loi commune anglaise, et a, comme lui, accepté plusieurs des règles et usages de la Grande-Bretagne en matière de commerce et surtout de lettres de change et billets promissoires, il n'est pas étonnant, disons-nous, de retrouver l'aval dans la jurisprudence Louisianaise, tel qu'il a toujours existé en France. C'est ainsi que dans plusieurs causes, les cours y ont maintenu que quand un tiers endosse en blanc un billet ou effet de commerce, et qu'il n'en est ni le tireur, ni le preneur, comme sont Messrs. MacDougall & Davidson, il est réputé donneur d'aval: Gilbert & al., vs. Cooper & al., 4 Robinson's Rep. 161; McGuire vs. Bosworth & al., 1 An. Louis., 248; Penny vs. Parham, 1 An. Louis., 274; Cooly vs. Lawrence, 2 Martin, 301; Guidroy vs. Vives, 7 id. 701; Smith vs. Gorton, 10 Louis. 374; Lawrence vs. Oakey, 14 Louis., 386; Drew vs. Robertson, 2 An. Louis., 592; McCaustán vs. Lyons, 4 id. 273. Dans la cause de McGuire vs. Bosworth, Eustis, J. C., remarqua: "It is settled by the uniform jurisprudence of this State that when a person not "a party to a note puts his name on the back of it, he is presumed to bind him-"self as surety."

Le Bas-Canada a adopté une jurisprudence semblable. La plus ancienne cause en mémoire au Barreau est, croyons-nous, celle de Bellingham et al., vs. Dorwin et al., No 1386, décidée par la cour du banc du Roi, composée du juge en chef Reid et des Hon. juges Pyke, Rolland et Gale. La question d'aval n'a été soulevée dans cette cause que d'une manière indirecte comme dans la cause récente et presqu'analogue de Tranchemontagne vs. Seymour, maintenant en appel (1). L'action était portée par Messrs. Bellingham et Wallis, sur le billet suivant:—

£25.1.9. Montreal, 7th March 1834.

"On the twenty fifth day of March next I promise to pay to Messrs. Bellingham "and Wallis, or order, twenty five pounds one shilling and nine pence, currency, "value received.

(Signé) Jos. McKellip.

Le billet fut livré à Messrs. Bellingham et Wallis, portant au dos la signature de "C. Dorwin." Le commis des demandeurs, qui avait écrit le billet, déclara qu'il l'avait ainsi rédigé par erreur, voulant mettre payable à l'ordre de M. Dorwin, et que plus tard lors qu'il se rendit à la banque pour l'y placer pour collection, le caissier exigea que Messrs. Bellingham et Wallis l'endossassent avant et après la signature de "C. Dorwin," ce qui fut fait. Le billet fut protesté et C. Dorwin, étant poursuivi avec le faiseur McKellip, prétendit qu'il n'était responsable que subsidiairement à Bellingham et Wallis, qui étaient dans la position de premiers endosseurs. Mais la situation originaire et première des parties au

(1). Cette cause a depuis été décidée dans le sens de Bellingham vs. Dorwin.—*Note du Rapporteur.*

billet fût établie, et la cour condamna M. Dorwin avec le faiseur conjointement et solidairement comme ayant été caution, *aval*, du faiseur. Ce jugement non motivé est du 18 avril 1835. Pratt et al., vs. MacDougall et al.

Dans la cause de Ouellet vs. Pariseau, qui est la plus ancienne que l'on trouve mentionnée dans nos rapports judiciaires, l'action était instituée sur ce billet :—
£20.0.0.

Montréal, 19 décembre 1848.

" Au premier de mai prochain, je promets de payer à M. Michel Méville dit " Déchêne, ou à son ordre, la somme de vingt livres courant, pour valeur reçue.

(Signé,) " FRANCOIS BENOIT.

(Endossé,) " HONORÉ PARISEAU."

Ce billet avait été transporté avec d'autres créances par Dechêne au demandeur Ouellet. Pariseau, le défendeur, admit " que la signature *Honoré Pariseau*, avait été apposée comme aval au dos du dit billet ;" et ainsi à cette époque on ne pensait pas encore à plaider que l'aval est inconnu dans notre droit. Néanmoins Pariseau ajoutait que, comme donneur d'aval, il avait droit à un protêt et à un avis de protêt, au moins à une demande de paiement à François Bénoit, le faiseur. La cour de circuit de Montréal, J. S. McCord, J., par son jugement du 29 avril 1850, condamna Pariseau au paiement du billet. Appel de la part de ce dernier à la cour supérieure, laquelle confirma en tous points le jugement de la cour inférieure. Cette dernière décision a été rendue par les Honorables juges Day et Smith le 11 juin 1850. Cette cause est mentionnée, sans détails, dans le *Law Reporter* de Messrs. Morin et Ramsay, p. 57.

Dans le même temps, les tribunaux de Québec consacraient la même doctrine dans la cause de Paterson et al., vs. Pain, rapportée au 1er volume des *Lower Canada Reports*, p. 219. Il s'agissait d'un billet ainsi conçu : Québec, etc. etc., " Je promets de payer à Pierre Boisseau, ou à son ordre, la somme de vingt cinq " louis, dix-huit chelins et neuf deniers pour valeur reçue."

(Signé,) EDWARD LACROIX.

(Endossé,) ELIZABETH PAIN
sa
marque
PIERRE BOISSEAU.

Le billet avait donc été transporté par le preneur Boisseau à Messrs. Paterson, Young et Cie., les demandeurs.

La défenderesse, Elizabeth Pain, soutenait que l'aval sous croix n'était pas valable et enfin, comme Pariseau, elle disait que les donneurs d'aval ont droit à des diligences, qui n'avaient pas été faites. Comme Pariseau, elle fut condamné par la Cour de Circuit, Duval, J., par jugement du mois de Mai 1850. Appel par Pain à la Cour Supérieure, laquelle (Bowen, J. C., et Meredith, J., siégeant), le 11 février 1851, maintint le jugement de la Cour de Circuit. " Considering," dit l'arrêt, " that the liability on the part of the said Elizabeth Pain, resulting from her having so caused her signature to be indorsed on the said promissory note, is to be determined by the Civil law of Lower Canada, according to which the signature of the said Elizabeth Pain, so indorsed on the said promissory note, constitutes an *aval*, and renders the said Elizabeth Pain, liable for the due payment of the note, jointly and severally with the maker thereof," etc.

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Dix années plus tard, la même règle était suivie à l'égard de l'endosseur du billet suivant:—

"One day after date, I promise to pay to D. B. Merritt or bearer ninety five "pounds and twelve shillings, currency, for value received on account of wood "for the Ontario and St. Lawrence Steamboat Company, in the year 1856.

(Signé,) "W. T. BARRON,
(Endossé,) "OWEN LYNCH."

Jugement intervint en 1860 en faveur de Merritt contre Lynch, malgré le défaut de protêt et d'avis de protêt. Berthelot, J., remarqua dans cette cause:

"The note here was evidently not signed by Lynch for the purpose of transferring it to Merritt, for Merritt's name is mentioned in the note as *payee*, the note being moreover payable to bearer. Lynch's signature was only put to guarantee the payment of the note."

Comme Merritt, les Messrs. Pratt sont devenus les propriétaires non par la signature de Messrs. MacDougall & Davidson, l'effet étant payable au porteur. Ils sont donc avals comme Lynch.

La cause de Narbonne vs. Tétreau, rapportée au 9e volume du Juriste nous offre un autre exemple récent d'un aval. Tétreau était poursuivi sur ce billet:—

"I, for value received, promise to pay Jean Tétreau or bearer the sum of "twenty dollars, ten the first January next and ten dollars the first April next "with interest."

Franklin, N. Y., Sept. 1861.

(Signé,) "WM. YOUNG.
"JEAN TETREAU."

Il faut bien remarquer que Jean Tétreau, qui avait signé au bas de Young, et non au dos du billet, en était le preneur; mais comme le billet était payable au porteur, sa signature n'avait d'autre signification que celle d'un aval. Le fait que Tétreau avait signé au bas du billet était sans importance; car l'endossement a lieu aussi bien sur la face qu'au dos d'un effet de commerce. Si le billet en question avait été à l'ordre de Tétreau au lieu d'être au porteur, nul doute que sa signature même au bas de celle de Young aurait été considérée comme endossement (Bateman, Com. Law, 324; 16 East 6). Tétreau fut donc condamné à payer, comme donneur d'aval, par la Cour de Circuit de St. Jean, le 12 mars 1863, Loranger, J., siégeant.

Le principe consacré dans toutes ces causes ne peut plus être contesté; il a été confirmé par la Cour d'Appel dans la cause non rapportée de Gauthier et al., vs. Lacroix et al., jugée le 20 septembre 1866. L'action était portée sur ce billet:—

"Montréal, 26 novembre 1861.

"$300.00

"Trois mois de cette date, pour valeur reçue, je promets de payer à l'ordre de "Gauthier & Desmarteau, au bureau de la Banque du Peuple, la somme de trois "cents dollars.

(Signé,) JOSEPH LACROIX.
(Endossé,)
"LOUIS A. HUGUET-LATOUR.
"P. G. LEMOINE."

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Le billet ne fut pas protesté, ou le protêt était nul, et Messrs. Latour et Lemoine, poursuivis par Messrs. Gauthier & Desmarteau, soutenaient qu'ils étaient endosseurs et non avals. Ils prétendaient que la doctrine quant aux avals avait été poussée bien trop loin dans la cause de Merritt vs. Lynch; que l'aval n'était pas connu dans la pratique du commerce canadien, et qu'il n'était ni plus ni moins qu'un piége tendu à la bonne foi des négociants, que les cours de justice étaient appelées à détruire. Messrs. Gauthier & Desmarteau disaient au contraire: "Il est impossible d'expliquer la signature de Latour et Lemoine "sur ce billet autrement qu'en la considérant comme un aval. Ils ont endossé "le billet avant les demandeurs, à l'ordre desquels il était payable; ils sont les "premiers endosseurs: et si leur signature ne peut valoir comme endossement, "elle doit être acceptée comme aval." La Cour d'Appel adopta ces raisons et confirma le jugement de la Cour Supérieure de Montréal.

Enfin, le Code du Bas-Canada a consacré cette jurisprudence dans un de ses articles; l'article 2311 déclare: "Le tiers qui garantit par un aval la lettre de "change est tenu de la même manière et dans la même mesure que la personne "pour laquelle il se porte garant." Entr'autres autorités au bas de l'article, on trouve Savary, Pardessus, Story, Bell, Merritt vs. Lynch, et 10 Louis. Rep. 374, c'est-à-dire précisément celles que nous avons invoquées.

Non-seulement l'aval est connu de la jurisprudence de tous les pays régis par le droit commun français; mais on le trouve en toutes lettres et dans la même mesure dans la législation et la jurisprudence de toutes les nations commerciales de l'Europe et de l'Amérique, aux Etats-Unis comme en Allemagne, en Angleterre même; et comme la célèbre opinion de M. le Sénateur Verplank, dans la cause de McLaren vs. Watson's Ex'rs, 26 Wendell 428, nous en offre un exemple remarquable, la tendance des idées actuelles est même d'adopter les articles du code Napoléon et de tous les codes européens sur l'aval et d'accepter l'aval par acte séparé. Voir Nouguier, Lettres de change, Etudes des législations étrangères, vol. 2, p. 467; 1 Bell, Com., 376; Chitty on Bills, p. 865; Calfavru, Dr. Com. comparé, p. 242; Story on Bills, § 372, 393, 454, 457; Parsons on Bills and Notes, vol. 2, p. 117, 118 (éd. 1867); Story on Notes, § 475, 480; 1 Hill 91; 2 Comstock 225; 8 Wend. 403, 421; 8 Pick. 122, 130; 24 id. 64; 7 Gray 284; 13 id. 580; 8 Met. 504; 6 Con. 315; 7 id. 310; 11 id. 440; 9 Vermont 345; 16 id. 554; 17 id. 285; 7 Mass. 232; 9 Mass. 313; 2 McCords R., 388; 9 Ohio 39; 13 id. 328; 9 Mass. 436; 31 Mai. 536; 36 id. 265; id. 147; 44 id. 433; 32 id. 339; 12 Vermont 219; 20 id. 335; 11 New Hampshire, 385; 7 Missouri 440; 18 id. 74; id. 140; 20 id. 571; 2 McMullan 313; 5 Richmond 305; 10 id. 17; et 12 Johns. 159; 13 id. 175; 14 id. 349 pour l'Etat de New York.

Voici les raisons que signalait Coffin, J., dans la cause de Lewis vs. Harvey 18 Missouri, à l'appui de cette jurisprudence:

"We think the strength of argument is decidedly opposed to the conclusion "that the party who puts his name upon the back of a note to which he is not "a party, whether it be negotiable or not, is to be held as an indorser. We "think that he is to be taken to have assumed the obligation arising from the "act of putting his name upon paper as it then was, and upon which he could

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"not then be an indorser. Shall he, then, be held to be guarantor or maker? In "the absence of all intrinsic evidence it is but giving effect to his signa- "ture to allow the holder to treat him as a maker, for that is the effect most bene- "ficial to the holder, and is entirely consistent with the meaning of his signa- "ture."

Nous avons rangé au nombre de ces autorités Chitty on Bills, bien qu'il dise que "this description of a surety (l'aval) is unknown in England." Chitty n'entend parler ici que de l'aval moderne, c'est-à-dire *par acte séparé*, aussi inconnu de l'ancien droit que de notre jurisprudence. La fin du même paragraphe de cet auteur et d'autres passages de son ouvrage font suffisamment voir que ses remarques en question ne s'appliquent pas à l'aval ou garantie sur le titre même; et comme l'observent les Codificateurs (Lois Com., p. viii), "il est probable qu'en Angleterre et aux Etats-Unis la règle de l'ancien droit français serait observée." La décision de la cause de McLaren vs. Watson's Ex'rs, maintenant que l'aval n'a lieu que sur le titre et non par billet séparé, justifie pleinement cette observation des Codificateurs.

Enfin, après les décisions dans les causes de Penny vs. Innes et de Mathews vs. Bloxsome, il ne peut plus rester de doute sur la conformité de la jurisprudence anglaise avec celle des autres nations.

Dans la cause de Penny vs. Innes, John Rose Innes était poursuivi par John Penny, associé survivant de Robert Brookes sur la lettre de change suivante:—

"£200, 0s. 0d. "9th Sept. 1829.

"Twelve months after date, pay to me, or my order, the sum of two hundred pounds, for value received.

"WILLIAM WILSON.

"Messrs. Henry Wilson & Co., Pedlar's Acre, Lambeth."

(Endossé.)

"Pay to Messrs. Brookes and Penny or order.

"WM. WILSON.
"JOHN ROSE INNES.
"BROOKES & PENNY.

John Rose Innes fut condamné non pas comme endosseur, mais parce qu'étant dans la position d'un nouveau tireur il se trouvait responsable comme William Wilson. "Every endorser," disait Parke, B., dans cette espèce, "of a bill is a new drawer; and it is part of the inherent property of the original instrument that an endorsement operates as against the endorser in the nature of a new drawing of the bill by him.....The endorsement by the defendant was equivalent to the drawing of a new bill, and was intended to transfer that new bill to the Plaintiff. It has been argued that the case may be treated as if the defendant was the endorsee of the plaintiff and Brookes, and as if he had again delivered the bill to them; and it is said that in such a case, to avoid circuity of action, the Plaintiff ought not to be suffered to recover. But the fact was not so. The defendant never was the endorsee of plaintiff and Brookes, nor was it ever intended to convey the property in the bill to him." (1 C., M., & R., 439)

Ce précédent est de la cour "Exchequer" (Lord Lyndhurst, C. B, Parke, B., Alderson, B., Guerney, B. siégeant), et remonte à l'année 1834.

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Le principe consacré dans la cause de Penny vs. Innes a récemment reçu un nouveau développement devant la Cour du Banc de la Reine, dans la cause de Matthews vs. Bloxsome, décidée le 3 Mai, 1864, et rapportée au 10eme volume du *Jurist, N. S.* p. 998.

Il s'agissait dans cette espèce de la traite suivante tirée et payable à Londres. L'action était dirigée contre Joseph Bloxsome.

"London, February 28th, 1857.

"Forty six months after date pay to our order the sum of fifty pounds for value received.

(Signé,) "MATHEWS & PEAKE.
(Endossé,) "W. EDMOND.
"JOSEPH BLOXSOME.
"MATHEWS & PEAKE.

"To Mr. Richard Bloxsome, 129, Regent Street."

Sur la face se trouvait l'acceptation suivante:

"Accepted, RICHARD BLOXSOME."

COCKBURN, C. J.—I am of opinion that the plaintiffs are entitled to our judgment upon the third count. The decision of the Court upon the demurrer to the first count was, I think, right, inasmuch as the defendant was therein charged as endorser of a bill drawn by the plaintiffs, which in legal acceptation he was not. No title or legal interest ever passed through him to the plaintiffs, and no person can be sued as endorser who does not pass such an interest. But upon the third count, in which the defendant is sued as drawer by the plaintiffs as holders of the bill, it seems to me that the plaintiffs are entitled to recover upon the authority of Penny vs. Innis. In that case a person, not originally a party to the bill, intervened, and put his name thereon and was held liable, the court laying down as a general proposition that every endorser is to be considered as the drawer of a new bill. The doctrine amounts to this—that a man who puts his name in this way as endorser, although not in legal acceptation an endorser, nevertheless does what an endorser does; *that is to say, he guarantees the payment by the acceptor at maturity of the bill.* The same consequences attach in the case of a drawer, and it is *in this capacity, and not as an endorser,* that a person who puts his name to a bill, as in the present case, is liable. And this is in accordance with justice and sound sense; and here it holds equally good, whether we look at the bill as a mercantile instrument, or regard the intention of the parties. As to the intention, it clearly was, that the defendant should guarantee payment of the sum secured by the bill of his brother, the proposed acceptor, to the plaintiffs; and to carry out this intention he puts his name in such a manner, as it so happens, as that he cannot be sued upon it as endorser; but inasmuch as he intended to be liable upon it in some form or another, it is in accordance with his intention that he should be liable as drawer. If we look simply at the instrument, we cannot take into consideration the question whether he put his name thereon before or after the instrument was filled up; all we have to look to is, the fact that he put his name to it; and that being the case, according to Penny vs. Innes, *he is to be treated not as an endorser, but as a drawer.*

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BLACKBURN, J.—I cannot do otherwise than hold that the defendant made himself liable by his endorsement, either as a drawer of a bill payable to bearer, or according to the tenor and effect of the bill itself, of a bill payable to the plaintiffs' order.

MELLOR, J.—I am of the same opinion. It is not necessary for us to say in what precise form the declaration should be drawn; the substantial question, however, is, whether or no a person who puts his name to a bill in this particular manner thereby incurs any legal liability? The effect of what the defendant has here done is to guarantee the payment of the bill according to its tenor and effect, and this virtually amounts to a new drawing.

SIBE, J.—"The defendant here may be treated as drawer; that is, as guaranteeing the payment of the bill by the acceptor; and in so deciding, it seems to me that we are proceeding in conformity with Penny vs. Innes."

Telle est la jurisprudence de toutes les nations commerciales sur l'aval, sur la responsabilité de celui qui, comme Messrs. McDougall & Davidson, n'étant ni tireur, ni preneur, met sa signature au dos d'un effet de commerce.

Les Défendeurs, à l'audition, ont prétendu admettre ces autorités; mais disent-ils, elles ne s'appliquent pas au cas actuel, parce que l'aval est une question de fait qui est laissée à l'arbitrage du juge. Qu'il s'agisse d'une question de fait, ou d'une question de droit et de fait tout à la fois, il est incontestable que les opinions des jurisconsultes et les décisions des cours sur des cas analogues doivent déterminer le tribunal.

III. Mais dit-on, le chèque n'est pas susceptible d'un aval? Il semblerait bien extraordinaire qu'un chèque ne fut pas susceptible d'un aval, le chèque qui est payable à demande, est avant tout destiné à effectuer des paiements et à passer de main en main comme l'argent courant, et qui pour ces considérations a besoin de tant de garantie, d'un crédit pour ainsi dire infaillible. Comment! un négociant, un particulier non connu, transige hors des heures de banque et il offre son chèque en liquidation, avec la garantie d'un tiers connu, et l'on dira que ce tiers, qui a tout simplement mis sa signature au bas de celle du tireur ou au dos du chèque payable au porteur ou à l'ordre du preneur, n'est pas caution ou donneur d'aval! Evidemment, ce serait décider contre la volonté des parties, contre le fait même, introduire un principe pernicieux pour le commerce.

Le chèque n'est pas susceptible d'un aval, mais que vaudrait alors la signature de ce tiers, qui n'a jamais vu le preneur ou le porteur et qui est intervenu pour répondre de la valeur du chèque? Encore une fois, elle ne peut valoir que comme garantie, cautionnement, aval du tireur.

Et enfin quels inconvénients peut-on signaler contre l'aval sur un chèque? Est-ce parce que le chèque n'est pas causé *pour valeur reçue*. Mais ces mots ne sont pas de l'essence d'un billet, ni d'une lettre de change. Est-ce encore parce qu'il ne porte aucun terme de paiement? Encore cette formalité n'est pas requise. Où se trouve donc l'impossibilité? Le chèque comme la lettre de change n'est-il pas une réquisition de payer au porteur ou à ordre, négociable de la même manière, identique pour ainsi dire dans sa forme essentielle, comme l'attestent d'ailleurs les codificateurs dans leur rapport sur les *Lois Commerciales*, p. xi. Soutiendrait-on enfin que nos cours de justice n'auraient pas également considéré

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Pariseau, Pain, Lynch et autres, comme donneurs d'aval, s'ils eussent apposé leur signature au dos d'un chèque au lieu d'un billet ?

Les Codificateurs ont fort bien senti que l'aval sur un chèque était une nécessité de commerce, et ils en ont consacré le principe dans un article.

L'article 2354 veut que les règles sur la lettre de change de l'intérieur s'appliquent aux chèques, *en autant que l'application en est compatible avec l'usage du commerce.* Cet article se rapporte au transport des chèques, à leur négociabilité, à la prescription, *à l'aval* enfin, et à toutes les opérations qui peuvent intervenir dans la négociation d'un effet de commerce, et dont le chapitre "*Des chèques ou mandats à ordre*" ne parle pas spécialement, pour éviter sans doute des répétitions inutiles, la lettre et le chèque se ressemblant sous tant de rapports. L'usage du commerce n'offre rien qui empêche qu'un chèque soit payable au porteur, ou à ordre, et alors le transport s'en fera comme dans le cas d'une lettre de change et d'après les mêmes règles. L'usage du commerce n'a rien non plus qui prohibe l'intervention d'un tiers par aval dans la négociation d'un chèque; et par conséquent l'aval apposé sur un chèque sera, aux termes de cet article, traité comme l'aval sur la lettre de change.

Maintenant, si l'on consulte Pothier, Savary, Rogue, Dupuy de la Serra et tous les commentateurs de l'ancien Droit, on verra que le Code n'est que déclaratoire de l'ancien droit sur la question qui nous occupe; on sera bientôt convaincu que la seule différence qui existait dans l'ancien droit entre la lettre de change et le mandat ou mandement, consistait dans la contrainte par corps et les diligences, comme nous l'avons signalé en commençant; et c'est dans ce sens que Denizart, vo. *Rescription*, dit que "les rescriptions des banquiers se traitent comme les lettres de change." Voir surtout Savary, Parères, vol. 2, p. 714, 715.

Pareillement en Angleterre et aux Etats-Unis, on y traite les chèques à peu près comme les lettres de change—Lord Kenyon (Boelm vs. Sterling, 7 T. R., 419,426) dit: "There is no difference between bankers' checks and bills of exchange "and the same rules apply to both." Nelson, J. C. (Little vs. Phœnix Bank, 2 Hill, 430) dit de son côté pour les Etats-Unis: "For all essential purposes checks are bills of exchange and therefore to be dealt with according to the same rules of law."

La même règle a été maintenue dans les causes suivantes: Harker vs. Anderson, 21 Wend. 372, per Cowen; Cruger vs. Armstrong, 3 Johns. Cases, 5, 7, 8, per Radcliff, J. et Kent, J.; Merchants Bank vs. Spicer, 6 Wend. 443, 445, Marcy, J.; Murray vs. Judah, 6 Cowen 484, 490, per Sutherland, J.; Chapman vs. White, 6 New York Rep. 412, Gardener, J.; Brown vs. Newell, 8 N. Y. Rep. 190; Keene vs. Beard, 8 C. B, N. S. 372, Law Rep. 171, 187; Daniels vs. Kyle, 1 Kelly 304; Janes vs. Smith, 20 Wend. 192; Bowen vs. Newell, 4 Seld., 190; 5 Sand. 326, 6 Kent's Commentaries 75; Chitty on Bills 511; Byles on Bills 10; Bateman, Commercial Law, No. 289; The Cabinet Lawyer for 1864, p. 361.

La jurisprudence de la Louisiane se prononce dans le même sens. Dans la cause de Barbour vs. Bayon, 5 An. Louis. Rep. 304, Slidell, J., dit: "Although not identical with a bill of exchange, a check on a bank is governed by the same

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rules."—Voir aussi l'opinion du Juge-en-Chef Martin dans la cause de la Banque de la Cité de la Nouvelle-Orléans vs. La Banque Girard.

Dans le fait, les négociants ont mis presque sur le même pied ces deux effets, et leurs idées sont tellement fixées sur ce point que dans la pratique des affaires l'on voit aux Etats-Unis des lettres de change étrangères ainsi formulées : "Pay by this first cheque (second unpaid)," et en France : "Payez par ce seul *mandat*."

Le chèque et la lettre sont presque semblables ; ils sont régis par les mêmes principes ; ils sont donc capables des mêmes opérations et négociations.—Le chèque est donc susceptible d'un aval comme la lettre de change, et alors cet aval sera soumis aux règles de l'aval mis sur la lettre de change.

Mais il y a plus : Supposons que le chèque ne ressemble pas à la lettre de change dans le sens que nous soutenons, on ne saurait disconvenir, et on a admis à l'audition, que le chèque est un effet de commerce lorsqu'il a pour objet un trafic de banque ou qu'il intervient entre des négociants, comme dans le cas actuel. Répertoire D'Auvilliers, vo. Mandat de paiement, no. 11 ; Merlin vo. Rescription ; Pardessus, Dr. Com. no. 464.

Or l'Ordonnance de 1673, tit. 5, article 33, déclare ce qui suit : "Ceux qui auront mis leur aval sur des lettres de change, &c., *sur des ordres*, etc., *ou autres actes de pareilles qualités concernant le commerce*, seront tenus solidairement avec les tireurs, etc."

D'après cette disposition, non-seulement la lettre de change, mais encore tous les effets de commerce en général sont susceptibles d'un aval. L'article ne parle pas nommément des billets promissoires ; mais étant des effets de commerce, ils sont compris dans ces mots "ou autres actes de pareille qualité concernant le commerce," comme l'affirme Savary, Parf. Nég. vol. 1, p. 218.

De même, le mandement ou rescription, le chèque ou mandat suivant le langage moderne, étant un effet de commerce, est susceptible d'un aval. Mais non seulement ces effets, qui aujourd'hui circulent comme le papier crédit, sont des actes de commerce capables de recevoir l'intervention d'un tiers par aval, mais encore tous les autres effets de commerce, comme la lettre de crédit, la lettre de voiture ou connaissement, *bill of lading*, un reçu de marchandises en douane ou en voute, connu en France sous le nom de *récépissé* et en Angleterre, *warehouse receipt*, un certificat de dépôt en banque, *certificate of deposit*, qu'ils soient négociables ou non ; et la législation récente sur l'impôt du timbre, 27. 28 Vict., c. 4, en mettant sur le même pied la lettre de change, le billet promissoire, la lettre de crédit, le certificat de dépôt d'argent, et en prenant le soin de faire une exception spéciale en faveur du chèque, ne semble-t-elle pas consacrer ce principe ancien que tous ces effets de commerce doivent être traités d'après les mêmes règles, en autant, bien entendu, que la nature respective de ces actes ne s'y oppose pas.

Mais ont dit les défendeurs à l'argument, l'Ordonnance de 1673 n'a pas été enrégistrée au Conseil Supérieur de Québec ; elle ne fait donc pas loi. Elle ne fait point loi quant aux articles introductifs d'un droit nouveau ; mais elle peut être citée comme étant la plus sûre autorité, lorsqu'elle n'est que déclaratoire d'un droit ancien ; et même en Angleterre et aux Etats-Unis, on la consulte tous

les jours comme raison écrite, la source même des règles qui gouvernent aujourd'hui le monde commercial. Pratt et al., vs. MacDougall et al.

Et où est le commentateur qui ait jamais affirmé que l'article 33 en question ait dérogé ou innové à l'ancien droit. On ne peut pas en citer un seul; et Savary, ce négociant de près de quarante années d'expérience, qui a rédigé presque tous les articles de cette célèbre ordonnance et s'empresse toujours d'en signaler les règles nouvelles, ne dit pas un seul mot des innovations qu'aurait introduites l'article 33 dans le droit français. Il est si vrai que l'ordonnance n'a introduit aucun droit nouveau sur ce sujet, que presque tous les auteurs qui l'ont commentée ne citent pas même l'article 33 pour décider que l'aval se met sur tous les effets de commerce.

C'est ainsi que Rogue, vol. 2, p. 353, dit: "Lorsqu'on a mis son aval au bas d'une lettre de change, *ou autre acte qui a rapport au commerce*, cela forme une obligation solidaire [illegible] encore cautionnement, faire valoir."

Guyot, vo. Aval, [illegible] "Ceux qui mettent leur aval sur des lettres de change, promesses, billets [illegible] *de commerce*, deviennent solidairement tenus avec ceux pour lesquels [illegible] pris un engagement."

LaCombe, vo. Lettre de change, dit: "Donneurs d'aval sur lettre de change, "ordres ou acceptations, billets de change *ou autres actes de commerce*, sont "tenus solidairement avec les tireurs, etc."

Toubeau, Inst. du Dt. Cons. vol. 2, p. 242, affirme que l'article 33 de l'Ordonnance n'était que la reproduction de la 78e Décision de la Rote de Gênes, et un arrêt du Parlement de Paris du 17 décembre 1615, rapporté au Recueil des Arrêts de Bouchel et Joly, ch. 16, fait voir qu'il formait le droit commun de la France; enfin en référant à Heinneccius, *Elem. Jur. Camb.* 6, 10, on se convaincra qu'il était d'accord avec la jurisprudence européenne du temps.

Il y a plus encore: Bornier, Conférence des Ordonnances, vol. 2, p. 611, dit formellement que l'aval se met sur le mandat comme sur la lettre de change; voici comment il s'exprime: "Celui qui sort de caution, met seulement sur la lettre ce mot *aval*, au-dessus de sa simple signature; et par icelle il s'oblige solidairement au paiement d'icelle; mais quoiqu'il [illegible] pas observé cette formalité de mettre le mot *aval* au-dessus des signatures [illegible] des signatures qu'il a mises ensuite de celle du tireur ou *au dos des lettres ou* MANDEMENS, *ne laissent pas pour cela de passer pour des avals et cautionnements.*"

IV. A l'audition, les défendeurs ont prétendu que les donneurs d'aval avaient droit de s'attendre à des diligences; et ils se sont appuyés sur un passage de Rogue, Juris. Cons. vol. 2, p. 371, no. 11, qu'ils n'ont pas compris; et il faut bien leur pardonner cette mépriso, puisque les demandeurs se sont eux-mêmes laissés surprendre sur la portée des remarques de cet auteur, lorsqu'elles ont été citées à l'argument. Une lecture tant soit peu attentive de ce paragraphe convaincra en effet que Rogue veut tout simplement dire à cet endroit que si l'aval est fourni pour l'endosseur, il faut faire les diligences; et c'est ce qui résulte pleinement de ces derniers mots du même paragraphe; "mais s'il est mis au bas de la lettre, il faut faire des diligences dans le temps prescrit contre le tireur."

Tous les autres commentateurs sont d'ailleurs unanimes sur ce point, et j

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suffit de référer aux autorités sur l'aval qui se trouvent cotées plus haut, même aux décisions américaines et louisianaises pour se convaincre que l'obligation du donneur d'aval, étant commerciale, est solidaire, identique avec celle de la personne qu'il cautionne, obligé de la même manière que le débiteur principal, libéré s'il l'est, tenu au paiement s'il est encore responsable.—Voir aussi: Code du B. C. art. 1105, 2311; 78e décision de la Rote de Gênes; arrêts du 9 mai 1577, 14 février 1591, 17 juin 1672, et autres arrêts du Parlement de Paris du 29 avril 1564 et août 1594, tous cités dans Toubeau, Inst. vol. 2, p. 30-33; et principalement la liste d'autorités citées au bas du rapport de la cause de Merritt vs. Lynch (3 Jur. 280).

Or, quelle est la responsabilité du tireur d'un chèque? Il est toujours responsable jusqu'à ce que la prescription soit acquise, à moins que par la faute du porteur de présenter le chèque à la Banque, cette dernière faillisse, auquel cas il est déchargé jusqu'à concurrence de ce qu'il en souffre. "If a check, dit Parsons on Bills (éd. 1867) vol. 2, p. 72, be presented long after date, and is refused payment, not on account of a failure, but because the drawer has closed his account or withdrawn his funds, the drawer is still liable.." Voir Peck vs. Craft, 4 Duer 122; Serle vs. Norton, 2 Moo. et Rob. 404; Alexander vs. Burchfield, 7 M. & G. 1067; Robinson vs. Hawksford, 9 Queen's Bench 52; Laws vs. Rand, 3 C. B. N. S. 442; Mullick vs. Radakissen, 9 Moore, P. C. 46; 28 English L. & Eq. 86; Conroy vs. Warren, 3 Johns. Cas. 259; Murray vs. Judah, 6 Cowen, 484; Elting vs. Brinkerhoff, 2 Hall 459; In re Brown, 2 Story, 502; Little vs. Phenix Bank, 2 Hill 425; Oxley, 3 Iowa 289.

Dans les causes de Laws vs. Rand et de Robinson vs. Hawksford qui sont deux causes modernes anglaises, on a décidé "that no time less than six years was an unreasonable time to present a check, unless some loss accrued meanwhile to the drawer." A check "disait le Baron Parke," (9 Moore, P. C. 69,) is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the check must be considered as the person primarily liable to pay to his orders, his debt to be paid at a particular place and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place, and not elsewhere, who has no right to insist on immediate presentment at that place, (voir aussi, Pothier, Change, No. 229).

Or, l'on sait que le faiseur d'un billet aussi bien que l'accepteur d'une lettre de change, payable à un lieu particulier, ne peut à bon droit se plaindre du défaut de présentation qu'on plaidant et justifiant de la présence des fonds et en les consignant en justice. Story on Bills, § 356; Story on Notes, § 228, 1 Am. Lead. Cases p. 365; 10 Robinson R. 533, 540; Rice vs. Bowker, 3 Lower Canada Reports, 305; Mount vs. Dunn, 4 id. 348. La Cour d'Appel dans cette dernière cause déclara en effet entre autres choses: "La Cour etc., considérant qu'en supposant que dans l'espèce ce défaut de demande préalable de paiement au dit lieu indiqué n'aurait pu fournir à l'intimé un moyen de défense à l'action de l'appelant qu'en autant que l'intimé aurait eu plaidé et prouvé en même temps qu'une provision, conformément à la loi, avait été faite en temps utile, au dit lieu indiqué pour payer le dit billet." &c.

Mais allons plus loin. La position du tireur d'un chèque ne peut certainement être plus favorable que celle du tireur d'une lettre de change. Or suivant la jurisprudence incontestable du Bas-Canada le tireur d'une lettre de change ne peut invoquer le défaut de présentation qu'en établissant la présence des fonds nécessaires. "There seems," disait Mr. Juge Day dans la cause de The Bank of Montreal vs. Ruston, Knapp et Noad (1 L. C. Rep. 252, 270) "there is no room for doubt that by the law of France, as it stood under the old system, the obligation was imperative upon the drawer to provide funds in the hands of the acceptor, for the payment of the bill, if he would avail himself of the laches of the holder." Plus loin son Honneur ajoute: "I have, at no time, felt any difficulty in this case, with respect to the plaintiff's right to recover from the drawers." C'est aussi ce qu'a déclaré Sir J. Stuart, J. C., lorsque la même cause fut jugée en appel. "A good deal of learning," disait le savant juge, "has been displayed as to the question of 'no effects,' but this could only apply to the drawers. Absence of effects according to the law of France could only affect the drawers in this cause, it is chose jugée as against the drawers."

Ritchie, Q. C., for defendants.—The action of the plaintiffs is for the recovery of two hundred and twenty dollars, amount of a cheque upon La Banque Jacques Cartier, drawn by the late J. E. Malhiot, on the fifteenth day of February, eighteen hundred and sixty-four, in favour of (no name inserted) or bearer, and endorsed by the defendants in blank. The plaintiffs in their declaration allege that after Malhiot drew the cheque, he requested the defendants "de mettre au dos d'icelui leur signature sociale *dans le but* d'en garantir le paiement et de devenir cautions par aval du dit J. E. Malhiot," and that the defendants did in fact so place their partnership name on the back of such cheque with the intention of binding themselves "par aval et comme cautions solidaires" of the drawer of the cheque. That the plaintiffs became the holders of the cheque for value; that about the sixteenth of February, eighteen hundred and sixty-four, and at different times since, the cheque was presented at the bank and payment refused, neither Malhiot nor the defendants having any funds there. That when Malhiot drew the cheque he was insolvent, and the defendants knew it, and that when the action was brought, Malhiot had been ill and was confined to his bed for several months. That since the date of the cheque the defendants *had been repeatedly notified that the cheque had been dishonored and had always, since the sixteenth of February, eighteen hundred and sixty-four, known that fact*, but that nevertheless the defendants had refused to pay it.

The defendants pleaded. First, a défense en fait; second, a special plea in which, admitting the signature "Macdougall & Davidson" on the back of the cheque to be theirs, they specially deny that they placed it there as *cautions par aval* of Malhiot, and expressly put that fact in issue. The defendants allege that they placed their signature on the back of the cheque as endorsers and as a *procuration* authorizing their names to be inserted on the face of the cheque as payees, *and with the intention that the cheque should forthwith be presented for payment*, and that in case of non-payment it should be protested and they should have due notice. That the cheque never was protested, and that the

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plaintiffs did not use due diligence in presenting the cheque and in recovering the amount of it from Malhiot, *and that for more than seven months the defendants* were kept in ignorance *that the cheque remained unpaid and that plaintiffs did not during that time notify them that they (plaintiffs) held the cheque, nor demand payment of it from the defendants.* That Malhiot frequently had funds sufficient to meet the cheque, and defendants could have recovered the amount had the cheque been protested and they notified.

The plaintiffs fyled a special answer, the only new allegation in which is that the cheque in question represented a loan from the plaintiffs by Malhiot *to be paid on demand*, and which loan the plaintiffs refused to make without the guarantee of some solvent third party.

This admission in the plaintiffs' special answer is somewhat important, as it shews that the cheque was not taken by the plaintiffs in the ordinary course of business, nor was intended by plaintiffs to be forthwith presented in the usual manner, but as an *irregular* security for a loan to Malhiot payable by him on demand. *No demand was made on Malhiot for payment of the loan.* The special answer of the plaintiffs places them in a worse light, if possible, than the facts disclosed in the other pleadings had done, and removes every shadow of equity from their claim against the defendants.

The pleadings in this case raise three principal questions, viz.:

1. Did the defendants, as a matter of fact, place their names on the cheque as *cautions par aval*?

2. What liability did the defendants incur by placing their blank endorsement on the cheque?

3. Were the plaintiffs bound to use any diligence in respect of presenting the cheque for payment and notifying the defendants?

1. The leading case in Lower Canada upon the subject of "aval" (Merritt *vs.* Lynch, 3 Lower Canada Jurist, page 276) lays down the doctrine that the question whether a party intends to sign as *aval* is a question of fact. In the present case there is no direct and positive evidence, Malhiot being dead, of what the intention of the defendants was in placing their signatures on the back of the cheque, but the evidence of a number of merchants and bankers shows conclusively that the practice of signing or endorsing cheques *pour aval* has never been known in this Province. Unless, therefore, the defendants deliberately intended to extend a doctrine, of which they were entirely ignorant, to cheques upon banks, their statement that they meant to become ordinary endorsers and to authorise their names being used as payees on the face of the cheque must be accepted. (Where payee's name is left in blank, the legal holder may fill up the blank. Code, Article 2282). There can be no doubt that had the words "pour aval" been written on the back of the cheque, and their meaning explained to the defendants, they would have refused to endorse it. Had they been aware that the cheque was to represent a loan to be made by some person unknown, to Malhiot, and of which payment had to be demanded of him, they would equally have declined to become endorsers of the cheque. Malhiot is alleged by the plaintiffs to have been insolvent when the cheque was drawn, and assuming that to be the fact, it is unreasonable to suppose that the defendants would assume a

liability as *cautions* which would last for six years at least, and might, perhaps, by means of repeated demands of payment of the maker, be made to last an infinite period. It is clear then that the defendants only meant to become endorsers for a temporary purpose and with the understanding that due diligence should be used in presenting the cheque and notifying them of its non-payment. The evidence in rebuttal adduced by the plaintiffs really amounts to nothing, for even Mr. Atwater, who seems to have some knowledge of the nature of an *aval*, only acquired that knowledge subsequent to the date of the cheque in question. The case of the plaintiffs, as the defendants contend, is disposed of, upon the issue of fact raised by the pleadings, viz: did the defendants sign the cheque *pour aval*?

An endorsement is not presumed to be an *aval*, 1 Nouguier, No. 497. "L'aval étant un cautionnement, et un cautionnement d'une nature toute par-" ticulière, ne se présume pas et doit être expressément prouvé. Quoi qu'il " puisse résulter de simples inductions, *par exemple d'une signature* (on le " verra ci-dessous), il faut que ces inductions soient d'une nature telle que la pen-" sée de celui qui s'oblige, dégagée de toute équivoque, apparaisse claire et " nette.

"Ainsi, le créancier qui se prétend nanti d'un aval doit établir non seulement " que son obligé a voulu garantir paiement de son titre, mais encore le garantir " *au moyen d'un aval.*"

2 Pardessus No. 396. "Il arrive souvent que celui à qui on oppose que cette signature en blanc n'est qu'une procuration *prétend la faire valoir comme un aval. C'est à lui à prouver ce qu'il avance* puisque cette signature isolée se prête à l'une ou à l'autre interprétation: et c'est aux tribunaux qu'il appartient d'apprécier les circonstances."

2. Can a signature upon the back of a cheque be considered as an *aval*?

The defendants respectfully submit that it cannot; and very slight attention to the nature and history of the *aval* will suffice to establish their pretension. The practice of signing or endorsing bills of exchange, promissory notes and other commercial instruments of a like nature *pour aval*, arose out of the existence of commerce. It grew up entirely by mercantile usage. Its object was to secure payment of *actes de commerce where a term was given for delay in transmission* (as in the case of a bill of exchange). There is no instance of its having been extended to cheques upon banks which are intended to be paid immediately, and which, although in many respects similar to bills of exchange, have many marks of difference. Most of the authors in treating of the subject, speak of the usage as applied to bills of exchange and notes only. "Aval est une " souscription mise au bas d'une lettre de change, ou billet de change, &c. Pour " l'ordinaire l'aval *qui se met au dos d'une lettre de change* ou billet, est ainsi énoncé " *pour aval*, et au dessous de ces mots, celui qui a fait l'aval, met sa signature." " (Ferrière Dict. de Dr. vo. *aval.*")

"Lorsqu'un négociant *veut se porter caution du paiement* d'une lettre de change, ou de *quelqu'autre billet de commerce, il est d'usage* qu'il mette au bas "ces " mots *pour aval* avec sa signature et l'on nomme aval l'engagement même qui a été contracté de cette manière." (Nou. Denizart, vo. Aval.) Sometimes for the

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sake of brevity, the donneur d'aval "se contente de mettre la signature au bas "de la lettre." (Same, vo. aval, § 2,) "Ceux qui auront mis *leur aval* sur les lettres "de change, sur des promesses d'en fournir, sur des ordres ou des acceptations, sur "des billets de change ou *autres actes de pareille qualité* concernant le commerce, "seront tenus *solidairement*, &c." (Ord. 1673. article 33.) Now Denizart explains that the "*autres actes de pareille qualité*" are billets de commerce, (Vo. Billets de com.) This section, as the counsel of the plaintiffs contends, (page 15 of his memorandum) is only declaratory of the old law. There is nothing in it to extend the *aval* to cheques. Pothier states that "les avals ou cautionnements "en cette forme n'étaient plus guère en usage." (Change, part 1, c. iii, § 4). The plaintiffs are seeking to extend a usage which even in Pothier's time was almost obsolete, to a class of commercial instruments, the very nature of which almost precludes the possibility of such a usage arising in respect of them. The defendants respectfully contend that both the facts of the case and the law are against the pretensions of the plaintiffs.

3. But supposing that the defendants did intend to become *cautions par aval*, the plaintiffs have lost their recourse by their own want of diligence. The cheque in question, given, according to the allegations of the plaintiffs, to secure a loan of a very irregular description, was not presented at the bank for about *fifteen days* after it was drawn. It was not presented to the defendants for payment for seven months after its date, during which time the defendants were in ignorance of its non-payment or of its being in possession of the plaintiffs. *During that long period the defendants had no means of protecting themselves*, owing to the negligence of the plaintiffs; and it is proved that *at different times Malhiot had funds in the bank to meet the cheque.* The plaintiffs well understood that they were bound to use diligence in presenting the cheque, and they had it presented at the bank upon two or three occasions, and left it there for collection, but withdrew it when it would have been met had they not taken it back. The evidence clearly establishes that if the defendants are condemned, they have lost all recourse owing to *laches* of the plaintiffs. The holder of an instrument, secured by *aval*, is bound to use diligence and will be liable for any loss sustained by the want of it. (Story. Prom. Notes, §460) Rogue says (vol. 2, chap. 66, No. II): "On doit faire les mêmes diligences contre un donneur "d'aval que contre un endosseur, si l'aval est au dos de la lettre, *mais s'il est au "bas de la lettre il faut les faire dans le temps prescrit contre le tireur, sinon "on est non recevable.*" The plaintiffs' counsel endeavours to explain away this authority, but without success. See also No 12 following, as to negligence.

The holder of a cheque is bound to present it at the bank within a reasonable time according to the usages of trade. (C.C. 2291, 2351, 2354). The usual time in Montreal is twenty-four hours. In this case presentation was delayed about two weeks.

The law of England applies to questions upon cheques where our own law is silent (Code 2340, 2354). There is no provision for *aval* upon cheques, and to apply its use, as applicable to bills of exchange, would be inconsistent with the usage of trade. By the law of England a cheque has to be presented within

twenty-four hours after its date, adding the time required for transmission, if it be drawn in one place upon a bank in another place (Byles on Bills, pages 13 and 14).

The defendants respectfully submit that the action of the plaintiffs should be dismissed with costs.

MONK, J.—Cette cause est d'une grande importance pour le commerce. L'action est portée sur un chèque payable au porteur, tiré par J. E. Malhiot et endossé par Messieurs MacDougall et Davidson. Ces derniers, qui sont seuls poursuivis, plaident qu'ils sont endosseurs, que le chèque était ainsi payable au porteur, pour autoriser le propriétaire de l'effet à le remplir du nom de Messieurs MacDougall et Davidson, et qu'enfin les Messieurs Pratt n'ont fait aucune diligence. A cette défense les porteurs répondent que les défendeurs sont donneurs d'aval, et comme tels n'ont droit ni à une présentation, ni à un protêt, ni à un avis de protêt.

Il n'y a aucun doute que les demandeurs ont retardé longtemps à présenter le chèque à la banque. Plus de quinze jours se sont expirés avant que demande de paiement fut faite, et néanmoins il est en preuve que depuis la réception du chèque jusqu'à ce jour là, Malhiot avait des fonds à la banque. C'est encore au bout de sept mois que les Messieurs Pratt avertissent verbalement les défendeurs que le chèque n'a pas été payé. Les demandeurs étaient-ils dans leurs droits, en agissant ainsi? voilà la question?

Les défendeurs prétendent que la question d'aval est une question de fait; à mon avis c'est une question de fait et de droit tout à la fois, et peut-être plus de droit que de fait; mais je n'ai aucun doute que cette garantie peut être stipulée sur tout effet de commerce, sur un chèque comme sur un billet promissoire.

La signature des défendeurs peut-elle être prise comme endossement? Mais ils n'ont jamais été porteurs et n'ont jamais transigé avec les demandeurs, qui ne connaissaient que M. Malhiot. C'était donc pour garantir le paiement du chèque que les défendeurs sont intervenus dans la négociation de l'effet. A part cette circonstance, le fait que le chèque était payable *au porteur* suffirait à lui seul pour faire voir qu'ils n'ont pas signé comme endosseurs, l'endossement n'étant rien autre chose que la cession, la vente, le transport de l'effet. Mais si les défendeurs ne sont pas endosseurs que sont-ils? Car personne n'est présumée en loi avoir apposé sa signature sans encourir par là une responsabilité légale. Et ici, quelle sera cette responsabilité, si ce n'est celle qui résulte d'aval, et qui s'accorde avec l'intention des défendeurs, puisque c'est pour permettre au tireur Malhiot de réaliser un emprunt, qu'ils ont endossé. Comme tels donneurs d'aval, les défendeurs sont responsables comme le tireur Malhiot, n'ayant pas d'autres exceptions que les siennes. Il est hors de doute que cette action serait bien fondée, si elle était prise contre la succession de M. Malhiot. La responsabilité du tireur d'un chèque dure en effet tant que la prescription n'est pas acquise, à moins, bien entendu, que le défaut de présentation lui ait causé un dommage réel, comme dans le cas de la faillite de la banque où il aurait eu les fonds nécessaires. La responsabilité des défendeurs étant la même que celle de Malhiot, la présente action est donc bien fondée, et jugement doit intervenir en faveur des demandeurs.

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Le jugement est motivé comme suit :

The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings, proofs of record and having deliberated thereon, considering that the defendants have put their signatures on the back of the cheque described in the plaintiffs' declaration for the purpose of guaranteeing *par aval* the payment of the same ; considering that as such *donneurs d'aval* of the drawer, J. E. Malhiot, the defendants were not entitled to any presentment, protest, nor notice of protest, doth condemn the defendants jointly and severally to pay, &c., &c., &c., being the amount of a certain cheque, dated Montreal, 15th February, 1864, made and drawn by one J. E. Malhiot, payable to bearer, addressed to the cashier of the Bank Jacques Cartier, and upon the back of which said cheque the defendants placed and wrote the name of their firm, Macdougall & MacPherson, as such security, and which said cheque was afterwards by the said [illegible] delivered to the said plaintiffs, who are and were the bearers [illegible]

Devlin, avocat des demandeurs.

Rose & Lavallée, avocats des défendeurs.

(D. G.)

MONTREAL, 8TH OCTOBER, 1868.

Coram TORRANCE, J.

No. 1206.

Forsyth et al. vs. *Charlebois* and *Forsyth* et al., Plaintiffs *en garantie*, and *Lefebvre*, Defendant *en gar.*, and intervening party.

J. O. Joseph who under examination as a witness in the cause, produced by his client Lefebvre, intervening party. A question was put to him in cross-examination as to what had passed between him and his client on an occasion and in reference to a matter not arising out of the examination in chief. The question being objected to by the witness as tending to draw from him what had been communicated to him professionally, and not arising out of the examination in chief, the objection was maintained by the Court, citing 1 Taylor, Evidence, p. 766, § 849.

J. A. Perkins, for plaintiff.

P. S. Coyle, for defendant.

J. O. Joseph, for intervening party.

(J. K.)

MONTREAL, 3RD NOVEMBER, 1868.

Enquête Sitting

Coram TORRANCE

No. 1763.

Cholette [illegible]

FAITS ET ART[illegible] *Expenses.*

HELD:—That a party in a cause, who has answered [illegible] for interrogatories upon articulated facts, has a right to have [illegible] expenses taxed under [illegible] 233.

F. Lefebvre, for plaintiff.

Doutre & Doutre, for defendant.

(J. K.)

COUR SUPERIEURE.

MONTREAL, 27 FEVRIER 1868.

Coram BERTHELOT, J.

No. 215.

Day vs. *Decousse et Dorval.*

JUGE—1o. Qu'un défendeur qui n'a pas comparu peut demander et obtenir la péremption d'instance.
2o. Le défendeur, en ce cas, peut signer lui-même la demande en péremption, et constituer procureur lors de sa présentation en cour.
3o. La cour ne peut prendre connaissance, d'elle-même, du fait que l'avocat du demandeur aurait cessé de pratiquer.
4o. La demande en péremption d'instance est indivisible ; d'où il suit qu'un seul des défendeurs peut la demander, et dans ce cas elle est accordée en faveur de tous les défendeurs.

Cette action fut intentée en 1861, réclamant conjointement et solidairement des défendeurs le montant d'un billet promissoire signé par eux pour aval, et une balance sur le loyer d'un magasin.

Cette action fut rapportée en Février 1861, et depuis lors aucun procédé n'a eu lieu.

En Novembre 1867, l'un des défendeurs signa seul, et fit signifier au domicile élu de l'avocat du demandeur, une motion en demande de péremption d'instance.

Cette motion fut présentée à la Cour Supérieure par le ministère d'un procureur *ad litem* qui comparut là ou lors, sur cette demande en péremption, pour le dit défendeur Dorval.

Le demandeur fit défaut de comparaître.

Pagnuelo, pour le défendeur Dorval, soumit les propositions et les autorités suivantes, aux questions soulevées par la cour :

1ère Proposition.—Un défendeur qui n'a pas comparu peut demander et obtenir la péremption d'instance.

Code de Procédure, B. C., art. 454. "*Toute* instance est éteinte par la discontinuation de poursuite pendant trois ans."

Art. 457. "La péremption doit être déclarée par le tribunal sur requête sommaire signifiée au procureur, s'il y en a un ; sinon la demande en déclaration de péremption doit être signifiée à la partie elle-même."

Ainsi le code ne dit pas si cette demande sera faite *par le défendeur lui-même ou par le ministère d'un procureur* ; et il a évité de le dire à dessein, pour ne pas tomber dans les inconvénients apparents du Code de Procédure français, dans les cas où le procureur du défendeur a cessé d'agir, et lorsqu'aucun procureur n'a été constitué ; car l'art. 400 du code français, *cité par les codificateurs*, déclare "elle (la demande en péremption) sera formée par requête *d'avoué à avoué*." Il semblerait résulter de ces termes que le défendeur, non représenté par un procureur, ne pourrait former la demande en péremption d'instance. Cependant on ne l'a pas entendu ainsi en France.

Carré et Chauveau, 3 vol., p. 433, (3e. Edition) interprétant cet art., disent : (au bas de la page.)

"Jurisprudence. Nous pensons que 1o. Des *créanciers* peuvent proposer la péremption d'instance, *du chef de leur débiteur*," (arrêts cités.)

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Id., p. 434, (en haut.) "Mais le pouvoir de l'avoué peut avoir cessé, pour l'une "des causes mentionnées dans notre article, dans la personne de l'avoué, soit du "demandeur, qui aurait à défendre à la demande en péremption, *soit du défen-* "*deur qui aurait à former cette demande; dans le second cas*, elle serait formée "par requête d'avoué, *contenant de la part du demandeur (en péremption) cons-* "*titution d'un avoué pour occuper sur cette demande.*"

Id., p. 437. "De ce que l'art. 400 n'entend parler que de l'avoué du deman- "deur, *il suit que le défendeur qui n'a pas constitué avoué dans l'instance* n'est "pas dispensé d'employer la voie de la requête, *pour former sa demande en* "*péremption;* ainsi l'a jugé *in terminis* la cour de Metz (arrêt cité); *mais il peut* "*le faire par la même requête qui contient constitution du nouvel avoué* et som- "mation d'audience," (arrêts cités.)

Ainsi le code Napoléon, qui exige que la requête soit formée *d'avoué à avoué*, n'a jamais prétendu que la péremption d'instance fut niée à celui qui n'a pas comparu; de fait on ne trouvera pas une seule autorité qui soutienne cette doctrine; et il n'y aurait aucune raison de rendre sa position plus mauvaise que celle du défendeur qui aurait comparu ou plaidé à l'action; la péremption étant fondée sur *une présomption de discontinuation de l'action*, et dans le but de mettre fin aux procès.

La seule chose requise est qu'il n'y ait pas de procédés utiles dans les trois ans.

C. de Proc., B. C., art. 458. "La péremption est couverte par toute procé- "dure utile adoptée après les trois ans, *mais avant la signification de la* "*demande en péremption; mais elle ne peut être empêchée ou affectée par un* "*acte de procédure subséquent à la signification de cette demande.*"

Or ici aucun acte de procédure n'a été fait avant la signification de la motion; cette dernière est faite et signée par le défendeur lui-même; son procureur n'a comparu que lorsque la motion a été présentée en cour, et seulement sur la demande en péremption, c'est le procédé qui remplace ici la constitution de procureur signifiée au demandeur par le défendeur avec sa requête, en France.

Cette procédure est suivant les principes, car disent Carré et Chauveau, (p. 413, Question 1428.) "C'est un principe *désormais certain* par l'application "fréquente qu'en ont faite les cours souveraines, que la demande en péremption "d'instance, *est une procédure nouvelle à la suite d'une précédente, et tout à fait* "*indépendante de la cause principale.* La conséquence immédiate de ce prin- "cipe, c'est qu'elle doit être régie par la législation sous l'empire de laquelle elle "est formée," etc. Ils répètent la même chose au bas de la page 433.

"2o. Une *demande en péremption constitue un procès à part*, dans lequel on "ne peut plaider que le seul fait de la discontinuation des poursuites, et sans "entrer dans la discussion d'aucune question relative au fonds de l'instance." (Arrêts cités.)

Il faut donc conclure que quand même défaut aurait été enregistré contre le défendeur, ce dernier pourrait toujours former sa demande en péremption, car *c'est une demande nouvelle, tout à fait indépendante de la demande principale, et on ne peut entrer dans la discussion d'aucune question relative au fonds de l'instance.*

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Il est impossible de voir sur quoi serait basé un jugement qui distinguerait entre les causes contestées et celles par défaut, sur cette question, car la loi ne distingue pas; "*toute instance est* éteinte, par la discontinuation des poursuites "pendant trois ans" art. 454, et les auteurs soutiennent tous la doctrine contenue dans notre proposition. D'ailleurs cette doctrine n'est pas nouvelle.

Pothier, Proc. Civ., No. 242. "On avait douté autrefois si l'exploit de demande "donné à quelqu'un, sur lequel il ne serait intervenu *aucune constitution de pro-* "*cureur* ni *aucune présentation* de la *part d'aucune partie*, pouvait former une "instance sujette à péremption." Mais l'art. 1er de l'arrêté de la Cour du 28 "Mars 1672, a déclaré qu'il y avait lieu, en ce cas, à la péremption, et que la "discontinuation de procédure sur cette demande, ne pouvait perpétuer ni proro- "ger l'action ni même interrompre la prescription." 2 Jousse, p. 465, Ord. 1667.

2nde Proposition.—La signature du défendeur Dorval apposée, hors de cour, sur la motion et l'avis, fait-elle foi par elle-même?

Cette objection a été soulevée par le savant juge qui dit: la signature du procureur est officielle, mais non celle de la partie; ainsi sur une confession de jugement, il doit être assisté d'un avocat, et faire sa déclaration devant le greffier.

Cet argument est basé sur des faits qui n'existent pas. D'abord celui qui confesse jugement n'est plus tenu d'être assisté d'un avocat; en second lieu, l'assistance de l'avocat était requise pour constater l'identité de la partie qui comparaissait, et non sa signature. Enfin le greffier était présent pour recevoir la confession, comme officier ministériel dépositaire du document, et rien de plus. Cet argument n'a donc pas d'application.

La proposition soulevée par l'objection reste donc à prouver. Eh bien, elle n'a aucun fondement. Dans ce pays, le ministère du procureur n'est requis dans aucun cas. Toutes les parties peuvent comparaître en personne (art. 23, C. de P. et Statut cité.) Si elles peuvent comparaître, elles ont donc le pouvoir de signer officiellement les avis de comparution, de même que tous les procédés. Si le ministère du procureur était nécessaire pour certifier la signature de la partie, à quoi servirait cet art. 23?

Et les auteurs français modernes, et Pothier, qui donnait au défendeur qui n'a pas comparu, ou qui a comparu en personne, le droit de demander la péremption d'instance et de *nommer lui-même l'avoué qu'il constitue*, comment l'entendent-ils, s'il faut auparavant la signature *d'un avoué pour certifier* [illegible] *de la partie le constituant?*

Cette prétention est non seulement contraire à la raison, mais aussi à une disposition formelle du Code de Procédure.

L'art. 145, déclare que la *dénégation* de la signature d'une personne, faite par elle-même, sur un billet, lettre de change *ou tout écrit ou document sous seing privé*, est *nulle*, sans une déposition sous serment à cet effet. Et la signature d'une partie à un procès, sur un acte de procédure, ne serait pas considérée véritable jusqu'à preuve du contraire, lors qu'elle prétend l'avoir souscrite elle-même.

La Cour n'a aucune raison de mettre en doute la signature du défendeur Dorval: elle ne peut pas, et elle n'a aucun intérêt à le faire.

3ème Proposition.—Dans le cas où le procureur du demandeur eut cessé de pratiquer et eut laissé la province, sans en donner d'avis aux parties, il y aurait

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lieu à la péremption; de plus la cour ne peut prendre connaissance d'elle-même, de ce fait.

Code P[illegible] art. 200, 1, 2.

Art. [illegible] procureur d'une partie cesse ses fonctions, soit par la *nomination à quelque charge publique*, incompatible avec la profession de procureur, soit par suspension ou *décès*, la partie adverse, *si elle est représentée par procureur ad lites*, en est censée suffisamment informée, sans qu'il soit besoin d'autre avis."

Cet article, dit-on, n'est pas limitatif, car dans un cas de démence du procureur, la partie n'est plus représentée et ne peut plus agir, et là même raison de décider existe (1 Pigeau, p. 347.) de même si elle quitte son état (id) par la vente que le procureur faisait de sa charge à un autre procureur, ainsi que cela se faisait et se fait encore en France (Pothier, Proc. C. No. 236.) Tout ceci est basé sur le principe "*contra non volentem agere* etc. (note, 2 de Bugnet à la p. 110, sur no. 247 où d'autres cas sont cités.)

Mais doit-on l'entendre ainsi du cas où le procureur, en Bas Canada, a laissé le pays?

Pothier, (no. 236, P. C.) donne la raison suivante de l'art. 202: Ces *faits*, dit-il, *ne peuvent s'ignorer dans la juridiction*; d'où l'avis n'est pas nécessaire. Lorsque le procureur change d'état en vendant son office à un autre qui le remplace, le fait est de suite connu par les procureurs; mais lorsqu'il laisse le pays, le fait n'est pas toujours connu pareillement. On peut l'ignorer longtemps à cette époque, où les voyages sont fréquents; on ignore s'il doit revenir bientôt, ou s'il est établi en pays étranger; le fait n'est pas rare qu'un avocat fasse un voyage d'assez longue durée; cependant ses associés continuent la besogne en son nom. Et comment serait-on reçu à demander la nomination d'un nouveau procureur?

2o. Mais le code, qui est notre loi sur cette question, a prévu un autre cas qui est celui du défendeur en cette cause, savoir *lorsqu'une partie n'est pas représentée par un procureur ad lites*. Ce n'est que lorsqu'elle est ainsi représentée, "qu'elle n'a pas besoin d'avis que le procureur de la partie adverse a cessé ses fonctions par sa nomination à un emploi public, sa suspension ou son décès"; ou par sa démence ou autre incident semblable. Et cette restriction est fondée, en raison. "Cela ne peut s'ignorer dans la juridiction," dit Pothier, c'est-à-dire parmi le barreau, mais les parties elles-mêmes peuvent certainement l'ignorer, et c'est ce qui est arrivé ici.

Non seulement le défendeur l'ignorait, mais son procureur, sur la demande en péremption, l'ignorait, puisqu'il certifie avoir signifié la motion à *son bureau* en cité de Montréal. Ce certificat ne peut être attaqué par de simples affidavits, qui d'ailleurs n'existent pas ici; il faudrait une inscription de faux.

Le nom de *Day*, avocat, est toujours resté à la porte de l'étude de J. G. Day; personne n'était tenu de prendre des informations spéciales à ce sujet.

Le cas actuel ne tombe-t-il pas plutôt sous l'art. 201?

D'ailleurs la cour ne pouvait d'elle-même prendre connaissance de ces faits. Elle ne peut juger que d'après la preuve qui en serait faite, (Pothier, Procedure Civile,) et non par sa connaissance privée, ou une connaissance acquise en dehors des

formes réglées par la loi. L'information d'un tiers donnée privément doit être rejetée sans balancer. Car elle détruit les formes réglées, tend à l'arbitraire, et à condamner sans entendre, celui qu'elle accuse. La cour ne peut rejeter le rapport de l'huissier, certifiant que l'avocat du demandeur a un bureau en cette ville, sans inscription de faux, ou preuve légale de sa fausseté. *Voilà au moins une signature officielle et authentique.*

3 Jurist, p. 283. The New City Gas Co. vs. McDonnell, jugé par leurs honneurs les juges Day, Smith, et Mondelet.

4me. *Question.*—L'instance est-elle divisible? Si elle ne l'est pas, quelle sera la conséquence de cette solution sur la présente demande en péremption?

Le défendeur Dorval soumet que la péremption de cette cause doit lui être accordée, soit que la cour considère l'instance divisible ou non.

Si l'instance est divisible, ainsi que le prétendent un grand nombre d'auteurs, le défendeur peut la diviser, quant à lui, par sa demande en péremption; cela est évident.

Si, admettant la jurisprudence de la cour de cassation et des autres tribunaux de France, la cour déclare l'instance indivisible, il s'en suit que la demande de péremption que fait un seul défendeur profite à tous les autres, suivant cette même jurisprudence, et comme conséquence du principe même d'indivisibilité.

En effet "chaque co-héritier ou représentant légal du créancier, peut exiger *en totalité* l'exécution de l'obligation indivisible," (art. 1129, C. C. B. C.,) ce qui découle de la nature même de cette obligation, qui n'est pas susceptible de parties soit matérielles ou intellectuelles (art. 1124,) de sorte que "chaque créancier peut exiger en totalité l'exécution de l'obligation indivisible." Or, il a été établi clairement, ci-dessus, que la demande en péremption d'instance "est une "nouvelle procédure à la suite d'une précédente, et tout à fait indépendante de "la cause principale qu'elle tend à faire anéantir, parce qu'elle a une toute "autre origine, un tout autre point de départ," (Carré, p. 413. Question 1428.) En outre, "Toute instance est éteinte par la discontinuation de poursuite pendant trois ans" et elle est déclarée telle sur requête sommaire (Art. 454, 7, C. Proc. B. C.) Donc tous les défendeurs, par la discontinuation des poursuites, ont droit de faire déclarer l'instance périmée, et deviennent par là créanciers et demandeurs; donc, si l'instance est indivisible, chaque défendeur a droit d'exiger en totalité la reconnaissance de ce droit, c'est-à-dire de demander la péremption, laquelle profite à tous les défendeurs.

Cet argument se réduit au syllogisme suivant: chaque créancier a droit d'exiger en totalité la reconnaissance d'un droit indivisible; or la péremption d'instance est la reconnaissance d'un droit indivisible; donc chaque défendeur a droit d'exiger en totalité, la péremption d'instance.

Rodière, (*de la solidarité et ind., No.* 476), quoique combattant cette conséquence de l'indivisibilité de l'instance, comme contraire aux principes, lorsque l'objet de l'action est divisible, l'admet cependant lorsque *l'objet du procès est indivisible*, d'après le principe que nous venons de donner, *et aussi lorsqu'il y a solidarité entre les défendeurs*, (ce qui est le cas ici) d'après un principe analogue.

"Ce n'est que lorsqu'il y a solidarité entre les défendeurs, ou indivisibilité dans "l'objet du procès, que la péremption obtenue par l'un des défendeurs profite

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" mutuellement aux autres ; dans le premier cas, *parce que tout débiteur solidaire* " est censé mandataire de ses co-débiteurs, quand il s'agit de faire leur condition " meilleure ; dans le second cas, parce que la péremption resterait sans effet vis-à-" vis même de la partie qui l'aurait obtenue, si elle ne profite à ses litis con-" sorts."

Le défendeur se trouve demandeur sur la demande en péremption, or tout créancier solidaire a droit de poursuivre seul l'exécution de toute l'obligation solidaire ; donc un seul défendeur a droit de demander la péremption d'instance qui profite à tous les défendeurs. C'est le même principe que celui déjà donné plus haut.

La jurisprudence moderne, en France, avons-nous dit, a établi, d'une manière constante et invariable, le principe de l'indivisibilité de l'instance et de la demande en péremption, avec la conclusion qu'un seul défendeur peut la demander, et alors elle profite à tous ses co-défendeurs, que l'objet du procès soit divisible ou non. C'est ce que nous allons établir.

7 Bioche, Journal de Procédure, p. 102, art. 1887. Héritiers, *Prost* vs. Héritiers *Schotal*, Cassation, 6 janvier 1841. Rejet et confirmation de l'arrêt de la cour d'appel de Colmar.

" Attendu que le principe de l'indivisibilité de la procédure *doit profiter aussi* " *bien aux défendeurs* comme aux demandeurs ; attendu que si la péremption est " *acquise vis-à-vis* de tous les demandeurs, et *qu'un* des défendeurs *demande* " *qu'elle soit prononcée par* la justice, l'instance est éteinte, *on ne peut plus la* " *faire revivre, et le principe de l'indivisibilité* profite à tous les défendeurs, " *parceque le silence de l'une des parties ne peut nuire à ses litis consorts*, attendu, " qu'en le jugeant ainsi, loin de violer les principes de péremption, on en a fait " une juste application."—Rejette.

11, Bioche (id.) p. 369, art. 3164, Mermet et Besançon, Grenoble 20 Déc. 1844, et p. 371, (id.) veuve d'Etragues et Barge et al,

Grenoble, 26 Avril, 1845.

Limoges, 22 Avril 1841, (cité en note, p. 369 id.)

Colmar, 28 Dec. 1839. Sirey 40, 2, 460, Riom, 8 Juin 1853. Sirey, année 1853, 2, p. 582.

Jugé. " Que la péremption, demandée par une partie seulement des défendeurs " originaires, profite même à ceux qui ne l'ont pas demandée, mais qui déclarent " ultérieurement y adhérer. C. cassation, 8 février 1843 (Rouveire) Sirey 43, 1, 415. Id. Riom, 6 Nov. 1847 (Lavigne) Sirey 48, 2, 475.

Jugé. " Que même elle doit être prononcée à l'égard de ces derniers, *encore* " *qu'ils déclareraient ne vouloir pas en profiter, et s'y opposer de leur chef*, Nimes 27 janvier 1845 (Bayle) Sirey 48, 2, 672.

On ne trouve que deux arrêts contraires, de la cour de Riom, l'un du 20 août 1821, l'autre du 1er juillet 1825, (Sirey 27, 230.) Mais on le voit, par les dates, ces deux arrêts d'une cour royale sont de beaucoup antérieurs à ceux de la cour de cassation, et à tous ceux cités ci-dessus. Aussi la cour de Riom est-elle revenue à la jurisprudence universellement établie en France, par l'arrêt ci-dessus cité du 8 juin 1853, (Sirey, année 1853, 2, 582.)

Auteurs de la même opinion.

Carré No. 1427, Berriat; p. 357, Merlin Repertoire, t. 17, p. 322, et Question Vo. Péremption, § 6 No. 1; Favard, tome 4, p. 192, No. 4.

Rodière No. 475, 6; Bioche *dictionnaire* de Proc. Péremption (5 vol,) § 5 No. 147, 8 et suiv. Thomine No. 446.

Jugé. "L'appel de l'une des parties contre un jugement qui repoussait une demande en péremption a été *déclaré profiter aux parties qui n'avaient* pas appelé. *C. Cassation* 13 juillet 1830, Davill, 31, 55. Sur quel principe cette dernière décision s'appuie-t-elle, si ce n'est sur celui que *chaque* créancier solidaire, ou d'une chose indivisible, peut la demander seul?

Mais cette doctrine de l'indivisibilité de l'instance admise avec tant d'uniformité et dans toutes ses conséquences par la jurisprudence, est vivement attaquée, et combattue avec force par plusieurs auteurs de mérite. Et l'on peut, certes, se demander si elle ne pèche pas contre les vrais principes.

L'instance est de fait souvent divisée; elle ne finit pas toujours de la même manière à l'égard de tous les défendeurs, ni à l'égard de tous les demandeurs. Quelques uns des demandeurs sont reçus, d'autres rejetés dans leur demande; v. g: dans une action par des enfants douairiers, dont quelques uns ont fait acte d'héritiers; quelques-uns des défendeurs sont condamnés, d'autres sont absous. L'une des parties fait appel d'un jugement interlocutoire, tandis qu'une autre y adhère. L'un des consorts transige avec quelques-uns ou avec tous ses adversaires, tandis que l'instance se poursuit contre les autres consorts.

Voir ce que dit Bourbeau, continuation de Boncenne (5 vol. Proc. civile, p. 652, 3, 4, 7, 660) (*Brillon* vo. *Péremption*, No. 5, bis.) Voir aussi 1 Pigeau, Comm., p. 677, Reynaud, No. 101, Frominville, Org. et compétence des cours d'appel, tome 2, No. 1038.

Rodière admet la divisibilité de l'instance à l'égard des défendeurs, lorsqu'ils ne sont pas débiteurs *solidaires, ou débiteurs d'un objet indivisible*, No. 475.

Ainsi tout le monde est d'accord sur ce point, savoir qu'un défendeur ne peut pas, par caprice ou intérêt, empêcher ses co-défendeurs de demander la péremption de l'instance.

Ceux qui disent que l'instance est indivisible, donnent le bénéfice de la péremption à tous les défendeurs.

Rodière est du même avis, lorsque les défendeurs sont poursuivis solidairement, ou sont débiteurs d'un objet indivisible.

Ceux qui sont en faveur de la divisibilité de l'instance accordent à chaque défendeur le droit de faire périmer l'instance pour lui-même, ce qui ne souffre aucune difficulté.

Donc le défendeur Dorval ne peut pas faire autrement que de réussir.

Le 27 Février 1868, le jugement suivant fut prononcé:

La Cour ayant entendu le défendeur Joseph H. Dorval et le demandeur par leurs avocats, sur la motion du dit Joseph H. Dorval, du 25 Novembre dernier, à l'effet que cette instance soit déclarée périmée et éteinte, et en conséquence déboutée avec dépens, ayant examiné le dossier et la procédure dans cette dite cause, et ayant délibéré, attendu qu'il s'est écoulé plus de trois ans depuis le dernier procédé fait en cette cause, ainsi qu'il appert au certificat du Protonotaire de cette

Day vs. Decon-sa et Dorval.

Cour, produit avec icelle dite motion, accorde la dite motion, et en conséquence déclare la dite action périmée et éteinte, et la déboute avec les déboursés faits par le dit défendeur.

Day, avocat du demandeur.

Pagnuelo, conseil du défendeur Dorval.

(S. P.)

MONTREAL, 14TH OCTOBER, 1868.

Coram MONK, J.

No. 497.

In the matter of Edward C. Fraser, an Insolvent, and *Tancrede Sauvageau, Assignee*, and *Percival B. Winning, et al., creditors, Petitioners.*

INSOLVENCY—CROSS EXAMINATION OF INSOLVENT.

HELD:—That an insolvent or party summoned for examination as to his estate and effects, upon oath, under the Insolvent Act of 1864, Sec. 10; ss. 2, cannot be cross-examined.

Edward C. Fraser, having, under the provisions of the Insolvent Act of 1864, (amendment of 1865), made an assignment to Tancrede Sauvageau, Official Assignee, was summoned under the Insolvent Act of 1864, for examination under oath, as to his estate and effects, before any judge of the Superior Court; was sworn and examined at length by counsel for the creditors, petitioners. Petitioners objected to any cross-examination whatever, as not allowed by the Act.

A. A. Perkins, for creditors, opposing any cross-examination of the party by his own counsel, argued,

1st. That while the principle of law was, that no witness could be represented by counsel, and though there could be no objection that counsel should attend to guard that the deposition be fairly and correctly taken, yet that such counsel had no right to interfere.

2nd. That no cross-examination was provided for by the Act under which the examination was allowed.

3rd. That the party could not make any evidence for himself, and therefore any cross-examination was useless.

4th. That there was no case before the Court wherein the deposition could make evidence.

5th. That the act respecting insolvency, Sec. 10, ss. 2, provided remedy for assignee or creditors, to obtain information from the debtor before his public examination touching his estate and effects, under oath.

6th. That the party under examination was supposed to have answered on every point whereon questioned, and having had all liberty to answer as he deemed fit, had now no interest by his own oath to testify to any facts in his own favour.

Cited McOwan & Co., Insolvents, (Smith, J.), 1865, and Feron, Insolvent, (Badgley, J.), 1865.

F. Cassidy, Q.C., contra, contended that it was a principle of every law that a witness once examined had a right to be cross-examined, and that the pro-

positions argued by petitioners were not founded in law. Cited S. C. M., 1868, Macfarlane, an insolvent, (Mondelet, J.), wherein such cross-examination was allowed by the judge. Fraser, Sauvageau, and Winning, et al.

His Honour, in maintaining objection, stated that after consultation he was of opinion that no cross-examination in like matters was allowed by law or should be sanctioned by the judge.

Objection as to right of cross-examination of the insolvent maintained.

Perkins & Ramsay, for creditors.

Leblanc & Cassidy, for insolvent.

(J. A. P., JR.)

MONTREAL, 31ST OCTOBER, 1868.

Coram TORRANCE, J.

No. 572.

Ex parte Thomas Jenking, Petitioner for *certiorari*; and *J. P. Sexton*, Recorder, and *The Mayor et al.*, Prosecutors.

ASSESSMENT FOR STREET IMPROVEMENTS—27 AND 28 VIC. CAP. 60, § 27.

27 and 28 Victoria, cap. 60, sec. 27, authorizes the City Council of Montreal to order, by resolution, certain street improvements, "such as dressed or stone paving, flagstone or brick footpaths or sidewalks," and to assess the cost upon the proprietors of the real estate situate upon either side of the streets, and requires the City Surveyor to assess the cost upon the proprietors according to the frontage.

HELD:—1st. That a resolution of the City Council, ordering flagstone *or* brick footpaths (in the alternative) was void for uncertainty.

2nd. That the City Surveyor's assessment roll should show that the cost of the improvement was apportioned upon the real estate according to the frontage, and that an Assessment Roll simply stating that he had "assessed on the proprietors according to law," was insufficient.

TORRANCE, J.—This case comes before the Court on a writ of *certiorari*, which has removed here the proceedings and judgment in a cause returnable and returned before the City Recorder, on the 22nd April last, wherein the Mayor *et al.*, of Montreal, were plaintiffs, and Thomas Jenking was defendant, and finally determined by the Recorder on the 2nd May last. The proceedings before the Recorder were to recover a sum of $199.20, as the price and value of 66.4 yards of Potsdam flagging, laid in front of the defendant's property in Notre Dame Street.

The defendant met the demand by a preliminary exception, alleging that the cause of action was insufficiently and irregularly stated, which was dismissed. He also fyled a plea to the merits by which he denied the existence of any by-law whereby he might be subjected to pay the amount of the claim.

This plea did not avail, and judgment went against the defendant for the amount of plaintiff's demand.

At the hearing, a good deal was said as to the equity of the case on one side and on the other. With the *equities* or the merits of the case, this Court has nothing whatever to do. Its duty is simply to examine whether the inferior tribunal or the City Corporation has exceeded its jurisdiction in the matter under consideration.

Jenking, and Sexton, and The Mayor, et al.

From the proceedings of record it appears that the defendant was charged with the cost of the flagging, under the authority of a resolution of the City Council, at a meeting held on the 11th June, 1867. The resolution is in the following words:

"Moved, &c.: That certain works or improvements, that is to say, flagstone or brick footpaths be undertaken, commenced, executed and carried out in the streets, public places, and squares of the City of Montreal, specified as follows: viz., Notre Dame Street, &c., and that the whole cost of the said works and improvements be defrayed and paid in the manner specified in the law in such case made and provided, by the proprietors or usufructuaries of the real estate situate in the said streets, public places or squares, in proportion to the frontage of each real estate in front of which such flagstone or brick footpaths shall be laid or constructed."

The Council divided on the motion, and it was carried, 13 voting for and 6 against it, and it was resolved accordingly.

Upon this resolution, 66.4 square yards of Potsdam flagging were put down opposite the defendant's store in Notre Dame Street, and the City Surveyor prepared a certificate or assessment in the following words: "I hereby certify "that a flagstone footpath hath been laid on the N. W. side of Notre Dame "Street, between St. Lambert and Dollard Streets, and that the total cost "thereof amounts to the sum of $2429.20, which sum I have assessed on the "proprietors therein interested, according to law; as follows, to wit:"—then follow the names of the parties assessed, the description of flagging, number of square yards, rate and amount to each person.

For the authority of the City Council to pass the resolution, and of the City Surveyor to make the assessment, we are referred to the Provincial Statute passed on the 30th June, 1864, 27 and 28 Vict. cap. 60. s. 27, which enacts that "it shall be lawful for the Council of the said city to order, by resolution, "certain works or improvements in the streets, public places or squares of the "said city, such as dressed stone paving, flagstone or brick footpaths or side-"walks, or gravel, and to defray the cost of the said works or improvements "out of the city funds, or to assess the cost thereof, in whole or in part, as the "said Council may, in their discretion, deem proper, upon the proprietors or "usufructuaries of the real estate situate on either side of such streets, public "places or squares, in proportion to the frontage of the said real estate respect-"ively; and in the latter case it shall be the duty of the City Surveyor to appor-"tion and assess the cost of the said works or improvements, or such part "thereof as the said Council may have determined should be borne by the said "proprietors or usufructuaries, upon the said real estate, according to the "frontage thereof as aforesaid; and the said assessment, when so made and "apportioned, shall be due and recoverable, the same as all other taxes and "assessments, before the Recorder's Court."

A variety of objections have been taken by the applicant for the *certiorari* to the proceedings, but it is sufficient in the present case to take notice of the following reasons set forth in the affidavit of circumstances:

"2nd. Because the resolution of the eleventh of June, 1867, filed in said

cause, supposing it could be brought to the support of the plaintiff's demand, is null, illegal, irregular and void, and the Council of the City of Montreal had no power to pass the same.

"3rd. Because said resolution does not state what kind of sidewalks or footpaths shall be laid in said streets, but leaves it to some parties unknown to decide and order flagstone or brick footpaths in the same street, whereas said Council alone had the power to declare the same.

"8th. Because no proper assessment roll was ever made by the City Surveyor of the flagstone footpaths made on Notre Dame Street, and the pretended assessment roll, fyled in the said cause, is null, irregular, illegal, and void, inasmuch as it does not assess the cost aforesaid in proportion to the frontage of each real estate respectively, but charges four dollars a yard to some parties, while it charges only three dollars to some other parties."

There is no doubt that under the Statute cited above, the City Council could order by resolution flagstone footpaths, and assess the cost thereof, in whole or in part, as the said Council might, in their discretion, deem proper, upon the proprietors in proportion to the frontage of their real estate respectively. Did the Council pass such a resolution? I am bound to answer this question in the negative. The resolution of the 11th of June, which is relied upon, sins for uncertainty. It resolves to order flagstone or brick footpaths, in the alternative, but not the flagstone footpaths which are charged against the defendant. *Non constat*, but if the motion had been put for flagstone in the Council, the majority would have been against it, and so a resolution for brick footpaths might have been lost, though a majority were found to resolve that flagstone or brick should be used. It is impossible then to say that the Council by resolution did order the flagstones.

There is another objection of an equally serious character to the assessment which it was the duty of the City Surveyor to make, if the Council resolved to make the footpaths, and to assess the cost upon the proprietors. The assessment roll should have shown that the cost of the flagstones was apportioned and assessed by the City Surveyor upon the real estate in question according to the frontage thereof. The assessment roll produced simply says, "I have assessed "on the proprietors interested according to law."

On these two grounds then, 1st, that the Council did not by resolution order the flagstones charged against the defendant, and 2nd, that the assessment roll prepared does not show any apportionment and assessment of the proprietor upon his real estate, according to the frontage, I am of opinion that the motion of the applicant to quash the judgment of the Recorder of date the 2nd May last, and all proceedings connected therewith, should be granted, and the Court accordingly grants his motion, and the motion of the Mayor, etc., is rejected; the whole with costs to the petitioner.

The judgment is in the following terms:

The Court, considering that the Council of the City of Montreal did not by resolution order a flagstone footpath in Notre Dame Street of the said city, such as assessed upon the petitioner, and authorized by the Statute numbered 60 of the Parliament of the late Province of Canada, passed in the session held

Jenking, and Sexton, and The Mayor, etal.

in the 27th and 28th years of the reign of Her present Majesty Queen Victoria: Considering that by the resolution of date the 11th June, 1867, ordering flagstone or brick footpaths, the said Council exceeded the powers conferred upon them by the said Statute; and the said resolution is null and void for uncertainty:

Considering further that it doth not appear by the certificate or assessment of the City Surveyor of date the 18th September, 1867, fyled in this cause, that the works done were assessed upon the petitioner's real estate according to the frontage thereof, as required by the said Statute:

The Court of our Sovereign Lady the Queen now here doth reject the motion of the Mayor, &c., to quash the writ of *certiorari*, and doth grant the motion of the petitioner of date the 21st September last, and doth in consequence quash and annul, and declare null and void the orders and proceedings of John P. Sexton, Esq., Recorder of the City of Montreal, in the cause returnable and returned before him on the 22nd April last, wherein the Mayor, Aldermen and citizens of the City of Montreal, were plaintiffs, and the petitioner was defendant, and especially the judgment of date the 22nd May last; the whole with costs to the petitioner against the Mayor, &c.

Judgment of Recorder set aside.

Barnard & Pagnuelo, for Applicant.

Stuart, Q.C., and Roy, Q.C., for the Mayor, &c.

(J. K.)

MONTREAL, 31st OCTOBER, 1868.

Coram TORRANCE, J.

No. 2519.

Rolland vs. *Guilbault.*

CAPIAS—AFFIDAVIT.

HELD:—That the affidavit for *capias ad respondendum* must set forth the cause of action and the nature of the defendant's indebtedness.

TORRANCE, J.—This case comes before the Court on a motion to quash a writ of *capias ad respondendum*, sued out against the defendant for a sum of $180. A variety of reasons have been alleged in support of the motion, but the only one upon which the Court thinks it of consequence to dwell is in the following words:

"Parceque le demandeur dans son affidavit, n'allégue ni la cause ni la nature de la dette, et ne dit pas sur quoi repose sa créance."

The bar is aware that the motion to quash is an English proceeding, and it was naturally adopted to test the validity of another proceeding taken from the English law,—the *capias ad respondendum*. The English rule has always been to require in the affidavit a sufficient though succinct and concise statement of the cause of action or the nature of the debt. An early case on the point is Cooke *vs.* Dobree, 1 H. Bl. 10. To an affidavit deposing that the defendant was indebted to the plaintiff "in the sum of £500 and upwards" it was objected

that the deposition had not disclosed how the debt had arisen. The Court considered the omission fatal. In Taylor *vs.* Forbes, 11 East 316, the affidavit of debt made by the plaintiff, stated that the defendant was indebted to the plaintiff in so much "for goods sold and delivered." This was objected to because it was not stated that the goods had been sold by the plaintiff. Lord Ellenborough, one of the ablest judges who ever sat in the Court of K. B., made the rule absolute to quash the *capias*, and said: "The strictness required in these affidavits is not only to guard defendants against perjury, but also against any misconception of the law by those who make the affidavits, and the leaning of my mind is always to great strictness of construction, where one party is to be deprived of his liberty by the act of another."

In Tidd's Practice, cap. 10, p. 183, 9th edition, it is laid down that the affidavit should be certain and explicit as to the nature of the cause of action. The practice in Lower Canada has followed the English rule, and the rule is a most reasonable one. The *capias* is in restraint of liberty, and a man should not be restrained of his liberty without it being distinctly stated what the cause of indebtedness is. Would it be reasonable that a person should be arrested and not know for three days why he was arrested? Supposing he owed several debts, would it not be reasonable that he should have notice by the affidavit for which of the debts he was arrested? If the course followed by the plaintiff were to prevail, a debtor would be kept in the dark for several days as to the nature of the demand against him. I have never known any other practice than that which requires the statement of the nature of the debt. The case of Dubien *vs.* Marsand dit Lapierre, 14 L. C. R. 89, has been cited as in favour of the present affidavit; it is directly in plaintiff's favour, but I doubt whether a single similar precedent is to be found in the records of the Court since the beginning of the century. It was further argued, in support of the *capias*, that the article 801, C. C. P., requiring a specification of circumstances in the affidavit, where the arrest was for unliquidated damages, it was not required where the indebtedness arose from another cause. But in answer to this, it is to be remarked that without a statement of the nature of the debt, it is impossible to know whether the claim is for unliquidated damages or not, and, therefore, the statement is necessary in all cases, though the judge's order is only required for unliquidated damages. I have conferred with my brother judges and we are all of one mind on the question. I would remark in conclusion that the 798th article of the Code of C. P., upon which the plaintiff relies, is not new law; it is the same law which is to be found in the Consol. Stat. of Lower Canada, chap. 87.

The proceedings of the plaintiff are otherwise very formal, and carefully drawn, but the omission to state the nature of the debt is a fatal one, and the defendant's motion must therefore be granted.

The judgment is as follows:

The Court, &c., having heard the parties on the motion of the defendant, &c., considering that the affidavit of the plaintiff does not set forth the cause or nature of the indebtedness of the defendant, as required by law and the practice of the Courts of the Province of Quebec; considering, therefore, that the writ of *capias ad respondendum* in this cause issued, hath been illegally and improvidently issued, in-

Rolland vs. Guilbault.

much as it is not based upon the affidavit required by law, doth grant the motion of the defendant made on, &c., and doth in consequence set aside, quash, and annul the writ of *capias ad respondendum*, &c.

Capias quashed.

H. A. C. Prevost, for Plaintiff.
A. Ouimet, for Defendant.
(J. K.)

MONTREAL, 22ND SEPTEMBER, 1868.

Coram TORRANCE, J.

No. 1865.

Compagnie de Prêt et Dépôt du Haut Canada, vs. *Augustus Barlow*, et al., and divers creditors, opposing, and *Louis Edouard Pacaud*, contesting collocation.

CONTESTATION OF COLLOCATION.

HELD:—That the party collocated under a report of distribution has a right to fyle an answer in writing to a contestation of the collocation, and must be put in default to do so by the usual demand of an answer.

2. Where the party collocated appears by attorney, the inscription of the cause for hearing on the merits by the contestant must be served upon the attorney.

TORRANCE, J.—I have examined the pleadings in this case on the contestation made by Louis Edouard Pacaud to the collocation of $289.30, prepared by the Prothonotary of this District in favour of Louis Richard. The report of the Prothonotary making the collocation was fyled on the 31st August last. The contestation was fyled on the 1st September instant, and on the same day an appearance was fyled for Louis Richard, by Messrs Cartier, Pominville & Betournay, who gave due notice thereof to E. L. Pacaud, the attorney of the contestant. No demand of an answer from L. Richard to the contestation has been made by Mr. Pacaud. Further, on the 11th September instant, Mr. Pacaud inscribed the cause for hearing on the merits, and served a notice of the inscription upon L. Richard, *not* through his attorneys, Messrs. Cartier, Pominville & Betournay, but by leaving the notice at the office of the Prothonotary, as if Messrs Cartier, Pominville & Betournay had not appeared. I am of opinion to discharge the inscription as irregularly and prematurely made. But putting that objection to one side, the party collocated has a right, if he sees fit, to fyle an answer in writing to the contestation, and he must be put in default to do so by the usual demand of an answer. Further, the inscription is invalid, as not having been notified in due course to the attorneys who had appeared for L. Richard.

The 748th article of the Code of Civil Procedure says that these contestations are subject to the rules of procedure which apply to ordinary suits. I view the contestant as a plaintiff, and the party whose collocation is attacked as a defendant. It is true art. 744 says that contestations may be inscribed

forthwith upon the roll for hearing without the necessity of any written answer to such contestation; but the right of the party collocated to answer, if he see fit, is not taken away.

Gagnon vs. St. Denis.

E. L. Pacaud, for Contestant. Inscription discharged.
Cartier, Pominville & Betournay, for L. Richard.
(J. K.)

COUR DE CIRCUIT.

MONTREAL, 8 NOVEMBRE 1867.

Coram MONK, J.

No. 1713, 1714, et 1715.

Alphonse Gagnon, qui tam demandeur, vs. *Edouard St. Denis, Léandre Chaput et Charles Chaput, défendeurs.*

JUGE:—1o. Que dans le cas où les versions anglaise et française d'un statut différent, celle-là seule doit être suivie qui est conforme à l'esprit du législateur.

2o. Que l'affidavit requis par l'acte 27 et 28 Victoria, ch. 43 est nul et irrégulier, si le déposant demandeur suivant la version française, déclare "*qu'il n'agit pas dans le but de se procurer à lui-même aucun avantage*" au lieu de dire "dans le but de *lui* procurer (au défendeur) aucun avantage," suivant la version anglaise et l'intention du législateur.

Semble que l'affidavit ci-dessus est irrégulier s'il est intitulé dans la cause, et ne donne pas la qualité et le domicile des parties.

3o. Que le demandeur, ayant donné son affidavit dans la cause, ne pouvait être tenu de comparaître personnellement pour constater son existence, et déclarer son état réel, sa résidence et sa capacité à poursuivre, malgré la déposition du défendeur sous serment, qu'il a fait les recherches nécessaires mais sans succès pour le connaître.

Le demandeur prit trois actions *qui tam* contre les défendeurs, réclamant £50 de pénalité de chacun d'eux pour avoir fait commerce en société sous la raison sociale de "L. Chaput, fils & Cie.," sans avoir fait enrégistrer la déclaration exigée par le chapitre 65 des S. R. du B. C.

Le demandeur produisit dans chaque cause en conformité à la section 1er du ch. 43 de la 27 et 28 Victoria, un affidavit à peu près identique, dans la forme suivante:—

Province du Canada,
District de Montréal. } COUR DE CIRCUIT.

Alphonse Gagnon, demandeur, et *Edouard St. Denis*, défendeur.

Alphonse Gagnon, gentilhomme, de la cité et du district de Montréal, étant dûment assermenté, dépose et dit, que dans la présente poursuite qui a pour objet de réclamer du défendeur l'amende imposée par le chapitre soixante et cinq des Statuts Refondus du Bas-Canada, le déposant n'agit pas collusoirement avec le défendeur et que le déposant ne poursuit pas en vue d'empêcher qu'une autre personne n'intente l'action, non plus que de retarder ou de faire échouer celle-ci, ni en vue de soustraire le défendeur au paiement de tout ou partie de l'amende, ou de se procurer à lui-même quelqu'avantage, mais qu'il intente la dite poursuite ou action de bonne foi et dans le but d'exiger et recouvrer le paiement de l'amende avec toute la diligence possible.

Et le déposant a déclaré ne savoir signer, lecture faite.

Assermenté devant moi à Montréal ce 11 Février 1867.

(Signé,) J. A. LABADIE, C.C.S.

Gagnon vs. St. Denis.

Les défendeurs présentèrent, aussitôt après le rapport des actions, les motions suivantes :

Motion du défendeur, sans préjudice à la motion par lui faite pour forcer le prétendu demandeur à se faire connaître du défendeur.

Que la présente poursuite *qui tam* soit déclaré émanée illégalement, irrégulièrement, d'une manière informe et en violation de la loi ; et en conséquence à ce que congé soit donné au défendeur de l'assignation qui lui a été faite en cette cause, tous les procédés déclarés nuls, illégaux et irréguliers, et la présente action deboutée et renvoyée avec dépens, pour entr'autres raisons les suivantes :

1o. Parceque la présente poursuite n'a pas été précédée de l'affidavit requis par la loi en pareil cas.

2o. Parceque le prétendu affidavit produit en cette cause ne donne pas les noms, prénoms, qualité et domicile de la personne que le déposant entend et va poursuivre en vertu du statut par lui cité, et que rien dans le dit affidavit ne fait voir que cette personne soit le défendeur en cette cause.

3o. Parceque le dit affidavit est contradictoire et ne contient pas les allégués prescrits par la loi, en ce que le déposant, savoir le prétendu demandeur en cette cause, prétend jurer que dans la présente poursuite il n'agit pas dans le but de se procurer à lui-même quelqu'avantage, tandis que dans les conclusions de sa déclaration, il demande que le défendeur soit condamné à lui payer la moitié de la pénalité dont il prétend poursuivre le recouvrement, et que la loi accorde la moitié de telle pénalité à tout dénonciateur et poursuivant qualifié à poursuivre dans une cour de justice.

4o. Parceque le dit déposant ne jure pas dans son prétendu affidavit, que, dans la présente poursuite, il n'agit pas dans le but de procurer quelqu'avantage au défendeur, tel que requis par la loi.

5o. Parceque le déposant ne jure pas dans le dit prétendu affidavit qu'il intente la présente poursuite ou action de bonne foi et dans le but d'exiger et recouvrer le paiement de l'amende avec toute la diligence possible.

6o. Parceque le dit prétendu affidavit ne contient pas de date certaine, et que rien ne fait voir qu'il ait été assermenté avant l'émanation de la présente poursuite.

7o. Parceque le dit prétendu affidavit n'a pas été assermenté devant un officier de cette Cour, qualifié par la loi pour ce faire.

8o. Parcequ'il n'appert pas que le dit prétendu affidavit ait été lu au déposant en aucun temps avant qu'il eut été assermenté, ni qu'il ait été requis de déclarer s'il savait signer son nom.

Motion du défendeur, sans préjudice à celle par lui faite en cette cause pour faire déclarer tous les procédés, en cette cause, irréguliers et illégaux.

Vu les affidavits produits au soutien des présentes et les faits qui y sont allégués ;

Vu que le défendeur a toute raison de croire que le prétendu demandeur en cette cause n'existe pas, ou qu'il est une personne inhabile à poursuivre devant une cour de justice ;

Vu que le défendeur a fait toutes les recherches possibles pour parvenir à découvrir le prétendu demandeur et que l'avocat et procureur en cette cause du

prétendu demandeur a refusé de faire connaître son client au défendeur et de lui donner aucune information sur son compte ;

Vu que le défendeur a un grand intérêt à constater l'existence ou la non existence du prétendu demandeur ainsi que son état civil, sa profession et sa résidence ;

Que tous procédés en cette cause soient suspendus jusqu'au onze avril prochain, que l'avocat et procureur *ad litem* en cette cause du prétendu demandeur soit sommé de faire connaître au défendeur, l'état civil, l'âge, la profession et la résidence de son client, de manière à ce que le défendeur puisse connaître et identifier le dit prétendu demandeur, à ce qu'il lui soit enjoint de faire et déposer dans cette cause une déclaration par écrit à cet effet ; et à ce qu'il soit enjoint au dit prétendu demandeur de se présenter personnellement au greffe de cette cour le onze avril prochain, pour là et alors en présence du défendeur ou en son absence faire dresser acte par le greffier de cette cour de sa comparution personnelle, laquelle restera de record en cette cause ; et déclarer sous serment qu'il est le demandeur en cette cause, le dit défendeur se réservant expressément de plaider plus tard tous moyens de fond ou de forme qu'il croira convenables à son intérêt ; à ce que le présent jugement soit communiqué au dit prétendu demandeur à la diligence de son procureur *ad litem* ; enfin, à ce que faute par le défendeur de comparaître et de faire sa déclaration, comme susdit, et faute par susdit procureur *ad litem* de faire et déposer le ou ayant le onze avril prochain, la déclaration requise de lui comme susdit, la présente action soit déboutée avec dépens.

Cette dernière motion était accompagnée de l'affidavit suivant :—

Province du Canada,
District de Montréal. } COUR DE CIRCUIT.

Alphonse Gagnon, demandeur, et *Edouard St. Denis*, défendeur.

Edouard St. Denis, épicier, de la paroisse et du district de Montréal, et défendeur en cette cause, étant dûment assermenté sur les Saints Evangiles, dépose et dit :

Qu'il ne connait pas le prétendu demandeur en cette cause ; qu'il ignore s'il existe ou s'il est habile à poursuivre devant une cour de justice.

Qu'il a pris toutes les informations qu'il est possible de prendre pour trouver le dit prétendu demandeur, pour connaître son état civil, son âge, sa profession, et sa résidence, et que malgré ses efforts il est encore dans la plus complète ignorance sur le compte du dit prétendu demandeur, sur son existence ou sa non-existence, son habilité ou son inhabilité à poursuivre devant une cour de justice, et le dit déposant a signé après lecture faite.

Assermenté devant moi, à Montréal, ce premier jour de Mars, mil huit cent soixante-et-sept. } (Signé,) E. ST. DENIS,

(Signé,) J. A. LABADIE, C. C. S.

Le procureur du défendeur produ[illegible] aussi un affidavit dans le même sens.

Propositions et autorités des défe[illegible]

1ère Motion. Par sa motion *to quash*, le défendeur prétend que l'affidavit du prétendu demandeur est insuffisant et ne contient pas les exigences de la loi.

Cagnon vs. St. Denis.

1o. Il ne désigne pas la qualité ni la résidence du défendeur et n'identifie pas celui qu'il poursuit comme étant la même personne que le défendeur en cette cause.

L'affidavit doit être fait de manière à poursuivre le déposant pour parjure.—Schroder, Law of Bail, p. 37-38.

"Or comment serait-il possible de prouver que le déposant entendait jurer du défendeur lorsqu'il déclare qu'il ne s'entend pas avec un nommé "Chaput on St-Denis" sans les identifier davantage, car l'affidavit est le premier procédé adopté; il n'y a pas encore de cause ni de dossier existant, par conséquent le No. même n'existait pas et l'endossement de l'affidavit n'a eu lieu qu'après coup et postérieurement, car "aucun writ" ne peut émaner avant que l'affidavit soit assermenté. 27 et 28 Vict. c. 43 s. 1.—Schroder, Law of Bail, p. 49-50.

Tidd's practice, p. 492, 3.

2o. L'affidavit ne contient pas les allégués requis par la loi. Il contient de allégués contradictoires, contraires à la loi et au bon sens. Ainsi "il (le déposant) n'agit pas dans le but *de se procurer à lui-même* aucun avantage," lorsque le but de l'action est de procurer au demandeur une somme de vingt-cinq louis dans chaque action. Il jure donc une chose fausse à la face même du document. Cette erreur provient d'une erreur de traduction dans le texte français, mais le législateur n'a pas pu vouloir dire cela. En effet le texte anglais dit: "*nor for the purpose of saving such defendant from the payment of the whole or any part of such penalty, nor of procuring* TO HIM *any advantage.*"

Cette erreur est fatale.

L'art. sect. 14ème du chap. 1er des S. R. B. C. concernant l'interprétation des statuts déclare: que dans un cas de variante entre la version française et la version anglaise, on suivra celle qui est le plus conforme à l'esprit du législateur. L'article final du code civil et du code de procédure contient une disposition semblable. S. R. C. Chap. 5, Interprétation des statuts provinciaux, vingt-huitièmement. Or ici, il ne peut y avoir de doute sur l'esprit de la loi qui est d'empêcher la connivence entre le demandeur et le défendeur. Schroder, Law of Bail, p. 58.

Dans l'acte d'agriculture de 1861, chap. 30, une forme de cautionnement est donnée en appel. Or la version française contient l'erreur suivante: la caution paiera si le dit jugement *n'est pas confirmé*, lorsqu'il faudrait dire, *s'il est confirmé*. Son Honneur le juge Loranger a renvoyé un appel pour cette raison, et refusé un amendement au cautionnement dans une cause de Busby et Lefebvre, à la Cour de Circuit à Napierville.

3o. L'affidavit ne contient pas la cause de la dette, ce qui est fatal.

Schroder, Law of Bail, p. 49.

4o. L'affidavit ne contient pas de date certaine; elle est en chiffre, et rien ne constate qu'il ait fait avant l'émanation du writ.

Robertson's digest, p. 296, 11 L. C. Rep. p. 493, Rivet vs. Rousson.

5o. Le *jurat* est irrégulier et illégal 1o. par rapport à la personne qui l'a reçu; 2o. par rapport au défaut de signature.

1o. Cet affidavit est reçu devant J. A. Labadie, C. C. S. ce qui est insuffisant. Schroder p. 55. Que veulent dire les lettres C. C. S. (?) L'honorable juge se rappellera le jugement rendu dernièrement sur un appel de la Cour de Police où

la conviction a été cassée, l'officier de police s'intitulant P. M. qu'il expliquait par "*police magistrate.*" C. C. S. peuvent dire commissaire de la Cour Supérieure, mais ils peuvent dire toute autre chose. Gagnon vs. St. Denis.

2o. Lorsqu'une personne est illettrée et ne sait pas signer son nom, il est de rigueur que le commissaire l'interroge [illegible] en fasse mention et insère sa déclaration; ce qui n'a pas été fa[illegible] Léandre Chaput no. 1713.

Tidd's practice, vol 1, p. 495. [illegible] p. 111, 1 Petersdorf Abridg. p. 123. Guyot. Vo. Déposition, C. [illegible] 06

2ème Motion. Par sa 2de mot[illegible] nd forcer le demandeur à se faire connaitre.

Le défendeur a intérêt à connaitre et i[illegible] le demandeur afin de constater son existence, il a été impossible de le trouver. Il a aussi intérêt de constater son état civil et de savoir s'il est compétent à rendre témoignage dans une cour de justice, s'il a été convaincu de quelque crime infâmant entre autre de parjure, ce qui le disqualifierait.

Schroder, Law of Bail, p. 40.

Il faut bien remarquer qu'en Angleterre où l'affidavit est comme ici le premier procédé dans les actions *qui tam*, le défendeur a droit d'obtenir du procureur du demandeur une désignation telle de son client qu'on puisse le trouver, s'il existe, et d'interroger le procureur lui-même sur l'autorisation en vertu de laquelle il procède.

Chitty's General Practice Vol. 3, p. 251.

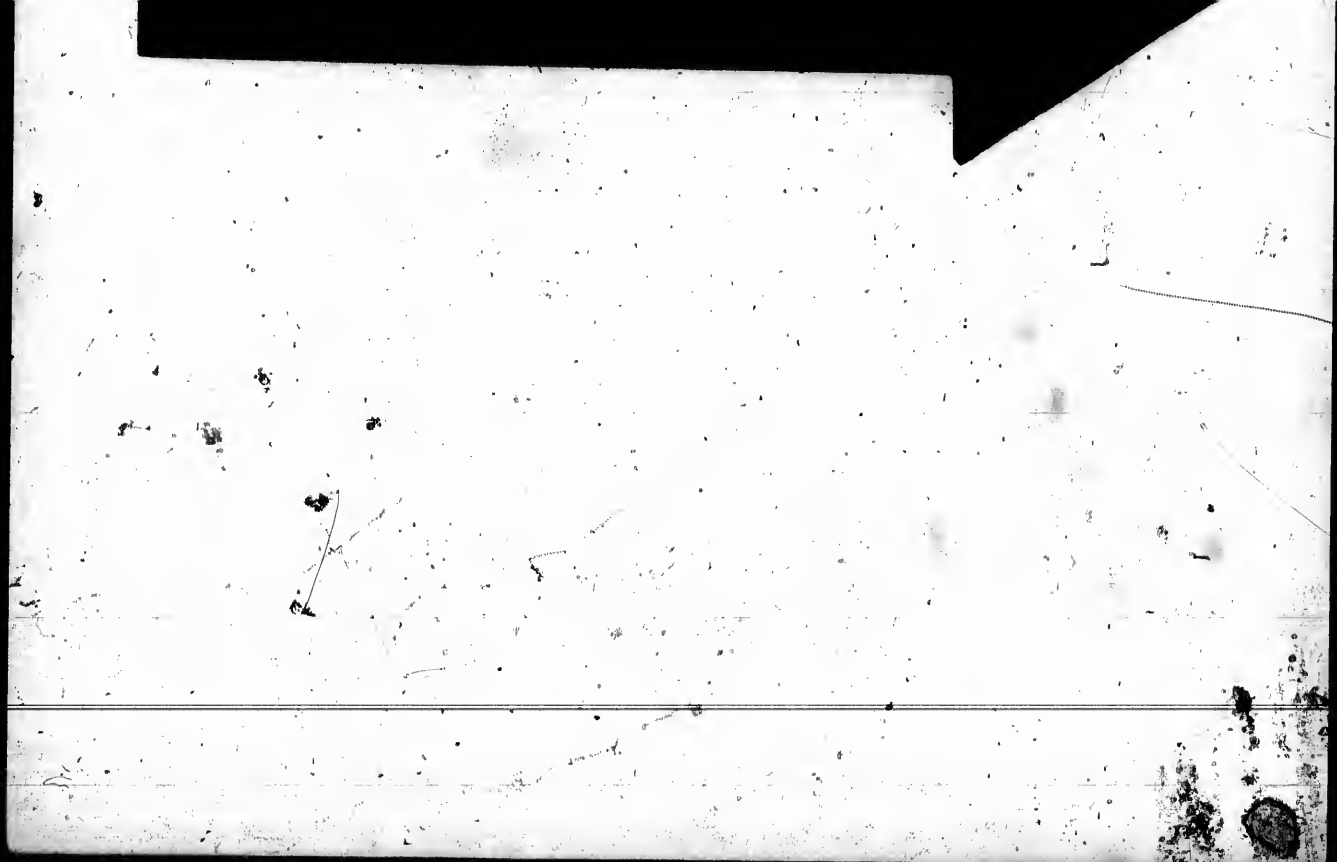
Idem page 251, in notes.

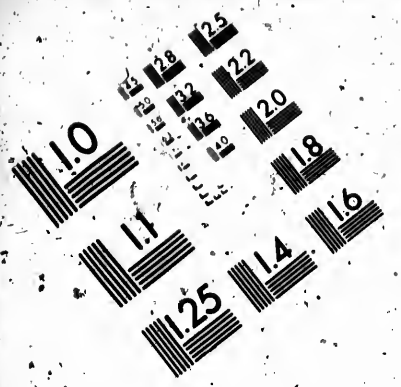
In ejectment, if the residence of the lessor of the plaintiff be unknown, and in *qui tam actions* the Courts will stay proceedings until the residence be accurately stated, or in the alternative until security for costs be given.

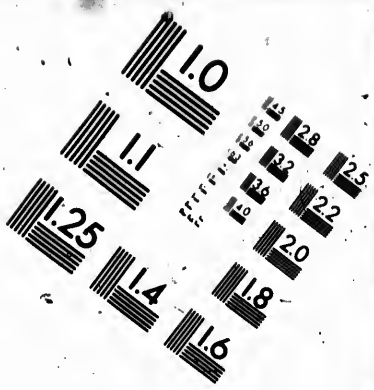
Tidd's Practice, page 533, 4. Strange's Reports, p. 402.

Per curiam. Le Demandeur a pris trois actions contre les membres de la société Chaput, fils & Cie, en recouvrement de la pénalité de £50, qu'aurait encourue chacun des membres de cette société, pour n'avoir pas enrégistré la déclaration exigée par le statut. Les défendeurs ont fait chacun une motion demandant le déboutté de l'action parce que l'action n'a pas été précédée d'un affidavit renfermant toutes les exigences du statut de 1864, et parceque l'affidavit est tout à fait irrégulier. 1° Les parties ne sont pas désignées dans l'affidavit par leurs qualités et résidences; 2° l'affidavit est intitulé dans la cause; 3° le statut exige que le Déposant jure "qu'en prenant la présente action, il n'agit pas dans le but de procurer aucun avantage au Défendeur," tandis qu'il jure qu'il n'agit pas dans le but de se procurer aucun avantage à lui-même, ce qui est contradictoire avec le reste de l'affidavit et l'action elle-même, le Demandeur réclamant la moitié de £50 pour lui-même.

Je ne m'arrêterai pas aux deux premières objections qui sont très graves, parce que la 3e est celle sur laquelle je veux baser ma décision. Cependant je dirai qu'en Angleterre, d'où nous est venu ce genre d'action, les tribunaux sont d'une grande sévérité sur ce point, comme dans toutes les actions pénales, et on y a toujours jugé, lorsqu'un affidavit est requis avant l'émanation du writ, qu'il ne







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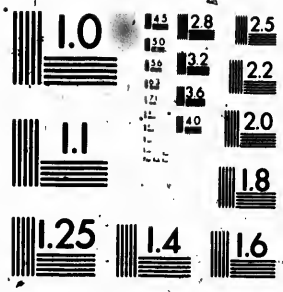

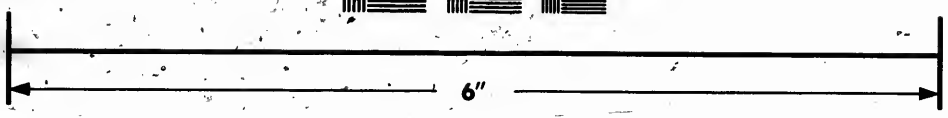

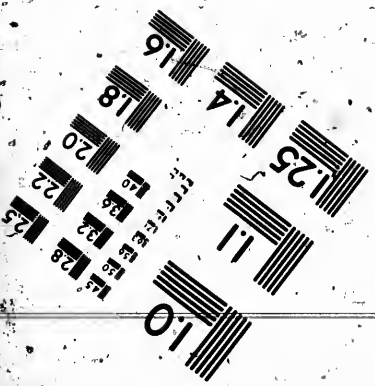

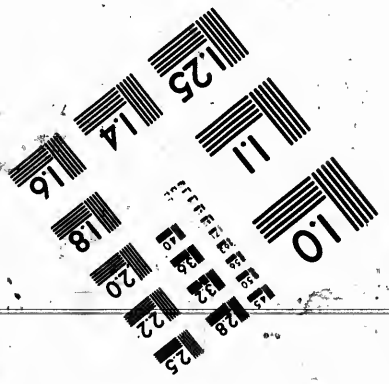

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Gagnon vs. St. Denis.

doit pas être intitulé dans la cause, et que les qualités des parties doivent être données, ce qui est fondé en raison puisqu'aucune action n'existe encore.

Venons à la 3e objection. Souvent un individu qui avait encouru une pénalité, se faisait poursuivre par un de ses amis, ou sous un nom supposé, afin d'empêcher que l'action ne fut prise par un autre; cet ami ne lui faisait jamais payer le montant de l'amende ou même laissait tomber l'action après que la prescription était acquise. C'est pour obvier à ces fraudes que le statut de 1864 exige, avant que le bref de sommation puisse émaner, que le demandeur fasse un affidavit dans lequel il jure qu'il poursuit le défendeur dans le but de lui faire payer l'amende, et non de lui procurer quelqu'avantage. Or, ici le déposant jure au contraire qu'il n'agit pas dans le but de *se procurer à lui-même* quelqu'avantage. Il ne rencontre donc pas l'exigence du statut, et il jure une chose absurde, puisque le but de l'action est de procurer au déposant une somme de £25 dans chaque cause, l'autre moitié appartenant à la Couronne.

Le demandeur a basé sa déposition sur les termes même de la version française du statut, qui diffère en cela de la version anglaise. Mais cette excuse ne peut se soutenir; car en cas de différence entre les deux versions, il faut suivre celle qui est conforme au but et à l'esprit du législateur; d'autant plus qu'ici la version française dit un non-sens.

Cependant une autre question se présente: L'affidavit est défectueux et ne remplit pas le but de la loi. Mais puis-je débouter une action sur une simple motion? Si le défendeur avait pu attaquer l'affidavit autrement que par une motion, je n'oserais pas la débouter à présent, mais il n'y a pas d'autre moyen convenable de le faire, et en conséquence, je maintiens les motions et déboute les trois actions avec dépens.

Le jugement est motivé comme suit:

La Cour, après avoir entendu les parties par leurs avocats sur la motion du défendeur du douze mars dernier, que la présente poursuite *qui tam* soit déclarée émanée illégalement irrégulièrement, d'une manière informe et en violation de la loi, à ce que tous les procédés en cette cause soient en conséquence déclarés nuls, illégaux et irréguliers, à ce que congé soit donné au défendeur de l'assignation qui lui a été faite, et la présente action déboutée et renvoyée avec dépens pour les raisons mentionnées en la dite motion, examiné la procédure et avoir délibéré: Accorde la dite motion et en conséquence la dite action est par les présentes renvoyée et déboutée avec dépens.

Vallée, avocat du demandeur.

Houle, avocat du défendeur.

Pagnuelo, conseil.

(S.P.)

IN THE CIRCUIT COURT, 1868.

MONTREAL, 10TH SEPTEMBER, 1868.

IN CHAMBERS.

Coram TORRANCE, J.

No. 2164.

Morean vs. *Mathewson*, et al.

HELD:—That where a defendant in a case of *saisie revendication* refuses to open his doors, the judge may, upon a return of the seizing bailiff, to that effect, on the petition of the plaintiff, order the opening to be effected by all necessary means, in the presence of two witnesses, and with such force as may be required.

A *saisie revendication* was taken out against the defendants, and the seizing bailiff made a return that they would not open their doors. Upon the application of the plaintiff by petition; an order was granted to effect the opening by all necessary means, in the presence of two witnesses, and with such force as might be required.

Vide C. of C. P., Art. 569.

David & Valois, for plaintiff.

Petition granted.

(J. L. M.)

MONTREAL 10TH SEPTEMBER, 1868.

Coram MACKAY, J.

WILLIAM THOMPSON,
(Defendant in the Court below,)
APPELLANT;

AND

PHILIP DURNFORD,
(Plaintiff in the Court below.)
RESPONDENT.

INFORMATION—CONVICTION—TEMPERANCE ACT OF 1864.

HELD:—1st. That in a prosecution under Consol. Stat. Lower Canada, cap. 6, the conviction must exactly conform to the charge in the information.

2nd. Where the statute creates several offences, one of which is charged in an information, a conviction of another offence, though subject to the same penalty, will be held bad and be quashed.

This was an appeal to the Circuit Court under the temperance act of 1864, (27 & 28 Vic. Cap. 18. Sec. 49,) from a conviction made by W. H. Brehaut, Esq., Police Magistrate, for the District of Montreal, under the authority of Consol. Stat. Lower Canada, Cap. 6.

The nature of the case fully appears from the remarks of the sitting judge.

MACKAY, J.—The defendant was summoned in August, before the Police Magistrate "for that whereas the said William Thompson, holding a license to "vend spirituous liquors, vinous liquors and fermented liquors in a quantity not "less than three half pints at any one time, but having no license to keep a "house of public entertainment, did at the said parish of Montreal in the said "second division in the District aforesaid, to wit; in the house and premises "there situated and occupied by him, the said William Thompson, on the third "day of August in the year one thousand eight hundred and sixty eight, and at

Thompson and Durnford

"sundry times before and since, sell by retail in a quantity less than three half "pints at one time, beer, to wit, one pint of beer, the said beer being a fermented "liquor, without having previously obtained the license required by the provisions "of the statute in such case made and provided, contrary to the statute in such "case made and provided." On the 8th of August, proof was made before the magistrate, and on the 10th followed this conviction "for that he the said "William Thompson, at the said parish of Montreal, in said second division in "said district to wit: in the house and premises there situated and occupied by "him the said William Thompson, on the third day of August instant, did sell "by retail in a quantity less than three half pints at one time, beer, to wit, one "pint of beer, the said beer being a fermented liquor, without having pre-"viously obtained the license required by the provisions of the statute in such "case made and provided."

Among the reasons of the petition in appeal, it is alleged that the best evidence is not adduced, the girl that bought the beer;—that there is no evidence that the beer was a fermented liquor. As to the best evidence, the evidence is good enough. Best. Evidence, 4th Edn. 115, 116 supports it The beer was sold to a girl. True she is not produced, but a person who saw the sale, and saw what was paid, and tasted the beer, swears to all. As to beer not being a fermented liquor, a witness has sworn to it perfectly. Upon the evidence I would remark that it might have been more particular, but it is not necessary to say more about it now. Before going to the other reasons of appeal, it is proper to look at Con. Stat. L. Can. Cap. 6 and see what Sec. 22 says. "If any person keeps an inn, tavern, temperance hotel, or any other house or place of public entertainment, or sells, vends or barters by retail, brandy, rum, whisky, or other spirituous liquors, wine, ale, beer, porter, cider or other vinous or fermented liquors, or causes or suffers the same or any of the same to be sold, vended or bartered by retail in his house or premises, or in any boat, barge, craft or other construction, floating on or moored in any river, lake, or stream, or in any house, shanty, hut, or other building erected upon any frozen water, without the license required by this act, or contrary to its true intent and meaning;—such person shall incur a penalty of fifty dollars for each such offence." Is the information under it? No. Then, take up Sec. 32. The first part of it is that upon which the information is founded: "If any person holding any license to sell spirituous, vinous or fermented liquors in any shop, store or place, but not to keep a house of public entertainment, sells any such liquor, in quantity less than three half pints, or allows any such liquor to be drunk within such shop, store or place, or on the premises appertaining to the same, either by the purchaser of such liquor, or by any person not residing with or in the employ of the person holding such license * * * such person shall be liable to a penalty of fifty dollars for every such offence."

The latter part of the section, the information is not founded on; i. e. "selling less than three gallons in any shop, store or place *not* designated in such license." It might have been under section 41, which allows several counts in such information, but when several counts are used, it must be in form, with statement of time and place of each offence. We are to settle under what sec-

tion the information is. It is not the offence of the 22nd; it is not the offence of the second part of Sec. 32. The offences of the several sections are distinct.

If the information had not been clear about the charge, it would have been bad. If a statute give summary proceedings for various offences specified in several sections, an information is bad which leaves it uncertain under which section it took place. Paley; Convictions, Ed. of 1856, p. 161. The offence charged is under Section 32. Prosecutor meant it to be so, and was particular in his description, following the very words of the 1st part of Sec. 32. Take up the conviction, manifestly it is not the proper conviction for the case. The conviction I observe, is endorsed "selling liquor without a license," and the transcript is endorsed, Consol. Stat. L. C. Cap. 6, Sec. 22. "Offence, selling liquor without a license." We may pass over the 4th reason of Appeal and need not say whether or not, informant had to prove that the defendant held a license to sell in a quantity not less than three half-pints at a time. The sixth reason against the conviction is sufficient. It is sufficient that the conviction is not appropriate to the offence charged. Paley 106. The 27 and 28 Vic. Cap. 18, Sec. 39 cannot help the respondent. The judgment was recorded in the following words:

"The court having seen the petition in appeal of the said William Thompson "fyled in this court on the 7th of September, 1868, whereby he complains of "a certain conviction of, him made on the 10th of August last, at the City of "Montreal, by William Henry Brehaut, Esquire, Police Magistrate for the Dis- "trict of Montreal, at the instance of the respondent Philip Durnford, of the "City of Montreal, Collector of Inland Revenue, to wit, for the 2nd Division "of the said District of Montreal, for revenue purposes, for having, at the Parish "of Montreal in the said second division, in the said District, in the house "occupied by him William Thompson on the 3rd August last, sold by retail in a "quantity less than three half pints at one time beer, to wit, one pint of beer, "the said beer being a fermented liquor, without having previously obtained the "license required by the provisions of the statute in such case made and provid- "ed; Having also examined the said conviction the information referred to in it, "the evidence in support of it, and the record of said conviction; Having heard "the parties, appellant and respondent, by their counsel respectively, and mature- "ly deliberated: considering that said conviction of the 10th of August last, was, "and is not a conviction appropriate to the particular offence, or case charged "against the said William Thompson in and by the information, or complaint "of said Philip Durnford upon which said conviction has proceeded, the said "information or complaint being as follows:—[Here follow the words given above.]

"Considering the said conviction complained of, of the 10th of August last, "unwarranted and illegal, the Court doth vacate and quash the said conviction "and doth condemn the respondent to pay appellant his costs of appeal in this "behalf, and any costs of the original court."

Appeal maintained.

Carter & Hatton, for Appellant.
M. Marchand, for Respondent.
(J. L. M.)

MONTREAL, 16TH SEPTEMBER, 1868.

Coram MACKAY, J.

No. 2127.

Beaudry vs. *Champagne.*

KEPT MISTRESS—RESILIATION OF LEASE.

The defendant was a kept mistress and living as such in a house belonging to plaintiff, but without it being proved to be to his knowledge; and in the same house was another kept woman living with the defendant. HELD to be a cause of resiliation of lease.

On the 4th Sept. 1868, the plaintiff sued defendant, under the Lessors' and Lessees' Act, *en resiliation de bail*, as for misuse of premises leased.

The declaration stated a lease made on 14th March, for a year from the 1st May, 1868, of a "côte de maison, à deux étages," &c., in Montreal, for £30 payable by equal monthly instalments; the plaintiff went on to state that defendant had turned the house into a "maison de debauche and prostitution," &c. Conclusions that the lease be rescinded, and defendant ejected, &c.

The defendant pleaded a general denial, stating also that plaintiff, so late as 14th of August, had taken from her the assessments for the whole year up to May, 1868, in respect of the premises leased.

At *enquête* several witnesses were examined on both sides. As to defendant it was proved, by two witnesses, that being charged by plaintiff with keeping "une mauvaise maison" she had admitted the fact. One of defendant's witnesses had to admit, "J'ai pensé qu'elle était debauchée, mais je ne savais de quelle manière, car pour en être certain, &c." This witness is a tenant in another portion of the plaintiff's house, part of which is occupied by defendant. The same witness, indeed all of them, describe the defendant's house as *bien tranquille*. The defendant describes her establishment as consisting of herself, another fille, qui reçoit ses amis, et une servante, but she refuses to answer several questions put to her.

The parties having been heard, the following judgment was rendered 16th Sept. 1868:

The Court &c., * * * considering that it is well enough proved that the defendant, though not a common prostitute, keeping a positively disorderly bawdy-house, is nevertheless a prostitute or kept mistress, and is living as such in the *côté de maison*, belonging to plaintiff, described in plaintiff's declaration and in the lease of the fourteenth of March last, passed at Montreal, before Fortier, Notary, in which lease defendant is styled *modiste*; considering it not proved that the plaintiff had knowledge of defendant being such a kept mistress before and at date of aforesaid lease; considering that another kept woman is there living with defendant, and that it is hurtful to proprietors that their houses be turned to such uses, and that the keeping of such establishments as defendant's is proved to be, tends to the corruption of manners; considering that the defendant uses the premises for immoral and illegal purposes, contrary to the evident intent for which they were leased; the Court doth cancel and annul to all intents and purposes, the said lease of the 14th March, 1868, and

it is ordered that the said defendant do within eight days from the date thereof, quit, abandon and deliver up to the said plaintiff the said leased premises, described in said lease as follows:

(Here follows description) and in default of the said defendant so to do within the above delay, it is ordered that she be ejected from the said house and premises, and the goods and chattels found therein put out, *mis sur le carreau*, and the plaintiff put into the peaceable possession of said house and premises above described.

Judgment for plaintiff.

Jetté & Archambault, for Plaintiff.
Leblanc & Cassidy, for Defendant.
(J. L. M.)

See Troplong, Louage, Vol. 2, No 302—also Pothier, Louage.

SUPERIOR COURT,

MONTREAL, 30TH NOVEMBER, 1868.

Coram TORRANCE, J.

No. 966.

Fitts vs. *Piton* et al., and "*Her Majesty's Principal Secretary of State for the War Department*" et al., T. S.

HELD:—That moneys, payable under a contract for the erection of fortifications in this Province are not liable to attachment.

This was a motion, by the defendant, to quash the attachment, and was worded as follows:

"Motion on behalf of the defendant, inasmuch as it appears by the declaration of the said *tiers saisis*, that the moneys pretended to be attached in this cause were and are payable under a contract for the erection of fortifications in this Province, that in and by the judgment to be rendered on the present *saisie arrêt*, it be declared and adjudged that the attachment of such moneys was and is detrimental to the public service, and consequently that such moneys are exempt from attachment, and that said attachment be quashed and set aside with costs."

Per Curiam:—In this case, the plaintiff has lodged in the hands of Her Majesty's Principal Secretary of State for the War Department, and Colonel Galloway and others representing the department, a *saisie-arrêt* after judgment. John Francis Rogers, for the garnishees, has declared that at the time of the seizure there was payable by the War Department on account of a contract between the War Department and the defendant, Nicolas Piton, to the defendant, Nicolas Piton, the sum of $1138.92. The defendant has made a motion to quash the attachment, on the ground that the attachment of such moneys is detrimental to the public service. It is a novel thing to take proceedings against the Crown, without its consent, and it would be the duty of the Court, even if the defendant had not moved, to take cognizance of the present proceeding.

The Court is of opinion that the attachment cannot hold. 4th Howard's Reports of the Supreme Court of the United States, p. 20, has been cited in sup-

Fitts vs. Filton.

port of the motion.* The opinion of Justice McLEAN is in the following words, and the remarks are to the point in the present case:—"The important question is, whether the money in the hands of the purser, though due to the seamen, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and navy, and also in every other case where the public funds may be placed in the hands of an agent for disbursement. *To state such a principle is to refute it. No government can sanction it.* At all times it would be found embarrassing, and under some circumstances it might be *fatal* to the *public service.*"

"The funds of the government are specifically appropriated to certain *national* objects, and if such appropriation may be diverted and defeated by State process or otherwise, *the functions of the government may be suspended.* So long as money remains in the hands of a disbursing officer, it is as much the money of the United States, as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. * * * We think the question in this case is *clear of doubt*, and requires no further illustration."

In addition to the authorities cited at the Bar, I would also refer counsel to the opinions of the Attorneys-General of the United States, 1st vol. p. 625; 2nd vol. p. 666; 3rd vol. p. 718; 5th vol. p. 759. Also to the following cases decided in the United States: Decatur vs. Paulding, 14 Peters. p. 497; Cheavy vs. Bremer, 7 Mass. R. p. 259, and Hodgson & Dexter, 1 Cranch, p. 345.

The motion is therefore granted, and the following is the judgment of the Court:

The Court * * * Considering that the *saisie arrêt* or attachment in the hands of said *tiers saisis*, to wit, Her Majesty's Principal Secretary of State for the War Department, T. Lionel G. Galloway, commanding Royal Engineers, and John F. Rogers, Assistant Commissary General, both of the City and District of Quebec, in their said capacities, was and is detrimental to the public service, and subversive of public order, and the due administration of the government of the country, doth grant the motion of the defendants, and doth quash and set aside the said *saisie-arrêt* or attachment in the hands of the said *tiers saisis*; the whole with costs against the said plaintiff.

Motion to quash attachment granted.

Perkins & Ramsay for plaintiff.

Strachan Bethune, Q.C., for defendant.

(S. B.)

* In addition to the citation from Howard's Reports, the defendant's counsel also referred to Roger Sal. Ar. pp. 159, 160; Wade vs. Hussey & Hussey, opposant, 8 L. C. Law R. p. 511 Leclerc vs. Caron, 8 L. C. Law R. p. 287, and Roy vs. Codere and Les Com. d'Ecole, T. S.; The Law Reporter, 2d. pt. p. 59.—[REPORTER'S NOTE].

MONTREAL, 12TH MARCH, 1867.

Coram BERTHELOT, J.

No. 477.

James B. Stevenson et al., Plaintiffs, vs. *Rufus Kimpton* et al., Defendants.

HELD:—That holders of a promissory note insufficiently stamped will be allowed, even after suit brought, to affix stamps to the note in the presence of the Prothonotary.

Plaintiff's petition granted.

John A. Perkins, jr. attorney for plaintiffs.

Monk & Rixford, for Rufus Kimpton.

Rose & Ritchie, for Alpheus Kimpton.

(J. A. P., JR.)

MONTREAL, 10TH NOVEMBER 1868.

Enquête Sittings.

Coram TORRANCE, J.

No. 1722.

Winning et al., vs. *Fraser*.

HELD:—That an indictment in a criminal prosecution of the defendant is not admissible as evidence in a civil suit against him.

The defendant had been arrested in an action of debt, and had presented a petition for liberation under C.C.P. 819. The plaintiff examined him as a witness, and put him the following question.

"Are you not now under bail under two indictments in the Court of Queen's Bench for obtaining goods with intent to defraud and for obtaining goods under false pretences."

Cassidy, objected to the question as irrelevant and making no proof in the present case. The objection was maintained by the judge citing Taylor Ev. § 1505.

Perkins & Ramsay, for plaintiffs.

Leblanc & Cassidy, for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, APPEAL SIDE.

MONTREAL, 2ND SEPTEMBER, 1863.

No. 22.

SOLOMON BOUVIER,

(*Defendant in Court below,*)

APPELLANT;

AND

DAME M. E. V. REEVES,

(*Plaintiff in Court below,*)

Coram AYLWIN, J., MEREDITH, J., MONDELET, J., BERTHELOT, J.

HELD:—That proceedings upon a second appeal will be suspended till the costs of previous appeal be paid, and if such costs be not paid on a day certain the second appeal will be dismissed with costs.

Motion by respondent that all proceedings on the appeal should be stayed till $49.50, costs of previous appeal between the parties upon same judgment (but

Bouvier and Reeves.

dismissed) should be paid. Appellant denied right of party respondent to urge such grounds.

Per curiam.—Having heard the parties on the motion made by the respondent in this cause on the 9th day of June last, it is ordered that all proceedings in this cause be suspended until the appellant shall have paid to the respondent the costs amounting to £12 7s. 6d. mentioned in the said motion; and that in default of the said costs being paid on or before the 9th day of September inst., the present appeal be dismissed with costs in favour of the respondent, and the record in this cause remitted to the Court below; and this without any further judgment being necessary for the purposes aforesaid, with costs on the said motion in favour of the respondent.

Sicotte & Rainville, for appellant.

John A. Perkins, jr., for respondent.

(J. A. P., Jr.)

EN APPEL.

MONTREAL, 8 JUIN 1867.

Coram DUVAL, C. J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

No. 76.

Benjamin Burland, appellant, et Hector Larocque, intimé.

JUGE—Que lorsqu'une partie devient insolvable dans le cours de l'instance, tous les procédés seront suspendus sur motion à cet effet, afin que la reprise d'instance soit faite par le syndic.

Le 3 Juin 1867, l'appelant fit la motion suivante:

Motion on behalf of the said appellant for *acte* of the deposit, which he now makes of an authentic copy of a deed of assignment made under the provisions of the Insolvent Act of 1864, at Montreal, on the 4th January last, before Mtre. L. H. Trudeau, Notary Public, by the said respondent, Tancrède Sauvageau, Official Assignee, and duly deposited in the office of the Prothonotary of the Superior Court for Lower Canada, for the District of Montreal, on the 7th of January last, and that it be declared and ordered that no proceedings be had in the present cause, until the suit or instance be duly continued by the assignee to the insolvent estate of the said respondent.

Le jugement de la Cour d'Appel est motivé comme suit.

Having heard the appellant and respondent by their counsel respectively, on the appellant's motion of the third June instant, and maturely deliberated thereon; this court doth grant the said motion of the appellant of the third day of June instant, and in consequence it is ordered that all further proceedings on this appeal be staid until a Reprise d'Instance be made in the name of the assignee to the insolvent estate of the respondent: same to be made and fyled herein within one month of this date; costs to abide the final judgment in this cause.

Abbott, Q.C., avocat de l'Appelant.

Doutre, Doutre & Charland, avocats de l'Intimé.

(P. R. L.)

COUR DU BANC DE LA REINE.

En Appel.

MONTREAL, 29 FEVRIER 1868.

Coram Duval, Juge en Chef, Aylwin, J., Caron, J., Drummond, J., et Badgley, J.

No. 91.

MAYNARD *et al.*,

(*Demandeurs en Cour Inférieure,*)

et APPELANTS ;

RENAUD,

(*Défendeur en Cour Inférieure,*)

INTIMÉ.

Jugé:—Que l'endosseur d'un billet promissoire à ordre qui n'a pas payé lui-même ce billet et n'en est pas devenu porteur, ne peut être reçu dans une action contre le faiseur à demander que ce dernier soit condamné à payer le billet, vu qu'il est échu et protesté.

L'action fut intentée par les appelants, endosseurs, contre l'intimé, prometteur d'un billet à ordre resté sous protêt à la Banque de Montréal.

Les appelants, après avoir allégué qu'ils avaient reçu l'escompte de ce billet, et l'avaient employé à des achats de grains à commission pour l'intimé, se plaignaient de ce que le retard apporté au paiement de ce billet nuisait à leur crédit et les laissait exposés au risque d'en payer le montant ; ils concluaient à ce que le montant en fût payé entre leurs mains, si mieux n'aimait l'intimé, payer entre les mains de la Banque de Montréal, *ou à qui il appartiendrait*, et leur en rapporter quittance.

L'intimé plaida : 1o. Que les appelants n'avaient aucun droit d'action avant d'avoir payé et d'être devenus porteurs du billet, ou du moins avant d'être recherchés pour le paiement. 2o. Que ce billet, avait été fait et négocié pour l'avantage des deux parties et pour mener à bonne fin des opérations commerciales faites dans leur intérêt commun. 3o. Qu'en considération de transactions intervenues entre l'intimé et la Banque de Montréal il avait été convenu que ce billet serait payé en six échéances semi-annuelles avec intérêt de sept pour cent, ce qui déchargeait les endosseurs et les rendait sans intérêt au paiement. 4o. Que ce retard ne portait aucune atteinte au crédit des appelants. 5o. Qu'ils n'avaient aucune raison d'appréhender de payer ce billet. 6o. Que tous les termes de paiement échus avaient été payés régulièrement.

La preuve établit que le billet en question avait été donné en renouvellement des six autres dont les appelants avaient reçu l'escompte, l'avaient employé en achats de grains à commission pour l'intimé, que les appelants étaient directement intéressés à ces transactions, vu que outre leur prix de commission elles étaient un des principaux aliments de leur commerce et contribuaient beaucoup au soutien de leur maison ; qu'il était de coutume générale dans le commerce des grains, d'obtenir les fonds nécessaires à ce négoce, par la négociation de billets signés et endossés par le commettant et le commissionaire, et que la négociation de ces billets était faite dans l'intérêt commun des deux parties contractantes ; Que dans l'espèce l'escompte avait été obtenu pour le moins autant, s

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non plus, dans l'intérêt des appelants que dans celui de l'intimé ; que ces derniers ne couraient aucun risque raisonnable par suite des pertes souffertes par l'intimé. Qu'après les dites pertes, le dit intimé avait encore un actif s'élevant à bien au-delà de $100,000, et que depuis cette époque ses affaires avaient toujours été très-prospères ; que le fait pour les appelants d'avoir leur endossement sur un billet de l'intimé resté entre les mains d'une banque, loin de nuire à leur crédit, servait au contraire à les faire connaître, et témoignait de la confiance que l'intimé, homme d'expérience dans le commerce, avait reposée en eux.

Les questions de droit, soulevées par la plaidoirie peuvent se réaumer comme suit :

1o. L'endosseur d'un billet à ordre, échu, a-t-il contre le faiseur, une action utile avant d'avoir lui-même payé le billet ; et pour décider cette question, en l'absence de dispositions formelles de notre droit, doit-on avoir recours au droit français qui n'a jamais admis l'endossement en blanc, ou au droit anglais à qui est empruntée cette forme d'endossement et partie de notre législation sur cette matière ?

2o. Si l'endosseur a une telle action, le billet étant négociable et pouvant changer de mains à tout moment, peut-il intervenir un jugement condamnant le faiseur à payer le montant du billet à l'endosseur ou au dernier propriétaire, ou à qui il appartiendra ; et un tel jugement serait-il susceptible de recevoir sa sanction au moyen d'une exécution ?

3o. L'endosseur d'un billet à ordre peut-il être assimilé à la caution, et peut-il jouir du bénéfice de l'exception établie en faveur de cette dernière à qui il est permis de poursuivre le débiteur principal avant d'avoir payé ?

4o. En admettant que l'endossement soit un cautionnement, la caution ne perd-elle pas le bénéfice de l'exception conférée par la loi en sa faveur, dès qu'elle est intéressée dans la transaction et que son endossement ou cautionnement a perdu, par là, son caractère de contrat de bienfaisance ?

5o. Un billet endossé pour en renouveler d'autres que l'on avait endossés pour *valuable consideration*, participe-t-il de la nature des premiers, lorsque l'intérêt qu'avait l'endosseur dans la négociation du premier billet a cessé ; ou si, au contraire, ce second billet est devenu par ce fait un billet de complaisance, (*accommodation bill*) ?

5o. Une convention verbale intervenue entre le porteur et le faiseur du billet, à l'effet d'en changer le terme de paiement, et d'établir d'autres échéances *avec intérêt*, opère-t-elle une novation suffisante pour décharger l'endosseur ?

7o. Si le porteur est une banque, cette convention faite avec son gérant (*manager*) est-elle valable sans que le bureau des directeurs ait passé une résolution à cet effet, de manière à lier la Banque ?

8o. La preuve verbale de cette convention faite par un témoin, ci-devant au service du faiseur, est-elle complète, ou bien s'il eut fallu la compléter par le témoignage d'un des employés de la Banque.

Le jugement de la Cour Inférieure qui a motivé cet appel se lit comme suit : (Berthelot, Juge.)

" La Cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites et preuve, et les admissions faites

" par les dites parties et avoir sur le tout délibéré : considérant que le billet réci-
" té dans la déclaration des demandeurs a été endossé par eux, pour renouveler
" six autres billets que le dit défendeur, en l'automne mil huit cent soixante et
" quatre, avait consenti aux demandeurs, et que ces derniers avaient endossés et
" fait escompter pour réaliser des fonds devant servir aux transactions commer-
" ciales que les demandeurs et les défendeurs faisaient alors ensemble, pour
" achat de grains dans la paroisse de St. Hyacinthe, pour le compte du défen-
" deur, sur lesquels achats les dits demandeurs avaient une commission, ce
" qui les rendait intéressés dans la négociation des dits billets ;

" Considérant de plus, que la Banque de Montréal, maintenant porteur du dit
" billet, a donné terme et crédit au défendeur pour le montant du dit billet, et
" que durant ces délais les demandeurs ne peuvent être recherchés, ou poursuivis
" par la dite Banque de Montréal, et que de plus, les dits demandeurs ont été
" libérés de leur responsabilité comme les cautions du dit défendeur pour le
" paiement du dit billet par le fait de la dite Banque de Montréal ;

" Considérant que, pour ces raisons, les dits demandeurs sont sans intérêt
" dans la présente action, la Cour a renvoyé la dite action avec dépens."

W. Dorion, pour les appelants :

La caution qui s'est obligée, du consentement du débiteur, peut agir contre lui même avant d'avoir payé, pour en être indemnisée lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avait été contractée, sans avoir égard au délai accordé par le créancier au débiteur sans le consentement de la caution.

Tels sont les termes mêmes de l'article 1953 du Code Civil, conforme à l'ancien droit.

Cette règle est générale. Elle s'applique aux cautionnements pour affaires civiles et pour affaires commerciales. Perry & Milne, 5 Jurist, p. 121. Mc-Kinnon & Cowan, 9 Jurist, p. 175. Or, celui qui, sans donner de valeur, prend un billet et l'endosse pour lui donner plus de crédit et pour procurer de l'escompte au faiseur, n'est qu'une *simple caution*. Pardessus, Droit Commercial, t. 2, p. 521, No. 585.

" Il arrive fréquemment qu'une personne souscrit au profit d'une autre un ou plusieurs billets par pure obligeance et sans être débitrice, pour donner à celle-ci le moyen de négocier le billet avec plusieurs signatures. Si l'appréciation des faits et circonstances conduit à ce résultat, celui qui a payé en vertu de sa signature a contre celui dont il n'était *réellement que la caution* et contre ceux qui ont garanti la solvabilité de ce dernier, les droits de recours attribué *aux cautions*." Pardessus, Lettres de change, t. 1, p. 17.

L'endosseur n'est *qu'une caution solidaire*.

Bayley on Bills, 4e éd., p. 247-8. De Berdt vs. Atkinson. *Note* 136. " In an action against the payee of a note.....it also appearing that the defendant gave no value for the note, that he lent his name merely to give it credit.....The Court, &c.....But in this case the maker was the real debtor, the payee *a mere surety*." P. 271, Laxton vs. Peat, 2 Comp. N. P. C. 1865.

Indorsee of a bill against acceptor.....Lord Ellenborough held that this

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being an accommodation bill, within the knowledge of all the parties, the acceptor could only be considered *as a surety for the drawer*." P. 167. Same case.

But Lord Ellenborough held that the acceptor was *a mere surety*.

Lorsque les appelants ont endossé le billet du 30 novembre 1864, ils l'on fait à la demande de l'intimé et dans son seul intérêt, ils ont ajouté leur garantie à celle de l'intimé et sont devenus ses cautions.

" On a vu, par tout ce qui précède, que les divers signataires d'une lettre de change en étaient débiteurs solidaires, moins cependant comme co-obligés principaux, que comme cautions les uns des autres, mais cautions solidaires." Pardessus, No. 413, p. 275.

A l'échéance du billet ils avaient donc le droit, même avant d'avoir payé, de demander à l'intimé, débiteur principal, à être indemnisés, et leur demande étant dans la forme ordinaire, devait être accueillie par la Cour. C'était la conséquence nécessaire de la position des parties. L'intimé, en obtenant l'endossement des appelants, s'était engagé à payer le billet à son échéance. Ils avaient le droit d'exiger l'accomplissement de son obligation, en le forçant à payer ou du moins à leur rapporter une décharge.

Même dans les transactions ordinaires et pour valeur reçue, l'endosseur est censé être la caution du tireur. 2 Pardessus, Droit Commercial, p. 285, No. 413. 2 Pardessus, Droit Commercial, p. 221, No. 585. 1 Pardessus, Lettres de Change, p. 17. Roucher & Latour, 6 Jurist, p. 276. Observation du Juge en Chef Lafontaine.

C'est pour cela que l'endosseur peut intenter son action en garantie, et obtenir jugement contre le tireur avant d'avoir payé le billet, et même avant condamnation sur la demande principale. Il y a plusieurs décisions à cet effet, dans nos cours.

L'intimé a cité quelques auteurs anglais pour établir qu'un endosseur ne pouvait pas se pouvoir contre le tireur, sans avoir payé le billet. Il n'en peut être autremsnt en Angleterre, ou la caution n'a pas de recours contre l'obligé principal, avant d'avoir payé la dette cautionnée. Sous notre droit, la règle est différente.

La Cour a néamoins renvoyé l'action, en se fondant sur deux raisons qui sont également mal fondées. La première, que le billet en question a été endossé pour renouveler six autres billets que les demandeurs avaient endossé et fait escompter pour réaliser les fonds devant servir aux transactions commerciales que les apwelants et l'intimé fesaient alors ensemble, pour achat de grains, pour le compte du défendeur, sur lesquels achats, les dits demandeurs avaient une commission, ce qui les rendaient intéressés dans la négociation. Il est vrai que les appelants avaient une commission pour acheter des grains pour l'intimé, mais ils n'avaient aucune commission pour endosser ses billets. Leur endossement était entièrement gratuit, dans le seul intérêt de l'intimé et pour lui procurer les fonds qu'il devait fournir aux appelants pour lui acheter des grains. Ces billets n'ont jamais été la propriété des appelants, et quoique faits à leur ordre, ils n'ont donné aucune valeur en les recevant de l'intimé. Ils sont allés avec une lettre de l'intimé à la Banque de Montréal, où les billets ont été escomptés. Ils devaient seulement avec l'escompte qui appartenait à l'intimé,

acheter des grains pour lui, ce qu'ils ont fait. Voilà quant aux six premier billets. Quant au billet du 30 novembre 1864, le seul dont il soit question en cette cause, il n'a jamais été donné aux appelants, soit pour acheter des grains, soit pour renouveler les premiers, mais l'intimé le leur a envoyé à St. Hyacinthe, avec demande de l'endosser pour le mettre à même de retirer les premiers. La manière dont la transaction a été faite, montre que les appelants n'avaient aucun intérêt dans les billets. Si ces billets leur avaient été donnés dans le cours ordinaire des affaires et pour leur propre compte, à leurs échéances, l'intimé leur aurait envoyé un ou plusieurs autres billets, en leur demandant de vouloir bien les renouveler. Ce n'est pas ce qu'il a fait. Il leur demande tout simplement leur endossement, se chargeant lui-même de régler les premiers billets. Il en a payé lui-même chaque fois l'escompte, ce qui prouve que ces billets étaient escomptés pour lui, et endossé seulement par complaisance, ce que les auteurs anglais appellent *endorsement by accommodation*. Les appelants n'ont fait que prêter leur nom à l'intimé, pour lui faire avoir de l'argent pour ses propres affaires. Ils n'ont fait escompter les premiers billets que comme mandataires de l'intimé. Ils ne sont, d'après les autorités ci-dessus, que de simples cautions solidaires.

En supposant que la commission retenue par les appelants aurait pu s'appliquer pour partie à l'endossement des premiers billets, elle ne pouvait certainement pas s'appliquer à l'endossement de celui de $6000. Cet endossement n'avait aucun rapport à l'achat de grains, il a été donné à l'intimé pour le faciliter dans ses affaires. C'est un simple office d'ami, qu'ils ont rendu à l'intimé, et cet endossement n'est autre chose qu'un cautionnement à titre gratuit, et donné dans le seul intérêt de l'intimé. Mais lors même que les appelants auraient reçu une rémunération pour se rendre caution de l'intimé, ils n'en seraient pas moins bien fondés à demander à être déchargés de leur cautionnement, après l'échéance du terme pour lequel ils se seraient rendus cautions. Ce n'est que lorsque la caution a reçu une rétribution pour cautionner une dette sans terme, qu'elle ne peut exiger de décharge à l'expiration du terme de dix ans, que fixe la loi en pareil cas, pour les cautionnements à titre gratuit. Mais pour les cautionnements à terme fixe, la rétribution payée par le débiteur, ne change pas la nature, ni l'étendue de ses obligations vis-à-vis de la caution. Il y a donc erreur de fait et erreur de droit, dans le premier motif donné par la Cour Inférieure.

Le second motif est que la Banque de Montréal, maintenant porteur du billet, a donné terme et crédit à l'intimé pour le montant du billet, que durant ces délais, les appelants ne peuvent être recherchés, ni poursuivis par la Banque de Montréal, et que de plus, ils ont été libérés de leur réponsabilité par le fait de la Banque.

Il suffit de dire que l'intimé n'a produit aucun écrit et n'a fait aucune preuve légale que la Banque lui eut donné terme et qu'eût-il fait cette preuve, cela ne l'aurait pas exonéré de rapporter la décharge que les appelants lui demandent, puisque ce terme n'aurait pas eu l'effet de les décharger de leur cautionnement. (Code Civil, B.C. art. 1953 & 1961.)

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Trudel pour l'intimé :

Les appelants ont prétendu assimiler le cas de l'endossement à celui du cautionnement. La caution, disent-ils, a le droit de se faire décharger dès que le terme de paiement est échu, avant même d'avoir payé elle-même. Or, continuent-ils, l'endosseur n'est rien autre chose qu'une caution ; par conséquent, il a le droit de se faire décharger de son endossement aussitôt après l'échéance du billet ; et ils citent à l'appui de cette prétention la cause de McKinnon vs. Cowan, 9 L. C. Jurist, p. 175, ou la caution a été reçue à exiger qu'elle fut déchargée de son cautionnement.

En admettant pour un moment, ce qui est fort contestable assurément comme on le verra ci-après, que l'endossement ait tous les caractères du cautionnement, il est évident que la caution n'a le droit d'être ainsi déchargée que lorsqu'elle n'est nullement intéressée dans l'obligation principale, lorsque l'obligation de la caution résulte d'un contrat purement de bienfaisance ; car dans le cas contraire la caution n'aurait certainement pas droit de jouir de ce privilège. Ainsi, la caution qui a droit de se faire décharger est celle qui a cautionné pour obliger et rendre un service d'ami, sans retirer aucun profit de la transaction. Le motif qui a déterminé cette disposition de la loi. L. 10 et 18 D. cod. mand. d'ou dérive notre droit en cette matière, est évidemment le fait que le cautionnement est un contrat de bienfaisance. On a cru qu'il ne serait pas équitable que celui qui se serait obligé pour rendre service, fut tenu à plus que ce à quoi il a entendu s'obliger.

" Comme le cautionnement est un office qui part d'un principe d'affection, l'obligation qui en naît ne peut aller au-delà des bornes dans lesquelles le fidejusseur est censé avoir voulu se renfermer." Leg. 68 § I, f f de fidejussoribus, Ferrière Dict. de Droit, vo. Caution.

Or, la même raison d'équité n'existe plus, dès que le contrat de cautionnement a perdu le caractère de contrat de bienfaisance ; aussi Pardessus, vol. 2, no. 585 p. 522, dit-il à ce sujet :

" Si le débiteur payait une rétribution quelconque à celui qui le cautionne... " nous n'hésitons pas à croire que cette caution ne serait pas admise à exiger " au bout de dix ans, comme le droit commun en donne la faculté aux conditions " que le débiteur lui procure sa décharge.

C'est cette opinion que la Cour Inférieure a adoptée, et qu'elle exprime dans le motivé du jugement ci-dessus. En effet :

Le premier des motifs de ce jugement repose sur le fait que les appelants, de même que l'intimé, étaient intéressés dans la négociation du billet en question, l'escompte qui en provenait devant servir aux transactions commerciales que les appelants et l'intimé faisaient ensemble.

Or, il est impossible de prouver d'une manière plus complète que ne l'a fait l'intimé, l'intérêt direct qu'avaient les appelants dans la négociation de ce billet :

Un emprunt d'argent est fait à la Banque de Montréal pour acheter du grain. Ces achats devront procurer, d'un côté, aux appelants, des profits directs résultant de leur commission, de la collection de leurs créances, de l'augmentation de leurs

affaires et de leur crédit, de l'aliment principal qu'ils procurent à lour commerce ; de l'autre, à l'intimé un gain sur la revente de ces produits.

Pour effectuer cet emprunt, l'un fournit sa signature, l'autre son endossement. La transaction n'est-elle pas faite pour l'avantage commun des deux parties ?

En l'absence de convention entre les appelants et l'intimé quant à la manière dont les fonds pour achats à commission devaient être fournis, c'était l'usage qui la déterminait. 2 Pardessus, Droit Comm. No. 573.

Or l'usage établit que ces fonds se procurent par négociation de billets, soit signés soit endossés par le commissionnaire.

Il est encore établi que la nature spéciale du commerce de grains à commission nécessite la négociation de billets pour toucher de l'escompte, et que ces billets sont toujours négociés autant dans l'intérêt du commettant que du commissionnaire, et souvent bien plus dans l'intérêt de ce dernier.

La preuve va même jusqu'à constater que les négociations de billets en question ont été faites presque exclusivement au profit des appelants.

Il y a plus : Le fait, pour les appelants, d'être les agents de l'intimé et d'endosser ses billets a beaucoup augmenté leur crédit et amélioré leur position commerciale, vu la haute position que l'intimé occupait dans le commerce.

DEUXIEME QUESTION.

De ce que le billet en question n'est qu'un renouvellement des billets qu'ils ont endossés et dont ils ont touché l'escompte pour acheter du grain, les appelants infèrent que l'intérêt qu'ils avaient dans la négociation de ces derniers billets n'existait plus dans le premier, et que ce billet n'est qu'un billet *d'accommodation* émis dans l'intérêt exclusif de l'intimé. D'abord, il est évident que les billets de $1,000.00, étant faits à courte échéance, et devenant échus longtemps avant la fin des transactions auxquelles avait servi l'escompte en provenant, l'intérêt des intimés continuait lors du renouvellement. En second lieu, dans quel but le billet de $6,000.00 a-t-il été fait, sinon pour payer six billets au paiement desquels les appelants étaient obligés comme endosseurs ? N'étaient-ils pas intéressés au paiement de ces six billets ? et par conséquent n'étaient-ils pas intéressés à une transaction devant effectuer ce paiement ? Les appelants n'ont donc pas endossé le billet en question pour rendre service à l'intimé. Ils y avaient donc intérêt, ne fut-ce que pour avoir du délai et en faciliter le paiement.

D'un autre côté, le renouvellement de ces billets ne donnait pas naissance à une nouvelle créance mais continuait la première ; c'était seulement un nouveau titre recognitif de la même créance, sans aucune novation. C'est la doctrine soutenue par les meilleures autorités sur billets promissoires et leur endossement en blanc. Tous sont d'accord à dire qu'un billet donné en renouvellement d'un autre, participe de la nature du premier : "If a bill originally given upon an illegal consideration be renewed, the renewed bill is also void." Byles on Bills. No. 111 ; Story, P. N. § 105 ; Just. Lib. 3, Tit. 30, § 3 ; D. lib. Tit. 2.

"If in satisfaction of a note, a second note be given, and in satisfaction of "the second a third, the third note cannot be pleaded as given in satisfaction of "the first." Idem No. 184.

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D'ailleurs, qu'est-ce qu'un billet de complaisance (*accommadation*)? c'est dit Chitty on Bills No. 5, un billet endossé ou signé sans obligation ni considération, mais comme un service d'ami. "If a consideration exists between payee "and acceptor, such is not an accommodation bill."

Chitty on Bills of Exchange, *accommodation.*

Byles définit le billet de complaisance comme suit:

"An accommodation bill is a bill to which the acceptor, drawer or indorser, "as the case may be, has put his name without consideration, *for the purpose* "*of benefiting* or accommodating some other party."

Or, les appelants ont endossé le billet en question pour valable considération. Cette considération, pour eux, était le profit qu'ils retireraient des transactions du commerce de grain; l'escompte provenant des premiers billets qu'ils avaient touchés, de plus, le délai que produisait le renouvellement d'un billet au paiement duquel ils étaient tenus comme endosseurs:—

"What then is a valuable consideration [to a contract or promissory note] in "the sense of the law," se demande Story? "It may in general terms," dit-il, "be said to consist either in some right, interest, profit or benefit accruing to "the party,.....or some forbearance, detriment, loss, *responsibility* or act "or labour or service on the other side. And if either of these exists, it will "furnish a sufficient valuable consideration to sustain the making or endorsing "of a promissory note." Story on Prom. Notes, § 80.

Le billet en question n'est donc pas un billet de complaisance et les appelants l'ont donc endossé par intérêt pour *valable considération.*

Si ce billet a été fait, endossé et négocié pour l'avantage commun de l'intimé et des appelants, comment ces derniers peuvent-ils être reçus, immédiatement après avoir retiré leur profit de la transaction, à venir tracasser l'intimé, et à le forcer de payer ce billet, lorsque ce dernier n'a pas encore retiré ses deniers engagés dans la transaction, n'y a rencontré que des pertes et lorsqu'ils ne sont nullement inquiétés à ce sujet; que partie du billet est déjà payée et que, dans le cas où la balance ne le serait pas, ce qu'ils n'ont aucune raison de craindre, la prescription de cinq ans viendrait, sous un laps de temps assez court, les mettre à l'abri de toute responsabilité.

"Nous pourrions, disent les appelants, avenant l'insolvabilité de l'intimé, être obligés comme endosseurs, de payer ce billet, en outre, le fait que ce billet reste sous protêt à la Banque de Montréal est préjudiciable à notre crédit."

D'abord, les appelants courent-ils un risque raisonnable? Nullement. La preuve met en fait que, aussitôt après avoir subi des pertes en 1864, l'intimé jouissait encore de tout son crédit dans les banques et les premières maisons de commerce de Montréal; et que son actif était alors de près de $200,000 au-dessus de son passif; et que depuis ce temps ses affaires avaient été prospères.

Le témoin Sache, caissier de la Banque Molson, dont la déposition doit, du consentement des parties, être considérée comme celle de deux témoins, après avoir établi qu'il avait depuis longtemps eu une connaissance parfaite des affaires de l'intimé, dit en parlant du délait accordé par les banques à l'intimé:

"This time was granted to the defendant, to enable him to realize his property. ..."This was caused by a temporary embarrassment on account of a sudden fall

"in the price of produce in which the defendant was dealing, and not by the "insufficiency of his means. At that time, the assets of the defendant over his "liabilities were upwards of a hundred thousand dollars. It was probably more, "that is, nearly two hundred thousand dollars, but I am sure it was not less "than $100,000. Since that time, his affairs have been prosperous. I "consider that at the time of this agreement, and since, his credit was as good "as that of others engaged in the same business, and it was better than that of a "great many." (Déposition de Sache, p. 11.)

Il est également prouvé que le retard apporté au paiement de ce billet et le fait que l'endossement des appelants reste à une banque sur un billet de l'intimé ne peut nullement préjudicier à leur crédit.

"Should one of the endorsers [of the respondent] wish to do business in the "bank of which I am manager, the fact of his name being on the said notes "would not be prejudicial to his credit, and I would make transactions with "him as if his name was not on those notes at all." [Déposition de Sache, p. 11.]

....."Le fait d'avoir endossé des billets pour le défendeur, loin de nuire à "leur crédit, l'a augmenté beaucoup." [Déposition de Chamard, p. 10.]

TROISIEME QUESTION.

En second lieu, l'intimé maintient comme proposition légale, que la Banque de Montréal, maintenant porteur du billet en question, ayant donné à l'intimé un délai de trois ans pour le paiement de ce billet, en considération d'un intérêt de sept pour cent sur son montant, les appelants peuvent être, durant ce délai, poursuivis par cette Banque: qu'en outre les appelants se trouvant, par ce délai, libérés de leur responsabilité comme endosseurs, sont par conséquent sans intérêt à ce que le billet soit payé, et n'ont ainsi aucun droit d'action contre l'intimé.

C'est le second motif sur lequel repose le jugement dont est appel.

Sur cette question encore, il importe peu que l'endossement ne soit qu'un cautionnement ou non. Les autorités qui soutiennent cette proposition sont aussi formelles et aussi nombreuses soit qu'il s'agisse de cautionnement, soit qu'il s'agisse de l'endossement. Il est établi que l'extention de délai produisant vis-à-vis la caution ou l'endosseur une novation imparfaite, les décharge de leur endossement ou cautionnement:

"Si l'obligation contient un terme" dit Argou, "le créancier qui le proroge "sans le consentement des cautions, les décharge malgré lui de leur cautionne-"ment." 2 Argou, P. 451, Despeisses P. 686, 1 Pothier oblig. N. 406 P. 380, Jussieux de Montluel, Instructions faciles, Tit. XV. P. 804.

Ce principe a été sanctionné par notre jurisprudence dans la cause de St. Aubin vs. Fortin, 3 Revue de Législation P. 293.

De son côté, Story dit:

"If there be any valid agreement (that is, one founded upon a valuable con-"sideration and operative in point of law) between the maker and the holder, "whereby the holder agrees to give credit to the maker of the note after it is "due, or whereby the payment of the note is postponed to a future day, and this "agreement is made without the consent of the indorsers, they will be thereby

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"absolved from all obligation to pay the same." Story, Prom. No., Sec. 413, p. 541. "A release to the acceptor or maker discharges the indorsers." Byles on Bills, No. 193 and 194; Thompson on Bills, Chap. 6; Lord Ellenborough, Gould vs. Hobson, 8 East B. P.1576, 579; Ferriere, dict. Vo. Cautionnement, No. 284; Charondas Rep. 74 [LXXIII], p. 612; Merlin, Repertoire Vo. Nov., § 6.

Or, le contrat par lequel la Banque de Montréal a accordé du délai au défendeur étant fait à raison d'un intérêt annuel de 7 pour cent, taux de l'escompte tel qu'établi par la loi, ce délai a été donné pour valable considération, et décharge les endosseurs.

Si l'on s'appuyait sur le articles 1953 et 1961 du code, malgré que le code ne fût pas en force lors de l'institution de l'action, il faudrait voir aussi l'art. 1959—et les autorités ci-dessus citées qui montrent que les arts. 1953 et 1961 ne s'appliquent qu'au délai de grâce, à la simple prorogation de délai et non au délai avec terme convenu et pour valable considération comme dans l'espèce actuelle.

Maintenant, la preuve faite, par l'intimé du contrat par lequel la Banque de Montréal lui a accordé du délai, et de la valable considération pour laquelle ce délai a été donné, est-elle suffisante pour permettre l'application du principe ci-dessus établi, à l'espèce actuelle?

J. O. Lafresnière, témoin des appelants et qui était, en 1864 et 1865, 1er teneur de livres de l'intimé, dit:

"Le défendeur a fait, vers le commencement de l'année 1865, une convention "avec la Banque de Montréal, par laquelle il a obtenu trois ans de délai pour le "paiement du dit billet de $6000.00.....il devait être payé dans le "cours des dites trois années en six installements d'un sixième chacun, de six "mois en six mois, avec intérêt de sept pour cent. Les demandeurs n'ont pas "consenti à cet arrangement."

De son côté, le témoin Sache, dont la déposition a la valeur de celle de deux témoins, corrobore ce fait:

"In the fall of 1864, the defendant made an agreement with the Molsons "Bank, the Bank of Montreal.....and others, to the effect that he should "have a certain delay for the payment of his notes, which were due or to become "due. This delay was for three years, in semi-annual payments.....The "instalments are paid with interest, at the rate of seven per cent. per annum." (Déposition de Sache, p. 11 et 12.)

Comment les appelants pourraient-ils être reçu à prétendre, comme ils l'ont fait en Cour Inférieure, que cette preuve est insuffisante, et que pour être effective, elle aurait dû être faite par les employés de la Banque de Montréal?

Ce contrat de délai ayant été fait entre la Banque de Montréal d'un côté et l'intimé de l'autre, sur quelle loi, sur quel principe se fonde-t-on pour prétendre que la preuve aurait dû en être faite par les employés de l'une plutôt que de l'autre des parties contractantes? Les employés de l'intimé ne devaient-ils pas avoir eu connaissance personnelle de ce contrat tout aussi bien que les employés de la Banque de Montréal? En outre, ces derniers étant intéressés dans la décision de cet incident de la cause, en ce que la banque pouvait, par ce contrat avoir perdu la garantie d'un endosseur, et en ce que, eux étaient responsables de

ce contrat, vis-à-vis les directeurs de cette banque, comment leur témoignage, à eux intéressés, pourrait-il être reçu plus favorablement que celui de trois témoins complétement désintéressés, le témoin Lafresnière étant sorti de l'emploi de l'intimé ? Maynard et al., et Renaud.

QUATRIEME QUESTION.

Venons-en maintenant aux questions soulevées par défense en droit :

Les appelants, en leur qualité d'endosseurs d'un billet à ordre, échu et non payé, mais dont le montant ne leur est pas demandé, ont-ils un droit d'action pour forcer le faiseur de ce billet à leur en rapporter quittance ? peuvent-ils le faire condamner à en payer immédiatement le montant soit à eux-mêmes, soit au porteur du billet ?

L'intimé soutient la négative. C'est en vain que les appelants chercheraient à appuyer l'affirmative de quelques autorités, ou d'un texte quelconque de nos lois. Aussi, pour établir leur droit d'action, partent-ils du principe que l'endossement n'est rien autre chose qu'un cautionnement, et qu'alors les lois et autorités qui accordent à la caution un droit d'action pour se faire décharger de son cautionnement, sont applicables au cas de l'endossement et accordent à l'endosseur le même droit d'action.

Or l'intimé maintient respectueusement :

1o. Que l'endossement n'est pas un cautionnement, que la nature du contrat qu'il renferme en est toute différente, et que les règles qui régissent la matière du cautionnement ne lui sont pas applicables, notamment dans l'espèce actuelle.

2o. Que les appelants n'ont en droit aucun droit d'action contre l'intimé avant d'avoir eux-mêmes payé le billet en question, de manière à en devenir porteurs et propriétaires, et être en état d'en faire la remise sur paiement.

En effet, les différences entre le cautionnement et l'endossement sont essentielles : l'endossement est, de sa nature, un contrat principal, parfaitement synallagmatique, l'endosseur endossant à son bénéfice, dans son intérêt et pour retirer un profit direct de la transaction :

Le cautionnement, au contraire, est un contrat de bienfaisance, un contrat accessoire, qui ne bénéficie nullement à la partie qui s'oblige, la caution n'intervenant qu'au profit du débiteur et pour un service d'ami.

Quel est l'objet de l'endossement ?

Vendre et transporter une créance et en toucher le prix.

Quel est l'objet du cautionnement ?

Rendre service à un ami en se liant pour lui procurer un bénéfice quelconque.

Voici la définition que Nouguier donne de l'endossement :

" L'endossement est un transport au moyen duquel le propriétaire d'une lettre " de change substitue à ses droits un cessionnaire qui prend le nom de porteur, " jusqu'à ce que, opérant lui-même un sous transport, il devienne à son tour " endosseur." Lettres de Change, p. 274.

L'endossement est un mode de transport. 2 Gouget et Merger, Vo. Endossement, p. 619.

Mais, disent les appelants : " l'endossement participe du caractère du cautionnement en ce sens qu'il comporte garantie que le billet sera payé."

Il est vrai que l'endossement comporte une garantie, mais ce n'est pas celle du

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cautionnement. Pardessus, après avoir confirmé la doctrine que l'endossement est un transport de créance, ajoute que la garantie qu'il comporte n'est que la garantie du vendeur.

Le transport d'une créance, dit encore le même auteur, donne lieu à deux garanties.

L'une de fait, consiste à répondre:

1o. De l'existence de la créance,

2o. Que le titre n'est pas faux,

3o. Que le porteur en est propriétaire légal,

4o. Que le billet n'est pas déjà payé,

5o. Que la nature de la créance n'est pas changée,

6o. Que (dans l'espèce d'une lettre de change) un autre exemplaire n'est pas déjà négocié, etc.;

L'autre de droit consiste: Dans l'assurance de la solvabilité du débiteur. 2 Pardessus, Droit Commercial, No. 814. Ainsi, dans le cas même où l'on donnerait à l'endossement le nom de cautionnement, ce ne serait pas, dans tous les cas, le cautionnement qui est un contrat de bienfaisance; ce n'est pas, par conséquent, le cautionnement proprement dit d'où origine pour la caution le droit de se faire décharger. Le nom ne pourrait en aucune manière changer la nature de cette espèce particulière de contrat.

Story établit de son côté, que l'endossement ne comporte garantie du genre du cautionnement que si le billet n'est pas négociable. Prom. Notes § 134.

Nouguier soutient la même doctrine et établit clairement qu'il n'y a que l'aval qui puisse être assimilé en quelque manière au cautionnement. 1 N. Lettres de Change, p. 321, suiv.: "L'endosseur est garant solidaire avec les autres signataires de la vérité de la lettre."

"L'endossement fait foi des énonciations que contient le billet..... "et comporte translation de la propriété au profit du preneur." 2 Gouget et Meager, Vo, Endossement.

De ce que le porteur d'un billet à ordre a contre l'endosseur un droit d'action aussi efficace que celui qu'il aurait contre une caution solidaire, il ne faut pas inférer que l'endosseur soit une caution. Car si l'endossement comporte garantie solidaire, ce n'est pas à l'effet d'accéder à l'obligation principale et de la consolider, mais parce que l'endossement, étant une vente de créance, doit comporter garantie du vendeur.

La loi donne au porteur le droit de revenir immédiatement contre son cédant, comme étant celui avec qui il a contracté directement, et parce qu'en endossant, l'endosseur a promis de payer pour valable considération reçue par lui. Elle considère l'endosseur comme partie principale à un contrat par lequel il a vendu une valeur qu'il donnait comme valant de l'argent à échéance, s'engageant à fournir lui-même l'argent, si le billet n'en produit à cette époque, sans s'occuper du faiseur, et se constituant débiteur principal de la dette.

"L'endosseur, dit Nouguier, est garant à titre de cédant et de partie directement intéressée au contrat." Lettre de Change, p. 317.

"L'endosseur a la qualité de tireur à l'égard des tiers." 2 Pardessus, No. 350. Voir aussi 2 Gouget et Merger, Vo. Endossement, p. 719.

"Every endorsement operates in legal contemplation between the parties there- "to, as the *drawing of a bill of exchange* by the endorser." Storey, Prom. No., Sec. 129.

"Every indorser is in the nature of a new drawer." Byles on Bills, 117.

Ainsi : 1o. Dans le cautionnement, l'obligation, qui n'est rien par elle-même, accède à l'obligation principale pour lui donner plus de force :

C'est donc une obligation accessoire.

2o. Dans le contrat d'endossement qui est par lui-même une opération de change, l'obligation existe par elle-même, indépendamment de tout autre ; l'endosseur y reçoit une somme d'argent, et en échange s'oblige à faire toucher à son fournisseur une autre somme, à une époque déterminée, ce qui est un contrat synallagmatique. C'est donc une obligation principale ; ce n'est donc pas un cautionnement. L'endossement n'étant rien autre chose qu'un transport, une vente de créance, pourquoi la garantie qu'il comporte ne serait-elle pas la même que la garantie du vendeur ? Nouguier, Lettres de Change p. 214.

Quelle différence y a-t-il, au point de vue des principes du droit, entre celui qui transporte par acte notarié, le titre de créance appelé *Obligation*, et celui qui transporte par endossement cet autre titre de créance que l'on nomme billet promissoire ? Or, le cédant d'une telle obligation ne serait nullement reçu dans une action contre le débiteur à l'obligation, pour le faire payer, sous prétexte qu'i pourrait devenir insolvable. Le codébiteur solidaire ne serait pas plus reçu dans une action contre son co-débiteur, pour lui faire payer la somme que ce dernier se trouverait à la fin de la transaction, devoir en entier. Il en serait encore de même de celui qui aurait acheté quitte et net un immeuble sur lequel se trouverait une hypothèque et qui, sans être troublé voudrait poursuivre son vendeur pour faire payer l'hypothèque, alléguant que ce dernier pourrait devenir insolvable. Pourtant, ces trois cas sont bien plus favorable que n'est le cas de l'endosseur. Dans tous les cas, les raisons d'équité seraient les mêmes. Pourquoi alors l'endosseur serait-il revêtu d'un droit d'action qui est refusé à ces derniers.

Il est donc évident que les autorités qui ont rapport au cautionnement ne sont nullement applicables dans l'espèce actuelle. Et à moins d'une disposition formelle de notre droit, donnant à l'endosseur le droit de poursuivre avant d'avoir payé, l'endosseur ne peut exercer ce droit d'action.

Or, non-seulement il n'y a rien de semblable dans notre droit, mais l'opinion contraire paraît à la fois être la seule en accord avec les vrais principes qui régissent la matière des billets promissoires, avoir été consacrée par la jurisprudence et maintenue par les auteurs dont l'opinion est la plus respectée.

L'endossement, soit intéressé soit par accommodement, n'étant pas un *cautionnement* mais une *garantie*, [2 Pardessus No. 344 ; 4 Nov. Denizart, Vo. caution, 9—idem Vo. garantie], malgré l'analogie qu'il puisse y avoir, l'exception faite en faveur de la caution ne peut s'étendre au *garant*.

Dalloz, Jurisprudence du Royaume, Vol. 2, P. 372 (note) après avoir cité un arrêt du 2 avril 1819, décidant qu'une personne qui avait hypothéqué son fond pour la dette d'autrui, a droit d'être déchargée en vertu de l'art. 2032 dont l'art. de notre code n'est qu'une copie, ajoute

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"Cette décision a sans doute pour principe un sentiment d'équité, mais, est-"elle conforme aux saines maximes du droit? Nous ne le pensons pas. Les "arrêts qui précèdent, les réflexions dont nous les ayons accompagnés, montrent "assez que les règles des cautionnements ne sont pas applicables aux affectations "hypothécaires. L'arrêt que nous examinons semble le reconnaître; mais il se "fonde sur l'analogie, qui, dans cette espèce, ne nous paraît pas pouvoir être in-"voquée.

"En effet, il est de principe que les exceptions ne s'étendent pas; et l'art. "2032 est une véritable exception.

"L'art. 2032 est donc essentiellement exceptionnel, et il ne saurait être ap-"pliqué à aucun contrat autre que le cautionnement."

Voir les trois arrêts qui précèdent ces remarques.

CINQUIEME QUESTION.

L'intimé soutient donc en second lieu, comme proposition légale, que l'endosseur d'un billet à ordre, qui veut, par une action, réclamer le montant de ce billet ou faire cesser sa responsabilité comme endosseur, doit préalablement en payer le montant et en devenir porteur et propriétaire:

1o. Parceque le faiseur n'est tenu de payer que sur présentation du billet. Storey, P. N. § 107, Nouguier, Lettres de Change, p. 329;

2o. Parce qu'il a droit d'exiger que le billet lui soit remis sur paiement. [Id.]

3o. Parce qu'il n'y a que le paiement au porteur et propriétaire qui puisse libérer le faiseur, et que ce dernier a droit de ne pas payer, sans que ce paiement produise sa décharge.

Les droits du porteur sont si absolus que toutes les règles ordinaires protégeant les droits des tiers, notamment les droits des mineurs, des créanciers d'un failli, etc., se trouvent suspendues en sa faveur.

Ainsi:

Transport d'un billet vaut sans être signifié.

"Un billet donné la veille d'une faillite est valable pour le porteur de bonne foi. Merlin Endossement p. 603, 2 Pothier, Change, p. 125. Nouguier, Change, 277.

"Billet transporté par un mineur est un bon titre en faveur du tiers-détenteur." Storey, P. N. No. 80.

Le terme "payable à ordre" signifie payable sur présentation du billet ou au porteur; et l'ordre n'est manifesté que par la présentation du billet. Le faiseur a droit de refuser le paiement à toute personne qui n'est pas en état de lui en faire la remise. C'est le seul moyen qu'il a d'éviter le risque de payer deux fois.

Donc, les appelants, ne pouvant ni présenter le billet, ni en faire la remise, ne peuvent en demander le paiement. Storey, Prom. No. 107, 109, 110, 2 Pothier, Change, No. 67. "Le paiement ne peut être fait à propos qu'au porteur légal "du billet." 2 Pothier, Change, Nos. 214, 125.

Si cette alternative des conclusions des appelants, savoir, que le montant du billet leur soit payé à échéance, ne peut leur être accordée, la deuxième alternative savoir, "que l'intimé soit condamné à payer à la Banque de Montréal ou à *qui il appartiendra*," rencontre pour le moins autant d'objections. Comment

ces conclusions peuvent-elles être accordées? Quel moyen y aurait-il de sanctionner un jugement rendu suivant ces conclusions? La Banque de Montréal ou le porteur quelqu'il soit ne peut-il pas à chaque instant transporter le billet? vu qu'il peut être transporté même après échéance, 2 Gouget et Merger, Vo. Endossement. Un tiers inconnu ne peut-il pas, dans le but de mettre l'intimé dans l'impossibilité de payer ou d'empêcher l'exécution du jugement, aller le payer ou en devenir propriétaire? Comment alors, l'intimé pourrait-il rapporter quittance; comment pourrait-on l'y forcer?

Un tel jugement est donc impossible; combien n'est-il pas plus simple et plus en accord avec les principes du droit de prétendre que celui qui veut recouvrer le montant du billet, ou se décharger de la responsabilité encourue en l'endossant, de payer le billet lui-même et d'en poursuivre le paiement en qualité de porteur; ou s'il l'aime mieux, attendre qu'il soit troublé au sujet de son endossement et exercer son recours en garantie contre le faiseur.

Cette opinion est au reste, formellement soutenue par les auteurs et consacrée par une jurisprudence unanime.

D'abord, si l'on interroge l'ancien et le nouveau droit français, on y trouvera que tout le recours que peut avoir un endosseur contre le faiseur d'un billet, avant d'avoir payé ce billet, est de faire valoir son droit de garantie en indemnité contre le faiseur, mais dans le cas seulement où il est poursuivi. 2 Pothier, Change, p. 124, 156, Ordonnance 1673, Tit. 7 art. 12.

"L'endosseur *poursuivi* a son recours en garantie contre les précédents endosseurs et le faiseur." 1 Pothier, Change, No. 14, 2 Pardessus, No. 442.

Ce qui vient au soutien de la doctrine exposée ci-dessus, que le transport d'un billet n'est qu'une vente de créance et ne donne naissance qu'à la garantie du vendeur, et n'ouvre à l'endosseur que la voie de l'action en garantie contre le faiseur.

Pothier dit encore ailleurs....."Ce n'est pas par ce premier donnant de "valeur (l'endosseur) que l'action doit être intentée, mais par le propriétaire de "la lettre de change, à qui cette action est censée avoir été cédé par l'endossement "de la lettre qui lui a été fait." 1 Pothier, Change, part 1, chap. 4.

Story qui, plus que tout autre peut-être, a approfondi la matière des billets promissoires; qui a fait une étude toute spéciale des lois anglaise, française et américaine sur ce sujet, est encore plus formel:

"It may be well, in this connection, to state that it is no part of the duty of a "holder of a note, which has been dishonored, and due notice thereof given to the "indorser, to sue the maker, if the indorsers or any of them request him so to do. "He has his choice in this respect, to sue whom he pleases, and all are in default "to him. *On the contrary, it is the duty of any endorser who desires to* RECOVER "*or* SECURE the amount against any of the antecedent parties, to pay the note "himself, and thus to entitle himself to bring a suit against such parties." Story Prom. Notes, No. 115, p. 127, 128.

Même opinion soutenue, § 419, p. 554.

On trouve la même doctrine dans Chitty où le droit d'etion que prétendent exercer les appelants, leur est formellement refusé:

"The liability of an indorser or *surety* of a bill or note gives him NO RIGHT

Maxwell et al., et Cushman. "OF ACTION against any *prior party* to the bill or note, *until he has paid* either "the whole or a part of the bill *or note*." Chitty on Bills, Springfield Ed., note sur No. 537; Même doctrine dans Thompson on Bills, chap. 6, § 5, p. 542, 543, 2e Edit. Post, § 419.

Cette opinion des plus hautes autorités en matière de billets promissoires, parfait confirmée par une jurisprudence unanime et a été maintenue entr'autres dans les causes de Beebe vs. West Branch Bank, 7 Wats et Serg. R. 375. Maxwell vs. Jamieson, Barnewall et Alderson R., Hoyt vs. Wilkinson, 15 Pickering R., p. 20, et par 5 ou 6 décisions qui y sont rapportées.

Dans cette cause de Hoyt vs. Wilkinson, il a même été décidé que l'endosseur même par accommodement n'avait pas de droit d'action avant d'avoir payé : En effet dit le rapport :

"When one signed a note as surety for the benefit of the principal and died, "and the note was laid before commissioners of insolvency on his estate, and was "by them allowed, but no part of it was paid by the intestate or his administra- "tors, it was held that the administrators could not maintain an action against the "principal."

"PER CURIAM : The note held by Cushman cannot be charged to the defendant, as it has not been paid." 10 Pick. P. B. 30.

Pour ce qui est des objections faites par les appelants, que les autorités ci-dessus étant de droit anglais et américain, n'ont pas d'application en la présente instance, l'intimé croit qu'il est à peine nécessaire de faire remarquer, que notre législation sur les billets promissoires, surtout pour ce qui regarde l'endossement en blanc, a été empruntée au droit anglais et ne diffère presque en rien des lois américaines. Bien loin que les règles relatives à ce mode d'endossement se trouvent consignées dans notre ancien droit française, c'est notre statut 12 Vict. cap. 22 qui a donné à l'endossement en blanc la même valeur au profit du porteur que l'endossement motivé. Et cette disposition était empruntée au droit anglais. Au contraire l'endossement en blanc n'a jamais été admis en France, soit sous le droit ancien, soit sous le droit nouveau. Or, comment veut-on nous obliger à trouver dans une législation, des règles et des autorités sur un mode de contracter qu'elle ne reconnait pas. D'ailleurs, qui songera à nier que la forme et le mode de négociation de nos billets promissoires soient, de même qu'une partie de notre législation en matière de commerce et la plupart de nos usages commerciaux, empruntés au droit anglais? Partant, n'est-il pas naturel [illegible] d'aller chercher nos autorités sous un système de loi qui a reconnu [illegible] depuis longtemps une forme de contrat que nos statuts lui [illegible], surtout lorsque ces autorités ne font que confirmer les principes qui servaient de base à notre droit, D'ailleurs, n'avons-nous pas notre statut 12 Vict. chap. 22, S. R, B. C. chap. 64 sect. 29 qui déclare que dans toutes matières concernant les lettres de change, on aura, en l'absence d'une disposition formelles de nos lois, recours aux lois anglaises!

Les autorités ci-dessus sont donc parfaitement appliquables au cas actuel, et ne laissent pas de doute sur la question.

L'action des appelants était donc mal fondée et le jugement qui l'a déboutée doit être confirmé.

Le jugement de la Cour d'Appel confirmant le jugement de la Cour Inférieure se lit comme suit : Maynard et al., et Renaud.

" La Cour, etc., etc., considérant que le billet récité en la déclaration des demandeurs appelants, par eux endossé et pour le recouvrement du montant duquel l'action a été intentée, était, lors de l'institution de cette action, en la possession de la Banque de Montréal, à qui le dit montant était alors et est encore dû, et que partant, les demandeurs et appelants sont non-recevables en leur présente demande, et en conséquence que dans le jugement de la Cour Supérieure, prononcé à Montréal le trentième jour de mai mil huit cent soixante-et-six, et dont est appel, déboutant les demandeurs de leur action, il n'y a pas erreur, confirme le dit jugement avec dépens contre les appelants en faveur du dit intimé."*

Dorion et Dorion, pour les appelants.

F. X. A. Trudel, pour l'intimé.

(F. X. A. T.)

COURT OF REVIEW.

MONTREAL, 30TH NOVEMBER, 1868.

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

No. 173.

In the matter of *Samuel R. Warren* Insolvent, and *Joseph W. Shaw*, Claimant, and *George W. Warner*, et al., Contestants.

HELD:—That *mere insolvency* is not of itself a sufficient cause for setting aside a mortgage granted whilst the debtor was in that state, without proof either that such insolvency was *notorious*, or that there was really fraudulent collusion between the debtor and creditor.

This was a hearing in Review of a judgment rendered in appeal, by the HON. MR. JUSTICE MONK, reversing a judgment or award of the assignee, on a contestation of a dividend sheet, under the Insolvent Act of 1864.

The facts of the case are sufficiently stated in the remarks of counsel which follow.

Morris, for the contestants, submitted the following propositions of law and fact:

The contestants contested the dividend sheet in so far as it collocated Joseph William Shaw, for $1462.86c., as a privileged and hypothecary creditor of the insolvent.

MOYENS OR REASONS.

1st. The contestants are claimants on insolvent's estate for $5593.40, and were creditors at date of the assignment on the 23rd May, 1865.

2nd. Shaw's pretended privileged claim based upon a deed of mortgage of 4th March, and registered on 9th of March, 1865, by which, in order to secure Shaw the repayment of $3000.00, and interest, the insolvent declared that he mortgaged in his favour a lot of ground, &c.

* A l'audition de ce jugement les appelants ont demandé et obtenu permission d'en appeler au Conseil Privé : mais ils n'ont pas donné suite à cet appel, vu que le billet qui faisait la base de cette action se trouvait à l'époque du jugement complètement payé.

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3rd. The insolvent, on said 4th March, 1865, and during four months preceding, was insolvent.

4th. Said Joseph William Shaw, during said period, was son-in-law of the insolvent, and well knew his condition of insolvency.

5th. Said deed of mortgage was given by fraud and collusion between said insolvent and his said son-in-law, Shaw, and was so given in fraud of the creditors of the insolvent.

Therefore null and gave no privilege.

CONTESTANTS' REVIEW OF CASE.

The mortgage was given on the 4th March, 1865, for an antecedent debt.

The assignment was made on the 23rd May, 1865.

1st Question.—Was Warren insolvent on the 4th March, 1865? Yes. Unquestionably so, according to the evidence.

2nd Question.—Is the mortgage therefore null? Duncan v. Wilson, 2 L. C. J. 253; Cumming & Smith, 5 L. C. J. 1; Dickson v. Sawtell, 3 L. C. R. C. C. 2023.

Insolvent Act of 1864, S. 8, ss. 4.

3rd Question.—Was the mortgage given in contemplation of insolvency, and at the time of giving it did Warren know he was insolvent?

This question can be solved:

1st. By ascertaining from the evidence what others thought of his affairs at the time, who of course knew less of them than he did himself.

2nd. By ascertaining what he himself really knew.

1st. What did others think of him? Clark Fitts thought that unless he could obtain security he would lose his debt. *Shaw*, the son-in-law, evidently thought so, too, for he pressed him again and again, urging him to give a mortgage, asking to see his books, and to know about his affairs; at length he succeeded and got the mortgage, which is disputed. Nelson Davis thought likewise. Millard, and others, from the reckless way he borrowed money, and the high rates he paid, thought there was something wrong. The Bank directors thought the same.

Events have proved they were right in their suspicions.

Can he, who knew a *great* deal *more* than they the witnesses did, have *thought differently from them?*

2nd. What did Warren himself know? The evidence shews that he knew that he owed large debts for years, which he could not pay; that in November, 1864, he lost $1600, by Mauby; that all the winter he was very hard up for money, and times dull; that he knew he owed Shaw $3000, which he could not pay; that he knew he owed his son $212.00, which he could not pay; that he knew he owed Fitts over $2000, which he could not pay; that he knew he gave cheques on the Banks where there were no funds; that he knew he was running round the street borrowing right and left, paying ruinous interest, from 15 to 50 per cent. for such sums as £100; that he knew his liabilities were $33,522; that he knew he could not meet these without borrowing money; that in fact he knew he could not meet his engagements.

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In his deposition he says that he did not know he was insolvent at the time he gave the mortgage; but of what avail is it for him to say so, when it is proved that he knew all the above facts, which constitute the elements of insolvency.

It is clearly proved that he was really insolvent at the time, and it is proved that he knew of all the elements which rendered him insolvent—what more is wanting? Knowing himself to be unable to *meet his engagements* he gave a preference to his *son-in-law*, when really insolvent and on the eve of his assignment.

It is clear there was collusion between the father and son-in-law.

Shaw, the son-in-law, asked for the mortgage because he thought security necessary; that without it he would not get paid. He was so uneasy about it that he wanted to see his father-in-law's books. He asked about his affairs. It was talked about in the family. He must have known that he was receiving the mortgage to the prejudice of others.

Shaw evidently knew of Warren's "inability to meet his engagements," or had "probable cause for believing such inability to exist."

Insolvent Act of 1864, sec. 8.

The presumption therefore is that the deed was made with intent to defraud his creditors, *vide ib.*

Whether Shaw knew of the impending insolvency or not is immaterial (though it is evident he did know of it) under sec. 8, ss. 4, Insolvent Act. Under that section, if the contract be made "in contemplation of insolvency," it is null.

In the note to that section Mr. Abbott remarks, "the phrase, in contemplation of insolvency, does not mean in contemplation of the issue of a writ, nor "of the execution of a deed of assignment, but merely that the debtor is "*conscious of being in difficulty*, and of the probability of insolvency occurring, "and gives the security as a precaution against insolvency."

That Warren acted fraudulently is proved directly. He had frequently given cheques on banks where he had no funds. He told Fitts there were no other mortgages before his; but in fact there were two or three before his. In March he protected his connections and relations; none of them suffered; they were Nelson, Millard, Atwater, Shaw, his son-in-law. He tried to get Hilton in deeper. He got Brown to give up his security the day he failed.

Bethune, Q.C., for Shaw:—In the dividend sheet of the moneys arising from the sale of the insolvent's real estate, Shaw was collocated for $1462.86 cy. on account of his claim for $3000 cy., based on a notarial obligation and mortgage, dated 4th March, 1865.

The collocation was contested by Geo. W. Warner & Son, on the ground that when the mortgage was executed the insolvent was "*en état de déconfiture*"; that Shaw "was the *son-in-law* of the insolvent and *well knew* his condition of insol-"vency," and that the mortgage was "given by *fraud and collusion and fraud-*"*ulent concert*, between the said insolvent and his said son-in-law, and was so "given *in fraud of the creditors* of the insolvent."

On the 21st of October, 1867, T. S. Brown, Esq., the assignee of the estate

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of the insolvent, maintained the contestation, on the ground that the evidence established that the insolvent had suffered heavy losses shortly previous to the date of the mortgage; "that it was *publicly known* that he was *borrowing* "*money from day to day;* that he was *unable to pay his promissory notes* when "they became due; that he issued *cheques* upon the Bank where *he had no funds* "to meet them, and where *payment* of the said *cheques* was *repeatedly* refused"; that for more than three months before the date of the mortgage the estate could not pay more than five or six shillings in the pound to chirographary creditors; that the insolvent "had *declined to raise money by mortgage* for the payment of his cur- "rent liabilities, when advised so to do, and had *refused repeatedly* to execute a "mortgage in favour of *another* creditor;" that at date of said mortgage the insolvent "was and for four months next before the said date had been in a state "of hopeless insolvency, *en état de déconfiture;*" that the mortgage was given to secure the repayment "of a long pre-existing debt;" and that said mortgage was given by the insolvent and accepted by the claimant, "*in fraud of the creditors* "of the said Samuel R. Warren, *within the meaning of the Insolvency Act of* "1864."

From this award of the assignee the claimant (Shaw) appealed to a Judge of this Court, and by the judgment rendered by the Hon. Mr. Justice Monk, on the 31st December, 1867, the award was set aside, on the ground that "there was "*no fraud, collusion or fraudulent concert*, by or between the said insolvent and "the said Joseph W. Shaw," and the contestation of Shaw's collocation dismissed.

It is from this judgment that Warner & Son now appeal to the Court of Review.

In their *factum* Warner & Son contend that the *mere fact of insolvency* of the mortgagor, at the date of the mortgage, renders the mortgage "*null.*"

In support of this proposition reference is made in the *factum* to the following authorities:

Duncan vs. Wilson, 2nd L. C. Jurist, p. 253.
Cumming & Smith, 5th L. C. Jurist, p. 1.
Dickson vs. Sawtell, 3rd L. C. Law Rep., p. 65.
Art. 2023 Code Civil of L. C.
Insolvent Act of 1864, sec. 8, sub.-sec. 4.

It is readily conceded that the case of Duncan vs. Wilson, *as reported*, would seem to sustain the extreme pretension enuncinated by the contestants, but a reference to the record of proceedings in the case will establish that the ground of contestation was—*notorious* insolvency and consequent *fraudulent collusion* between the debtor and the creditor. The *evidence* in the case, too, discloses the fact that *before March*, 1855, the debtor had *actually stopped payment* and called his creditors together *early in that month*, at which meeting he submitted statements *which proved him to be insolvent*, and made an offer of ten shillings in the £, which was subsequently accepted by a number of the creditors. The mortgage attacked was not given *until the 25th April*, 1855, when the debtor was *notoriously* insolvent, and was granted to his *own sister*, who was living at the time *in the same country village* as himself. Although the word "*notorious*" seems to have been omitted in the judgment, it is manifest, in view of the pleadings

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and evidence in the case, that its omission was purely accidental, and that the court was influenced in its decision, *not* by the *mere fact* of insolvency, but by the fact that such insolvency was *notorious*.

As to the cases of Cumming & Smith and Dickson vs. Sawtell, they in no way sustain the pretension of the contestants. In the former case, the very first *motif* of the judgment (page 17 of 5th L. C. Jurist) was, that the debtor was "*notoriously* insolvent." And the *motif* assigned in the judgment, in the latter case (page 73, 3rd. L. C. Law Rep.) was,—that "the said Thomas Sawtell (the "debtor) was in a state of *open declared insolvency and bankruptcy*, of which "the *respondent* (Dickson, the creditor) *had notice and was aware*."

The reference to the 2023 Art. of our Code is equally unhappy, as its provisions are limited to "persons *notoriously* insolvent." And the reference to the Insolvent Act has no kind of bearing on the point under discussion, as the section cited refers solely to acts done "in contemplation of insolvency," and lays down no such rule as that here sought to be enforced.

Great stress has also been made on a *dictum* of Mr. Abbott, at page 56 of his work on the Insolvent Act of 1864, but, at page 57, Mr. Abbott says:—"The "rule, however, must not be extended *too far* * * * most security is pro- "bably taken as a *precaution* against *insolvency*, and in *that sense* may be said to "be given *in contemplation of it; but no system of bankruptcy law goes the "length of invalidating such securities*."

On the part of Shaw it is respectfully submitted, in the language of Chief Justice Meredith, in the case of Anderson et al. vs. Généreux (13th L. C. Law Rep., p. 321, 382) that "according to the general principles of our law, *mere* in- "solvency does *not* deprive the owner of real estate of the power of hypotheca- "tion," or, in the language of the Roman Law, that there must be "*consilium "fraudis*."

Of course the *notoriety* of the insolvency is a fair presumption of fraud, and for that reason our Code has enacted that *notorious* insolvency shall be a legal ground of objection to the validity of a mortgage granted whilst the debtor is actually *notoriously* insolvent.

In support of the above proposition, reference is made to the following authorities:

6 Touillier, Nos. 352, 353, 354, 355.
The 2023rd Art. of Civil Code of L. C.
3rd. Battur, ps. 130, 131, 132.
Nouv. Den., vo. Fraude, pp. 75, 76, and vo. Hypothèque, p. 767.
1 Grenier, ps. 255, 256, 257, 258.
Dict. Cont. vo. Décomfiture, p. 254, Nos. 6, 7, 8, 13, 15, 16, 17, 18.
Anderson vs. Généreux, 13 L. C. Law Rep., p. 374 and seq.
Sirey, 1812, 2nd Part., ps. 313, 314, 315.
3rd Troplong, Priv. and Hyp., No. 661, p. 56.

The award of the assignee is based on the assumption that Warren *was notoriously* insolvent at the date of the mortgage, and that Shaw *knew* the fact.

It is conceded, for argument's sake, that it has been established in evidence, that Warren must have been *de facto* insolvent some time previously to the date of the mortgage; but it is confidently contended on the part of Shaw, that the

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evidence also establishes that he was not then more insolvent than he had been for years previously; that *Warren* himself *had not the least suspicion that he was insolvent*, until he was told so by Mr. Brown, the assignee, who looked into his affairs shortly before the assignment; that *Shaw*, moreover, *had no knowledge* of his insolvency; and that so far from such insolvency being *notorious*, it took the whole commercial community here *by surprise*.

Warren swears that until May, 1865, he thought he "was all right enough," and could pay 20s. in the £; that he *never kept* a regular *check book* or *cash book*, and that he was a *mere mechanic* and knew *nothing about books*.

Warren's son swears that his father *always thought himself solvent*, and that he *no idea* that his father would stop payment *till he actually did*.

Henry W. Atwater, a son-in-law of insolvent, swears that he had not the *slightest suspicion* that the insolvent was going to fail when he did,—and that Warren was a *mere mechanic*, and *in business and money matters a mere child*, and *quite incompetent* to make out a *balance sheet* of his affairs.

As an instance of Warren's *simplicity*, Clark Fitts swears to his apparent *ignorance* that when he was paying some party $4 a week for the loan of $400, he was actually paying interest at the rate of 52 pef cent. per annum.

Horatio A. Nelson also swears that, *even after the assignment*, Warren *did not seem to think himself insolvent*, and that he very much questioned the capacity of Warren to make a balance sheet.

Then *John D. Nutter*, *Edwin Atwater*, *George R. Prowse*, *Philo D. Browne*, *William Hilton* and *George W. Warner*, all swear that they had no suspicion that Warren was going to fail until he actually stopped.

Of these witnesses, *Nutter* loaned Warren $50 about a week before he stopped; *Browne* surrendered certain *securities* to Warren's son *on the very day that he heard* Warren had failed,—and *Warner* (one of the contestants) swears that he *never at any time* thought Warren insolvent until he *actually* stopped, *in fact, until the assignee was in possession*.

It is true that *Clark Fitts* and *Nelson Davis* attest to Warren being chronically "hard-up,"—but, as explained by *young Warren* and *Henry W. Atwater*, the *nature of Warren's business* was such, that he required to give *very long credit*, and that he *consequently* required a *good deal* of accommodation.

Moreover, *not one* witness swears that he *believed* Warren *knew* that he was insolvent before he actually stopped.

Then again, it is in evidence that the People's Bank *discounted* paper for Warren, *up to the end of April*, 1865.

It is clear, therefore, that *neither the insolvent nor the public generally believed or suspected* that Warren was insolvent until he actually stopped payment.

There was no attempt made to prove that *Shaw* either *knew* or *suspected* the insolvency. But it is urged by the contestants that from the fact of his being the *son-in-law* of the insolvent, and having asked for a mortgage in December, 1864, he (Shaw) must be *presumed* to have known the actual condition of the affairs of the insolvent.

The *evidence*, however, establishes that the family relations between the parties were such, that *neither young Warren nor Henry W. Atwater would*

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suffer Shaw to address them; that the *family*, moreover, when the mortgage was originally asked for, *counselled Warren not* to grant it; that Warren also *refused to allow Shaw to examine his books*, and that the *reason* why the mortgage was *eventually* given was, that Shaw, at the time, *intended going to the United States*, so much so, that he notified his landlord (*George Rogers*, examined as a witness) that he so intended to leave.

It is also to be noted that the creditors of Warren, *including* the contestants, *never opposed Warren's discharge.* A tacit admission on their part that there was nothing *fraudulent* in his conduct.

In the face of these facts and circumstances, how can the Court say, in the language of the assignee's award, that the mortgage in question was *given and accepted*, "*in fraud* of the creditors" of the insolvent?

MONDELET, J., said that he found no appearance of fraud, or of connivance at fraud, on the part of the insolvent or the claimant.

MACKAY, J.—It would be intolerable if *mere insolvency* should vitiate all transactions which have occurred in good faith with the insolvent. In order that it should vitiate such transactions, the insolvency must be *known to the party or notorious.*

Judgment in appeal confirmed.

Torrance & Morris, for contestants.
Strachan Bethune, Q C., for Shaw
(S. B.)

SUPERIOR COURT, 1868.

IN INSOLVENCY.

MONTREAL, 30TH NOVEMBER, 1868.

Coram TORRANCE, J.

No. 987.

In re William M. Freer et al., insolvents, and *William M. Freer*, petitioner for discharge, and *John Gilmour* et al., opposants.

FRAUDULENT PURCHASE OF GOODS ON THE EVE OF INSOLVENCY—SUSPENSION OF DISCHARGE.

A trader purchased goods for cash at a time when the Court considered that he must have known that he could not meet his liabilities, and having converted the goods into money, he applied the proceeds to his own use and to the payment of certain creditors. He withheld payment of the price of the goods during five days under various pretences, and then declared himself insolvent.

HELD:—That; by the acts stated above, the insolvent was guilty of fraud within the meaning of the Insolvent Act of 1864, and his discharge was suspended for five years.

TORRANCE, J.—This case comes before the Court on the petition of William Mulcaster Freer, one of the insolvents, for a discharge under the Insolvent Act of 1864.

An assignment was made on the 15th February, 1867, and at the time the petition was presented, on the 26th March last, one year had expired from the date of the assignment, and the petitioner alleged that he had failed to obtain from the requisite proportion of his creditors a consent to his discharge. The discharge of the other insolvent, Boyd, was granted by this Court on the 28th of February last.

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The discharge of the petitioner is opposed by Gilmour & Co. under the provisions of the Insolvent Act of 1864, sec. 9. The opposition sets up that the said William M. Freer was, previous to the assignment, guilty of fraud towards divers of his creditors, within the meaning of the Insolvent Act; that on the 28th January, 1867, he bought from the opposants fifty-five barrels of potash, for the price of $2103.11, for cash on delivery; that he received the bill of the inspector for the same, on the 29th January, and promised to pay the price thereof at one o'clock on the afternoon of the same day; that the petitioner disposed of the ashes, but did not pay the opposants any portion of the said sum, and applied the proceeds of the potash to his own use and to that of his firm; that the petitioner on the 2nd of February announced the insolvency of himself and firm; that he and the said firm, on the 28th and 29th January, were, and for a long time had been insolvent, of which he was fully cognizant; that the said Freer obtained delivery of the potash from the opposants on the said 29th January with intent to defraud them. The opposants further averred that, within two weeks of the declaration of insolvency, the said Freer bought from C. A. Starke flour of the value of $800 for cash, but never paid for it, and converted it to his own use; and that he also obtained from Thomas Gordon & Co., on or about the 28th January, seventy barrels of potash for $2630.22 in cash, and only paid $1300 on account of it, and made away with the said potash, intending to defraud the said Thomas Gordon & Co. of the balance of $1330.22.

It appears from the evidence of record that the opposants, by the agency of F. W. Henshaw, broker, on the 28th January, 1867, agreed to sell Freer fifty-five barrels of potash for $2103.11, strictly cash, and to have the same re-inspected before delivery. On the 29th, about noon, the bill was delivered to Freer, who said to Henshaw that he would go his office and check the account, and that if Henshaw would send down to his office about one o'clock he would get the cheque. Mr. Henshaw sent his clerk at one, but Mr. Freer was not in. He sent again the same afternoon, but the clerk could not see him. Later in the day, Mr. Freer called on Mr. Henshaw, and said that he was selling his exchange, and that he would pay him as soon as he sold it. From that day, Mr. Henshaw made unceasing efforts to get paid. On the 31st, Mr. Freer informed him that he had sold his exchange, and that the money was all right. Mr. Henshaw then asked him to pay them at once. He replied that as it was the last day of the month, he would not give him a cheque, as the bank liked to see a good balance to the credit of their customers. On the 4th of February Mr. Henshaw saw Freer in his office, and renewed his demand for payment, in answer to which Freer informed him that he had burst, meaning that he had failed. It also appears that on the 31st January Freer sold the potash to Charles John Cusack, for shipment to England, and got a cheque for the amount, and deposited it to the credit of his firm in the Ontario Bank. On the evening of the 30th or 31st January, Freer informed his partner, Boyd, that they would have to suspend. On the 28th and 29th January, the account of Freer, Boyd & Co. was overdrawn at the Ontario Bank, and had been overdrawn from the 22nd to the 30th. The largest amount overdrawn was about $2000, but on the 30th it was duly covered. All the time the bank was protected by collateral security. The estate had only paid the opposants 7½

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cents in the dollar. The sales to Starke and Thomas Gordon & Co., for cash, and non-payment, also appear in evidence.

The Insolvent Act of 1864, section 9, sub-section 6, says that proceedings to obtain a confirmation of discharge may be opposed upon the ground of fraud within the meaning of the Act. Sub-sections 10 and 11 allow of the opposition where the insolvent applies for a discharge after twelve months, as in the present case, and by sub-section 12 the Court may make an order either granting the discharge absolutely, conditionally, or suspensively, or refusing it absolutely. The 8th section treats of frauds and fraudulent preferences. All contracts made with intent to defraud creditors are null and void, and any trader in Lower Canada who purchases on credit, knowing or believing himself to be unable to meet his engagements, with intent to defraud the person so becoming his creditor, is held to be guilty of a fraud, and assuredly the insolvent who purchases for cash payable on delivery, and fraudulently converts the goods to his own use without payment, is guilty of a fraud within the meaning of the Insolvent Act of 1864.

Was there in this case fraud within the meaning of the Act? To answer this question it is necessary to consider all the circumstances of the case. Roscoe, Crim. Evidence, 302, Edn. of 1868. The facts are not controverted. In the first place, Freer must have known on the 28th and 29th of January that he could not meet his liabilities. He informed his partner of it on the 30th or 31st. On the 29th, the purchase is completed for cash. A promise is made to pay first, at 1 p.m. that afternoon, and broken—then follow repeated promises to pay, which are also broken. There are repeated falsehoods. The bank account must be full on the last day of the month, and it was made up probably from the proceeds of these goods, as a large deposit was made on the day the ashes were converted into money. The goods were removed out of the country, and the proceeds were applied to the use of the insolvents, in place of being paid over to the sellers. Where a party makes a statement dishonestly, or with a reckless disregard to the truth, it must be fraudulent; and here the proceeds of the property of the sellers, Gilmour & Co., immediately after its conversion, go to pay another creditor, the Ontario Bank, or J. G. Mackenzie & Co., who the petitioner said to Mr. Macduff, the agent of Gilmour & Co., had to be paid. Mr. Macduff is put the question: "Have you had any conversation at any time, with respect to the said potash, with Mr. Freer, the petitioner? Answer: I had on or about the 8th of February, 1867, when he called on me in Gilmour & Co.'s office, in consequence of F. W. Henshaw having made an affidavit in reference to the transaction. He admitted that he had purchased the potash from Henshaw, and entered into a statement of the affairs of his firm generally; after hearing which I said that I understood the proceeds of exchange drawn against Gilmour & Co.'s ashes had been applied in paying the debts of J. G. Mackenzie & Co. and Mr. Stanton. To this he replied, that Freer, Boyd & Co. had borrowed money of J. G. Mackenzie & Co., and that it had to be repaid them, and was repaid, as their cash book would show. He made no remark as to the payment of Mr. Stanton's debt."

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The Court is compelled to regard the present case as an instance of reckless and dishonest dealing with the property of another on the eve of bankruptcy. The case is therefore one of fraud within the meaning of the statute. It was pleaded in extenuation of the repeated falsehoods that what a man says when drowning is not to be stated strongly against him, but a fit of drunkenness is no excuse for the commission of manslaughter, and the reckless trading which has been exhibited in the present case cannot free the petitioner from the responsibility which each individual must assume for his own acts. The purchase from Starke on the 28th of January of flour of the value of $800 for cash, and delivered by Starke, but not paid for, and the purchase from Thomas Gordon & Co. on the 28th of January of seventy barrels of potash of the value of $2630.22 for cash, and delivered by Gordon & Co., but unpaid for to the extent of $1330.22, have been invoked by the opposants as assisting to make out the intent to defraud. Let us ask what a purchase for cash means. There is on the one hand the purchase of the goods and the delivery, and on the other hand the contemporaneous act of making payment by the purchaser, who, in agreeing to purchase and pay cash, affirms that he has the cash to make the payment. The breach of a contract in such a case by the purchaser who has obtained delivery, but fails to pay, is worse than the violation of a promise in the future. If he has not the cash to pay, it is a false pretence, and it approaches near to what is known in the criminal law by the charge of obtaining goods under false pretences. It is the painful duty of the Court to pronounce its condemnation of actions which, like the present, strike at the foundation of the social fabric, and destroy that confidence between man and man which forms the basis of commercial intercourse. The sentence of the Court (for the form of which I refer the bar to the case of *Lamb*, an insolvent, page 193 of the 2nd volume of the Lower Canada Law Journal) is that the discharge of the petitioner be suspended for the period of five years, beginning from this date, and ending on the 30th day of November, 1873.

The judgment of the Court is as follows:

The Court, etc., considering that the petitioner, on or about the 29th January, 1867, purchased from the opposants fifty-five barrels of potash for the price or sum of $2303.11, payable cash on delivery;

Considering that the petitioner made the said purchase with intent to defraud the opposants, and obtained delivery of said goods;

Considering that on receiving delivery of the said potashes, he then immediately converted the same to his own use, or to the use of the firm of Freer, Boyd & Co., of which he was a member, and paid other creditors out of the proceeds of the said potashes, although being then in a state of insolvency, and did not pay the opposants the price of the said sale;

Considering that the petitioner by the said purchase and conversion to his own use while in a state of insolvency, and by the non-payment of the opposants, and the payment out of said proceeds of other creditors at the said date, committed a fraud within the meaning of the Insolvent Act of 1864, doth grant the said discharge of the petitioner suspensively, and doth order that the said

discharge be suspended until, and go into operation and have effect upon and after the 30th day of November, 1873. Freer and Gilmour.

Discharge suspended for five years.

J. J. C. Abbott, Q.C., for the petitioner.

W. H. Kerr, for the creditors opposing.

(J.K.)

MONTREAL, 31 OCTOBRE 1868.

Coram MONK, J.

No. 284.

McMillan vs. *Boucher*.

LIBELLE—SOLIDARITE.

JUGE:—1o. Que la réparation faite par l'un des auteurs du libelle ne libère pas son complice quoiqu'elle puisse atténuer les dommages.

2o. Que la solidarité, dans ce genre de délit, résulte de la suggestion des écrits diffamatoires, sans participation dans le fait matériel de leur rédaction.

Pendant que se poursuivait, à Washington, le procès de Surratt, accusé de complicité dans l'assassinat du président Lincoln, la presse de Montréal publiait jour par jour, la preuve faite devant la Cour Supérieure. Le demandeur, McMillan, était le principal témoin de la poursuite. Il relatait les aveux faits par le prisonnier, durant la traversée entre Québec et Liverpool à bord du steamer *Peruvian*, sur lequel le demandeur agissait comme chirurgien.

La *Minerve*, journal de Montréal, publia, en juillet 1866, un article dans lequel il était dit en substance, qu'il fallait n'attacher aucune foi au témoignage de McMillan, et les raisons que donnait ce journal pour discréditer le demandeur étaient très graves.

Le demandeur porta une première action contre les propriétaires de la *Minerve*; mais quelques jours après ce journal déclarait qu'il avait publié l'article libelleux dans l'ignorance des faits et sous la direction du défendeur Boucher; que depuis lors il avait appris à connaître le demandeur et que son caractère avait toujours été à l'abri du reproche. Là-dessus et sur le paiement des frais, par les propriétaires du journal, l'action fut discontinuée et une nouvelle action, savoir la présente, fut instituée contre Boucher.

Le défendeur plaida qu'il n'avait rien écrit des paroles diffamatoires qu'on lui reprochait; qu'au reste il avait été fait, par le même journal, une réparation pleine et entière de ce tort dont se plaignait le demandeur.

A l'enquête le fait de l'action discontinuée, et celui de la réparation, fut prouvée. Il fut aussi prouvé que l'un des rédacteurs du journal avait écrit l'article en question, sans connaitre le demandeur et sous la dictée du défendeur, qui lui disait: écrivez ceci, dites cela.

Cassidy, C.R., pour le défendeur, soutint lors de l'audition, que la réparation faite par le même journal au demandeur exonérait le défendeur; que d'ailleurs le défendeur ne pouvait être responsable de l'acte du rédacteur, qui était libre d'écrire ou de ne pas publier ce que lui avait dit le défendeur.

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J. Doutre, C.R., pour le demandeur, répondit que le défendeur, n'ayant fait aucune preuve de l'effet produit par cette réparation, il était tenu de payer les dommages prouvés; que celui qui conseille la commission d'un délit est responsable du tort dans la même mesure que l'auteur direct du délit et solidairement avec lui, et il cita les autorités suivantes:

Art. 1106, C.C. L'obligation résultant d'un délit ou quasi-délit commis par deux personnes ou plus est solidaire. Sourdat, Responsabilité, T. 1er, No. 473: "Quand plusieurs personnes ont concouru à un même acte illicite commis avec intention de nuire, intention qui s'est réalisée, chacune d'elles est réellement coupable du délit dans son entier. La responsabilité d'un pareil fait ne se partage pas. Comment l'un ou l'autre s'isolerait-il pour rejeter sur son complice une portion du fardeau? En prêtant son concours à l'action coupable, il en a accepté toute la moralité et toutes les conséquences. Il a commis la faute, le délit, autant qu'il était en lui, il a causé le dommage tout entier autant que le concours de tous les auteurs a pu le permettre." Id. Nos. 474–477. Id. T. 2, Nos. 704, et suivants.

MONK, J.—The defendant, a priest, went to the *Minerve* office, and suggested to one of the proprietors that he should write certain things respecting the plaintiff, who was a witness examined at the Surratt trial in Washington. The editors of the *Minerve* seemed to have had such entire confidence in the good faith of the defendant that they received the suggestions respecting McMillan, and in receiving these suggestions, and inserting them in their journal, they were no doubt guilty of an atrocious libel. It is unnecessary for me now to mention the particular language made use of by the *Minerve* respecting McMillan. It is sufficient to say that it was unquestionably a gross libel. Thereupon, McMillan sued the proprietors of the *Minerve*. These gentlemen found that they had been misled, and retracted the libel, and on their paying the costs the action was discontinued. McMillan then sued Boucher, who had instigated the article. He has pleaded that he is not liable, and that reparation has been made by the editors of the *Minerve*. The Court, on looking into the evidence, has come to the conclusion that Boucher was the originator of the article in question, which would never have been written but for him. The defendant being the originator of a scandalous libel, the public retractation by the *Minerve* does not exonerate him from the consequences of his participation in the *délit*. The defamer is equally liable, whether he writes the libel himself, or causes another person to write it. Were it not that a retractation has been published, which may have the effect of lessening the injury to the character of McMillan, the judgment of the Court would have been more severe. Taking all the circumstances into consideration, I am of opinion that the plaintiff should recover $200 damages, with costs of an action for $400.

Jugement pour le demandeur.

Doutre & Doutre, pour le demandeur.
Leblanc & Cassidy, pour le défendeur.
(J. D. & J.)

COURT OF QUEEN'S BENCH, 1868.

MONTREAL, 9th DECEMBER, 1868.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, Ch. J., CARON, J., BADGLEY, J., DRUMMOND, J.

No. 6.

WARDLE, APPELLANT;

AND

BETHUNE, RESPONDENT.

HELD:—That a builder is responsible for the sinking of a building erected by him, on foundations built by another, but assumed by him in his tender and contract, without protest or objection, although such sinking be attributable to the insufficiency of the foundations and of the soil on which they are built, and is liable to make good at his own expense the damage thereby occasioned to his own work.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, on the 17th of April, 1867 (MR. JUSTICE BERTHELOT presiding), dismissing the appellant's action.

This judgment was the final one in the case reported at pages 289 *and seq.* of the 8th vol. of the L. C. Jurist, homologating the report of the *experts*, which established that the cost of replacing the tower and spire referred to in that report would be very considerably in excess of the apparent balance due by the respondent to the appellant.

DUVAL, CH. J., said that, in consequence of the judgment already rendered by this Court, it was unnecessary to enter into detail of the reasons which influenced the Court to confirm the judgment appealed from. No doubt it was a very hard case for the appellant, who was proved to have done his work in the best style, but however harsh the law might be in making the builder liable under the circumstances of this case, the Court was nevertheless bound to administer the law as they found it.

CARON, J., dissented, and spoke as follows:

Appel du jugement de la Cour Supérieure à Montréal (Berthelot, Juge), 17 avril 1867, homologuant le rapport des experts produit le 22 février 1867, en exécution du jugement de la Cour d'Appel du 4 juin 1864, confirmant celui de la Cour Supérieure (Smith, Juge), Montréal le 24 février 1862, (voir ce jugement dont appel au factum de l'appelant, page 11, celui de la Cour Supérieure du 24 février 1862, au même factum, page 25, et celui en appel du 4 juin 1864, factum de l'intimé, page 5.)

L'action qui a donné lieu à tous ces jugements était par l'appelant Wardle, contre l'intimé représentant un comité de membres de l'Eglise Anglicane à Montréal, chargé de faire construire une église y située, nommée *The Christ Church Cathedral*, dont l'appelant était l'entrepreneur suivant contrat, cité au factum des parties. L'action était portée pour £5000 composés des différents items portés à la page 1ère du factum de l'intimé. La défense est très détaillée et se trouve résumée au factum de l'appelant, pages 1 et 2.

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La seule question importante soulevée par les prétentions respectives des parties est de savoir, "si sous les circonstances établies dans la cause, tant par les actes et contrats produits et prouvés, que par les autres preuves, l'appelant est responsable de l'affaissement (*sinking*) survenu à la tour et au clocher de la dite église, après sa construction, et des dommages qui en sont résultés. Si l'appelant est responsable, la somme qui lui revient pour les causes mentionnées en son action, fixée assez correctement probablement, par le jugement dont est appel mentionné plus haut (4 juin 1864), à $2195.36 est beaucoup plus que compensée par les dommages causés à l'intimé par suite de l'affaissement qu'a éprouvé la bâtisse, lesquels sont estimés à la somme de $29,000 et plus par le rapport d'experts homologué par le jugement dont est appel.

Si au contraire l'appelant n'était pas responsable, il lui serait dû $2195.36 qui lui sont allouées, par le jugement de la Cour d'Appel du 4 juin 1864, lequel pour cette partie du moins, et pour toutes les difficultés soulevées dans la cause quant aux questions de ce qui pouvait être dû sur le contrat, doit être regardé comme final et mettant fin à toutes contestations, quant à la qualité et à la quantité de la pierre fournie et livrée, et quant à la manière de la mesurer; quant aux dommages résultés de la mauvaise qualité, quant aux additions et extras faits et réclamés par l'appelant, tout cela a été réglé définitivement par le jugement de la Cour d'Appel susdit, et il serait oiseux d'y revenir, quoique l'on en ait parlé longuement lors de l'audition du présent appel dans le terme dernier. En référant à ce jugement, l'on trouvera que celui de la Cour Supérieure, dont il était appel (24 février 1862) est confirmé, excepté quant à la somme de $400 ajoutée à celle qui, par le susdit jugement, avait été accordée à l'appelant, tout en laissant cette somme sujette à la compensation admise et prouvée en la Cour Supérieure, pour établir laquelle, l'expertise y mentionnée avait été ordonnée, cette expertise n'étant nullement dérangée par la Cour d'Appel.

Si telle est la portée du jugement du 4 juin 1864, il semblerait que toute la contestation dans la présente instance se borne à savoir si le rapport qu'ont fait les experts nommés par le jugement du 24 février 1862, et mentionné plus haut, est bon et valable et doit être approuvé comme il l'a été par le juge Berthelot par son jugement qui donne lieu au pré-ent appel. Il paraîtrait qu'après le jugement de la Cour d'Appel, tout ce qui restait à faire par la Cour Supérieure à qui le dossier était renvoyé, était de mettre à exécution la partie du dit jugement du 24 février 1862 qui ordonnait l'expertise, afin de déterminer le montant des dommages reconnus exister et que la cour reconnaissait susceptibles d'être opposés en compensation à la somme restée due à l'appelant.

Si cette manière de voir est correcte, la conséquence est que la question de la responsabilité de l'appelant pour les dommages résultés des causes susmentionnées a été comme tout le reste réglée définitivement par le dit jugement, et il paraîtrait que l'on n'aurait pas dû renouveler des discussions qui étaient devenues oiseuses, et dont la cour ne pouvait plus prendre connaissance, puisqu'elle les avait jugées définitivement. Il est probable que ce n'est pas ainsi que la chose a été considérée par les parties, puisque la cause a été, tant verbalement que par écrit, plaidée sur tous les points de même qu'elle avait pu l'être lors des auditions précédentes. La cour paraît avoir été de l'avis des parties intéressées, puisqu'elle

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les a laissé faire sans aucune remarque. Dans la crainte que je me trompe dans l'appréciation des circonstances, je m'occuperai de l'importante question qui s'est traitée dans la cause et que j'ai posée plus haut, savoir : " Sous les circonstances prouvées et établies, l'appelant est-il responsable des dommages résultés de l'affaissement de la tour et du clocher ?"

La Cour d'Appel unanimement et le juge de la Cour Supérieure qui a rendu le jugement, ayant décidé que l'appelant était responsable, c'est avec répugnance que je me trouve entretenir une opinion contraire, et pour cette raison et aussi parceque cette opinion, dans le cas actuel du moins, doit être en pure perte, puisqu'elle ne peut changer le jugement rendu, je me contenterai d'exposer succinctement les raisons qui me font croire que l'appelant n'est pas responsable, et que le jugement qui lui impose cette responsabilité est injuste et illégal, et que son action aurait dû être maintenue et jugement rendu en sa faveur pour $2195.36.

J'admets bien distinctement que l'entrepreneur, même lorsqu'il agit sous la surveillance et direction d'un architecte choisi par le propriétaire, et dont, par le contrat il s'est obligé de suivre les ordres, est cependant responsable des vices du sol sur lequel il construit, et peut être condamné soit seul, soit solidairement avec l'architecte aux dommages qui en résultent au propriétaire. J'admets que les principes émis dans la cause de Browne et Laurie (1 L. C. Rep. 343) sont parfaits, tels qu'appliqués aux faits dans cette cause et que le jugement du juge Day est remarquable quant à la clarté et la logique avec laquelle il a été rendu, mais les principes sur lesquels il est basé ne sont nullement applicables au cas de l'appelant.

La preuve établit que l'ouvrage qu'il a fait est aussi bien que possible, ce n'est pas à cette cause ni au défaut des matériaux employés que l'affaissement en question peut être attribués, c'est au vice des fondations qui étaient insuffisantes vû la qualité du sol sur lequel la construction devait être faite. Or, les fondations ont été faites par Brown et Watson en vertu d'un contrat spécial fait entre eux, et l'intimé (voir le factum de l'appelant p. 3) auquel l'appelant n'avait rien eu à faire, lequel a été exécuté, sans intervention aucune de la part de l'appelant, sous la direction et surveillance d'un architecte (Wells, depuis décédé), choisi par l'intimé, ces fondations devant être exécutées d'après les plans et spécifications mentionnées au contrat et suivant les ordres de l'architecte. La chose s'est passée ainsi que convenue. L'intimé a été tellement satisfait de la manière dont ces fondations ont été faites par Brown et Watson, qu'il a fait avec les mêmes un autre contrat par lequel il les a chargés de construire sur ces fondations deux pieds et demi de mur en sus, ce qui a aussi été exécuté. Ce n'est qu'après l'exécution de ces deux contrats que l'intimé a fait publier ses demandes pour soumissions pour construire le reste de la bâtisse, y compris la tour et le clocher. Cette manière de procéder n'indiquerait-elle pas que l'appelant considérait cette partie de l'ouvrage tellement importante qu'il voulait en faire une tâche expresse et particulière, séparée et distincte du reste, afin que l'on pût ensuite sans danger, ériger le reste de la construction. Cette précaution plus qu'ordinaire et assez singulière était surtout une indication que tout le soin nécessaire avait été pris quant à la suffisance et la solidité des fondations faites sous de pareilles circonstances. Les soumissionnaires et l'appelant n'étaient-ils pas après cela justifiables à prendre

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pour admis que l'on pouvait sans danger exécuter le plan pour lequel ils contractaient et l'asseoir sur la fondation pratiquée avec tant de soin. Ces circonstances ne paraissent justifier la prétention de l'appelant, quand il dit que les précautions prises pour l'intimé exemptaient l'appelant de l'obligation de regarder aux fondations et d'examiner la qualité du sol et l'étendue qui leur avait été donnée. Il avait raison de croire que tous les calculs avaient été faits, et que l'on aurait pris en mauvaise part l'intervention qu'il aurait voulu faire à ce sujet.

Ces circonstances extraordinaires et exceptionnelles différencie notre espèce de tous les précédents que l'on a cités et que l'on peut citer sur le sujet. Je maintiens que l'appelant n'était pas tenu de regarder aux fondations; il pouvait bâtir dessus en toute sûreté; si elles n'étaient pas suffisantes, comme la chose est constatée, parcequ'elles n'ont pas été faites assez étendues, c'est la faute de l'intimé ou de ceux qu'il a employés pour les faire, et c'est à eux qu'il doit s'adresser pour se faire indemniser. Autrement il aurait deux recours, celui contre le premier entrepreneur et le premier architecte, et un autre contre l'appelant et le second architecte auquel il était tenu de se conformer. Mais indépendamment des faits particuliers qui viennent d'être énumérés et qui différencient cette cause de tout autre à laquelle l'on puisse référer, l'on peut poser en principe que le propriétaire qui emploie successivement plusieurs entrepreneurs pour la confection d'une bâtisse, ne peut les tenir responsables chacun que pour la partie de l'ouvrage qu'il a exécuté. Cette proposition est établie par nombre d'autorités citées par l'appelant et plusieurs autres, et entre autres 1 vol. Fremy-Ligneville, *législation des bâtiments*, Nos. 91, 92.—3 N. Den. vo. Bâtiments, p. 313. 314.

D'après ses autorités et pour les raisons exposées plus haut, si la cour n'est pas liée par les jugements déjà rendus, je suis d'avis que le jugement devrait être réformé et le défendeur condamné à payer à l'appelant la somme de $2195.36 intérêt et les dépens.

Si le jugement déjà rendu doit rester, je me contenterai d'exposer mes raisons, et de dire que si j'avais fait alors partie de la cour je n'aurais pas concouru dans ce jugement, Ça me laissera libre pour l'avenir.

BADGLEY, J., said he had already stated his view of the case, on the occasion of the previous judgment being rendered.

DRUMMOND, J., was unable to be present, owing to illness, but he signed the judgment (as provided by statute) which confirmed the judgment appealed from purely and simply.

Judgment of court below confirmed.

A. & W. Robertson, for appellant.
A. A. Dorion, Q.C., Counsel.
Strachan Bethune, Q.C., for respondent.
Henry Stuart, Q.C., Counsel.
(S. B.)

SUPERIOR COURT, 1868.

MONTREAL, 31st DECEMBER, 1868.

Coram MACKAY, J.

No. 521.

The Bank of British North America vs. *Torrance* et al.

HELD:—That when a Bank discounts for A a draft by him on B and accepts a check for the proceeds, and delivers it to A for transmission to B, to enable B therewith to retire a draft for a similar amount, drawn by A and accepted by B, for A's accommodation and about to fall due at the branch of the Bank where B resides, on the faith of A's representation, assurance and undertaking (without authority, however, from B) that B will accept the new draft, and B receives the check, and before using it has knowledge of the transaction as between A and the Bank, B cannot legally use the check to retire his own acceptance on the old draft, without accepting the new one.

This was a hearing on a motion by the defendants for judgment *non obstante veredicto*, and a further motion by them for judgment in their favour, on the verdict and findings of the special jury, before whom the case had been tried, and on the pleading and evidence of record, and likewise on a motion by the plaintiff for judgment in the plaintiff's favour on the verdict and findings of the jury and on the pleadings and evidence of record.

The facts and circumstances of the case sufficiently appear for the remarks of the Honourable Judge.

Per Curiam :—The plaintiffs in this case, on the 15th July, 1867, were holders of a draft for $10,000, drawn by one Yarwood on defendants, and accepted by them, to mature on the 18th July. The plaintiffs allege that the draft was Yarwood's affair, though the defendants were the acceptors. To retire this bill, Yarwood made a fresh draft on defendants to his own order for $10,000 at three months. This he asked the Bank to discount, and to allow him to draw a cheque on their agency in Montreal for said amount, payable at par, in order to meet this first mentioned draft when it should fall due. The Bank Manager at London acceded to Yarwood's request, and marked the cheque payable at par in Montreal, and gave it to Yarwood. The latter sent it to the defendants, asking them to accept the new draft, and with the cheque, take up the original draft to fall due on the 18th. They allege also, that on the 17th July, the defendants received the cheque, and on the same day the new draft was left with defendants for acceptance, and though defendants mentally determined not to accept the new draft, without saying that they did not intend to accept it, with fraudulent intent, and well knowing the conditions upon which plaintiffs had certified and marked the cheque at London, defendants presented the cheque on the 17th and got it paid, and on the 18th refused to accept the new draft. It was protested thereupon for non-acceptance, and on the 21st October following, on payment being refused, it was protested for non-payment.

The plaintiffs also allege that Yarwood was insolvent on the 15th July, and that when defendants received the cheque from him, they had reason to be aware of it.

The defendants plead that the draft maturing on the 15th July was purely accommodational, and was accepted by them with the understanding that Yarwood was to provide for it. That they received the cheque for $10,000 from

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Yarwood, who had gotten the Bank to accept it for the purpose of enabling defendants to take up the accepted draft falling due on the 18th, and that immediately on receipt of the cheque, it was placed to Yarwood's credit, and they, by means thereof, were enabled to, and did then immediately, take up and pay the said draft, the whole according to their agreement with Yarwood, to which the latter had consented.

In answer to defendants' plea the plaintiffs said that though Yarwood may have been bound to pay the draft on maturing, yet the defendants were pecuniarily interested in the transactions which gave rise to it; that the grain which Yarwood bought was paid for by drafts on defendants from time to time, the grain being afterwards sold by the defendants on commission, to their (the defendants') profit.

A jury trial was moved for, and the trial took place on the 12th and 13th of November, 1868.

The following were the questions submitted to the jury, and their answers thereto:

1. Were the plaintiffs on the 15th July, 1867, at Montreal, the holders of a certain draft for $10,000, which had been previously drawn by one E. M. Yarwood, of London, in the Province of Ontario, on the defendants, and accepted by them, and which was to mature on the 18th of July, 1867?

Answer—Yes.

2. At the time of making and accepting of the said drafts was the said E. M. Yarwood engaged in purchasing grain in Upper Canada with the money raised by drafts on defendants, for the purpose of being shipped to and sold by the defendants on commission?

Answer—No.

3. Was the said draft accepted by the defendants that the said E. M. Yarwood might make similar purchases with the proceeds thereof, and that they should thereby be enabled to make profit as well by such acceptance as by the sale of grain purchased with the proceeds thereof; or was the said draft so accepted by them without any such understanding, and purely for the accommodation of the said E. M. Yarwood (and in order to free defendants' wheat, which had been pledged by said Yarwood without defendants' consent, and the money obtained on such pledge), and on the understanding and agreement that said Yarwood would meet and pay the same at maturity, or provide funds for its payment, and that no claim might be made against defendants in respect of the same?

Answer—We have no evidence of the defendants' having any wheat. The draft was accepted by the defendants as an accommodation to E. M. Yarwood with the understanding that the said Yarwood should retire the said draft on maturity.

4. Did the said E. M. Yarwood, with a view to provide the necessary sums to retire the said draft at its maturity, make and sign, on the 15th day of July, 1867, at London aforesaid, the draft for $10,000 in the plaintiffs' declaration referred to?

Answer—Yes.

5. Did the said E. M. Yarwood request the plaintiffs to discount said draft of the 15th day of July, 1867, and allow him to draw a cheque for the full amount thereof, in order that he might therewith retire the said first mentioned draft, and upon the representation and engagement by him that the defendants would accept such new draft; and did the plaintiffs discount such new draft, and accept the said cheque, and certify it as being payable in cash at Montreal, on the faith of such representation, assurance and undertaking, and deliver it to the said E. M. Yarwood for the purpose aforesaid?

Answer—Yes.

6. Did the said E. M. Yarwood transmit said accepted cheque to defendants, informing them in effect that said cheque represented the proceeds of the said draft for $10,000, so drawn on the 15th day of July, 1867, by him on defendants, and that said cheque had been obtained on representation that said defendants would accept said draft on the 15th July, 1867, and requesting defendants to accept such draft, and with the proceeds of said cheque retire said first mentioned draft for $10,000, to mature on the 18th July, 1867; or did said E. M. Yarwood transmit said cheque to defendants without explaining how he had obtained it, and informing them only that it was to retire said first mentioned draft, to become due on 18th July, 1867?

Answer—Yarwood remitted the cheque in his letter of the 15th July, 1867, to cover the draft due on the 18th inst., without explaining how he had obtained it.

7. Was the said draft of the 15th day of July, 1867, presented to the defendants for acceptance on the 17th day of July, 1867, by the said plaintiffs, and left with them according to the custom of trade in that behalf until the 18th day of said month; and did the said defendants, on the last mentioned day, refuse to accept said draft?

Answer—Yes.

8. Was the said last mentioned draft protested for non-acceptance and non-payment, and was notice of such protest attended with the costs in said declaration alleged?

Answer—Yes.

9. Was the said draft presented for acceptance after said defendants had so been made aware of the transaction, and did they obtain the amounts of said cheque from the plaintiffs before refusing acceptance of the said draft?

Answer—Yes.

10. Did the said defendants immediately on receiving said cheque on the 17th day of July, 1867, present the same for payment and receive the proceeds thereof from the plaintiffs, and did they then immediately place the proceeds to the credit of said Yarwood?

Answer—Yes.

11. When they so presented the said cheque for payment, did they know, or had they reason to believe, that it represented the proceeds of the draft of the 15th July, 1867, and that such draft was only discounted upon the faith that they would accept it?

Answer—We are of opinion that the defendants had reason to believe that the

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cheque was the proceeds of the draft of the 15th July, and that said draft was discounted upon faith that defendants would accept it.

12. Did the said plaintiffs, on the 18th July, 1867, notify the said defendants of all the facts and circumstances connected with the discounting of said last mentioned draft, and the acceptance and transmission to them of said cheque, as alleged in said declaration; and did the plaintiffs also forbid the said defendants to use the proceeds of said cheque without accepting said draft?

Answer—Yes.

13. Did the defendants, after being so notified and forbidden, and with a full knowledge of all the facts and circumstances under which said draft was so discounted, use the proceeds of the said cheque for $10,000 with intent to relieve themselves, at the expense of the plaintiff, from their liabilities on the said draft, which became due and payable on the 18th July, 1867, and did they, in fact, retire and pay the said draft with the proceeds of the said cheque?

Answer—The defendants drew the amount of the cheque (but how they applied the proceeds is not known) and retired the draft with legal tender notes through their notary.

14. Was the said E. M. Yarwood, on the 16th July, 1867, wholly unable to pay the amount of the said cheque, and did the same become wholly insolvent, *en état de déconfiture*?

Answer—Yes.

15. Did the said defendants, when they received the said cheque from the said E. M. Yarwood, know, suspect or believe, or had they reason to suspect or believe, that the said E. M. Yarwood was then either insolvent or wholly about to become so?

Answer—We have no evidence to show that the defendants considered Yarwood an insolvent at that time.

On the 26th of November the plaintiffs moved that on the verdict, pleadings and evidence, judgment be entered in their favour.

On the same day the defendants presented two motions to the Court:

1st. Inasmuch as plaintiffs' allegations are not sufficient in law to sustain their pretensions, that (notwithstanding the verdict) judgment be rendered in favour of defendants. (Art. 438 Code of Procedure.)

The second was for judgment on the verdict, pleadings and evidence.

It is to be remarked that defendants did not move for a new trial.

If the allegations of the Bank are sufficient in law, defendants' first motion must fail, but if insufficient, it must be granted, no matter what were the findings of the jury. (Tilstone & Gibb, 4 Jur. 361; and Higginson vs. Lyman, 4 Jur. 329, shew how those motions work.)

Upon mature consideration, after reading and re-reading it, I think the plaintiffs' declaration good enough in law. It was not demurred to. The verdict must be applied, in so far as may be consistent with the nature of the action and according to the rights of the parties under it. The reference to the jury was for the purpose of particular findings by them, upon mere matters of fact. Their verdict is like a special case, and ought to have effect, as one in England would have, as to what is set forth in a special case to which both parties had agreed.

We may now pass to defendants' second motion, namely for judgment in his favour upon the pleadings, evidence and verdict. First as to the evidence:—

The relations between defendants and Yarwood may be gathered from the letter of December 28, 1866, from defendants to Yarwood. The latter was an agent employed by defendants upon a commission to buy grain for them. "We have to-day arranged for a credit of $20,000 to begin with," say defendants; "We shall want regular returns and the property insured." What passed at London is clear from the parol evidence before the jury and from the following letters from Yarwood to the defendants:—

ST. THOMAS, July 19, 1867.

MESSRS. D. TORRANCE & CO.

Gentlemen,—I wrote you on the 15th inst., and now have your letter of the 12th, and your telegram of the 17th inst. I was away from home when the telegram arrived, and only got back last night.

I wrote Mr. Cramp from Toronto. The cheque of $10,000 was drawn against proceeds of my draft on you at three months for same amount, and if you decline to accept my draft, then the cheque should not be used. I would not have made a draft on you if my anticipations respecting grain had been realized.

I am, Gentlemen,

Your obedient servant,

E. M. YARWOOD.

ST. THOMAS, July 19, 1867.

MESSRS. D. TORRANCE & CO., MONTREAL.

Gentlemen,—I have received your letter of the 17th inst. My draft on you for $10,000 was discounted by the manager of the Bank of British North America, at London, on the understanding that it was a renewal of a bill for same amount due on the 18th inst., and for which he marked my cheque.

I drew upon you because I had failed to realize, as I expected, from sales of grain, and because I had no other means at the moment of meeting the bill, and I was bound to prevent you being put to any inconvenience in the matter. But if you do not accept you will not only ruin me, but seriously injure the manager of the Bank, who acted in good faith in the matter, and discounted the draft only for the purpose of enabling me to retire that due on the 18th.

I am,

Your obedient servant,

E. M. YARWOOD.

ST. THOMAS, 20th July, 1867.

MY DEAR SIR,—I hope your firm will not continue to refuse acceptance of my draft. The doing so will be disastrous, not only to me but to the Manager of the British N. A. Bank. He discounted the bill for the express purpose of enabling me to retire the draft due on the 18th, and he had full confidence you would accept or he would not have marked a cheque expressly intended to retire a bill of which the draft he discounted was a renewal.

If you will continue to accept for a few months I will redeem the debt as fast

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as I possibly can, and if I fail to realize enough from my business this fall to pay off my liability, I will dispose of everything I have before the close of the year.

My earnest desire is to pay for the amount I owe you as quickly as possible. When I saw you in Montreal, I expected to have to draw for $5,000. I have drawn for $19,000, and have insured my life and transferred the policy.

I certainly ought to have advised you before I drew, but as I had not the means to pay the bill, I thought it better to make a draft and send you a cheque, than allow you to retire the acceptance, and put you to inconvenience.

Yours truly,

E. M. YARWOOD.

THOS. CRAMP, ESQ.

The letter of Yarwood, of the 16th of July, from Toronto, is not produced by the defendants, it being lost. It is certainly unfortunate that such an important paper should be lost, and I feel bound to say that I never heard the loss of such a paper so poorly explained; the paper itself bearing upon such large amounts, and upon things, the like of which never happened before probably. The cheque was cashed between twelve and one on the 17th; and the plaintiffs contend that the letter of the 16th was in the possession of D. Torrance & Co. on the 17th July, before they cashed the cheque. So it must have been, unless we presume several irregularities. How important it was to have kept the letter to prove irregularities if any. If it arrived irregularly, or late, in Montreal, how important it was to men of business to keep it carefully. On the 18th, in the afternoon, D. Torrance & Co., to the Notary presenting the new draft for acceptance, say:—"We cannot accept; no advices from Upper Canada;" yet surely they had this letter of the 16th then. Yarwood is certain that that letter of the 16th contained more than the one of the 15th. He says:—"I think it stated my regret at having been obliged to draw; that I had no other means of meeting the draft." "I told them what I had done," he adds, on cross-examination. Plaintiffs argue that it stated in like words what the letters of the 19th and 20th do; and complain that for want of that letter of the 16th they have had to resort to the parol evidence of Yarwood, biased in favour of defendants. It is observed in support of the plaintiffs' complaint that Yarwood's position at the date of the trial was very different from what it was in July, 1867. Before the time of being examined as a witness for plaintiffs, Yarwood had been discharged by the opposite party, the defendants, from over $10,000, on payment of 12½ cents on the dollar; that is, he was forgiven $9,625.

It is proved by Mr. Hooper that Mr. Cramp called at the Bank on the 18th (the cheque had been cashed on the 17th), and said that Yarwood had no authority to draw. It is complained of by plaintiffs that defendants did not inform them earlier of their intention not to accept the draft. Mr. Hooper, on the 18th, went to Mr. Cramp's office, and Mr. Cramp showed him Yarwood's letter of the 15th; saying that there was nothing to connect the cheque with the draft. But Mr. Cramp, who had Yarwood's letter of the 16th then, unless he had lost it before, said not a word about it. And this is the letter

that Yarwood swears told Mr. Cramp of what he (Yarwood) had done. The plaintiff says that Mr. Cramp was guilty of artifice and reticence on this occasion. As to this letter of the 16th, from Toronto, defendants appear up to the 4th of November, 1868, not to have told their own counsel of it. This is evident from the *factum* submitted to me by the defendant a few days before the trial. This factum, after reciting Yarwood's letter of the 15th, states as follows: "This letter contained the only information respecting the alleged "circumstances attending the discounting of the new draft that the de- "fendants received from Yarwood before the old draft was retired." The old draft was retired at three p.m. on the 18th. Any man to whom the case might be stated, as to myself, by defendants' *factum*, without mention of the letter of the 16th, from Toronto, would form an opinion of the case very different from what he would if fully and truly informed. Defendants say to plaintiffs, you may prove the contents of lost letter by secondary evidence, but plaintiffs rights may be greater than this; in such cases presumption may be in their favour. Yet I did not charge the jury so. In the hurry of the trial I confess to have been unprepared a little for what came out, and I left the case as one of fact to the jury, with no special advice or remark, as to whether they might presume things or not, in consequence of the loss of that letter of the 16th by defendants.

Here is some law on the subject: If a man withhold the evidence by which the true nature of the facts of a case would be manifested, every presumption to his disadvantage will be adopted. (Page 153—1 Smith's Leading Cases.—Note.) If a person is proved to have destroyed any written instrument, a presumption arises that if the truth had appeared it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance. But if the evidence be shown to be unattainable, the presumption sometimes ceases. (727 Broom's Leg. Max. Kerr on Fraud—p. 214.) Upon such authorities judges all over the world constantly charge juries that they may presume things, not the total of an opposite party's case, but many things, such as regularities, rather than irregularities.

There is no proof here of how the letter was lost, or when, or by rebuttal testimony, of what the contents were. As I said before, I gave no instruction whatever to the Jury on this particular point. The eleventh finding may be based in part upon presumptions. If so, I would, nevertheless, not find fault with it on that ground. The jury may have thought the letter of the 14th supported their eleventh finding. This letter reads:

"I have drawn on you to-day at 3 months for $10,000, and enclose cheque on Bank of B. N. America for same amount to retire bill due 18th inst."

Suppose Yarwood had written with mere transposition of words as follows:— "To retire bill due on the 18th inst., I have drawn on you to-day at 3 months for $10,000, and enclose cheque on Bank of B. N. America for same amount."

Plaintiffs say that Torrance & Co. had reason to believe, even from the letter of the 15th, all that the Jury has found by their eleventh finding.

Here is an important part of the case: Mr. Cramp, when he called at the Bank, gave as a reason for defendants refusing to accept the new draft, that

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Yarwood had no authority to draw. Now, after the trial, and since the Jury's eleventh finding, we may say that defendants had reason to believe, before getting the cheque cashed, that the draft on them had been discounted upon the faith that they would accept it, and that the cheque was the proceeds of that discount.

It is true that Yarwood had no authority to draw upon defendants; but plaintiffs say that by using the cheque under the above circumstances and belief, defendants ratified the act of Yarwood. The plaintiffs contend that, under the circumstances, defendants ought not to be allowed to retain plaintiff's money, proceeds of the cheque, and sole consideration therefor. Plaintiffs cited no authorities, whether from compliment to the Court or not I cannot say; but I have been compelled to look for authorities, and here are some:

"As an authority may be presumed from previous employment in similar acts, so the same presumption arises from subsequent acts of assent or acquiescence; a small matter will be evidence of such assent; and if with a knowledge of all the circumstances an employer adopts the acts of his agent for a moment, he is bound by them."—*Paley by Dunlop* (171).

Of course there must be a knowledge of the circumstances; but the Jury in this case has found enough.

Livermore, Pr. & Agent, vol. 1, says:—"If I make a contract in the name of a person who has not given me authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it. But if with full knowledge of what I have done he ratify the act, he will be considered to have contracted originally by my agency; for the ratification is equivalent to an original authority."

Does not Yarwood say that in his letter of the 16th he told the defendants of what he had done? Here is another case from notes to Paley, page 172.

"If the principal, after knowledge that his orders have been violated by his agent, receives merchandize purchased by him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favour of the ratification of the acts of the agent may fairly be drawn by the Jury."

Troplong, Mandat, No. 612, says:—"Si ayant reçu avis de ce qui a été entrepris pour moi à mon insu, ou en dehors de mes ordres, je garde le silence, je suis censé consentir par là à ce que l'affaire se poursuivre, j'ai tout ratifié."

When sending up the cheque the defendants ought not to have been merely silent, for so doing they may be held to *poursuivre l'affaire*.

Here is a case from note to p. 1–11, Paley:—"Where bills were drawn by a supercargo, whose authority was doubtful, for the purpose of purchasing a cargo, the bills being drawn on the principals, who received the cargo and disposed of it, the Court said: 'Can they be permitted in a Court of conscience to question the authority by which the bills were drawn?'"

Very like the present case, a bill is drawn to buy a cheque, the drawees are told of what has been done, and receive the cheque and profit by it,—the Jury finding, as in this case, can the drawees escape by disavowing the act by which the bill was drawn? As to adoption of the agency, if the agency be adopted in

one party it is an adoption of the whole act; for an Act cannot be affirmed as to so much as is beneficial, and rejected as to the remainder [172] Paley. This is almost literally what is said in French by *Troplong*, Mandat, No. 615: "Un acte, en effet, ne saurait être divisé; on ne peut l'approuver pour partie et le rejeter pour partie. Il faut qu'il soit ou rejeté pour le tout, ou approuvé pour le tout."

I will take up some of the findings of the Jury particularly noticed by defendants' counsel at the final argument.

To question No. 5, the Jury answered "yes." "The Jury had no business to do this," said the defendants' counsel at the final argument, to which I would say "why not?" This fifth question was put to the Jury, no objection being made by the defendants to it. If the answer was unwarranted by evidence, on a motion for a new trial, it might be objected to; but not on the present motion, nor that for judgment *non obstante veredicto*.

No. 6.—"Informing them in effect, etc." "This finding is in favour of the defendants," said the counsel for defendants. It is to be observed that the 15th July is alone referred to here as the time of the actual transmission of the cheque by Yarwood, with his explaining to defendants then, further than as per letter of the 15th. It is to be observed also that when this question or item was drafted, the letter from Toronto of the 16th from Yarwood was not known to plaintiffs.

No. 9 "is not a finding in favour of plaintiffs," said defendants' counsel at the final argument. "After being '*so*' informed, defendants got the cheque cashed," is very different from "after defendants had been made aware of the transaction." "*So*, refers to Yarwood's letter of the 15th and to No. 6 of questions to jury, and to nothing else," said counsel. This latter part must be admitted. I suspect that that was all which was in the mind of plaintiffs' counsel, ignorant then of the letter from Yarwood of the 16th from Toronto.

But the eleventh finding is not confined or particular. It is submitted to by the motion for judgment *non obstante veredicto*, and judgment is now asked by defendants upon the verdict generally. What did the eleventh question involve? Had Torrance & Co. reason to believe, from anything, that the cheque represented the proceeds of the draft of the 17th July, 1867, and that the draft was only discounted upon the faith that they would accept it? That is what it involved. Reference is not made to the letter of the 15th in particular as means of knowledge possessed by the defendants. The letter of the 16th had been discovered, and its absence, and the so-called suppression of it charged, and the jury find at the end of the case this eleventh finding, viz.:—"We are of opinion that the defendants had reason to believe that the cheque was the proceeds of the draft of the 15th of July, *and that said draft was discounted upon the faith that defendants would accept it.*" "The defendants are bound," says plaintiffs' counsel, "to have known of the contract with Yarwood, and by the act of cashing the cheque they bound themselves to accept the new draft." There is no inconsistency between this eleventh finding and the sixth one. No. 6 confined the jury to find as to what, at the time of the actual transmission of the cheque, Yarwood said, or explained. The cheque was only once transmit-

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ted, and No. 6 enquires as to what was said at that point of time. No. 11 is not limited to that time.

As to No. 13, defendants' plea stands to help it, and is a confession that the legal tender notes were means gotten from the cheque.

How can the Court, upon the verdict and evidence in this case, say that defendants are entitled to have their motion for judgment granted, and plaintiffs' action dismissed? It is impossible. There is the verdict, reading fatally, as I take it, against defendants. I have to give it force. I think it supported by the evidence. But supposing it not to be, how can I disregard it, upon a motion such as I have before me, no motion for a new trial being presented?

The verdict ought to be affirmative or negative. The one in point is sufficiently affirmative. It is said, not to be certain, but a mere statement of opinion. It is well known that witnesses' mere opinions as to facts will most often go for nothing. We know also that men's opinions are variable, and liable to change. But we are dealing, not merely with a man's opinion, or with that of a witness, but with the verdict of a jury. There is no room for change in the verdict of a jury; it is irrevocable. A jury states its opinion, and are asked whether they are all of that opinion; they answer in the affirmative, and this is the last finding possible by that jury. They know that, and that they will be discharged and dissolved upon the recording of their verdict. Their opinion is fixed and invariable from the nature of things. They are twelve men, but one body saying in substance:—"*Nos opinions sont fixées sur ce point.*" Surely the eleventh finding is certain enough, and affirmative enough.

"We think," has been taken over and over again as a verdict. In the last case tried against the Ætna Insurance Company, for instance.

"We think," I do not consider as certain or strong as the expression here, "We are of opinion."

"We are of opinion," was the finding of the jury, p. 206, vol. 2, L. C. R., yet it was accepted by all as a good finding.

In sales, vendors are often held in fraud from having had reason to believe things. In insurance cases too, insured are often held in fraud from having had reason to believe things.

If in settling a special verdict, any difference arise about a fact, *the opinion* of the jury is taken, and the fact is then stated accordingly; *i. e.* according to the jury's *opinion*—8 Taunton. Tidd Pr.

A governing principle in trials by jury is that the jury have entire jurisdiction over the matters of fact, and that the Court has none (where there is no motion before it to set aside the verdict for inconsistent findings, or as being contrary to the evidence). This principle is admitted wherever trial by jury is understood and practised.

The verdict in the present case, if not uncertain, must stand, and be applied as it reads (the motion for judgment *non obstante veredicto* being dismissed). Whether it be certain or uncertain the defendants' motion for judgment in their favour cannot be granted. Why should defendants get judgment entered up in their favour upon a verdict confessedly uncertain, say where an important fact sent to be determined has *not* been determined? If a verdict be uncertain in a

case like the present, the Court cannot dispose of the case upon it, but must order a new trial. If a verdict be ambiguous or uncertain judgment shall not pass upon it, but a *venire de novo* shall be ordered: 1 Saunders Pl.

Any court taking such a view of a verdict would have to order a new trial. I ought to make the verdict stand, if I can. I see certainty in the jury's findings, and so seeing I say that the defendants cannot get judgment in their favour, for the verdict is against them, and in favour of plaintiffs. Finding as I do upon both motions by the defendants, I pronounce for the plaintiffs' motion. I may be wrong. My judgment can be carried to appeal; if wrong in so far as disposing of defendants' first motion, as it has, defendants have a remedy, as in Tilstone and Gibb.

The following was the judgment of the Court:

"The Court having heard the parties upon the first motion by the defendants, that, notwithstanding the verdict, judgment be rendered in their favour in this cause; also, upon the second motion of defendants for judgment in their favour upon the verdict, pleadings and evidence; also upon plaintiffs' motion for judgment in their favour upon the verdict, pleadings and evidence, had upon the merits; having read the record, pleadings, evidence and verdict, and deliberated thereupon;

Considering plaintiffs' allegations sufficient in law, doth reject defendants' said first motion for judgment, notwithstanding the verdict, with costs against defendants.

Considering that judgment in favour of defendants upon the verdict, pleadings and evidence cannot, and ought not to be, doth reject defendants' said second motion, to wit for judgment, in their favour with costs against defendants;

Considering that the pleadings in this cause, and the evidence and verdict sufficiently sustain the plaintiffs' allegations; seeing the said several motions for judgment on the verdict; and that the defendants are not entitled to judgment in their favour, but that plaintiffs are, and that plaintiffs have established their claim as made in this cause against the defendants, and the plaintiffs are entitled to judgment in their favour, doth grant plaintiffs' said motion for judgment in their favour, as made; and it is, in consequence, adjudged that plaintiffs do recover from defendants, jointly and severally, the sum of $10,005.20, with interest on $10,000 from 17th July, 1867, and on $5.20 from 14th December, 1867.

Defendants' motions rejected.

Plaintiffs' motion for judgment granted.

Strachan Bethune, Q.C., for plaintiff.

Hon. J. J. C. Abbott, Q.C., counsel.

Ritchie, Morris & Rose, for defendants.

(S.B.)

MONTREAL, 9TH JULY, 1868.

Coram MONK, J.

No. 72.

Berthelet vs. *Dease* et al.

HELD:—1st. That a judicial bond, executed in 1841, and not hypothecating any property on its face, but duly registered, operated as a mortgage on all the property of the bondsmen then held by them within the registration district.

2nd. Parties sued hypothecarily, in respect of property held by them in virtue of a donation from the debtor, cannot plead the prescription of ten years, if they have become heirs at law of the debtor, by reason of his debt since the date of the donation, and have not renounced his succession.

3rd. A party paying a debt for which he was liable with others and obtaining a subrogation *sous seing privé*, may sue his co-debtors for their share of the debt, in the name of the original creditor.

This was an hypothecary action based on the facts and circumstances disclosed in the remarks of counsel.

Wurtele, for plaintiff:—By marriage contract of the 7th of July, 1831, before Lacombe, N. P., Benjamin Berthelet granted a dower to Helen Guy, of an annual life-rent of £100. They were married the next day.

Berthelet was proprietor of certain property in St. Paul Street, which became hypothecated for the dower. It was sold by the Sheriff on the 25th of January, 1839, to Olivier Berthelet, for £1,960.15.6; and by the judgment of distribution of the 29th of July, 1844, £717.0.8 was collocated to William McIntosh, subject to the condition of giving good and sufficient sureties that the purchaser would never be troubled for the said dower to that extent. McIntosh having died, his executor, Peter Warren Dease, gave the requisite suretyship, which was executed before Mr. Justice Gale on the 8th of August, 1844. By this bond Hugh Taylor and the said Dease, individually and personally, became joint and several sureties, and bound themselves towards Olivier Berthelet to guarantee and indemnify him from all trouble by reason of the dower to the extent of McIntosh's collocation. The marriage contract was duly registered on the 19th of July, 1844, and the act of suretyship on the 22nd of October, 1844.

Benjamin Berthelet died on the 14th of November, 1847, and his widow sued Olivier Berthelet hypothecarily for £86.0.8, being the proportion of her dower for two years from the 15th November, 1862, to the 15th of November, 1864, chargeable to the collocation in favour of McIntosh; the other creditors collocated under the same condition having all paid their proportions. Mr. Berthelet paid the amount with the costs, amounting to £7.19.6, forming in all £94.0.2.

Dease was proprietor of two lots of land in Côte St. Catherine, which became hypothecated under the judicial hypothec carried by the suretyship. By deed of donation of the 21st of May, 1851, Griffin, N. P., he gave them to his two daughters, Amelia and Matilda Dease, the defendants in this cause, with the condition that they should support him and his wife in a decent and becoming manner until their decease. Dease died a few years after, leaving his two daughters as his sole heirs, and they never renounced his succession.

By his action Mr. Berthelet has sued the defendants hypothecarily as the owners and possessors of the two lots of land above mentioned, for the recovery of the said sum of £94.0.2, for which Dease was bound to indemnify him, and

for the security of which obligation on his part, the said properties were hypothecated under the judicial bond entered into by him before Mr. Justice Gale.

The defendants have pleaded by exception:—1st. That they were not at the time of the institution of the action the owners and possessors of the lot firstly described in the declaration.

2nd. That they should have been called into the hypothecary action in warranty, and that the plaintiff has no other action.

3rd. That the bond is not a judicial bond, and not containing any description of property did not create any hypothec.

4th. That they had been in open possession in good faith since the 21st day of May, 1851, and had acquired prescription.

5th. That Mrs. Berthelet's renunciation to the community of property between her and her late husband was illegal, fraudulent and null.

6th. That the plaintiff had been paid by Hugh Taylor, who had received the collocation, and was really responsible.

The plaintiff answered all these exceptions generally, except the fourth, to which he answered specially that the defendants had not been in possession in good faith, and that they were liable and bound in the same manner and to the same extent as their late father, and could not therefore acquire prescription.

The plaintiff admitted that the defendants were not in possession of the lot firstly described at the time the action was instituted, and he consequently discontinued his action with respect to it.

The defendants have on their part admitted that their father, Peter Warren Dease, died intestate, and that they were his sole heirs.

The defendants have proved that the plaintiff was paid the amount sued for by Mr. Taylor, the co-surety under the bond, but with subrogation; they, however, failed to prove that he was alone responsible for the debt, and it is in evidence that the collocation was received by Dease.

The plaintiff submitted the following legal propositions:

On the 2nd Exception:—The plaintiff has not lost his right to be indemnified by failing to call in the defendants in warranty, and they are liable unless they prove that a sufficient ground of defence to Mrs. Berthelet's action existed, which they could have availed themselves of. The plaintiff had the option between an action in warranty and an action to be indemnified; and his present action is therefore correctly brought. Civil Code L. C. Art. 1520. Pothier, Vente, Nos. 109, 110.

On the 3rd Exception:—There are three kinds of suretyship; conventional, legal, and judicial. The latter is that ordered to be given by the judgment of a court or judicial authority. Judicial suretyship is entered into before a judge of the Court which ordered it to be given, and the bond remains of record. A judicial hypothec results from the act of suretyship judicially entered into, without it being necessary to describe it in any property: when entered into before 1842, it affects all property held by the surety at the time or acquired by him since; when between 1841 and 1860, all property possessed at the time; and when since 1860, such properties as belong to the surety and are described in a notice fyled and registered in the registry office. The bond in question is

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therefore a judicial bond, bearing hypothec; and as Dease was the owner at the date of the bond of the property described in the declaration, it became and is hypothecated thereby. Civil Code L. C. Art. 1930, 2034, 2035, 2036. Pothier, Oblig. No. 387. Ancien Denizart, Vo. Caution, Nos. 3, 12, 14.

On the 4th. Exception:—The prescription of ten years is given to third parties who acquire and hold in good faith, and it liberates them from all hypothecs upon the property so acquired and held; but this liberation is only acquired for debts and hypothecs for which such third parties are not themselves liable. Where they are liable, no prescription can be acquired. The defendants are the heirs of their *auteur*, as renunciation is never presumed; and as such are personally responsible for all his debts and liabilities. They consequently cannot claim any other prescription than that which Dease could have invoked himself, or the prescription of thirty years; and this prescription has not yet accrued. The defendants cannot therefore avail themselves of the prescription invoked. Civil Code L. C. Art. 607, 651, 735, 2251. Pothier, Successions, Ch. 5, Art. 2, p. 1. Pothier, Prescription, Nos. 112, 113, 126, 128.

On the 5th Exception:—Fraud is never presumed, and must be proved. No proof was made that the renunciation was fraudulent, and its validity is therefore unimpeached. Civil Code L. C. Art. 992, 2202.

On the 6th Exception:—The co-surety on paying the debt has the right to be subrogated in the creditors' rights, and he can exercise them against the principal debtor for the whole, or against his co-sureties for their equal shares. Mr. Taylor having paid the debt and obtained subrogation, was therefore authorized to sue in the name of the creditor, and is entitled to recover the sum he paid, or such portion as the defendants are liable towards him for. Civil Code L. C. Arts. 1156, 1950, 1955. Pothier, Oblig. Nos. 446, 556, 559. 16 L. C. Law Rep. p. 482.

The plaintiff would remark in concluding, that by the bond Mr. Dease individually and Mr. Taylor became the sureties in favour of Mr. Berthelet, for the obligation entered into by Mr. Dease, in his capacity of executor, of holding him harmless from the dower. Mr. Dease as executor was the principal debtor; and Mr. Dease individually, with Mr. Taylor, were the sureties.

C. J. Dunlop, for defendants:—This is an hypothecary action founded on a bond, executed under the following circumstances. Plaintiff became purchaser at sheriff's sale in 1839 of a property affected by dower. Opposition was fyled by plaintiff to the distribution of moneys, setting out dower. One McIntosh was collocated for £717.0.8, and before the distribution was perfected McIntosh died and was represented by P. W. Dease, as executor.

The judgment of distribution ordered that the £717.0.8 should only be paid on security being given to the plaintiff, O. Berthelet, that he should never be troubled by reason of the dower. On the 8th August, 1844, the bond sued upon was executed. This bond may be considered a bond given by Dease, in his capacity of executor with H. Taylor as a surety in addition. The bond also contains the word "personally" as applicable to Dease, and a question may arise whether Dease is also a surety personally, as well as executor. If so, there are three sureties: the bond, however, is only signed by Dease, executor. It will

be also remarked that the bond is only to the extent of £717.0.8, *and for no interest or larger sum.* After this bond was signed, the £717.0.8 was received by Taylor from the sheriff (see his evidence), and it does not appear that it ever came into the executor's hands. It also appears from the evidence that he, *Taylor*, paid the interest yearly from the time the dower became open, say for nearly twenty years. The suit is for two years' interest, and is directed against property which was owned by Dease *personally* at the date of the execution of the bond.

The 1st question is, Does the bond confer hypothecary right, seeing no property is mentioned in it? The defendants consider it a recognizance merely. It is not a judicial act, but a mere voluntary undertaking between O. Berthelet and the sureties. See Registry Act, Sec. 12, Subsection 3; Sec 45, Subsection 2; Sec. 47. This last distinctly says that any judicial act, to carry hypothec, must award a *specific* sum of money.

The 2nd question is, if the bond creates hypothec, can it affect the property of Dease, *personally*, seeing it is signed only by Dease as executor. If the word "personally" is taken as binding Dease himself, it might be said he was only *personally* bound and not his property.

The 3rd question is prescription. The defendants hold under a good title (see admissions and declaration) for about fifteen years in good faith. The prescription of ten years will apply, and if bond is a hypothec, it ought to have been registered by renewal under sec. 49 of Registry Act.

The next question is as to the payment and subrogation (the subrogation is not fyled) of Taylor, one of the sureties, who is the real plaintiff. Berthelet could transfer to Taylor no greater right than Taylor himself possessed, that is, on payment of the debt, to claim from his co-sureties their proportion of what Taylor had been obliged to pay. The bond is signed by either two or three sureties. If by three, Taylor has a right against each for one-third, and if by only two then he would have the right to recover half from that person who is clearly Dease's executor. It would appear just that Taylor, before he could recover anything, should show that he paid over the money to the executor. In his evidence he declares to have received it, and more than doubtful if he ever paid it over. The fact of the dower coming open so soon after he received the money, with the other fact that he himself had always paid the interest, would warrant the belief that the money never left his hands. It appears that the bond does not indemnify Berthelet for a greater sum than £707.0.8, *that is the amount of the capital* and the dower having come open in 1847. There has been already paid a larger sum than the amount for which the security was given. The defendants' pretension therefore is, 1st, that the action is bad as an hypothecary action. 2nd, Bad against Dease personally, or against his property personally. 3rd, Bad because one of the sureties had paid the debt. 4th, Bad from prescription. The 5th reason does not exactly affect this suit. It is that the bond is in effect now null and void, as it guaranteed no greater sum than £717.0.8, and this amount has already been paid by the sureties, and in fact more has been paid to this date by about fourteen per cent.

The Court took time to consider, and rendered the following judgment:

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Considering that by a judgment of distribution rendered on the 29th July, 1844, by the Court of Queen's Bench in the district of Montreal, in a certain cause under the number No. 86, wherein Augustin Cardinal was plaintiff, Benjamin Berthelet was defendant, and the present plaintiff and divers others were opposants, the sum of £717 0s. 8d. cy. of the proceeds of the sale of a certain lot of land situated in St. Paul Street, in the city of Montreal, was collocated to one Wm. McIntosh, subject to the condition of giving good and sufficient sureties; that the purchaser, the plaintiff in this cause, would never be troubled to that extent for or by reason of the conventional dower, consisting of a life rent of £100 cy., granted by the said Benjamin Berthelet to his wife, Dame Hélène Guy, by their contract of marriage, passed before Mtre. P. Lacombe and his colleague, notaries, on the 7th day of July, 1831, and duly registered according to law; that the executor of the said Wm. McIntosh, who had died pending the proceedings, gave the requisite security; and that by an act of suretyship judicially entered into before the Hon. Samuel Gale, one of the judges of the said Court of Queen's Bench, on the 8th of August, 1844, the late Peter Warren Dease and Hugh Taylor became his joint and several sureties, and as such bound themselves towards the said plaintiff, Olivier Berthelet, to guarantee and indemnify him from all trouble by reason of the said dower to the extent of the said collocation; and that the said Peter Warren Dease was at the date of the said act of suretyship the proprietor of the two lots of land described in the declaration in this cause, that they then became hypothecated for the fulfilment of the obligation entered into by him as such surety, and that the act of suretyship was registered in the County of Montreal, wherein the said properties were then situate, on the 22nd of October 1844:

Considering that the said Benjamin Berthelet died on the 14th of November, 1847; that on the said day the dower above mentioned opened and became payable to the said Dame Hélène Guy; that she renounced to the community of property that had existed between them: that the property sold to the said plaintiff, Olivier Berthelet, was and is hypothecated and affected therefor; that the proportion chargeable to the collocation in favour of the said Wm. McIntosh is £43 0s. 4d. per annum; that on the 15th of November, 1854, all the arrears of the said life rent had been paid, excepting the sum of £86 0s. 8d., being for two years of the proportion chargeable to the said Wm. McIntosh, which his legal representatives neglected to pay; that the said Dame Hélène Guy instituted an hypothecary action against the present plaintiff as possessor of the property sold upon the said late Benjamin Berthelet, for the said balance of £86 0s. 8d.; and that the said Olivier Berthelet thereupon paid her the said sum, with the sum of £7 19s. 6d. for costs, forming together that of £94 0s. 2d.:

Considering that the said late Peter Warren Dease, by deed of donation passed before Mtre. J. C. Griffin and his colleague, notaries, on the 21st of May, 1851, gave the lots of land described in the said declaration in this cause, and hypothecated as aforesaid for the fulfilment of his obligation as the surety of the legal representatives of the late Wm. McIntosh, to the said defendants; that he subsequently died intestate, leaving the said defendants, who never renounced his succession, as his sole heirs, and that the said defendants as such heirs are

personally responsible and liable for all the debts and liabilities of the said Peter Warren Dease, and being so liable cannot acquire nor invoke and claim prescription of the said obligation by reason of a possession of ten years:

Considering that the said plaintiff did not lose his recourse by failing to call in the said defendants in warranty, and that they remained liable to indemnify the said plaintiff unless they could prove that a sufficient ground of defense existed to the action of the said Dame Hélène Guy, of which they might have availed themselves:

Considering that the said Hugh Taylor repaid the said plaintiff the sum of £94 0s. 2d. above mentioned, and was subrogated in all his rights; that he is entitled to recover one half of the same from his co-surety or his representatives, and for that purpose to use the name of the creditor, the said Olivier Berthelet; that the two properties described in the said declaration are hypothecated for the payment of the half of the said sum, being £47 0s. 1d. with interest from the 28th of April, 1866, date of the service of process in this cause; that the said defendants were at the time of the institution of this action the proprietors in possession of the property secondly described in the said declaration, but that they were not at that time the owners and possessors of the property firstly therein described; the Court doth dismiss the present action as to the said lot of land firstly described in the declaration in this cause:

And the Court doth declare the lot of land in the declaration in this cause secondly described as follows, to wit: "secondly, the other part or lot situated on the North side of Côte St. Catherine, containing three arpents or thereabout in front less the width of the road, and about twenty-three arpents in depth, bounded in the rear by lands of Côte St. Laurent, joining on one side to the line road of the said Côte St. Laurent, and on the other side to Pierre Fortier, without guarantee as to the quantity of land, be the same more or less, with a two story stone house, barns, and other buildings thereon erected," mortgaged and hypothecated for the payment of the sum of forty-seven pounds and one penny currency, with interest thereon from the 28th day of April, 1866, until paid and costs of suit as of last class in Superior Court, distraction of which costs is granted to the Hon. J. J. C. Abbott, the plaintiff's attorney, the said sum of £47 0s. 1d. being the one equal half of the sum of £94 0s. 2d., this last mentioned sum being the proportion calculated upon the said sum of £717 0s. 8d. of the rent or dower payable to the said Dame Hélène Guy, and being for the two years immediately preceding the 14th day of November, 1864, including, however, the said sum of £7 19s. 6d., being the costs incurred upon an hypothecary action brought against the present plaintiff by the said Dame Hélène Guy; and the Court doth condemn the defendants as proprietors in possession, *détenteurs* of the said hereinbefore described immovable property, jointly and severally to pay and satisfy to the said plaintiff the said sum of £47 0s. 1d. with interest thereon from the 28th day of April, 1866, until paid, and costs of suit as of last class in Superior Court distraits in favour of the Hon. J. J. C. Abbott, the plaintiff's attorney, unless they, the said defendants, choose rather to abandon *délaisser en justice* the hereinbefore mentioned and described lot of land, to the end that the same may be sold upon a curator to the *délaissement* to be appointed for that purpose;

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and in default of the defendants making such *délaissement* within the period of fifteen days from the service of this judgment upon them, the said defendants are hereby condemned personally and jointly and severally to pay to the plaintiff the aforesaid sum of £47 0s. 1d., with interest thereon from the 28th day of April, 1868, until paid, and costs of suit, as of last class in Superior Court *distraits* in favour of the Hon. J. J. C. Abbott, the attorney of said plaintiff.

Judgment for plaintiff.

Abbott & Carter, for plaintiff.
Jonathan Wurtele, counsel.
C. J. Dunlop, for defendants.
(S. B.)

MONTREAL, 1st DECEMBER, 1868.

ENQUETE SITTINGS

Coram TORRANCE, J.

No. 1866.

Foucnier vs. *Noreau* alias *Noro* et ux.

HELD:—That proof of rumours current in the plaintiff's neighbourhood before the uttering of slanderous words imputed to plaintiff, may be made in mitigation under the general issue.

The action was for damages, by slanderous words, charged to be uttered by defendants, and particularly by the female defendant. The defence was the general issue.

The plaintiff was at *enquête*, and the witness, Louis Vincelette, was under examination, and in cross-examination the following question was put to the witness:

"Etait-ce la première fois que vous entendiez dire quelque chose sur le "compte du demandeur et la femme Gravelle dont vous avez parlé dans votre "examen en chef."

The question was objected to as "illégale et étrangère à la contestation et "aussi en autant qu'elle tend à prouver des faits contre une personne étrangère "à cette contestation."

The objection was overruled, the presiding judge holding, on the authority of *Richards* vs. *Richards*, 2 Mood. and Rob. 557, that proof might be made of rumours, current in the plaintiff's neighbourhood before the uttering of the words, in mitigation of damages. *Vide* Roscoe, Ev. at Nisi Prius, 525, 6, A.D. 1866.

Objection overruled.

Loranger & Loranger, for plaintiff.
Dorion, Dorion & Geoffrion, for defendants.
(J. K.)

MONTREAL, 22ND OCTOBER, 1868.

Coram TORRANCE, J.

No. 1060.

St. Jemmes dit *Beauvais* vs. *De Montigny.*

HELD:—That an application to examine a witness about to leave the Province, will not be granted by the Superior Court, while the record is before the Court of Review on an inscription for revision of an interlocutory judgment.

Robidoux, for the defendant, moved for leave to examine, as a witness, C. Primeau, who was about to leave the Province (under Code of Civil Procedure, Art. 240). An affidavit was fyled in support of the motion.

Loranger for plaintiff:—The cause has been inscribed by the defendant for revision, and the record is now before the Court of Revision. It would be necessary to have communication of the record in order to proceed with the examination of the witness.

Robidoux:—The case has been inscribed for revision only upon an interlocutory judgment. I cannot be deprived thereby of the right which the law gives me to obtain the evidence of this witness.

TORRANCE, J.—The defendant takes nothing by his motion. The record not being before this Court, I cannot grant the application.

Motion rejected.

Loranger & Loranger, for the plaintiff.
J. E. Robidoux, for the defendant.
(J. K.)

MONTREAL, 22ND OCTOBER, 1868.

Coram TORRANCE, J.

No. 40.

Greenshields vs. *Leblanc* et al.

DISCONTINUANCE OF SUIT—COSTS.

HELD:—That under Art. 450 C.C.P., a plaintiff, as a general rule, can discontinue his action only on payment of costs.

Laflamme, Q.C., for the plaintiff, moved to be permitted to discontinue the action against one of the defendants without costs. This defendant had pleaded separately to the action, that at the time the obligation sued on was made, he was a minor, while it was stated on the face of the obligation that he was a major. The obligation sued on was dated the 10th April, 1863, and the defendant attained the age of majority on the 24th of May following. The learned counsel contended that, under the circumstances, the plaintiff should be allowed to discontinue without costs.

De Lorimier, for the defendants, opposed the application.

TORRANCE, J. Under Art. 450, Code of Civil Procedure, costs should be paid by a party discontinuing his suit or proceedings. The Court sees no reason why the ordinary rule should be departed from.

Motion rejected.

R. & G. Laflamme, for the plaintiff.
C. C. De Lorimier, for the defendants.
(J. K.)

COUR DE CIRCUIT.

TROIS RIVIERES, 9 NOVEMBRE 1868.

Coram POLETTE, J.

No. 462.

Les commissaires d'école pour la Municipalité de St. Jean Baptiste de Nicolet, dans le comté de Nicolet, vs. *Trigge et al.*

JUGE:—Que par suite du dépôt du cadastre des seigneuries, conformément à la loi abolitive de la tenure seigneuriale, les seigneurs sont exonérés du paiement du quarantième du montant de la cotisation scolaire.

Les demandeurs réclamèrent des défendeurs entr'autres sommes pour cotisations scolaires, celle de £2.19.9½ pour le paiement annuel du quarantième du montant de la cotisation scolaire répartie dans la municipalité pour leurs droits lucratifs comme seigneurs dans les limites de la dite municipalité.

Les défendeurs ont rencontré cette partie de l'action par une exception péremptoire en ces termes:

Que quoique les dits défendeurs soient depuis plus de cinq ans propriétaires et en possession des cinq-sixièmes par indivis du fief et seigneurie de Nicolet, situé dans l'étendue de la municipalité de Nicolet; néanmoins ils ne possèdent plus de droits lucratifs comme seigneurs du dit fief et seigneurie en partie comme susdit, et ce depuis la clôture du cadastre du dit fief et seigneurie.

Que par l'opération de la loi, les droits lucratifs que possédaient les dits défendeurs en leur qualité de seigneurs des dits cinq-sixièmes par indivis du dit fief et seigneurie qui a eu lieu comme susdit et ont été convertis en propriétés privées appartenant aux dits défendeurs comme propriétaires par indivis, en sorte que les dits défendeurs ne doivent pas le quarantième de la prétendue cotisation sur les biens-fonds situés dans le dit fief et seigneurie et lequel quarantième est réclamé d'eux en cette cause, et ce depuis la clôture du dit cadastre.

Que par l'opération de la loi abolissant la tenure seigneuriale, toutes les terres non-concédés dans les fiefs et seigneuries ont été changées en franc alleu-roturier.

Les défendeurs ont cité les autorités suivantes:—

Les droits lucratifs des seigneurs ont été abolis depuis la clôture du cadastre, 24 septembre 1861, en vertu de la section 30, sous-section 2 et 3 du ch. 41 des Status Refondus pour le Bas-Canada.

Or, par la section 77 du chapitre 15 des mêmes Status Refondus, le 40ème n'est imposable que sur les droits lucratifs des seigneurs.

Maintenant les terres non-concédées appartiennent en propre aux seigneurs, en sorte qu'au lieu d'imposer le 40ème, les commissaires d'école doivent taxer les terres non concédées comme étant les héritages propres des seigneurs. Les dispositions des chapitres 15 et 41 des Statuts Refondus pour le Bas-Canada, ne sont pas incompatibles, car tant que les cadastres n'étaient point terminés et clos, le 40ème était payable, mais aussitôt et au fur et à mesure que les cadastres devenaient clos, le paiement du 40ème devait cesser et les terres non-concédés devenaient imposables au lieu et place des droits lucratifs.

De plus, voir le chapitre 1er des Statuts Refondus pour le Bas-Canada, sections

2, 5, 8, et 9, sur l'effet et le résultat de la refonte des Statuts, qui exclut toute incompatibilité entre les dispositions des Statuts Refondus. Nicolet vs Trigge.

Et attendu que le cadastre des cinq-sixièmes de la seigneurie de Nicolet dont les défendeurs s'étaient seigneurs a été fait et déposé et qu'avis public en a été donné suivant la loi depuis plus de cinq ans, qu'ainsi les défendeurs ont cessé d'être seigneurs des dits cinq-sixièmes de seigneurie; que leurs droits lucratifs en iceux tels qu'ils existaient auparavant ont été abolis suivant l'acte des Statuts Refondus, B. C. ch. 41, sect. 30 et 33, et que par suite ils se trouvent exonérés du paiement du quarantième du montant de la cotisation répartie dans la municipalité dont ils étaient seigneurs pour le soutien des écoles; la cour rejette le surplus de la demande des demandeurs par laquelle ils réclament un quarantième annuel pour les dites trois années de la cotisation entière dans les dits cinq-sixièmes de seigneurie, ce quarantième n'étant ni dû ni exigible.

Action renvoyée quant au montant réclamé pour le quarantième.

Macdougall & *Houliston*, avocats des demandeurs.

Alfred Hébert, avocat des défendeurs.

P. R. Lafrenaye, Conseil.

(P. R. L.)

IN REVIEW, 1868.

MONTREAL, 30th OCTOBER, 1868.

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

No. 2525.

Joseph M. Boudreau vs. *Médérie Lanctot*, and *Lanctot*, opposant.

HELD:—That the general rule by which the burden of proof is on the opposant, as plaintiff, suffers no exception, even when the opposition simply negatives the allegations of the affidavit on which an execution issued (under C. C. P. 551) before the expiration of fifteen days after judgment.

On the 28th of September, 1867, the plaintiff, Joseph M. Boudreau, obtained judgment against the defendant for $235.53, and on the 30th of the same month he obtained an order from a judge of the Superior Court, for the issuing of an execution against the goods of the defendant before the expiration of the usual period of fifteen days after judgment.

In his petition, the plaintiff averred as follows:

"Ce requérant est informé que le défendeur a dit qu'il ne paierait jamais le montant du dit jugement ni aucune partie d'icelui, et qu'il prendrait toutes mesures possibles pour s'en exempter. Ce requérant est de plus informé que le dit défendeur aurait dit les paroles suivantes: Je vendrai tout, j'esquiverai tout, je brûlerai tout, et j'irai cent fois chez le diable plûtot que de payer un sou à Boudreau; il n'aura jamais un sou de ses billets."

The allegations of this petition were sworn to by the plaintiff, and an order for the execution was granted by Mondelet, J., in chambers.

An opposition *à fin d'annuller* to the seizure was filed by the defendant, alleging "que les allégués de cette requête sont faux, mensongers et calomnieux;

Qu'il est faux nommément que le défendeur ait manifesté l'intention de ne point payer la créance pour le recouvrement de laquelle le dit jugement a été obtenu."

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The plaintiff contested this opposition, and his contestation was maintained by Monk, J., on the 31st of December, 1867, and the opposition dismissed. The defendant then inscribed the case for review.

MONDELET, J., (dissenting).—Le demandeur ayant, le 28 septembre 1867, obtenu jugement contre le défendeur, pour la somme de $235.93, s'adresse le 30 du dit mois de septembre, en vertu de l'article 541 du Code P. C., à l'un des juges de cette cour (Mondelet, J.), et obtint sur affidavit spécial à cet effet, un ordre qu'une exécution émanât, de suite, pour saisir et pour vendre les effets du défendeur. Les allégués de l'affidavit du demandeur sont comme suit :

"Ce requérant est informé que le défendeur a dit qu'il ne paierait jamais le montant du dit jugement, ni aucune partie d'icelui, et qu'il prendrait toutes mesures possibles pour s'en exempter.

"Ce requérant est de plus informé que le défendeur aurait dit les paroles suivantes : "Je vendrai tout, j'esquiverai tout, je brûlerai tout, et j'irai cent fois au diable plutôt que de payer un sou à Boudreau ; il n'aura jamais un sou de ses "billets."

Le demandeur, à l'audition de la cause devant la Cour de Revision, a soutenu qu'il y a bien jugé, par le jugement rendu le 31 décembre dernier (Monk, J.) déboutant l'opposition de l'opposant, dont les conclusions étaient que l'opposition du dit Médéric Lanctôt fût maintenue, et la dite exécution déclarée nulle. L'opposant, au contraire, attendu que le demandeur n'avait fait aucune preuve des allégués de son affidavit, conclut à ce que la saisie-exécution fût déclarée inducment émanée et pratiquée, et l'opposition maintenue. La question qui s'élève, est de savoir sur qui était *l'onus probandi*. L'opposant est devenu demandeur ; c'était par conséquent à lui à faire la preuve de ses allégués, soutient le demandeur. On a cité une décision qui a rapport aux requêtes pour obtenir libération du *capias ad respondendum*. L'opposant a répondu que telle décision n'a aucun rapport à l'espèce actuelle, et ne peut être étendue d'un cas prévu et défini à un cas qui ne l'est pas ; que d'ailleurs, l'opposant ne peut être tenu de prouver des négatives du genre dont il est question.

Mon avis est que, 1o. L'article du Code P. C., n'a ici aucune application. 2o. Nul ne peut être astreint sous peine de perdre ses droits à une impossibilité. Comment, en effet, l'opposant peut-il prouver qu'il n'a jamais dit qu'il ne paierait pas le demandeur, qu'il brûlerait tout, détruirait tout, et irait plutôt cent fois chez le diable, que de payer le demandeur ? Le principe qui me paraît devoir régler la question actuelle, et que lorsque l'opposant s'est borné à une négation, et rien qu'une négation absolue des allégués faits par le demandeur, dans toute espèce quelconque (sauf et excepté que la loi en ait statué autrement), c'est à celui qui a affirmé à prouver. Il me paraît que c'est un sophisme que d'appliquer à l'espèce actuelle, le brocard que l'opposant devient demandeur. Celui qui affirme par une exception péremptoire, v. g. le paiement, la compensation, ou autre telles choses, est, incontestablement, tenu d'en faire preuve. Mais il en est tout autrement, si le défendeur se contente de produire une défense en fait. Or, ici, l'opposition n'est autre chose qu'une défense en fait, c'est la négation la plus emphatique qu'une partie puisse faire des allégués d'un demandeur.

Mais, a-t-on dit, pouvez-vous de la sorte, engager une contestation à l'occasion

des allégués d'un affidavit? Et pourquoi non! N'est-ce pas au moyen de ces allégués que le demandeur a obtenu qu'il émanât une exécution, avant l'expiration des quinze jours limités par la loi? La cour est tenue de remédier à l'abus que l'on a fait de l'autorisation d'un juge qu'on allègue avoir été surpris par un faux affidavit. Refuser d'interposer ici son autorité paraît, suivant moi, de la part de cette cour, un déni de justice. A tout mal, tout remède; et il est superflu d'ajouter que cette cour, dont la juridiction est, dans ce rapport, celle dont était investi l'intendant (Acte Prov. 1734), sauf la partie législative, bien entendu, peut et doit remédier à tout grief, par l'exercice même de son autorité, de sa juridiction, pourvu que le remède qu'on sollicite, ne soit pas prohibé par la loi. Est-il nécessaire d'ajouter un seul mot, pour faire toucher au doigt les abus, les persécutions auxquels seraient exposés les défendeurs, s'il était permis aux demandeurs au moyen d'affidavits, tels que celui dont il est question, de faire émaner des exécutions avant l'expiration des délais accordés par la loi, et de fixer le jour de la vente, contrairement à la loi. Ceux qui le feraient, seraient certains de l'impunité, par là même que leur adversaire serait dans l'impossibilité de prouver des négatives qu'on lui attribuerait. Cela ne se peut: loi, raison, justice, tout s'y oppose. La conclusion à laquelle j'arrive est que l'opposition doit être maintenue, et le jugement dont est appel infirmé avec dépens.

MACKAY, J. On the 31st of December, 1867, Boudreau obtained judgment against the defendant Lanctot, dismissing an opposition filed by the latter against the seizure of his goods and chattels under Boudreau's execution in this cause. The question here is whether that judgment of 31st December, 1867, is good or bad. Lanctot contends that it ought to be revised and reversed. The general rule in this Court is well known, that execution cannot issue till the expiration of fifteen days after judgment. But the Code of Procedure, art. 551, allows seizure and execution before the expiration of fifteen days upon a petition presented to the judge, supported by an affidavit such as would be sufficient to obtain a *saisie-arrêt* before judgment. In the present case judgment was obtained against the defendant on the 28th September, and on the 30th, the plaintiff presented his petition and affidavit, and execution was allowed, without waiting for the expiry of the fifteen days. Lanctot's goods and chattels were seized, and on the 9th of October he stopped the sale by fyling the opposition before referred to, which was dismissed on the 31st December, 1867.

The opposition of Lanctot set up that the execution was premature, and that it had been allowed on false representations; that the affidavit of Boudreau upon which the order of the judge had been procured was "*rempli de fausse tés et de mensonges odieux;*" that it was false that defendant used the expressions attributed to him by Boudreau; and, generally, that the allegations of the *requête* were false. Conclusions, for nullity of the order of the judge, that the seizure be declared null, &c. The contestation by the plaintiff set out that the allegations of the opposition were false, and that all the allegations in Boudreau's *requête* and affidavit were true.

It appears that neither party made proof upon the opposition and contestation, and the judgment complained of followed. It is not *motivé*, and simply dismisses Lanctot's opposition, maintaining the contestation of it. Lanctot contends that

Beaubien et al. & Lanctot.

he, as opposant, had no proof to make, and that in the absence of proof by Beaubien, the opposition ought to have been maintained. Beaubien, on the other hand, contends that he had not the burden of proof, as Lanctot was to begin on his opposition, as *quasi* plaintiff.

The judge *a quo* having decided against the opposant, the question for this Court to decide is, was this judgment unwarranted? Shall it be confirmed or must it be reversed?

The general rule as to proof has been stated by the learned president of the Court, but in the course of practice, the rule is qualified in a variety of cases by the other rule, *actore non probante reus absolvitur*. Lanctot was the *actor* on his opposition. As to nobody being held to prove a negative, see Greenleaf, § 78; Best, § 268, 270. Best, Principles of Evidence, p. 367, says: "From these and similar expressions it has been rashly inferred, and is frequently asserted, that a negative is incapable of proof, a position wholly indefensible if understood in an unqualified sense". Suppose A to sue B for falsely charging him with crime, A must make some proof, but he shall be excused from making *plenary* proof. Every day, opposants say in oppositions *à fin d'annuler*, that the bailiff did *not* do so and so. These opposants are held to make proof. The opposant must begin the *enquête* on his own opposition. The *action négatoire* is also an instance of proving a negative. In it the plaintiff has to commence and make certain proof. Bonnier, Traité des Preuves, No. 38, says: "Il ne faut pas de bien profondes réflexions pour se convaincre de la possibilité de prouver une négative. N'arrive-t-on pas tous les jours à la démonstration claire et irréfragable d'une proposition négative, etc." See also No. 31. The defendant Lanctot is not in a more favourable position than a person arrested under a *capias*. If the defendant, in a *capias*, traverses the allegations of the affidavit, he is held to prove that they are false, C. C. P. arts. 819, 821; Doutre v. McGinnis, 5 L. C. Jurist, 160; Egert v. Laidlaw, 7 L. C. Jurist, 227. I refer also to two recent cases, Hudon v. Salmon, and Quebec Bank v. Steers, 12 L. C. Jurist, 227, in this Court, in which the defendants, petitioners, commenced the *enquête* on their petitions setting out that the allegations of the affidavits were false. Suppose that in either of these last two cases neither party had made any proof, the petitioner would have failed on his petition. The defendant Lanctot might easily have proved that the plaintiff had *not* been informed, if indeed the plaintiff had not been informed. He had simply to call the plaintiff. In the total absence of proof, the majority of the Court are of opinion that the opposant Lanctot, who is the plaintiff on the opposition, must fail.

TORRANCE, J. This case has been so fully explained, that it is perhaps unnecessary for me to say a word. The opposition simply impugns the allegations of the plaintiff's affidavit. The question is, on whom is the burden of proof? The ordinary rule is that the burden of proof is on the opposant. Is there, then, any reason why that rule should be departed from on the present occasion? I can see none.

Judgment confirmed.

Cartier, Pominville & Bétournay, for the plaintiff.
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(J. K.)

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RECUSATION:—The fact that a judge is one of several persons formerly associated together in a commercial enterprise to build a bridge, does not disqualify him from judging in an action *qui tam* for penalty, instituted against certain of these persons for failure to register the partnership. (Leclerc *vs.* Bilodeau, C. C.)..... 20

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REGISTRAR'S CERTIFICATE:—The, required by the Act 27 & 28 Vic. Ch. 40, need not include *hypotheques* registered more than ten years before the sale of the property by the Sheriff, unless the *hypotheques* have been renewed. (Roberts *vs.* Harrison et al., and divers opposants, S. C.)..... 148

RESPONSIBILITY:—A builder is responsible for the sinking of a building erected by him on foundations built by another, but assumed by him in his tender and contract without protest or objection, although such sinking be attributable to the insufficiency of the foundations and of the soil on which they are built, and is liable to make good at his own expense the damage thereby occasioned to his own work. (Wardle, appellant, and Bethune, respondent, Q. B.)..... 321

SAISIE ARRÊT:—*Vide* PRACTICE.

" :—In the case of a, before judgment, where an exception *à la forme* had been fyled against the *saisie*, and subsequent to the fyling of the exception a petition had been filed contesting the validity of the *saisie*, in the manner provided for the contestation of writs of *capias*, the *enquête* of the petitioner on the petition may be proceeded with independent of the contestation on the *exception à la forme*. (The Quebec Bank *vs.* Steers et al., and Seymour et al., T. S., S. C.)..... 227

SAISIE GAGERIE:—Goods belonging to a third party, stored temporarily in a bonded warehouse, leased as such from the landlord, are not liable to seizure for rent due by the tenant of the warehouse. (Eastty, appellant, and the Curé et Marguilliers, &c., of Montreal, respondents, Q. B.)..... 11

" :—Goods belonging to a third party, stored temporarily in an ordinary warehouse, are not liable to seizure for rent due by the tenant of the warehouse, beyond the amount of storage actually due and unpaid. (Renaud et al., appellants, and Hood, respondent, Q. B.)..... 197

REVENDICATION:—*Vide* SALE.

SALE:—In an action of damages, based on the allegation that the defendant, knowing a horse to be unsound, falsely and fraudulently represented the animal to be sound, and that the plaintiff purchased the horse from defendant on the faith of the truth of such representation, it must be established beyond doubt that these facts are true to entitle plaintiff to recover. (Teasel, appellant, and Pryor, respondent, Q. B.)..... 108

" :—The constructive delivery contained in the following words in a bill of sale,—"said timber to be delivered at Ottawa, where the same shall be manufactured, and to be considered as delivered when the same is sawed, and then to belong to and to be the property of the parties of the second part,"—is not valid as regards a third party, without notice and actual delivery. (White et al., appellants, and the Bank of Montreal, respondent, Q. B.)..... 188

" :—The expression "fifteen days after the sale," in the 1998th Art. of the Civil Code of L. C., means after the sale and delivery. (The Bank of Toronto vs. Hingston et al., and Allan et al., petrs., S. C.)..... 216

" :—The delivery of goods, sold in England, to a shipping agent, there employed by the vendees, who forwards them to the vendees carrying on business in Montreal, is not such a delivery as is contemplated by the 12th Section of the Insolvent Act of 1864, and such goods may be legally revendicated by the unpaid vendors in the hands of the Grand Trunk Railway Company, here, although more than fifteen days have elasped since such delivery to the shipping agent. (Do *vs.* Do)..... 216

SCHOOL COMMISSIONERS:—The secretary-treasurer of, who makes a false report to Government to obtain payment of funds belonging to common schools,

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can be sued by any person interested in the good administration of the schools, for the recovery of the penalty prescribed by section 126 of Ch. 15 of the Cons. Stat. of L. C. (Pacaud, appellant, and Roy, respondent, Q. B.)..... 65

School Tax:—In consequence of the deposit of the *cadastre* of a seigniory, under the Acts abolishing the seigniorial tenure, the seignior is exempt from the payment of the 40th of the school assessment formerly imposed. (The School Commissioners of St. Jean Bte. de Nicolet *vs.* Trigge et al., C. C.)..... 344

Seignior:—*Vide* School Tax.

Serment Judiciaire:—*Vide* Appeal.

Servitude:—*Vide* Caterpillars, also Trees.

Shareholder:—*Vide* Compensation.

" :—*Vide* Joint Stock Company.

Sheriff's Return to a writ of summons may be attacked by *exception à la forme*, without *inscription en faux*. (Hudon et al., vs. Solman et al. S. C.)... 120

" Sale:—A, made of substituted property for debts created by the author of the substitution, or for other debts or charges anterior to the substitution, purges the substitution, and at such sale the institute, who has *délaissé* the property *en justice* in consequence of being sued for a debt of his *auteur*, may legally purchase the property. (McIntosh et al., appellants, and Bell, respondent, Q. B.)..... 121

" :—Vide Registrar's Certificate.

Stamps:—Vide Promissory Note.

Substitution:—*Vide* Sheriff's Sale.

" :—Registration could not supply the place of publication and insinuation until after the passing of the Act 18th Vic. Ch. 101. (McIntosh et al., appellants, and Bell, respondent, Q. B.)..... 121

Subrogation:—A party paying a debt for which he was liable with others, and obtaining a subrogation *sous seing privé*, may sue his co-debtors for their share of the debt, in the name of the original creditor. (Berthelet *vs.* Dease et al., S. C.)..... 336

Trees:—The right to grow trees next a neighbor's property may be secured by thirty years prescription, but the right to allow the branches and roots of such trees to protrude into the neighbouring property cannot be so acquired. (Ferguson, appellant, and Joseph, respondent, Q. B.)..... 72

Usufructuary:—A universal usufructuary donee by contract of marriage is bound to advance the costs of the inventory of the property subject to the usufruct, and the fees of a notary employed by the heirs of the deceased to watch over their interests in the making of the inventory form part of such costs. (Prévost *vs.* Forget, C. C.)..... 54

Usury:—A promissory note, given on the [illegible] of February, 1864, as a renewal of one dated 23rd May, 1862, which had been discounted at a bank in American greenbacks taken at par, at the ordinary rate of [illegible] cent. per annum, and the payment in addition of $10 to cover alleged trouble connected with renewal, is null and void, as being tainted with usury. (The Eastern Townships Bank *vs.* Humphrey et al., S. C.)..... 137

Vendor and Vendee:—Where a party is sued for the price of land which is burdened with hypothecs beyond the price claimed, and the party sued has demanded before action that such hypothecation should be discharged, or good and sufficient security given against all possible trouble arising from such hypothecs, and the plaintiff has failed to cause such hypo-

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thecs to be discharged or the required security to be given, the action ought to be dismissed purely and simply. And mere [illegible] security in such a case is insufficient. And although in such an action the defendant, by his plea, only prays for the dismissal of the [illegible] case the necessary security be not given within a delay to be fixed by the judgment, and although the judgment in the Court of original jurisdiction be rendered according to the conclusions of such plea, and such judgment be confirmed in Review, The Court of Appeals, on an appeal instituted by the plaintiff only and without any cross appeal by the defendant, and although the respondent prays by her answer to the reasons of appeals, and in her *factum*, for the confirmation of both judgments, will nevertheless reform these judgments and dismiss the original action purely and simply. (Dorion, appellant, and [illegible] respondent, Q. B.) 47

VENDOR AND VENDEE.—In a case such as above, the purchaser may retain [illegible] the interest of the purchase money, besides enjoying the fruits and revenues of the property, until the proper security ordered be given. [illegible] 80

WILD ANIMALS.—The [illegible] wild animal is held to have the first claim to it, and [illegible] boat confiques, and any other person interfering with the [illegible] appropriating the animal is bound to pay the value of it to the party who commenced the hunt. (Charlebois *vs.* Raymond, C. C.) 55

WILL.—[illegible] ..... [illegible]

WITNESS.—*de Faits et Articles.*

—" Insolvent Act of 1864.

—An application to examine a party about to leave the Province will not be granted by the Superior Court, while the record is before the Court of Review, on an inscription for revision of an interlocutory judgment. (St. Jemmes dit Beauvais *vs.* De Montigny, S. C.) 343