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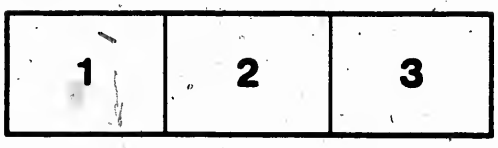

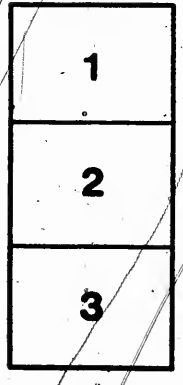

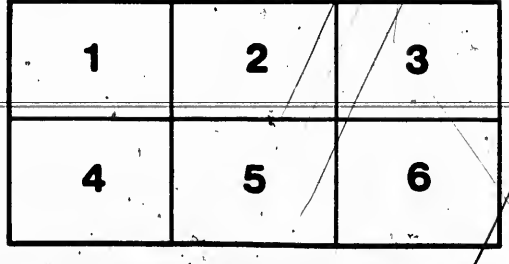

THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

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VOL. XXI.

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STRACHAN BETHUNE, Q.C.; JOHN L. MORRIS; JAMES KIRBY, D.C.L., LL.D.

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ERRATA.—On page 167, for "s'ils sont portés," read "et s'ils sont portés," &c.; for "solidairement et avec mari," read "solidairement avec son mari;" for "finalement une défense," read "et finalement une défense." On page 168, for "cette article," read "cet article."

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THE LOWER CANADA JURIST.

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 15TH MARCH, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 140.

ARCHIBALD M. CASSILS, ET AL.,

(Defendants in the Court below,)

APPELLANTS;

AND

JAMES D. CRAWFORD, ET AL.,

(Plaintiffs in the Court below,)

RESPONDENTS.

HELD:—That, notwithstanding anything contained in articles 1488 and 2268 of the Civil Code of Lower Canada, a valid sale or pledge cannot be made of stolen goods, except in the cases mentioned in article 1489, so as to divest the real owner of his right to reclaim them from the purchaser or pledgee without reimbursing the price paid for or advances made on such goods, although the purchaser or pledgee may have bought or made advances on the stolen goods *bona fide* in the ordinary course of his business.

The words "nor in commercial matters generally" in article 2268 do not protect a trader acquiring stolen goods in any commercial transaction, whether from a trader dealing in similar articles or not, but apply, apparently, to cases where the possession of the goods is obtained in a commercial transaction, whether by sale or otherwise, *but under the same circumstances by which a sale would be protected under Article* 1489.

The present action *en revendication* was instituted by the respondents in the Court below, claiming a quantity of silk and leather goods which had been seized by the high constable in their possession as property stolen from the appellants. The goods in question had been pledged to the respondents by one Atkin, the appellants' clerk, as security for advances made to him by the respondents. Atkin had stolen the goods from his employers, the appellants.

The action was maintained by the Superior Court, BEAUDRY, J., the judgment being as follows:—

"The Court, &c.;

"Considering that plaintiffs have established the material allegations of their declaration, and especially that in making the advances to Frank Atkin,

Cassils et al. and Crawford et al.

mentioned in the said declaration, they acted in good faith, and with due prudence, and that the transactions by which the goods in question in this cause came into possession of said plaintiffs, were of a commercial nature; and considering that the said defendants, Cassils & Stimson, lost possession of said goods by their servant and employee, who had the control thereof, and by their over-confidence in said servant, and said defendants, Cassils & Stimson, are bound by law to bear the loss occasioned by the fault of such servant, doth maintain the attachment in revendication in this cause made, doth adjudge that plaintiffs were at the time of the attachment made in this cause the lawful pledgees of said goods, and entitled to retain the possession thereof until they shall be repaid the sum of $2,108, the amount of the said advances; $116.99 interest thereon to the 7th of February, 1874, and $64.06, amount of storage due on said goods on said last-mentioned day, making in all the sum of $2,289.05 with interest on said sum of $2,108 from the said 7th of February last, and such further charges as may lawfully be incurred on the said goods, payable to said plaintiffs for storage or otherwise.

"And the Court considering that the trial of said Atkin before the Court of Queen's Bench, on the information and complaint of said defendant, Cassils, laid on the 7th of February last, for the purposes of which said goods were taken possession of by said defendant, Adolphe Bissonnette, has been since had and completed, doth adjudge and condemn the said Adolphe Bissonnette, within fifteen days after service upon him of this judgment, to restore and deliver up to plaintiffs the goods and merchandise so revendicated and in his possession as aforesaid, and doth order said defendants, Cassils & Stimson, to bear the present judgment and to abide by and conform themselves to the same; the whole with costs against them said defendants, Cassils & Stimson."

The defendants appealed from this judgment.

Abbott & Co., for the respondents, in support of the judgment, argued in their factum as follows:—

The matters of fact, which have been proved, and have the most material bearing on the question at issue, are as follows:

It is established that Atkin held a position in the warehouse which gave him unlimited control of the appellants' goods.

That while he held that position, he was, with their knowledge, trading in various other ways, and, amongst others, in hides, which was a kindred business to their own.

That *the transactions between him and the respondents were of a commercial nature;* that they took place openly during business hours, and in the ordinary course of the respondents' business; and that the goods which Atkin stored with them, and upon which he got advances, were delivered to them by the carters and employees of the appellants.

That the respondents were acting in the most absolute good faith, from the commencement to the end of the transaction, and that nothing occurred in the course of it that could have raised the suspicions of the most prudent of men.

The question in the case is, whether or no, under these circumstances, the position of the respondents is to be protected by the law.

There is an article of the Code which seems to the respondents to settle this question beyond the possibility of a doubt.

Article 2268 contains, amongst other things, the following words:

"Prescription of corporeal moveables takes place after the lapse of three years, "(reckoning from the loss of possession) in favor of possessors in good faith, even "when the loss of possession has been occasioned by theft. This prescription is "not, however, necessary to prevent revendication, if the thing have been bought "in good faith in a fair or market, or at a public sale, or from a trader dealing "in similar articles, [nor *in commercial matters generally,*] saving the exception "contained in the following paragraphs: nevertheless, so long as prescription "has not been acquired the thing lost or stolen may be revendicated, although it "have been bought in good faith, in the cases of the preceding paragraph; but "the revendication in such cases can only take place upon reimbursing the pur-"chaser for the price which he has paid."

It will be observed that the portions of these paragraphs which refer expressly to the prescription of stolen goods are new law; and that the phrase "nor in commercial matters generally" is new law.

The language is clear and unambiguous, and no expressions could have made more plain the English phrase, "in commercial matters generally," nor the French phrase, "*en affaire de commerce en général*," by which the advantages of possession, even in cases of theft, are extended from things bought in good faith in a fair or at a public sale, or from a trader dealing in similar articles, to things which have been acquired in the transaction of commercial matters generally—or, in other words, in the regular course of commercial business.

It would be easy to shew the importance which is attached not only by law writers, but by political economists generally, to the preservation of the rights of those who, in the exercise of a lawful business, acquire property from its possessor, in the ordinary course of such business. Or to point to the various provisions of law which have continually increased the force of the presumption, that the person in possession of a moveable is its proprietor.

But, where the law is explicit, it appears to the respondents that arguments are unnecessary, and they have in this case the express language of the law to sustain their pretensions. It cannot be denied, or even doubted, but that they acquired the goods in question in the ordinary course of their business, and in perfect good faith; nor that that acquisition was a commercial matter. If so, it will be impossible for the appellants to argue away the clear language of the law; or in any way to deprive the respondents of the security they have acquired in the prosecution of their lawful business.

If it were necessary to adduce equitable grounds, it would not be difficult to shew, that where two innocent persons must suffer by the act of a third, he who gave the power or opportunity for such act must bear the burthen of its consequences. This is a principle which pervades many branches of the law, and is constantly recognized by the courts. The appellants placed Atkin in such a position in their warehouse, that he seems to have acted in it as he pleased, not only in the conduct of their business, but in carrying on his own. And so far from carrying on his operations furtively, he was able, in consequence of the

Cassils et al. and Crawford et al.

position they gave him, to send out their own servants with goods wherever he pleased. And, as they allowed him to carry on other trades there, and participated in the monies and securities he received from those trades, they increased the difficulty of discriminating between what he was doing for them and what he was doing for himself. It was they, therefore, who gave him the power and the opportunity for committing the act by which either they or the respondents must suffer; and, on the principle just referred to, it is they, and not the respondents, who must bear the burthen of it.

The respondents, however, repeat, that they feel it to be unnecessary to discuss the question in an argumentative way.

They appeal to the express language of the article of the code which they have just recited, and which receives additional significance and force from the fact that it expressly purports to introduce into the code a new system in such matters. And they claim the benefit of that system, as one which, both in its letter and its spirit, protects them in the position they hold towards the goods in question, and entitles them to ask that the judgment of the Superior Court be confirmed.

TESSIER, J., *dissentiens.* Je regrette de différer d'opinion de la majorité de la Cour, mais je ne puis consentir à renverser un jugement de la Cour Inférieure que je crois absolument conforme à un article positif de notre Code Civil. Cet article, No. 2268, se lit comme suit:

"Prescription of corporeal moveables takes place after the lapse of three "years, (reckoning from the loss of possession), in favor of possessors in good "faith, even when the loss of possession has been occasioned by theft. This "prescription is not, however, necessary to prevent revendication, if the thing "have been bought in good faith in a fair or market, or at a public sale, or "from a trader dealing in similar articles, [nor *in commercial matters gene-* "*rally,*] saving the exception contained in the following paragraphs: neverthe- "less, so long as prescription has not been acquired, the thing lost or stolen may "be revendicated, although it have been bought in good faith, in the cases of "the preceding paragraph; but the revendication in such cases can only take "place upon reimbursing the purchaser for the price which he has paid."

Il s'agit de savoir, s'il faut donner effet à cet article, ou s'il faut en retrancher les mots "nor in commercial matters generally"—"ni en affaire de commerce en général." Ces mots sont de droit nouveau dans notre Code, et ne se trouvent pas dans l'article correspondant No. 2279 du Code Napoléon. Il ne faut donc pas invoquer ici les commentateurs du Code Napoléon, mais plutôt rechercher ceux qui ont écrit en faveur de ce changement comme Pardessus, changement que nos codificateurs paraissent avoir adopté.

Les intimés Crawford étaient commerçants, et dans leur ligne de commerce recevaient en dépot et nantissement des effets, sur lesquels ils fesaient des avances.

Le commis (Atkin) des appelants Cassils a déposé en son nom chez Crawford des objets de commerce sur lesquels il a eu des avances, c'est clairement une affaire de commerce; mais Atkin avait volé ces effets de Cassils, et Cassils les revendique sans offrir de payer le montant avancé par Crawford à Atkins.

Atkins a été convaincu de ce vol et est insolvable, qui doit souffrir la perte? est-ce M. Crawford ou est-ce M. Cassils?

Cassils et al. and Crawford et al.

Il est bon d'observer qu'il est prouvé que M. Crawford a agi de bonne foi, si c'était le contraire, je servis contre lui.

La position d'Atkins était celle d'un homme indépendant, fesant quelques affaires à son compte, quoiqu'il fut le commis de Cassils. "He was a confidential clerk," dit le témoin Whitehead, "who had full power to do almost everything for the benefit of the business."

Il est vrai que l'article 1489 en parlant de l'achat d'un objet volé n'inclut pas l'exception qui se trouve dans l'article 2268, c'est-a-dire *qu'en affaire de commerce en général*" le propriétaire de l'objet volé ne peut le réclamer qu'en payant à l'acheteur le prix qu'il a déboursé. Mais cela ne détruit pas l'exception qui est exprimée d'une manière absolue dans l'article 2268; cet article 1489 n'est pas restrictif aux seuls cas qui y sont mentionnes. On peut dire aussi que l'article 1489 ne s'applique qu'au cas de l'achat, tandis qu'il s'agit ici du nantissement. Le nantissement d'objets pour avance n'est pas une opération à laquelle il est d'usage de donner la même publicité qu'au cas de vente.

D'ailleurs lorsque la loi est positive, on ne peut pas la mettre de côté, au point de vue des inconvénients, c'est là le système arbitraire qu'un Code de lois écrit a pour but de détruire.

Il me semble qu'il n'y a pas de contradiction entre ces deux articles, et que cette omission apparente est suppléée par l'article 1487, qui dit, "La vente de la chose qui n'appartient pas au vendeur est nulle, sauf les exceptions qui suivent:" et cette 1ère exception est dans l'article 1488. "La vente est valide (de la chose qui n'appartient pas au vendeur) s'il s'agit d'une affaire commerciale." Il n'était donc pas nécessaire de répéter cette exception dans l'article 1489.

L'interprétation que j'adopte n'est pas contraire au droit existant avant le Code Napoléon, et nos Codificateurs en ajoutant les mots "en affaires de commerce" dans notre Code n'ont fait que s'accorder avec le sentiment d'auteurs fort estimés. Toullier 14 Vol. No. 118 dit:

"Avant la promulgation du Code, des jurisconsultes en grand crédit, croyant *favoriser le commerce* en donnant plus de latitude à l'axiome," "*meubles n'ont point de suite*," avaient pensé que dès qu'on ne peut reprocher *de mauvaise foi* dans l'achat que j'ai fait de votre meuble, je suis à l'abri de toute poursuite."

C'est d'après ce principe de bonne foi ou de mauvaise foi dans l'acheteur que je déciderais cette cause. Il parait admis que M. Crawford a reçu les choses de bonne foi en affaire de commerce qu'il fesait ordinairement, je le maintiendrais dans le droit d'être remboursé de ses avances avant de délivrer la chose nantie ou déposée pour sureté de ces avances.

6 Massé Droit Commercial, No. 444.

2 Pardessus Droit Commercial, No. 252.

2 Troplong Prescription, No. 1070.

Je conclus donc en disant qu'entre les deux parties, celle qui doit souffrir est l'appelant qui a employé un commis malhonnête: et c'est entraver beaucoup le commerce, que d'obliger l'acheteur de s'enquérir avant d'acheter un objet, s'il appartient au vendeur.

DORION, C. J.:—This contestation is between the appellants, who are the

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owners of goods stolen from their store by one of their clerks, and the respondents, who claim a lien for advances made to the party who stole them. The Court below maintained the claim of the respondents and awarded them the possession of the goods.

The question thus raised is not free from difficulty.

By art. 1487 C. C. "the sale of a thing which does not belong to the seller "is null, subject to the exceptions in the following articles."

Art. 1488 is for a different purpose altogether, and the only exception applying to this case is contained in art. 1489, which provides that: "If a thing lost or *stolen* be bought in good faith in a *fair* or *market*, or at a *public sale*, or *from a trader dealing in similar articles*, the owner cannot reclaim it without reimbursing the price he paid for it."

As the respondents did not acquire the goods claimed either in a fair or market, or at a public sale, or from a trader dealing in similar articles, it follows that they cannot, under these articles, claim a lien on the goods as against the appellants from whom they were stolen. But the respondents contend that under art. 2268, which, after establishing a three years' prescription as a bar to an action to recover stolen goods, provides that this prescription is not necessary to prevent revendication, if the thing has been bought in a fair or market, or at a public sale, or from a trader dealing in similar articles, (nor in commercial matters generally) they have a right to claim a lien on the goods, they have received in the ordinary course of their business as warehousemen, this being as to them a commercial transaction. The words (nor in commercial matters generally) are not in art. 1489, although the two articles have reference to the same cases. In their general sense these words would extend to all commercial transactions whether the possession of the goods was obtained from a trader dealing in similar articles or not, the exception which under art. 1489 applies only to sales from a trader dealing in similar articles. In a more restricted sense, they may mean that the exception applies to all cases where the possession of the goods was obtained in a commercial transaction whether by sale or otherwise, but under the same circumstances by which a sale would be protected, that is, when such transaction was made with and the goods obtained from a trader dealing in similar articles. The first interpretation would establish two contradictory rules on the same subject: the one laid down in art. 1489, by which the purchaser of stolen goods is protected when the purchase is made from a trader dealing in similar articles, while art. 2268 would protect him as well when he purchased from a non-trader or from a trader not dealing in similar goods, provided the purchase was on his part a commercial transaction. The second interpretation would imply no such irreconcilable contradiction between the two articles. It would merely extend to commercial transactions other than sales, such as pledging with a factor, a commission merchant or a warehouseman, the same rule which is applicable to sales under art. 1489, and would protect such factor, &c., for advances made on stolen goods, when the possession of the goods was obtained by him under the same circumstances as would protect him, if he had purchased them, that is, in cases where the goods were received in good faith from a trader dealing in similar articles.

Before the Code, the party in possession of stolen goods was only protected when he had acquired them in good faith from a trader dealing in similar articles, or in a fair or market, or at a public sale. The same rule prevails in France under art. 2279 of the French Code.

The commissioners who prepared our own Code say, in their supplementary Report, p. 369, in which they have suggested the additional words, "These "rules are conformable to the received doctrine. It need only be remarked that "in the amendment in order to more clearly define the case of the third para-"graph, the one having reference to lost or stolen goods, the words 'nor in "commercial matters generally' have been added."

This shows there was no intention on the part of the commissioners to alter the rule which they had adopted as to sales of stolen goods both in art. 1489 and in the previous part of art. 2268, and that their object was simply to clear any doubt that might have existed whether or not the same rule was applicable to commercial transactions other than sales, whereby a right or title might be acquired under similar circumstances, that is in good faith and from traders dealing in similar articles.

This last interpretation is the one we are disposed to adopt. It has the advantage of reconciling the provisions contained in arts. 1489 and 2268. It is further in accord with the spirit of the law, which is to protect the *bonâ fide* possessor who acquired from a trader dealing in similar articles, and in the ordinary course of his business, when nothing in the transaction can raise a suspicion of fraud.

The interpretation contended for by the respondents would open the door to innumerable frauds and act as a premium on dishonest clerks and employees, by increasing the facilities for disposing of stolen goods. We have here an instance of a clerk who on eight different occasions pledged in his name the goods of his employers. It is not contended that the respondents knew these goods were stolen, and to that extent they appear to have been in good faith; but they have made advances without proper inquiry, and if they suffer, it cannot be said they are entirely free from blame.

The judgment of the Court below is reversed, and the goods are to be delivered to the appellants.

MONK, J., entirely concurred in the views expressed by the Chief Justice. No doubt article 2268 created a good deal of difficulty, but he agreed in the conclusion that under the circumstances the claim of the respondents could not be recognized. The advances were no doubt made in good faith. But the respondents did not make any inquiry; Atkin was a thief, and came to them with goods stolen from his employers, and there was nothing to show that the respondents took the trouble to make any inquiries.

RAMSAY, J.:—This action raises the question simply whether the pledgee of goods pledged by a thief can retain them till the advances made in good faith are repaid. It has been questioned whether the rule that is applicable to a purchaser is applicable to the pledgee. On this point I think there is no distinction. The right to sell implies the right to pledge. This is illustrated by art. 1740 C. C., for by that article it appears that any agent entrusted with the possession

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of goods, or the titles to goods, may sell or may pledge them. It seems to me, then, that 1489 C. C. decides this case: "If a thing be bought in good faith in a fair or market, at a public sale, or from an owner dealing in similar articles, the owner cannot reclaim it without reimbursing to the purchaser the price he has paid for it."

It has been argued that a fair or market means "a sale of any kind." But this interpretation is inadmissible, for it would destroy the third condition which provides for the private sale and declares that it must be from an owner dealing in similar articles. And in the English cases cited to establish respondents' pretension, that the sale in a shop was sufficient, we find that it must be in a shop dealing in articles of a similar kind. So that our article expresses precisely the law of England. In the overt market case, 5 Coke 836, it was held the sale of gold on a market day at a scrivener's was not in market overt. See also Lyons and Dupasse, 11 Ad. and E. 326; also Crane and London Dock Company, 5 B. and S. 313, where it was held that a sale by sample will not do. In fact, the whole doctrine is laid down in the market overt case too clearly to leave doubt.

Again, it has been said art. 1489 does not apply, for Atkin was an agent of the owner in possession of the goods. But that is not the fact. He was in possession of the goods, it is true, or he could not have pledged them (1970 C.C.); but the article (1740 C. C.) does not say any one in possession of the goods or titles thereto, but "any *agent entrusted with*," &c. It is possible that some of the English cases cited go further than the Courts in this country would do in favor of the owner, but the law of art. 1740 is unquestionable, and its meaning as bearing on this case is not open to much difficulty. But further it is urged that the possession raises a presumption that he is entrusted therewith by the owner (1751 C.C.) Strictly, that the *entrusting* is presumed, but not the agency. But let us take it that the article means the agency and the trust are to be presumed from the possession; it is only till the contrary is shown. Here the contrary is shown, for the party in possession was a thief and consequently article 1751 C.C. establishes a proviso specially to reserve the case of art. 1489 C.C.

A further argument drawn from the terms of art. 2268 C.C. was urged in favour of respondents' pretensions. It is said that the words "nor in commercial matters generally," which are new law, impliedly add a fourth condition to art. 1489 C.C. There appears to be some defect in the formation of article 2268 C.C., for it is not compatible with the conditions of the art. 1489. If the articles are incompatible it is quite evident that the article directly on the subject has greater authority than a saving clause in an article on a different subject.

Our jurisprudence supports, I think, appellants' pretensions. In the case of Nordheimer vs. Fraser, 1 L. C. Law Journal, p. 92, it was held that a lessee could not pledge the article leased to the prejudice of the owner. And in the case of Nordheimer and Duplessis, 2 L. C. Law Journal, p, 105, it was held that a sale by authority of justice, null owing to the seizure and sale being in different districts, would not bar the rights of the owner. And in the case of

Gould vs. Cowan., S. C., in Review, it was held that the rule *possession vaut titre* does not apply to such cases.

SANBORN, J.:—The question in this case is what effect is to be given to art. 1489 of our Code, and how that article is modified, if at all, by arts 1488 and 2268. The goods were stolen. There is no question of this fact. I am fully satisfied that Crawford acted in good faith, so far as that term signifies sincerity and honesty. The transaction was of a commercial character. It is contended then that because the transaction is of a commercial character and not fraudulent on the part of Crawford he cannot be deprived of the possession of the goods otherwise than by payment of his advances. It must be noted that although articles 1487, 1488 and 1489 are cognate with 2268, they are quite distinct from each other. The former declare the general rule, that the sale of a thing which does not belong to the seller is null, and the exceptions to this rule. Art. 2268 treats of how moveables may be acquired by prescription. Prescription is only necessary where there is a vice in the title. Marcadé, speaking of these two principles contained in articles 1599 and 2279 Code Napoléon, says: "c'est un principe que la vente de la chose d'autrui est nulle; c'est un autre principe que dans le cas de vente de la chose d'autrui (comme au cas d'échange, de donation, de legs, &c.,) l'acquéreur, si cette chose est un meuble, en devient propriétaire par prescription; or la seconde idée n'apporte aucune exception, dérogation ni restriction à la première, puisque c'est précisément parceque, dans ce cas, comme dans tous les autres, la vente est nulle, qu'il y a lieu à l'application de la prescription. Si la vente était alors valable, le tiers acquerrait donc par son contrat et n'aurait pas besoin de prescrire." This is not a sale but a pledge. The reasoning applicable to the one is equally applicable to the other. If it were a sale Crawford's contention would be that he had a right to the goods as owner. It being a pledge he contends that he has a right to revendicate *jure pignoris*, to enforce payment of his debt. The whole difficulty arises from the words added in art. 2268, "Nor in commercial matters generally." These words, as well as in article 1488, "the sale is valid if it be a commercial matter," are indicated as new law, and found their way into our Code in some inexplicable way. They were not suggested by the codifiers but were inserted when the Code passed the committee of Parliament. It is now to be determined whether it was intended by these words to depart from the jurisprudence, ancient and modern, in this country and in France as respects the right to recover stolen goods. If this were intended, the preservation of the exception that stolen articles cannot be revendicated when purchased in good faith at a public sale or in a fair or market, or from a trader dealing in similar articles, would seem scarcely necessary. The exception, "in commercial matters generally," if the interpretation sought to be given to it be correct, would cover the whole ground. It is necessary to give effect to the exception having particular reference to stolen goods. In such case the vendee or pledgee must be in good faith, and the law indicates what sort of transaction is to be treated, in legal sense, as being in good faith. The goods must be acquired at a fair or market, or at a public sale, or of a person dealing in similar articles. In the case of a pledge the last condition applies. Mr. Crawford, while there is clear evidence that he acted without

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fraudulent intent or even suspicion of wrong, did not make the inquiries that the law required him to make, to ascertain Atkin's position and whether he was dealing in goods such as he offered to pledge. Had he made such inquiries he would have discovered that he was a clerk and salesman of Cassils & Stimson, and that he was not a dealer in the goods he offered to pledge, and this would, at once, have shown him good cause to suspect that Atkin was acting fraudulently. The admission of the principle that stolen goods might be pawned, and the pawnbroker, who advanced upon such goods, without any knowledge of the theft or any responsibility to inquire whether the pledgor had come honestly by them or not, could hold them against the owner, would lead to very mischievous consequences. If, however, this is the law we are bound to declare it without regard to consequences. When we find that a particular exception is applied to the case of stolen goods, that they cannot be revendicated by the owner when bought in a fair or market, at a public sale, or of a person dealing in similar articles, nor in commercial matters generally, we must endeavor to give effect to the whole exception interpreted by uniform jurisprudence heretofore. To say that the addition of the words "nor in commercial matters generally," in art. 2268, does not present difficulty is not true. The rule, as respects stolen property undoubtedly is, that the owner may recover it from the possessor, at any time within three years after loss of possession. What then is the exception to this rule? Respondent contends that it is a rule only applicable to fraudulent possessors or to possessors in good faith, who have obtained possession in a non-commercial way of dealing. He contends that all acquisition of possession acquired in the ordinary course of trade, comes within the exception, in the absence of proof of fraud on the part of the possessor. I cannot accept this proposition. I do not think there was an intention to give to the exception so broad a significance. It has been urged at the bar that this is only bringing our law into harmony with what many of the authors in France assert to be the law there. The authorities cited, except Pardessus and Bedarride, upon careful examination do not bear out that contention. Pardessus and Bedarride are the only authors I have found who seem to give some countenance to such a pretension. All the other writers, when speaking of good faith and the favor that should be extended to commercial dealings, in the interest of commerce, will be found subordinating their reasoning to 2280 C. N., which prevents recovery by the owner of goods lost or stolen, where the possessor has bought them at a fair or market or at a public sale, or of persons dealing in similar articles, without payment to the possessor of the price he has paid for them. No one doubts the necessity of good faith on the part of the acquirer. The question is what is necessary to show to establish it? It has hitherto been considered imperative that acquisition must have been made in one of the three ways indicated—either at a fair or market, at a public sale, or of a person dealing in similar articles. Does adding to this, "or in commercial matters generally," provide for any additional cases which come within the exception? It is not easy to suggest any. If there be any they must be *ejusmodem generis*. I am inclined to think that the sense of the addition, so far as significance can be given to it, is more reiterative and cumulative than anything else, merely a declaration

that if the term acquiring of a person dealing in similar articles does not cover all legitimate trade dealings, it should be extended to such, but that it was never intended to cover a purchase or acquisition of possession by way of pledge from persons who have not the legal possession of the goods they sell or pledge. If acquired from a person like a factor, agent, or perhaps even a depositary or lessee to whom the owner has entrusted the goods, although a fraud is committed by the agent upon the owner in disposing of the goods, if this fraud is short of theft, if it be an ordinary commercial transaction, there is sufficient evidence of good faith to prevent revendication by the owner. To carry the law beyond this would do violence to the universal sentiment of the authors, and I believe would be an incorrect interpretation of the Code although the language in its strict literal sense is susceptible of a larger construction. In so interpreting our Code as to maintain the possession of the acquirer of goods from a person holding them in a fiduciary capacity, but who has disposed of them in fraud of his principal, is admitting a change from the Roman Law in favor of commerce, which brought such cases within the exception. Toullier, differing from most of the writers since the Code, regards art. 2279 C. N. as restoring the ancient law, and, vol. 14, No. 118, says: "Le Code est revenu dans cet article à la pureté des principes du droit ancien, *nemo plus juris in alium transferre potest quam ipse habet.* Avant la promulgation du Code, des jurisconsultes en grand crédit, croyant favoriser le commerce en donnant plus de latitude à l'axiome "meubles n'ont point de suite," avaient pensé que dès qu'on ne peut reprocher de mauvaise foi dans l'achat que j'ai fait de votre meuble, je suis à l'abri de toute poursuite de votre part, sauf votre recours contre l'emprunteur, le dépositaire ou autre qui avait abusé de votre confiance en me vendant ce meuble, que vous ne lui aviez remis que pour vous le rendre. Dira-t-on que le code ne parle que de la chose volée ou perdue? Mais sa disposition s'applique à toutes choses dont le propriétaire est dépouillé injustement, par un abus de confiance, par exemple, tel que la vente par le dépositaire de l'objet déposé." Our Code, as most modern authors consider the French Code, only excepts goods lost or stolen. It goes this length in favor of commerce, no further. And this is what I understand to be contemplated in the provision "not in commercial matters generally." There is in this respect a shade of difference between our law and the English law on this subject, in the direction of favoring commerce. Story on Sales, No. 201: "But where the vendor has acquired the mere possession of goods by fraud without the knowledge or connivance of the actual owner, as where he has stolen or found them; or, where he holds them in a fiduciary capacity, with no express or implied right obtained from the owner to sell or otherwise dispose of them; as where he is a bailee or trustee; he cannot make a valid sale of them, so as to divest the actual owner of his right to reclaim them from the person having possession of them, although such person may have bought them *bona fide*. If, however, the owner place his property in the hands of another person under such circumstances, or in such manner, that the law implies a right and power on the part of that person to make a valid sale thereof, the sale by such person will be good, although he have, as between himself and the owner, no such right or power." In this case as Atkin never had any legal possession of the goods,

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and actually committed larceny in taking them from his employers to pledge them for his own debt, I think Crawford was required by law to know this fact, and he has not in a legal sense vindicated his good faith so as to hold the goods from the owners. The judgment declaring the contrary must be reversed.

The judgment is recorded as follows:

"The Court, etc.,

"Considering that it is established by the evidence in this cause that the goods claimed by the said respondents and seized at their instance in the hands of Adolphe Bissonnette, one of the defendants in the Court below, to wit, seventy-eight pounds of silk twist, consisting of twenty-six packages and one hundred and twenty-six dozens of French goat leather, consisting of one hundred and twenty-six rolls of said leather, were at the time the said goods came into the possession of the said respondents the property of the appellants from whom they had been stolen by the party to whom the respondents made advances on the security of the said goods;

"And considering that the circumstances under which the respondents received the said goods are not such as to entitle them to enforce against the appellants, who are the owners of said goods, the lien or privilege which they claim by their action for the advances which they improvidently made on the security of the said goods;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 26th of December, 1874, maintaining the action in revendication of the respondents;

"This Court doth cancel and reverse the said judgment of the 26th of December, 1874, and, proceeding to render the judgment which the said Superior Court should have rendered, doth declare the appellants to be the proprietors of the said goods, and doth dismiss the action in revendication of the said respondents," &c., (the Hon. Mr. Justice TESSIER dissenting.)

Judgment reversed.

L. N. Benjamin, for the appellants.

Abbott, Tait, Wotherspoon & Abbott, for the respondents.

(J. K.)

SUPERIOR COURT, 1876.

MONTREAL, 18TH NOVEMBER, 1876.

Coram MACKAY, J.

No. 1705.

Fauteux vs. *Parent*.

HELD:—That a replication to a general answer is unnecessary and will be rejected on motion.

PER CURIAM:—This is a motion to reject a replication filed to a general answer, as being *oiseuse*. And so I hold it to be. Ever since the famous case of Forbes and Atkinson reported in Stuart's Reports, the issue has been considered joined by the declaration, exception and general answer. Art. 148 of our own Code of C. P. says the same thing. Motion granted with costs.

Motion to reject replication granted.

Longpré & Dugas, for plaintiff.

Paguelo & Co., for defendant.

(S.B.)

COURT OF REVIEW, 1876.

MONTREAL, 31st JANUARY, 1876.

Coram MONDELET, J., JOHNSON, J., TORRANCE, J.

No 1471.

Livingstone vs. The Grand Trunk Railway Co.

HELD:—That a passenger travelling with a Railway ticket, from Montreal to Toronto, marked—"Good only for continuous trip within two days from date,"—and who leaves the train in which he starts at Kingston, where he remains several days, cannot afterwards avail himself of the ticket in payment of a trip on another train from Kingston to Toronto.

This was a motion by plaintiff for a new trial, and a counter motion by defendant for judgment on the verdict.

MONDELET, J.—This was a trial before a special jury. The action was for the recovery of damages which the plaintiff alleged that he had sustained by being ejected from the Grand Trunk cars for not having the required ticket. The jury were of opinion that the plaintiff had no claim against the company, and this finding was in accordance with the instructions of the learned judge who presided at the trial. Two motions were now made, one for judgment on the verdict of the jury, and the other for a new trial. The facts were very simple. The plaintiff bought a ticket to go to Toronto, but when he got as far as Kingston he stopped over there. The ticket which he had purchased bore the inscription, "Good only for a continuous trip, within two days from date." A few days after the plaintiff alighted at Kingston he wished to pursue his journey, and took the train. At a short distance from Kingston he was asked for his ticket, and he produced the old ticket. The conductor told him that that ticket would not do, and the plaintiff having been first politely requested to leave the car, and having refused to do so, was ejected. It was for this ejection that he now claimed damages. The question was, whether this ticket constituted a contract between the plaintiff and the Grand Trunk. The conditions on it were that the journey had to be a continuous one, and had to be accomplished in two days. The question was, whether these conditions formed a contract or not. At the hearing His Honor had an impression that the plaintiff's pretension might be well founded. But he had come to the conclusion that the demand could not be sustained. Livingstone must have been aware of the conditions. Being a person of some education he ought to have read what was on his ticket. Even if a man could not read it was his duty to inquire what was on the ticket. If this ticket was not spent after two days when would it be spent? His Honor referred to the case of Cunningham and The Grand Trunk, a case more favorable to the plaintiff than this one, in which the Court of Appeals dismissed the action against the Company.

JOHNSON, J.—The plaintiff brought an action for damages against a railway company for having been illegally ejected from their carriages on the occasion of his journey between Kingston and Toronto on the 10th of March last. The defendants pleaded that they were justified in what they did, and are not liable.

The facts are few and simple. The plaintiff being asked for his fare by the

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conductor, produced a ticket and refused any other payment, and was in consequence put off the train, without any unnecessary force being used. The sole question, therefore, was whether the ticket presented entitled the plaintiff then and there to be conveyed as a passenger in the defendants' carriages. The ticket is in these words:—"Grand Trunk Railway Good only for continuous trip within two days from date. Montreal, West to Toronto. First class." In one margin is stamped the date, namely, "6 March, 75," and in the other is printed the number 5,186. The Judge charged the jury, first, "that the meaning of the word continuous" was not, necessarily, (as had been contended by the plaintiff's counsel) the mere literal one of continuity of mechanical motion, which was a thing practically impossible throughout so long a journey; but was to be taken in a reasonable and practical sense, and might, for instance, be taken to mean, if the jury should be of that opinion, that there was to be such a continuous relation between the passenger and the train as was usual in railway travel in the case of through passengers; and, secondly, as regarded the knowledge of the plaintiff of the terms of his ticket, that if, by exercising the ordinary care and intelligence of passengers in his situation, he could, in the opinion of the jury have known what was printed on the face of the ticket, then there would be a contract between the parties according to those terms. The jury found unanimously that he had suffered no damage under the circumstances, and found specifically every fact alleged by the defendants in their plea: that the plaintiff bought the ticket on the 6th of March for a continuous trip, valid for two days from date; that he left Montreal in the train that evening, using this ticket; that he did not go on continuously to Toronto, but broke the journey by disembarking at Kingston, where he spent some days, and then reimbarked there on the 10th, using the same ticket, and refusing to pay otherwise, upon which the train was stopped, and the plaintiff was put out at the next station, without any unnecessary force. We are now asked to set aside this verdict for misdirection as to law, and for being contrary to evidence.

This case is not distinguishable in principle from Cunningham vs. The Grand Trunk Railway, 11 L. C. J. p. 107, where the Court of Queen's Bench, composed of Judges Aylwin, Meredith, Drummond and Mondelet, unanimously held that a person purchasing from a Railway Company a ticket, stated on its face to be good only for a specified term, enters into a special contract, which is at an end as soon as such term has expired. It is hardly necessary to observe that the present case is not to be confounded with the class of cases where a common law liability is attempted to be avoided by conditions unknown to the other party. It was not put upon any such ground by the learned counsel who argued this motion. If it could be doubted in a common-sense view of the matter, whether a person in the situation of the plaintiff, a highly intelligent commercial agent, would give his money without knowing what he got for it, there were circumstances proved in this case from which the jury was well warranted in believing that he had a very special reason for looking at it. It is proved in the case that this is a regulation designed to protect the corporation against fraud, which, it was also proved, could be very easily practised if the rule did not exist; and though a common carrier cannot divest himself of his common law responsibilities unless

by a special contract, and therefore his own act alone must be insufficient to relieve him of such duties, yet he may and he must in many respects regulate the mode in which he is to perform those duties. See 46 vol. N. H. Rep., 213, where the judgment of the Supreme Court is given in the case of Johnson vs. Concord R. R.

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Plaintiff's motion rejected and defendant's motion granted.

Doutre & Co., for plaintiff.
Geo. Macrae, for defendant.
S. Bethune, Q.C., Counsel.
(S. B.)

COURT OF QUEEN'S BENCH, 1875.

MONTREAL, 16TH SEPTEMBER, 1875.

Coram DORION, CH., J. MONK, J., TASCHEREAU, J., RAMSAY, J., SANBORN, J.

No. 178.

PIERRE HUDON,

APPELLANT:

AND

JOSEPH GIROUARD,

RESPONDENT.

HELD:—1. That an unstamped *bon* is null, and an action founded upon the same will be dismissed with costs, even although the defendant has not specially pleaded the non-stamping of the *bon*.

2. That an action founded upon a promissory note not fyled will be dismissed.

This was an appeal from the following judgment rendered by the Superior Court at Montreal (Hon. Mr. Justice BEAUDRY presiding) on the 21st of October, 1873:—

"La Cour, etc. Considérant que la créance que le demandeur prétend avoir contre le défendeur est basée sur deux bons, dont aucun n'a été estampillé suivant la loi, et sont ainsi considérés comme nuls, et un billet qui ne paraît pas en la possession du demandeur; déboute l'action du dit demandeur et casse et met à néant l'arrestation du dit défendeur, le tout avec dépens, &c."

The above judgment sufficiently discloses the facts of the case.

The following is the judgment of the Court of appeals:—

"La Cour, etc..... Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour Supérieure siégeant à Montréal le 27 Octobre 1873, confirme le dit jugement avec dépens, &c."

Judgment confirmed.

Laflamme, Huntington, Monk & Laflamme, for appellant.
Mathieu & Gagnon, for respondent.
(J. L. M.)

SUPERIOR COURT, 1877.

MONTREAL, 5TH FEBRUARY, 1877.

Coram TORRANCE, J.

No 1708.

Brisbin es qual. vs. *Campeau.*

DELEGATION—DEMURRER.

HELD:—That one in whose favor a stipulation is made by another may bring an action to enforce it, though not a party to the contract.

The plaintiff, as usufructuary legatee under the will of her son, Timothy Donohue, demanded from the defendant payment of the sum of $207.27. Her declaration set out a sale on the 12th February, 1864, by deed passed before Papineau, N. P., from Jean Baptiste Bergeron, père, to the defendant, of a piece of land, in consideration of the sum of 3500 livres, in deduction of which sum defendant by said sale bound himself to pay to Timothy Donohue to the discharge of said Bergeron the sum of 1000 livres, amount of a judgment, and also a further sum of 200 livres, equal to $200, upon which amount interest had since accrued, and there was then actually due a balance of said debt and interest amounting to $207.27 which, or any part thereof, defendant now neglects to pay; and for securing the payment of the said sum or purchase money it was, by said deed of sale, stipulated that said land should be hypothecated, and said deed was duly registered. That afterwards said Timothy Donohue made his last will, whereby he named plaintiff, his mother, his universal usufructuary legatee; that, on the 3rd December, 1873, said Timothy Donohue departed this life, since which time plaintiff has been in possession of said estate under said will.

Therefore plaintiff brings suit, &c., &c.

The defendant demurred to this declaration, on the grounds that there was no *lien de droit* between plaintiff and defendant, and no acceptance alleged by plaintiff of the obligation of defendant.

At the hearing, *M. Prevost*, for the defendant, cited Dorion v. Proulx, decided in the Court of Queen's Bench the 9th July, 1871.

Doherty, for the plaintiff, cited Ryan and Halpin, 6 L. C. Reports, 61.

PER CURIAM.—I do not see that Dorion v. Proulx applies to this case. I would refer to C. C. 1029, also to 20 L. C. Jur. 27, Charlebois et ux. v. Cahill, and authorities there referred to;—1 LaRombière; pp. 100, 1. Nos. 7, 8, Comm. on C. N. 1119; also same author, pp. 115–117. Nos. 4, 7. Table Gé ale de De Villeneuve and Gilbert; vo. Délégation, Nos. 11, 12. Hennen's Digest; vo. obligations VII. (b 1) 1. Vo. novation IV. 9. Vo. obligations III. (b 1), 19. The *défense en droit* must be dismissed.

T. J. Doherty, for plaintiff.
M. Prevost, for defendant.

Demurrer dismissed.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 24TH JANUARY, 1877.

Coram TORRANCE, J.

No. 2548.

Woodward vs. *Allan* et al.

HELD:—That a limitation of liability by a carrier put on a passenger's ticket, will not bind the passenger without proof of notice to him of such limitation, apart from the words on the ticket.

The action was by a passenger on one of the Allan steamers, Sarmatian, which arrived at Portland from Liverpool in December, 1875. The plaintiff (a lady) complained that articles of dress and jewellery of the value of $272, which were in her trunk on her embarkation had been taken out of her trunk while in the hold of the vessel during the voyage. Her action was to recover the value.

The defendants in their plea set forth that, by the ticket which the plaintiff obtained it was expressly agreed between plaintiff and defendants that the latter and their agents should not be responsible for the safe-keeping during the voyage, nor for the delivery, on the termination thereof, of the baggage of the plaintiff. The defendants also pleaded the general issue.

PER CURIAM:—The Court has had little difficulty with the facts of this case. The only point in the evidence with regard to which it has hesitated is as to the custody of the trunk in question from midnight on the night of the plaintiff's arrival at Sherbrooke, and the following morning. The servant man to whom plaintiff's checks were there given is not produced, and the witnesses examined speak only as to impressions and "recollection." The Court refers to the testimony of Miss Georgina Woodward, Mr. Woodward, the brother, and the plaintiff herself. It would have been more satisfactory to the Court to have had the evidence of the servant man, but the testimony, slight as it is on this head, is in favour of the plaintiff. There remains the question fully raised and discussed by the defendants, as to the value of the provision in the passenger's ticket limiting their liability. The Court has had the advantage of a decision lately given by the House of Lords on this very question. The case is that of Henderson and others, appellants, and Stevenson, respondent; 2 Scotch appeal cases, p. 470, (June, 1875) which was decided in the Scotch courts against the defendants. The House of Lords confirmed the Scotch judgments, and held that the limitation pleaded by the defendants should not take effect, inasmuch as they had not proved notice to the plaintiff. The Court here takes the same view of the present case, and gives judgment for $272 in favour of plaintiff.

Judgment for plaintiff.

L. H. Davidson, for plaintiff.
M. Tait, for defendants.
(J. K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND DECEMBER, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 75.

HYACINTHE *alias* SIDNEY ROBERT,

(*Defendant in the Court below,*)

AND APPELLANT;

JOSEPH ROBERT,

(*Plaintiff in the Court below,*)

RESPONDENT.

JUGE:—Qu'en vertu de l'article 341 C. P. les tribunaux peuvent d'office référer à des arbitres une contestation entre parents, lorsqu'elle présente des questions de fait dont l'appréciation est difficile, sans qu'il soit nécessaire que cette contestation résulte de leurs rapports de parenté.

The appeal was from a judgment of the Superior Court, MACKAY, J., homologating a report of arbitrators, by which the appellant was found to be indebted to the plaintiff in the sum of $290.50.

The action was between two brothers, the amount claimed being $872.50.

The details of the claim being of a complicated nature, the case was, by an interlocutory judgment, referred to three arbitrators whose report, as above mentioned, was duly homologated.

The appellant complained of the judgment referring the case to arbitration, on the ground that it did not fall under article 341 of the Code of Procedure. The arbitrators, it was also contended, had exceeded their jurisdiction by taking into consideration questions of law.

On these points the respondent in his factum submitted the following argument:—

Sans entrer dans le mérite de la cause, il est nécessaire de régler la question de procédure que soulève le jugement renvoyant la cause à l'arbitrage. L'appelant prétend que la Cour de première instance devait, avant de décider l'arbitrage, décider toutes les questions de droit qui surgissaient de la cause et que, tout au plus, les arbitres n'avaient à juger que les matières de fait. Or, dit-il, il y a des défense et réponse en droit qui n'ont jamais été adjugées par le tribunal et le renvoi aux arbitres ne pouvait se faire tant que cette adjudication n'aurait pas eu lieu. Ce raisonnement serait sérieux si les parties n'avaient pas abandonné les questions de droit, en n'inscrivant pas la cause en droit et procédant, sans aucune réserve, à la preuve des faits soulevés par les plaidoyers. De plus, lorsque la cause a été inscrite au mérite, il n'a pas été fait mention de ces questions de droit. En sorte qu'il n'y avait devant le tribunal que des matières de fait dans un cas de différend entre parents. Lorsque la cause fut en délibéré, le Juge éprouva de la difficulté à apprécier cette preuve compliquée et contradictoire et se prévalut du droit qu'il avait en vertu de la loi de se soustraire à la tâche ardue de rendre jugement, en renvoyant la cause à des arbitres. Le

jugement fut signifié à l'appelant: un jour y était mentionné pour la nomination des arbitres. Il fit défaut et les arbitres furent nommés : ce furent trois notaires respectables de la cité de Montréal et contre lesquels l'appelant ne peut rien dire qui tendrait à affecter leur impartialité. Au reste, l'appelant s'est fait représenter, par procureur, à toutes les assemblées des arbitres, a même produit un mémoire pour faciliter la décision de ces derniers. Ce n'est donc plus le moment de discuter la légalité de l'arbitrage, puisque l'appelant l'a accepté en participant dans les procédés par sa présence et l'exposition de ses prétentions.

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En référant au rapport des arbitres, il est facile de se convaincre de l'impartialité de la sentence. L'appelant n'a pu alléguer aucune informalité, aucune nullité, et de fait, sa motion pour faire déclarer le rapport non admissible n'en invoque aucune. C'était alors le moment de les constater, afin de mettre le tribunal en position de les apprécier, et il n'est plus temps de se mettre à leur recherche, pour venir devant ce tribunal se plaindre d'un rapport contre lequel l'appelant n'a pu rien préciser en fait d'informalité ou de nullité.

Les arbitres, par l'Art. 343 C. P. C., ne sont pas obligés de motiver leur décision. Il est donc impossible pour l'appelant d'entrer dans le mérite de leurs motifs.

Le tribunal de première instance ne pouvait se soustraire à la nécessité d'homologuer ce rapport et de rendre jugement en conséquence. L'Art. 347 C. P. C., lui en faisait un devoir.

TESSIER, J., *dissentiens.*—Il s'agit dans cette cause de l'interprétation de l'article 341 du Code de Procédure, qui se lit comme suit :

"Le tribunal peut d'office ou sur la demande de l'une des parties, renvoyer "la cause à la décision d'arbitres dans le cas de différends entre parents, "relativement aux partages ou autres matières de fait dont l'appréciation est "difficile pour le tribunal; et du consentement des parties dans toute autre "cause."

La Cour Supérieure a référé *d'office* à des arbitres le présent litige, et les arbitres ont décidé les questions de droit et de fait qui s'élèvent. Il est vrai que le procès est entre deux frères, mais la contestation n'a lieu que sur des matières qui ne résultent pas des liens du sang, il y est question du loyer d'un moulin à scie, d'argent prêté et de billets.

Je diffère d'opinion parceque les jugements de cette Cour doivent avoir pour but de fixer la jurisprudence, et je crois que le jugement actuel consacre un principe dangereux, celui de permettre à un juge de se débarrasser d'une cause pour la faire juger par des gens, peut-être tout-à-fait incompétents, contrairement à la loi et à la jurisprudence suivie jusqu'ici. L'article 341 est de droit étroit, il doit s'interprêter dans un sens limitatif, car si la signification en était générale, le législateur eût dit "dans toutes les causes" et n'eût pas restreint le pouvoir du juge de nommer des arbitres aux "cas de différends entre parents relativement aux partages ou autres matières de fait," et au lieu de faire 13 ou 14 articles sur le sujet, il n'en eût fait qu'un seul.

Suivant cette règle d'interprétation, les mots dans l'article 341, "entre parents relativement aux partages ou autres matières de fait," doivent s'appliquer seulement aux causes dans lesquelles il s'agit de partages ou d'autres différends rela-

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tifs aux liens du sang, aux droits inhérents à la parenté et non pas comme dans la présente cause, aux cas de transactions ordinaires et générales. Les mots "ou autres matières de fait" sont trop intimement liés aux mots "relativement aux partages" pour que la phrase entière ne s'applique pas à des choses de même nature, savoir aux procès provenant de rapports entre parents.

En outre de cette raison, les arbitres ont tranché des questions de droit, ce qui ne leur était pas loisible de faire et ce qui rend leur sentence radicalement illégale. Les arbitres décident entre autres questions de droit, la suivante: "Enfin "quant aux réclamations contractées aux Etats-Unis et que les dites parties pro- "duisent réciproquement l'une contre l'autre, les soussignés considèrent qu'elles "doivent être réglées là et non ici, car par nos lois nous ne pouvons nous en "occuper, vû qu'elles seraient prescrites."

La différence entre les arbitres et les experts est énorme. La décision de ces derniers ne lie pas le juge qui peut adopter le rapport de la minorité ou même rejeter le rapport tout entier. Mais la sentence des arbitres, si les formes ont été suivies, est finale et sans appel. L'article 1354 du Code de P. C. dit en termes formels: "Le tribunal saisi peut entrer dans l'examen des nullités dont la sen- "tence arbitrale est entachée, ou des autres questions de forme qui peuvent en "empêcher l'homologation; mais il ne peut s'enquérir du fond de la contestation." Le jury a certainement des pouvoirs très étendus, mais ils n'approchent pas de ceux des arbitres, parceque la loi refuse, contre les sentences arbitrales, la protection qu'elle accorde contre les décisions du jury.

Dans la présente cause, il ne s'agit que de quelques centaines de piastres, mais supposé que le montant du litige fût beaucoup plus considérable, le pouvoir du juge serait le même. Grâce à ce précédent auquel la cour va donner la sanction d'un jugement sans appel, les citoyens qui croyaient jusqu'ici pouvoir compter sur la science et les lumières de leurs juges naturels pour la décision de leurs différends entre parents, verront peut-être leur fortune dépendre d'une sentence d'arbitres nommés malgré eux. Je serais en conséquence d'avis de renverser les jugements dont est appel, de casser le rapport des arbitres et de renvoyer la cause devant le juge.

C'est assez remarquable que le Code Napoléon ne contient aucune disposition semblable à notre article 341, et le Code de la Louisiane contient un article tout contraire. Art. 445:—"The Court cannot *ex officio* refer a cause to the decision of arbitrators."

DORION, C. J.:—Les parties sont les deux frères dont l'un réclame $872.50 pour balance de différentes créances qui lui ont été cédées par un autre de leurs frères, et l'autre oppose en compensation diverses réclamations au montant de $2,932. Aucune des réclamations, soit du demandeur soit du défendeur, n'est justifiée par écrit et la preuve de part et d'autre n'est rien moins que satisfaisante. Après audition la Cour Inférieure a, sans demande des parties, référé la cause à des arbitres, qui ont accordé $290 à l'Intimé, demandeur en Cour Inférieure.

L'appelant prétend que la Cour Inférieure ne pouvait référer cette contestation à des arbitres parcequ'il ne s'agissait pas exclusivement de questions de

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fait, mais que la contestation présentait aussi des questions de droit, que les arbitres ont pris sur eux de juger.

Cette prétention n'est pas fondée. L'Edit de François 1er de 1560 disait: "Et parcequ'en matière de partages et divisions, il est besoin de prendre des "arbitres pour partir et diviser commodément les dits héritages et bailler soultes "et récompenses, *qui est chose plus de fait que de droit* et aussi pour entretenir amitié et paix entre proches parents, nous ordonnons &c." Sous l'empire de cet édit et de l'article 83 de l'ord. 1566, qui en a ordonné l'exécution, les cours pouvaient soumettre à des arbitres les contestations entre parents, qui y sont énumérées lorsqu'il y avait des questions de fait à déterminer quelque fussent les questions de droit que ces faits fissent naître.

L'Art. 341 du code permet de soumettre à des arbitres "*toute contestation "entre parents concernant les partages et autres questions de faits difficiles à "apprécier*". Tout ce que cet article exige c'est qu'il y ait dans la contestation des questions de fait difficiles à apprécier, et non pas que ces contestations fussent exclusivement sur les faits, ce qui rendrait la disposition inutile puisque dans toutes les contestations, les questions de fait sont plus ou moins liées à des questions de droit.

Mais l'art. 341 comprend-il toutes les contestations entre parents où il s'élève des questions de fait, ou seulement celles énumérées dans l'Edit de 1560 qui découlent des rapports de parenté entre les parties, tel que les demandes de compte et partage de successions, de communauté et autres semblables ?

Il y avait sur cette question une divergence parmi les auteurs et une grande contrariété d'arrêts. Prost de Royer (Dict. de Jur. et d'Arrêts, vo. arbitrage, No. 64) qui a résumé toute la discussion sur cette matière, dit qu'il est impossible d'entendre les termes de l'ord. de 1566 art. 83 dans le sens restreint que quelques auteurs veulent leur donner, et après avoir cité un grand nombre d'arrêts contradictoires, il conclut en disant: "D'après cet état de la jurisprudence, "il nous reste un vœu à former; c'est que par une loi claire et précise, il soit "ordonné que toutes les contestations entre proches parens, de quelque nature "qu'elles soient, pourvu qu'elles ne concernent que leurs intérêts particuliers, "seront renvoyées à des arbitres convenus ou nommés d'office."

Notre Art. 341 semble avoir réglé cette question d'une manière claire et précise comme le voulait Prost de Royer. Il ne fait pas comme l'Edit de 1560 une énumération des contestations dans lesquelles des arbitres pourront être nommés d'office, il ne réfère pas aux ordonnances antérieures comme le faisait l'Ord. de 1566; mais il décrète que dans toute contestation ayant rapport à des partages ou *autre matière de fait difficile à apprécier*, sans distinction, la cour pourra nommer des arbitres. Ces termes sont assez généraux pour comprendre une cause comme celle-ci où les faits sont très compliqués et où il s'agit de conventions verbales, de fournitures alléguées, qui sont les cas principaux où suivant *Pigeau*, T. 1. p 248, l'on a recours à l'arbitrage. Nous croyons qu'ici la Cour Inférieure a fait une juste application du pouvoir discrétionnaire donné par le code, et son jugement est confirmé.

SANBORN, J.:—This case has been so well elucidated by the Honorable Judge dissenting, and by the Honorable Chief Justice in rendering the judg-

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ment, that it is scarcely necessary to add anything to what has been said. I think articles 342 and 343 serve to interpret article 341 of the Code of Procedure. Article 341 is sufficiently large to permit the Court to refer matters between kindred to arbitration, other than such as relate to successions. Under article 83 of the Ordinance of 1566, on which our article 341 is based, there was a difference of opinion as to whether the words *et autres différends* apply only to other matters of fact growing out of rights by virtue of relationship, or whether it extends to other facts relating to disputes between kindred as to contracts, or implied contracts. Pigeau mentions cases under the second head under this article of the Ordinance. "Lorsqu'il s'agit de conventions verbales ou fournitures alléguées, ouvrages commandés, de faits en fin, sur lesquels il y a des dénégations et des doutes que l'on ne peut éclaircir que par le moyen d'une personne qui entende les parties, consulte ceux qui ont connaissance, fasse, en un mot, sans frais et sans longueurs, les perquisitions et examens qu'il est nécessaire de faire pour parvenir à la vérité, sans laquelle la justice ne peut asseoir de décision définitive." The reason of the rule is the same in the case of accounts between kindred, as when the subject relates to successions. It is to prevent hatred—to conciliate those who should live on terms of amity. Our codifiers have adopted not the restrictive, but the more liberal sense, and we now have to act upon our Code. In this case there was great propriety in submitting this long and involved account, of a nature difficult to clear up, to persons having the quality of experts united to the equitable jurisdiction as to disputed facts, to appreciate them according to all the circumstances, considering the relation of the parties, with a view to conciliate as well as to determine the rights of the parties. This case is determined on its merits. No rigid principle is settled by it; only the majority of the Court say there may be a case other than such as necessarily grows out of *les liens du sang*, in which a judge, in the exercise of a wise discretion, may submit the facts to be elucidated upon disputed accounts between kindred to arbitrators. That, in fact, the law contemplates an intermediate case, where, as respects disputed accounts between kindred, *arbitres* exercise the quality of experts and mediators, and that this presents such a case. It forms no precedent to warrant the improper exercise of discretion of a judge, in a case between kindred, where important legal questions may be delegated by the Court to arbitrators, which it is the province of the Court to decide. All we say is, that there was no excess of jurisdiction in this case in permitting *arbitres*. What should we do if we reverse the judgment? We either turn the parties out of Court, as suggested by the Honorable Judge dissenting, or send the case down to the Superior Court for that Court to perform the office of expert respecting these accounts. If we adopt the first alternative, we practically say we can make nothing out of these conflicting and irregular accounts. If we adopt the second alternative, we put a duty upon the Superior Court which, from its character and studies, it is far less capable of discharging upon these disputed accounts than these *arbitres*, who are men skilled in accounts. I think this is not a judgment that on any ground ought to be disturbed.

MONK, J.:—My first impression was that the judgment would have to be

reversed, but a closer examination of the case and consultation with my colleagues have led me to the conclusion that both the old law and the terms of the Code justify us in sustaining the reference to arbitrators.

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RAMSAY, J.:—I am inclined to think that the argument of Mr. Justice Tessier goes too far or not far enough. It is not more dangerous to refer a lot of trifling transactions to arbitrators than to submit the merits of a *partage* of a great estate. Again, the Judge can be restrained if he refers cases which are not difficult within the meaning of the article. If he has the discretion he certainly exercised it prudently in this case, for, without saying that there is no evidence, I have been unable to elicit, from the confusion of letters, badly written receipts and inexact verbal testimony, the real merits of the case.

Judgment confirmed.

Jetté, Béique & Choquet, for the appellant.
Doutre, Doutre & Hutchinson, for the respondent.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH FEBRUARY, 1877.

UNDER THE INSOLVENT ACT, 1875.

Coram TORRANCE, J.

No. 93.

Fulton es qual. vs. *Lefebvre*, and *Lefebvre*, petitioner.

HELD:—That a party who has for upwards of six months acquiesced in the proceedings taken against him under the provisions of the Insolvent Act 1875, cannot afterwards question the jurisdiction of the Court under said Act.

The plaintiff *es qualité*, on 3rd March, 1876, took proceedings against the defendant for compulsory liquidation under the Insolvent Act 1875, under which the estate of the petitioner went into insolvency. On the 18th November, 1876, the defendant presented a petition to a judge in insolvency, alleging that he had never been a trader, and was not, therefore, subject to provisions of the Insolvency Act, and his prayer was that the proceedings against him in compulsory liquidation might be set aside, and his estate ordered to be delivered back to him.

PER CURIAM:—I am by no means satisfied on the evidence that defendant is not a trader. Apart from this consideration, which, in the present case, it is unnecessary to discuss, it is sufficient to state that the defendant was made an insolvent on the 3rd March, 1876. He acquiesced in the proceedings until the 18th November, when the present petition was presented. He is too late now to raise the question of his not being a trader. Section 18 gives the insolvent five days after service of the writ upon him to petition to have the proceedings set aside. I am told by Mr. Justice Mackay that he has so decided more than once.

Petition dismissed.

G. Doutre, for petitioner.
T. P. Butler, for contestants.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 3RD FEBRUARY, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 167.

HENDERSON, APPELLANT;

AND

TREMBLAY, RESPONDENT.

HELD:—1o. That the unpaid vendor of moveables has a right, under art. 1543 of the Civil Code, to demand the resolution of the sale, under the circumstances stated in that article, even after the expiration of the eight days allowed for revendication by art. 1999.

2o. That in an action claiming such resolution the plaintiff has a right to attach the moveables by a *saisie conservatoire*, and, although his attachment may be in the nature of a *saisie revendication*, it will nevertheless avail to him as a *saisie conservatoire*.

DORION, CH. J.:—L'Intimé, demandeur en Cour Inférieure, a saisi-revendiqué des billots qu'il allègue avoir vendu et livré à l'appelant dans le cours de l'hiver 1874, et dont il n'a pas été payé. Il conclut à la résolution de la vente, faute de paiement du prix, à être déclaré propriétaire du bois saisi, et subsidiairement à ce que dans le cas où la saisie ne vaudrait comme saisie-revendication à ce qu'elle soit déclarée valable comme saisie-conservatoire pour lui assurer le paiement de la somme de $184.70 qui lui est dûe pour le prix de ces billots.

L'appelant a plaidé, 1o que la saisie-revendication était nulle parcequ'elle n'avait pas été prise dans le délai de huit jours après la livraison du bois; 2o une défense en fait; 3o qu'il avait acheté ces billots de D. & F. Truesdell et non de l'Intimé.

Sur cette contestation la Cour Inférieure a déclaré l'Intimé propriétaire du bois saisi, elle a maintenu sa saisie-revendication et condamné l'appelant, qui a obtenu possession du bois pendant l'instance en donnant caution, à le rapporter, sinon à payer à l'Intimé $183.50 et les frais.

Le Code Civil (*Art.* 1998) accorde au vendeur non payé, 1o le droit de revendiquer la chose vendue. 2o Celui d'être payé par privilége sur le produit de la chose; et enfin celui de faire résilier la vente. (*Art.* 1543.)

Le droit de revendication ne peut s'exercer que lorsque la chose n'a pas été vendue à credit; qu'elle est encore entière et dans la même condition: qu'elle n'est pas passée en main-tierce et que la revendication est exercée dans les huit jours de la livraison (*Art.* 1999.)

L'Intimé n'a pas saisi-revendiqué dans les huit jours de la livraison, et n'ayant pas procédé dans le délai fixé par la loi il est censé avoir voulu suivre la foi de son acheteur et lui avoir donné crédit. Il n'est plus dans les conditions nécessaires pour exercer la revendication, si ce n'est en faisant résilier la vente.

La Cour Inférieure paraît avoir fait une distinction entre le cas où la revendication est pratiqué sur l'acheteur et celui où elle l'est à l'encontre des droits des tiers, et elle a jugé que les tiers seuls pouvaient se prévaloir de ce que la revendication n'avait pas été faite dans les huit jours de la livraison, comme on

le jugeait autrefois à l'égard des saisies-gageries. Mais l'Art. 1999 ne fait pas une telle distinction et il est évident qu'il ne pouvait pas la faire, puisqu'il déclare expressément que la revendication ne peut plus avoir lieu, si la chose vendue est passée en main-tierce. Aussi tous les auteurs qui ont écrit sur l'Art. 2102 du Code Napoléon, d'où l'Art. 1999 a été tiré, s'accordent pour dire qu'après les huit jours expirés à compter de la livraison, il ne peut y avoir de revendication. Troplong Priv. et Hyp. No. 193–197 & 198. 1 Pont, Priv. & Hyp. No. 155 & 158. 3 Mourlon, p. 528, No. 1310. 4 Massé, No. 393, pp. 431 & 432.

Mais de ce que la revendication n'existe plus, il ne s'ensuit pas que le vendeur non payé n'ait plus le droit de faire résilier la vente en vertu de l'article 1543 du Code Civil, tant que la chose est encore entre les mains de l'acheteur et même après que le délai de huit jours pour revendiquer est expiré. La plupart des auteurs déjà cités reconnaissent que ce droit est différent du droit de revendication et qu'il peut être exercé en vertu de l'Art. 1654 semblable à notre Art. 1543, et comme les tribunaux du pays ont souvent permis aux parties intéressées de pratiquer des saisies conservatoires pour protéger dans des cas analogues des droits qu'elles étaient exposées à perdre, (*Torrance et al. & Thomas*, 2 *L. C. Jurist* 99. *Leduc & Tourigny*, 5 *Jurist* 123. *Baldwin & Binmore*, 6 *Jurist p.* 297–299. *Duchesnay et vir & Watt*, 8 *L. C. J.* 169,) la Cour Inférieure aurait dû traiter cette saisie comme une saisie-conservatoire, résilier la vente et ordonner à l'appelant comme elle l'a fait de remettre le bois à l'Intimé ou de lui en payer le prix. Le jugement est réformé quant aux motifs et au lieu d'accorder à l'Intimé la revendication comme s'il n'avait jamais cessé d'être propriétaire, la cour prononce la résiliation de la vente et maintient la saisie-conservatoire, le tout avec dépens.

The following was the written judgment of the Court :—

"La Cour *** considérant que l'Intimé en cette cause a établi les principaux allégués de sa déclaration, et notamment qu'il a vendu à l'appelant William Henderson la quantité de, etc., etc., etc., aux prix et conditions mentionnés en la déclaration, et que dans les mois de Décembre 1873, de Janvier et Février 1874, il a livré ce bois au dit Wm. Henderson agissant par John Woodman son agent ;

Considérant que lors de la saisie qui en a été faite en cette cause le bois était encore en la possession du dit Wm. Henderson, et que le prix en était encore dû à l'Intimé ;

Considérant qu'en vertu de l'article 1543 du Code Civil le vendeur d'objets mobiliers qui n'en a pas été payé est fondé à demander la résolution de la vente, aussi longtemps que l'acheteur en demeure en possession, et que quoique l'appelant ne fut plus dans le délai pour exercer la revendication en vertu de l'article 1999 du Code Civil, il pourrait néanmoins en vertu de l'article 1543 demander la résolution de la vente ;

Considérant que par son action l'Intimé a demandé la résolution de la vente du bois en question et qu'il a conclu à ce que dans le cas où la saisie en cette cause ne vaudrait pas comme saisie-revendication, elle fut déclarée valable comme saisie-conservatoire des droits du dit Intimé ;

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Et considérant que l'affidavit sur lequel a été émané le bref de saisie en cette cause, contient les allegués néccessaires pour justifier d'après la jurisprudence une saisie pour conserver sur le bois en question les droits de l'Intimé jusqu'à la décision de sa demande en résolution de la vente d'icelui;

Et considérant que l'appelant n'a pas prouvé les allegués de ses exceptions et défenses;

Cette Cour pour les raisons ci-dessus réformant le jugement rendu par la Cour de Circuit du district de Joliette le 15ème jour de Janvier 1875, adjuge et ordonne que la dite vente ainsi faite par l'Intimé au dit appelant *** sera et elle est par les présentes déclarée résiliée et résolue à toutes fins que de droit, et déclare la dite saisie qui a été faite du dit bois en cette cause bonne et valable, comme saisie-conservatoire, et attendu que depuis la dite saisie le dit appelant sur sa demande et sur cautionnement par lui fourni a été remis en possession du dit bois ainsi saisi à la poursuite de l'Intimé, condamne le dit appelant par reprise d'instance à remettre et restituer à l'Intimé la possession du dit bois, sous quinze jours de la signification du présent jugement, et à défaut par le dit appelant par reprise d'instance, de se conformer au présent jugement dans le dit délai l'appelant par reprise d'instance sera contraint, purement et simplement, à payer à l'Intimé la somme de $183.50 pour prix et valeur du dit bois et pour tenir lieu à l'Intimé de la remise d'icelui, avec intérêt sur la dite somme à compter du 6 Mai 1874 jusqu'au paiement, et la Cour condamne de plus le dit appelant par reprise d'instance à payer à l'Intimé les dépens encourus tant en Cour Inférieure que sur le présent appel, et réserve à l'Intimé tel recours que de droit contre les cautions fournies par l'appelant."

A. & W. Robertson, for appellant.
F. B. Godin, for respondent.
(S. B.)

Judgment of C. C. confirmed.

SUPERIOR COURT, 1876.

MONTREAL, 18TH NOVEMBER, 1876.

Coram MACKAY, J.

No. 1470.

Bruckert vs. *Moher*.

HELD:—That the mere fyling of the statement in conformity with art. 764 of the Code of C. P. does not entitle a party arrested under a *capias ad respondendum* to be released from custody; such statement being subject to attack by any creditor within the delays mentioned in Art. 773.

PER CURIAM:—The defendant has applied to be discharged from custody, simply because he has fyled his *bilan*. The law allows any creditor to contest the *bilan* within the delays prescribed by art. 773 of the Code of C. P., and these delays have not yet expired. It is impossible to grant the petition.

H. C. St. Pierre, for plaintiff.
Bourgoin & Lacoste, for defendant.
(S.B.)

Petition to be discharged rejected.

SUPERIOR COURT, 1876.

MONTREAL, 31ST JANUARY, 1876.

Coram JOHNSON, J.

No. 2475.

Metayer dit *St. Onge* vs. *Larichelière.*

HELD:—That the "one day" referred to in Art. 74 of the Code of C. P., with reference to the service of summons in suits between lessors and lessees, must not be a *dies non.*

PER CURIAM:—The insufficiency of service is contended for in this case by an exception *à la forme* that has been heard on the merits. The writ, issued on the 23rd of December, was returnable on the 27th. It was served on the 24th, at 11 a.m. One clear day is required by law (Cons. Stat. L. C. 40, sec. 10); therefore the service is bad, for the 25th was Christmas Day, the 26th, Sunday, and fractions of days do not count. It was said there was a case in point against this view. I have not seen it, but unless the words "one clear day," can be held to include a *dies non*, which is not reasonable, I should decline to regard a single case as decisive.

Exception à *la forme* maintained.

Dorion & Curran, for plaintiff.
Loranger & Cie., for defendant.
(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 18TH NOVEMBER, 1876.

Coram MACKAY, J.

No. 892.

Décary vs. *Poirier.*

HELD:—That a surveyor cannot prevent the opening of his report, unless a sum he chooses to name as his fee be first paid.

PER CURIAM:—Mr. Beaudry, the surveyor, fyles his report, and endorses thereon a prohibition to its being opened, unless he be first paid a sum of $120 as his fee. He gives no details. The plaintiff moves to have the report opened in order that the bill of the surveyor may be taxed. The surveyor is no doubt entitled to protection under art. 944 of the Code of C. P., but, in the absence of details, we are forced to open the report, in order to tax his bill. I, therefore, order that the report be opened and the bill taxed, and that no use be made of the report until the taxed bill be paid.

Motion to open report granted.

Ouimet & Co., for plaintiff.
Lacoste & Co., for defendant.
(S. B.)

COURT OF REVIEW, 1876.

MONTREAL, 31st JANUARY, 1876.

Coram JOHNSON, J., MACKAY, J., TORRANCE, J.

No. 3.

Ryan vs. *Devlin.*

HELD:—That the Court of Review has no power to revise a judgment on a petition to revise a bill of costs.

This was a motion to reject the inscription on the ground that this Court had no jurisdiction in the premises.

JOHNSON, J.:—We have been unable to take any other view of this case than the one we unanimously expressed at the hearing, namely, that there is by law no review from the order of a Judge made on a petition to revise a bill of costs.

The case of Brown, appellant, and Lowry, respondent, in the Queen's Bench, Quebec, 16 L. C. Rep., is in point. That judgment confirmed the judgment of JJ. Badgley and Stuart, being the majority of the Court of Review, granting a motion similar to the present one, for the rejection of the inscription. The motion of the petitioners is therefore granted, and the inscription is discharged.

Inscription discharged.

N. Driscoll, for plaintiff.
J. J. Maclaren, for defendant.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 10TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 341.

Holme vs. *Cassils* et al.

HELD:—That in an action on a foreign judgment and the usual assumpsit counts, where the plaintiff only fyles a copy of the judgment which does not reveal the cause of indebtedness, he will be ordered to fyle an account.

The plaintiff sued the defendant on a judgment rendered by default in England, and the declaration also contained the usual assumpsit counts. The only exhibit fyled by plaintiff at the return of the action was a copy of the judgment which did not disclose the cause of indebtedness.

The defendant moved the Court that plaintiff be ordered to fyle a statement or account, and that proceedings be stayed till he had done so.

The Court granted the motion.

Borlase, for plaintiff.
Benjamin, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21st DECEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 83.

WALKER,

(*Plaintiff below,*)

APPELLANT;

AND

SWEET,

(*Defendant below,*)

RESPONDENT.

HELD:—That the short prescriptions referred to in articles 2250, 2260, 2261 and 2262 of the Civil Code are liable to be renounced and interrupted, in the manner prescribed by art. 2227.

SANBORN, J., *dissentiens*:—The appellant sues the respondent for $2,418.65, balance alleged to be due on a bill of exchange, of which respondent was an endorser. James Foley was the drawer upon A. M. Dawson & Co., of Liverpool, 15th Nov., 1866. It was protested for non-acceptance 30th November, 1866, and for non-payment 2nd March, 1867. The amount of the bill was £450 sterling. On the 22nd September, 1868, appellant instituted an action against Foley for the amount of said bill, which was finally decided in appeal against Foley on the 14th March, 1872. On the 28th June, 1872, the present action was instituted. It is an ordinary action founded upon the bill of exchange, only including the general words that respondent during the last five years had frequently promised to pay the bill. Respondent pleads:—1. Five years' prescription. 2. Settlement of accounts on the 16th November, 1866, in which this bill was included and balance struck, which was paid by respondent. 3. That respondent is not liable as endorser, as there was no notice of protest served upon him. Appellant answered to the first plea that prescription had been interrupted by institution of action against Foley and by acknowledgments of indebtedness by respondent within five years; to the second plea, that the settlement was upon condition of the bill being paid, which was not paid. To the third plea, that respondent had received notice of protest and promised to pay. After proceeding to *enquête*, appellant was permitted to amend his declaration by adding after allegation of notice and protest, the following words, "and has since frequently promised to pay the same bill at various times within the last five years." The first and material question is as to interruption of prescription. The five years after maturity of the bill expired 5th March, 1872, nearly four months before the institution of the present action. The appellant relies upon letters written by respondent within five years before action. There are three letters, one of the 9th July, 1867, in which respondent says, referring to this bill, "I hope that Foley will keep his word with you and pay the bill of exchange by the 15th. If he does not pay it by that time, I will not ask you to wait any longer." In a letter of 10th March, 1868, he alludes to the Foley matter as not closed.

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In a letter of the 8th Nov., 1870, he says: "I have written James Foley, informing him of the judgment you have obtained against him in the Court of Review, and have written him asking him if he can't settle up the matter with you, as I do not want to be troubled as endorser. If I do not hear from him, or he does not arrange with you, I will go up and see him, and see what is the chance of collecting it from him, and if I find no hopes of collecting it of him, after I have seen him, of course I must try and pay you as fast as I can until the matter is paid." The case of Bowker *vs.* Fenn was accepted as settling this question of interruption of prescription by admissions, by giving full literal force to the statute before the Code. The statute upon which that case was determined, declared that "such bills or notes shall be held to be absolutely paid and discharged, if no suit or action has been brought thereon, within five years next after the day on which such bills or notes become due or payable." Has the Code altered the law? Art. 2260, "Actions are prescribed by five years upon inland or foreign bills of exchange," &c., "reckoning from maturity." Art. 2267, "In all cases mentioned in article 2260 the debt is absolutely extinguished, and no action can be maintained after the delay for prescription has expired." Art. 2188 declares, "that the Court cannot, of its own motion, supply the defence resulting from prescription except in cases where the right of action is denied." These articles clearly indicate that the prescription is an absolute bar to the action, and have made it plain that the law was not changed by the Code but made even more explicit. The debt is extinguished, and so completely so that prescription does not require to be pleaded for the Court to declare it. No plea could give a right which had been lost. The history of these articles serves to render this view still more manifest. The Codifiers, in their second report upon the subject of prescription, suggested two amending articles relating to the short prescriptions and specially regarding bills and notes, numbered in the report 116 and 117, in which they provide that the oath may be submitted to the defendant, or that he may be examined upon *faits et articles* after the lapse of the five years, as to whether the bill or note has been paid. When the projected Code was submitted to the Legislature it was enacted, 29 Vic., c. 41, "that articles 116 and 117 be stricken out, and an article inserted instead thereof, declaring prescriptions absolute as a general rule." In conformity with these statutory instructions, article 2267 was framed, declaring, as respects several short prescriptions, including those relating to bills and notes, the debt absolutely extinguished, as before cited. Articles 2264 and 2265 are relied upon as indicating that short prescriptions may be interrupted or renounced by admissions that the debt is due. To my mind such inference cannot be drawn by implication in face of the positive enactment in article 2267. These articles were in the original *projet*, and were left after the Legislature ordered the change respecting short prescriptions, and can now only apply to such prescriptions as are not included in article 2267. This was evidently the understanding of the Codifiers, as will appear from Mr. McCord's synopsis in his edition of the Code, p. xv., where he says: "Commercial debts, as well as others, are therefore brought under one uniform rule. Article 2267 no longer admits of the controversies, which frequently arose, as to whether a particular negative prescrip-

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tion was intended by law to establish a presumption of payment, or whether it was an absolute bar to the action. Negative prescriptions are not only declared absolute, but the article even dispenses with the necessity of pleading them." I may remark here that if prescription as respects notes is interrupted by simple acknowledgment that the note is not paid, at some date prior to the lapse of five years after maturity, we have this anomaly that the law expressly prohibits asking the defendant if such note is due, and still it is to be presumed to be now due from the proof of his acknowledgment that it was due five years ago, and this acknowledgment, perhaps, may be proved by *parol* testimony. The amendment in the declaration does not materially alter it. It is not an action founded upon a distinct contract to pay nor upon the original consideration. It depends upon the interpretation of the Code, and English and French authorities have nothing to do with it. If, however, we seek light from the dicta of modern jurists under the Common Law of England, the view just enunciated is rather strengthened than weakened. Lord Eldon in Baille *vs.* Sibbald declared "that the statute of limitations had been construed with a view to defeat, not to promote, its object, and that the established construction was against the true principle." Chief Justice Gibbs in Hallings *vs.* Shaw said "that if the courts could retrace their steps and see all the consequences that have resulted, they would have seen it better to adhere to the precise words of the statute than attempt to relieve in particular cases." In the Supreme Court of the United States, in Bell *vs.* Morrison, 1 Peters 251, Mr. Justice Story regrets that the decisions had not been more in accordance with the spirit and letter of the law, and held that the amount due must be established, and the promise to pay explicit to take a case out of the statute, and remarks "that there has been a disposition on the part of the English Courts to retrace their steps and bring the doctrine to sober and rational limits." It devolves upon our Courts to give effect to the Code, and not to shrink from giving an interpretation according to its meaning; and I think it is clear that the prescription is absolute from lapse of time, when the action is simply, as in this case it is, upon the bill. In corroboration of the view I have taken I would refer to article 2227 C. L., which says that "prescription is interrupted civilly by renouncing a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs." An acknowledgment of the existence of the debt before the term of prescription has elapsed is not renouncing a right acquired, because no right has been acquired. I have never been able to understand how the admission that a debt or a part of a debt is due today proves that it is due five years hence. Holding this view with respect to the plea of prescription, it is unnecessary to say more of the other pleas than that I do not consider them well founded, and I should have no difficulty in maintaining appellant's action if I did not consider that the debt was extinguished by the lapse of five years after maturity of the bill before the action was instituted.

DORION, C. J.; read the *motifs* of the judgment as embodying his views of the case, remarking that the case of Fenn & Bowker had certainly taken him, and the Bar generally, by surprise at the time it was rendered. The present

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decision he believed to be in accordance with the jurisprudence in England and the United States.

RAMSAY, J.:—James Foley drew a bill of exchange, dated 15th November, 1866, for £450 stg., payable 90 days after sight to the order of the respondent, who endorsed and delivered, the same to appellant. The bill was remitted to England for collection, and was protested for non-acceptance on the 30th of November, 1866, and for non-payment on the 2nd of March, 1867. Of all this the respondent had full knowledge.

Appellant then sued respondent for the amount of the balance due on the bill and expenses, which action was served on the 10th of July, 1872.

Respondent met the action by several pleas, one of which was a plea of prescription of five years. It is unnecessary to consider the other pleas, for they are not relied on, and the whole question, therefore, turns on the question of prescription. It is proper, however, to remark that after issue was joined plaintiff moved to be allowed to amend his declaration by adding, "and has since frequently promised to pay the same bill at various times within the last five years." This amendment was allowed, and we think rightly. The action, therefore, is as and for a bill due more than five years before the institution of the action, but the prescription of which has been renounced or interrupted by the debtor.

The evidence produced clearly shows that from the 31st of January, 1867, down to the 28th of January, 1869, defendant repeatedly admitted his liability, promised to pay, asked for delay, and paid money on account. Several of these admissions are without the period of five years previous to the service, but the letter of the 10th of March, 1868, and of the 8th of November, 1870, are within the five years, and the latter at all events is explicit. Besides, there is the charging to account of Sweet and the payments on account.

The question therefore arises whether there can be such a renunciation or interruption of the short prescription of five years.

Respondent relies on the case of Fenn and Bowker, decided under the Statute (C. S. L. C., c. 64, sec. 31), in which case it was held that the prescription of five years was so absolute a bar to the action that no acknowledgment of indebtedness or partial payment will take the case out of the operation of the Act. (10 L. C. J., p. 120.)

It is not necessary that the Court should consider that case, for the terms of the Code differ considerably from those of the Statute, and this difference was noticed at the time that Fenn and Bowker was decided. Chief Justice Meredith, who delivered the judgment of the Court, in doing so intimated that that judgment could not serve as a guide in cases arising under the Code, *which had just received the sanction of the Legislature*, and by which the laws on the subject of prescription of bills and promissory notes had been considerably changed.

In order, however, fully to understand the view now taken by the majority of the Court on the law as laid down in the Code, with which we have alone to deal, it may not be amiss to glance at the history of the articles in question.

There is a summary way of disposing of the question by saying "short prescriptions are absolute; they are a bar to the action," meaning by that that no action can in any case be brought on the original contract after the five or six

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years, as the case may be. I question very much whether, strictly speaking, any of our statutes will bear that interpretation. They have declared the action could not be maintained—that words only shall not be deemed sufficient evidence of a new or *continuing* contract, to take the case out of the operation of the Act; that no endorsement or memorandum of any payment made or written upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment is made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of the Act (C. S. L. C., 67). The Promissory Note Act says they shall be *held* to be paid and discharged after five years. But they all seem to me to contemplate the possibility of interruption or renunciation. However, as I have already observed, it is not necessary for us to go over the ground covered by the case of Fenn & Bowker; but without trenching upon it, I may say, that from the first draft of the title of prescriptions in the Code, down to the adoption of the Code, the idea of renunciation and interruption of prescriptions—of the absolute prescription called a bar—was never lost sight of.

I understand the other idea to be that it is not renunciation or interruption, but a new contract that can alone destroy the operation of the Act.

As Mr. Justice Day and I are the only surviving witnesses of the discussion that took place on the draft of this portion of the Code before the Commission, it may not be out of place that I should give the history of the articles referred to, more particularly as it appears to me to sustain the view taken by the majority of the Court. It will be borne in mind that the decision in appeal in Fenn & Bowker was not rendered until after the final adoption of the Code by Parliament, and consequently that the commissioners expressed what they understood to be the law unfettered by that decision.

In presenting these articles, Mr. Justice Morin said that he had thrown the English prescriptions of five and six years into two articles drawn from the statutes, so as to set up the law as it stands. In amendment he proposed four articles, which cover all those cases and those omitted in the previous articles, reducing the whole to one prescription of five years. The articles setting up the old law bore the numbers of the draft 111 and 112. They were as follows:

111. "La prescription des actions afin de compte ou *in factum* (upon the case) ou fondées sur un acte consenti pour prêt, ou un contrat sous un acte ou écrit scellé, (without specialty) en matières de commerce, et (en général des actions de nature commerciale) autres que celles concernant les lettres de change et les billets promissoires, a lieu par six ans à compter du jour où le paiement est devenu exigible.

"Cette prescription est absolue sans qu'il y ait lieu au serment du débiteur sur le fait du paiement, mais elle peut être interrompue.

"La reconnaissance n'opère l'interruption en ces cas que conformément aux dispositions contenues au titre des obligations.

"Les ventes d'effets mobiliers faites par un marchand à quelqu'un qui ne l'est pas, ou par ce dernier à un marchand, sont reputées affaires commerciales et tombent sous le présent article."

112. "Les lettres de change à l'intérieur ou à l'étranger et les billets promis-

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soires, negociables ou non, payables dans le Bas-Canada, se prescrivent par cinq ans, bien que la cause ou considération originaire, exprimée ou non, soit autrement prescriptible.

"Cette prescription est absolue sans qu'on puisse déférer le serment au débiteur sur le fait du paiement, mais il y a lieu à l'interruption, laquelle n'a lieu par reconnaissance que comme dans les autres affaires commerciales.

"Le billet payable à demande se prescrit à compter de sa date.

"Les billets de banque ne sont pas soumis aux prescriptions du présent article et ne se prescrivent que par trente ans."

Article 111 was adopted as law in force, striking out in the 1st paragraph "*en général des actions de nature commercial*," also striking out the 3rd paragraph.

Article 112 was adopted by striking out in the 1st paragraph all the words after "cinq ans," in the 2nd paragraph all the words after "paiement," and in the 4th paragraph all the words after "article." Here then we have ample recognition by the commissioners of the existence of interruption of the prescription of five and six years as being law in force before the Code. If we turn to the four articles submitted as amendments to the law in force, we find in article 111*a*, paragraph 2, "Cette prescription peut être interrompue, mais la reconnaissance n'opère l'interruption que conformément aux dispositions de l'article 234 au titre des obligations."

It may perhaps be said that the Commissioners omitted in the 2nd paragraph of article 112 all mention of the interruption, and that paragraph 2 of Art. 111*a* was also omitted. But the cause of these omissions was that it was an unnecessary repetition, for articles 113 and 113*a* covered the whole ground. I have therefore, I think, established my pretension, that, so far as the Codification Commission was concerned, the idea of destroying the effect of renunciation and interruption in short prescriptions was never entertained.

I say, further, that the change suggested by the majority of the commissioners really turned on the admission of the oath. They were not contending for interruption or renunciation. No one supposed that in question. Articles 113 and 113*a* of the draft passed without challenge. The rules laid down were corollaries of what preceded, as Mr. Commissioner Morin said. (MS. notes of the discussion.) They then went up to Parliament, and the committee, thoroughly alive to the whole question, decided that the suggested amendment of 113*a* should pass. It is article 2264 of the Code. It fully recognizes, while it confounds as essentially the same renunciation and interruption, as applicable to all prescriptions save that of 10 years, and it is not confined to long prescriptions, for it is under the rubric "Of certain short prescriptions."

But it is said art. 2267 contradicts art. 2264, and therefore we must blot out 2264 in order to give full swing to this absolute bar to every sound principle. I confess, at first sight it seemed to me that there was a contradiction in the articles; but a remark of the learned Chief Justice cleared up the only difficulty —the action cannot be maintained, after the delay for the prescription had expired. The prescription does not expire until five years after interruption or renunciation.

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It is contended that this is not the meaning of the law, that what the committee recommended was to make a short prescription—a *limitation*—something different from a prescription. The evidence that this view does not accord with what passed, when the law was under discussion, appears to me overwhelming. The resolution was: "That arts. 116 and 117 be struck out, and an article inserted instead thereof, *declaring prescriptions absolute, as a general rule.*" (Parl. Papers, Report of Com. of House of Commons.) The intention, then, of the committee most lucidly expressed, was to put short prescriptions on the same footing as long prescriptions. They were all to be absolute, and consequently to be all liable to the same general rules, unless the law otherwise provided. Art. 2264 then came in to obviate doubts, and principally to establish the exception of the prescription for ten years.

I think I may safely affirm, especially in the presence of the Chief Justice, who was in a minority of the committee, that the contest between him and the majority was, whether a short prescription was to be anything more than a prescription of certain kinds of evidence. The articles 116 and 113 allowed the oath and they disappeared. The rest of the codification scheme remained intact. The special reference to renunciation and interruption among short prescriptions could not be an oversight. It occurs again in article 2266.

The majority of the Court is, therefore, of opinion that the judgment of the Court below is erroneous in declaring the note in question prescribed, and that judgment is therefore reversed with costs both in this Court and in the Court below.

TESSIER, J.—Si la question n'était pas si importante je me contenterais de dire que je concours pleinement dans l'opinion de la majorité de la cour, mais cette question des courtes prescriptions et de leur interruption a si souvent engagé l'attention de nos tribunaux qu'il peut être utile de fortifier l'expression de sentiments sur ce point. Avant la promulgation de notre Code le jugement dans la cause de Fenn et Bowker avait produit une impression, qui paraît contraire à la décision que cette cour va donner, mais en réalité notre Code s'exprime d'une manière différente du Statut en vertu duquel cette cause a été décidée.

Mon collègue, le Juge Ramsay, a très bien expliqué l'historique de ces différents articles du Code, et il n'y a plus à douter sur l'intention des codificateurs. D'ailleurs les articles d'un Code doivent s'interpréter dans leur ensemble et l'un d'après l'autre, et si l'on refusait d'admettre l'interruption de la prescription de 5 ans, il faudrait dire que l'article 2264 n'a pas d'application et le retranoher. Le langage de cet article est positif: "Après la renonciation ou l'interrup-" tion, excepté quant à la prescription de dix ans en faveur des tiers, la prescrip-" tion recommence à courir par le même temps qu'auparavant."

L'article 2267, qui dénie l'action, ne dénie pas l'action en se servant des mots "*après cinq ans*, mais *après l'expiration du temps fixé pour la prescription.*" Ce temps est de cinq ans, s'il n'y a pas eu d'interruption ou de renonciation, mais les cinq ans *recommencent* à courir du jour de l'interruption ou de la renonciation suivant l'article 2264; de cette manière les deux articles s'accordent et s'expliquent l'un par l'autre. Cette interruption de prescription est conforme

Walker and Sweet.

à la bonne foi et a toujours existé dans le génie de la législation ancienne et nouvelle. Les articles 2224,2227,2228,2231,2255 de notre Code indiquent clairement les causes d'interruption de la prescription.

Il est facile d'en faire l'application dans la présente cause; le débiteur chaque année durant les cinq ans écrit des lettres à son créancier pour lui demander délai; pour le prier de lui éviter une poursuite, il lui paie une petite partie du montant à-compte; et poursuivi durant la sixième année de la date de la lettre de change, il invoque prescription absolue de 5 ans en vertu des articles, 2260 et 2267. Le créancier lui réplique qu'il y a eu interruption de prescription par la reconnaissance, et cette reconnaissance de la dette est clairement prouvée. Cette reconnaissance est suffisante suivant l'article 2227 de notre Code qui dit: "La prescription est interrompue civilement par la reconnaissance que le débiteur fait du droit de celui contre lequel il prescrivait."

Cette interruption de prescription s'applique à toutes les courtes prescriptions de l'article 2250 des loyers, arrérages de rente, intérêts, aussi bien qu'à celles de l'article 2260 pour billets promissoires, services professionnels, vente d'effets etc., La décision actuelle ne fait mal qu'aux débiteurs malhonnêtes, et elle protège la bonne foi. S'il fallait recourir à la jurisprudence étrangère, on trouverait qu'elle est favorable à la décision actuelle, mais il me semble qu'il faut s'en tenir à une interprétation de notre Code, lorsque la lettre et l'esprit de ses dispositions sont aussi positifs que dans le cas actuel.

MONK, J., said there could be no doubt it was an extremely important decision. It reversed the decision of this Court, that of Fenn & Bowker, rendered about ten years ago, which had formed the basis of the jurisprudence ever since. It was he, Mr. Justice Monk, who had decided the case of Fenn and Bowker in the Court below, and his judgment was reversed in Appeal. The decision had taken him by surprise. It was, he thought, a cause for congratulation that this Court had now come to the ruling of the Superior Court in Fenn and Bowker. He had never seen the reason or justice of saying that a man may not go to his creditor before the note is prescribed, and say to him, "You need not sue me; I will pay you part now, and the balance in a short time." Even before the Code, it seemed to him that the language of the Statute recognized that there might be interruption of the prescription, and such construction was inevitable, unless it had expressly stated "no interruption shall be possible, and no renunciation shall be recognized."

The following were the reasons assigned in the written judgment of the Court:—

"Considering that by Article 2260 of the Civil Code actions on inland or foreign bills of exchange are prescribed by five years;

"And considering that by Article 2264 of the same Code all such short prescriptions recommence to run for the same period of time to be reckoned from any act of renunciation to or of interruption of such prescription;

"And considering that it is alleged and proved in the present case that within five years from the institution of the present action, the respondent has, on several occasions, recognized to owe and promised to pay the debt claimed from him by the present action, and has paid divers sums of money on account there-

of; that he has thereby renounced to the time then elapsed and interrupted the prescription then commenced—which prescription can only run under Article 2264 from the date of such acts of renunciation and interruption; Walker and Sweet.

"And considering that Article 2267 of the Civil Code, while declaring that debts such as the one claimed in this case are extinguished by the short prescription therein mentioned, merely denies the action in such cases after the delay for prescription has expired, and that, after five years from the date on which the sum payable became due, as was the case under the Statute 12 Viet., ch. 22, and that therefore the action on a Bill of Exchange is by said Article 2267 denied only in such cases where the prescription has been acquired by the lapse of five years from the date of any act having the effect of interrupting the prescription under Article 2264 such as are proved in this cause;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal, on the thirtieth day of June, one thousand eight hundred and seventy-four, dismissing the action of the appellant;—

"This Court doth cancel and reverse," &c, &c.

Judgment of Superior Court reversed.

Abbott & Co., for the appellant.

Laflamme & Co., for the respondent.

(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 9TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 1261.

St. Jean vs. *Blea*.

HELD:—That in a plea to an action of damages for slander, where a defendant specially denies, and in the same plea alleges affirmative matter, which is not a justification, such matter will be struck out, on motion of plaintiff.

The plaintiff sued the defendant in damages laid at $500 for having, on or about the 22nd November, 1876, called her "ivrognesse," "femme perdue," "putain," &c., &c.

The defendant denied specially the allegations of the declaration, and further in the same plea alleged "que la dite demanderesse avait été employée "la veille ou l'avant veille du vingt Novembre dernier, date à laquelle elle "prétend dans sa dite déclaration avoir été injuriée par les paroles du défen- "deur, au service du défendeur comme femme de journée.

"Que le jour que la dite demanderesse a été ainsi employée par le défendeur "celui-ci en entrant chez lui, dans l'avant midi l'a trouvée dans un état d'ivresse "tel qu'il fut obligé de l'empêcher de sortir dans la rue, ayant de justes craintes "de croire que la police l'aurait arrêtée pour ivresse.

"Que d'ailleurs la dite demanderesse a été dans l'impossibilité de faire son "ouvrage comme elle devait."

The plaintiff moved the Court to reject these words from the plea: "lo parce "qu'ils ne sont pas pertinents et concluants, c. a. d. qu'en les supposant même

St. Jean vs. Bleau.

"vrais, ils ne justifieraient pas le défendeur, et ne le rendraient pas exempt de "la peine d'injure; 2o. parceque le défendeur ne peut être admis à faire la "preuve de faits qui sont secrets et qui auraient servi de fondement aux injures, "ou, en d'autres termes, parceque le défendeur ne peut, en loi, être admis à "prouver la vérité des faits diffamatoires."

PER CURIAM:—The Court does not agree with the défendant that the truth of the slander should not enter into the consideration of the damages; it might very materially affect the assessment of damages, but the part of the plea complained of would not be a justification or defense to the action. But the first resson in the motion is applicable, and the motion should be granted. If the defendant were desirous of pleading matters in mitigation of damages, there was a way open to him.

Des Rivières, for plaintiff.
Angé, for defendant.
(J. K.)

Motion granted.

SUPERIOR COURT, 1877.

MONTREAL, 7TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 2485.

Robertson et al. vs. *Hale*, and *Hale*, petitioner.

HELD:—That a capias may lie against a defendant who has made an assignment under the Insolvent Act.

The defendant made an assignment under the Insolvent Act, and was subsequently arrested under a *capias*.

E. Carter, Q.C., for defendant, submitted that he could not be arrested after the assignment, and prayed that he be discharged from custody.

W. W. Robertson, for plaintiffs, cited *Beaudin & Roy* et al., 20 L. C. Jur., 308:

The Court rejected the petition.

E. Carter, Q.C., for petitioner.
W. W. Robertson, for plaintiffs.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 17TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 665.

Beckham vs. *Farmer*.

EXPERTS—POWERS.

HELD:—That experts who have once made a report are *functi officio*, and cannot of their own motion make a new report on the ground that the first is imperfect or defective.

The Court had given an order for an *expertise* under which three experts

were named and acted. They filed a report which they agreed among themselves was informal and insufficient. They accordingly prepared and filed of record another report. The defendant moved to have both reports set aside and rejected. The plaintiff agreed that the first report was a nullity but supported the second.

PER CURIAM :—The utmost care is requisite in complying with the order of the Court. Every thing done by the experts must be above suspicion. The experts having once filed their report were *functi officio*. If there was any informality or imperfection in the first report by them filed, it was their duty to apply to the Court for permission to take it back and amend it. In place of doing so, of their own motion they make a new report without authority from the Court. The Court must grant both motions.

Motions granted.

F. W. Terrill, for plaintiff.
G. Doutre, for defendant.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 21st FEBRUARY, 1877.

Coram TORRANCE, J.

No. 2499.

Latour vs. *Gauthier*.

ENQUETE—NOTICE.

HELD:—That an inscription for enquête must be filed at least eight days before the day fixed for the trial.

The plaintiff had given the defendant eight days' notice of his inscription of the case for *enquête*, but had omitted to file the inscription before the eight days. On the day fixed by the plaintiff for the *enquête*, the defendant applied to DORION, J., presiding at *enquête*, to have the inscription struck from the roll on the ground that the inscription had not been filed eight days before. The application was granted by the judge, who stated that the Quebec practice was the same.

The plaintiff afterward moved the Court in the practice division to set aside the ruling of the judge at *enquête*.

PER CURIAM :—C. C. P. 234 says that either party may inscribe on the *rôle* for the adduction of evidence, and C. C. P. 235 says that notice of the inscription must be given at least eight days before that fixed for the proof. The Court thinks that the spirit of this enactment is that the inscription should be made as well as notice given at least eight days before the day fixed for proof. The ruling is therefore quite right.

Motion rejected.

E. C. Monk, for plaintiff.
S. Pagnuelo, for defendant.
(J.K.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH MAY, 1876.

Coram MACKAY, J.

No. 819.

Greenshields vs. *Wyman et al.*

HELD:—1. That when a partnership has been dissolved without registration of declaration of dissolution, and without special notice to plaintiff, creditor, service of process on one partner at the place of business of the firm is sufficient service also *quoad* the other partner though domiciled elsewhere.

2. That, seeing their failure to register dissolution, the late partners being sued as "co-partners," not as "heretofore co-partners," cannot object to this as misdescription.

3. That interest will be allowed plaintiff even at rates over six per cent., and also compounded after reasonable "rests" where, though no promise is proved, a contract to pay such interest can be implied from the circumstances or the mode of dealing between the parties, as where accounts charging such interest have been repeatedly rendered and monies on account paid after receipt of such accounts, and no objections to the interest stated.

Action for $3,223, with interest from first November, 1875 (date of account filed) at 7 per cent., against Wyman & Brooks, described as co-partners at Waterville under firm of L. W. Wyman & Co. Declaration, 1st, on several promissory notes signed "L. W. Wyman & Co.," dated in 1873-4-5, with special allegation that they were given in part acknowledgment of greater balances due plaintiff on their several dates; 2nd, the usual counts for goods sold, interest, etc., and *assumpsit*.

Wyman made default, but Brooks appeared alone and pleaded an *exception à la forme*, alleging *inter alia* misdescription of defendants and insufficient service, in this, that they had ceased to be partners long before, and that the service being on Wyman alone was bad.

Being required to plead to the merits, Brooks pleaded *inter alia*, that a large portion of plaintiff's demand, about $1,000, consisted of interest on the account current illegally charged, while *non assumpsit* to pay interest.

Both issues were tried at the same time, and the following facts appeared proven.

In 1866 Wyman and Brooks entered into partnership as "L. W. Wyman & Co." at Waterville, and registered a declaration of the same in Prothonotary's office at Sherbrooke. Brooks resided at Lennoxville, but Wyman at Waterville and managed the business there. In October 1874, Wyman and Brooks dissolved partnership but advertised it only in the Sherbrooke *Gazette*, and failed to register in Prothonotary's office any declaration of said dissolution even up to date of trial. All the goods claimed for were purchased *before* the dissolution. After said date Wyman continued to do business, though on his own account, on the same premises, and there service of process was made upon him personally. No special notice of the dissolution was given to plaintiff or other creditors, and plaintiff did not take in the Sherbrooke paper.

That soon after the dissolution Wyman, in conversation with plaintiff, and having before him the account as then made up, with interest as now claimed accrued to that date included, made arrangements to pay the total by instal-

ments, paid a few and then ceased. That Wyman neither then nor in many subsequent conversations had with plaintiff informed him of the dissolution. That accounts current had been rendered to the firm at Waterville at nearly regular intervals since its commencement years ago, always charging interest at about one per cent. over the current bank rate. That if not common custom, this is at least the practice in most houses like plaintiff's, and is his practice with all customers. That defendants had never made objection to said account in any of the many letters produced. That in some letters they had acknowledged receipt of these accounts, and sent therewith sums on account. That all such sums paid were regularly credited in following accounts current, where interest was again added on balance, always without objection made. That from the accounts and correspondence this system had gone on for several years, and that the total interest which Brooks now objected to, viz., about $1000, was the accumulation of that period upon sales amounting to over $9000. The original invoices sent with goods bore printed headings that they were "to be closed by note at 6 months." When some of the notes sued on were given they, added to those then held by plaintiff and current, formed more than the pure balances *for goods*, if interest was not to be added. That Brooks left the entire management of the business to Wyman, by whom alone all purchases and payments were made and all letters produced written, and Brooks appeared ignorant of the state of the account till shortly before suit.

Ramsay, for plaintiff:—

1. The service is sufficient. Defendants having registered their partnership in 1866 under C. S. L. C., ch. 65, and failed to register the dissolution which it *now* appears they made in October, 1874, Brooks is not (sect. 3) "deemed to have ceased to be a partner." Also vide C. C. 1835. Therefore, *quoad* the plaintiff the partnership continued to exist, and the service on Wyman on the premises where the business of L. W. Wyman & Co. had been done and continued to be wound up, was good under C. C. 1838 and C. P. C. 60.

2. Under the circumstances, although no actual specific promise to pay interest has been proven, either verbal or in writing, the whole course of business shews that it was intended that interest should be paid; the acceptance without objection by defendants of the repeated accounts with interest charged authorizes this presumption.—Greenleaf, Evidence, I, § 197; II, § 126.

The law and cases support the plaintiff. "Interest is, and always was, payable when there is a contract express or to be implied from the circumstances, the usage of trade *or* the mode of dealing between the parties".—(Smith, Merc. Law, 663.) See Eddonis vs. Hopkins, Douglas, 376. "Interest at 6 per cent. awarded after expiry of the credit allowed on purchases by custom of the American trade.."

Marshall vs. Poole, 13 East 98, Lord Ellenborough. "Where goods are sold and delivered upon an agreement by the vendor to pay for them by a bill at a certain date; as interest would have run upon such bill if given, it may be recovered, in action for price of goods, brought after the term when such bill would have become due, &c., &c."

Porter vs. Palgrave, 2 Campbell 472. Interest allowed under circumstances.

Greenshields vs. Wyman et al.

similar to last. Also vide Boyce vs. Warburton, 2 Campbell 480. Farr vs. Ward, 3 M. & W. 25. Slack vs. Lovell, 3 Taunt. 157. Mountford vs. Willis, 2 B. & P. 337. Davis vs. Smith, 8 M. & W. 399. Arnott vs. Redfern, 3 Bingham 353.

Interest allowed when debt withheld illegally.—Nichol vs. Thompson, 1 Campbell 52, note. Case for money had and received, to recover a balance of account. Lord Ellenborough refused to allow plaintiff interest, till, on inspecting the account, it appeared that interest had been allowed on former balances, which evidenced the mode of dealing between parties.—Ex parte Williams, 1 Rose 399. An implied contract to pay interest may be raised from the dealings of parties, as where the debtor has been in habit of paying interest upon such, and similar, securities.

Interest on a balance (i. e. rests) debiting the debtor with the former interest (in effect compounding interest) "is allowable where there is a contract "to that effect either expressed or to be collected from circumstances, as where "the parties had been in the habit of dealing in those terms or the customer "knew it to be the practice of the house, &c."—Smith, Merc. Law, 665. Bruce vs. Hunter, 3 Campbell 466: Interest compounded from rests allowed under circumstances very similar to this cause, viz., account rendered on this plan and not objected to. Newal vs. Jones, 1 Moody & Malkins 449: Compound interest allowed on practice between parties, &c. Moore vs. Voughton, 1 Star 487: Interest from rests, when interest added, allowed on proof of practice between parties unobjected to.

3. Wyman's promise to pay plaintiff's balance as claimed, though made after the private dissolution, is binding on Brooks, for *quoad* plaintiff and the world Brooks and Wyman were partners still, with the same rights and powers as before. C. S. L. C. 65, sect. 3.

W. W. Robertson, for defendant Brooks:—

1. The parties having dissolved in 1874, the description of them as partners is wrong, and the service on Wyman is insufficient *quoad* Brooks. The non-registration may give plaintiff, if really ignorant, claim to consideration of the Court on dismissal of the action, but the insufficiency of service remains.

2. As to the large amount of interest claimed, Brooks relies on the long established and well understood jurisprudence of the Province, whatever it may be elsewhere, that no interest accrues except on a special promise to pay it, duly proven, or from the institution of a suit.

Though part of plaintiff's claim is on certain notes, it will be found that when all this interest, about $1000, is deducted, those notes were in part without consideration, and in other part, when the remittances are credited on these notes, as the more onerous of defendants' debts, they are extinguished and only open account balance is left. All the interest should be deducted, especially as under the system of "rests" or new accounts made quarterly there is a large amount of *compound* interest charged.

3. Wyman's promises to pay in instalments, plaintiff's balance as made up being made after the dissolution, cannot avail against Brooks as admission of the system or a statement of the account.

MACKAY, J., [after stating the pleadings and proof]:—Was Brooks partner with Wyman, when Wyman signed these notes held by plaintiff, or bought their goods? Is Brooks chargeable as partner? I hold that he was and is so chargeable, and that the service of process upon Wyman, as made, was good to hold even Brooks to answer. Brooks formed a partnership with Wyman and registered it regularly in 1866; no dissolution appears to be registered up to May, present month; the dissolution was published in the Sherbrooke *Gazette*, October, 1874, but no proof is that plaintiff subscribed to that paper, nor is anybody of their establishment proved to have known of the dissolution before this suit. After the dissolution Wyman came to town and went into a settlement with plaintiff, and did not mention the dissolution. As to the plaintiff's claim, it is for goods, all of them sold before the dissolution date. When we come to look into plaintiff's claim, it is all for causes that arose and existed before the dissolution; but supposing that they had arisen *since*, Brooks would be liable for credit continued to be given to the partnership as formerly; persons having had a course of dealing with the partnership, while it existed indisputably, being entitled to actual notice of the dissolution, and in the absence of it, being justified in treating the partnership as continuing. Sections 120, 530, Collyer on Partnership. As to the notice in newspaper, see what Collyer says at section 532. Actual notice was plaintiff's right. Section 533, Collyer.

Brooks being found liable as a partner with Wyman, is he liable towards plaintiff in the amount claimed, or in any sum? I cannot find him liable in less than all that is claimed. As to the capital there can be no doubt, nor have I doubt as to the interest claimed. Accounts charging interest have been rendered over and over again to L. W. Wyman & Co., by the plaintiff, and no objections have ever been made to them before this suit, but payments on account have been made over and over again to the plaintiff. The conduct of the firm, defendants, must be held admission by it that the accounts were truly stated.

See Greenleaf, Evidence, 1, § 197: "Admissions may also be implied from the acquiescence of the party. But acquiescence to have the effect of an admission, must exhibit some act of the mind and amount to a voluntary demeanor or conduct of the party. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated. * * Thus also, among merchants, it is regarded as an allowance of an account rendered, if it is not objected to, without unnecessary delay"—and vide cases in Note, Sherman vs. Sherman, 2 Verm. 276. Hutchins Ld. Com. mentioned "a second or third post" as the ultimate period of objection. But Lord Hardwicke said that if the person to whom it was sent, kept the account "for any length of time, without making any objection," it became a stated account. Also Willis vs. Jernegan, 2 Atk. 252. Freeland vs. Heron, 7 Cranch 147-151. Murray vs. Tolland, 3 Johns. 575. Tickel vs. Short, 2 Ves. 239.

Greenleaf, Evid. 2, § 126: The admission itself must be voluntary, &c. * * But it need not be express and in terms; for if the account be sent to the

Greenshields vs. Wyman et al. debtor in a letter, which is received, but not replied to in a reasonable time, the acquiescence of the party is taken as an admission that the account is truly stated.

Exception à la forme dismissed, and judgment for plaintiff.

R. A. Ramsay, for plaintiff.

A. & W. Robertson, for defendant Brooks.

(J. J. M.)

COURT OF QUEEN'S BENCH, 1872.

MONTREAL, 22ND JANUARY, 1872.

Coram CARON, J., DRUMMOND, J., BADGLEY, J., MONK, J.

No. 29.

J. B. RENAUD,

(*Plaintiff in the Court below,*)

AND APPELLANT;

E. R. VANDUSEN,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—That *capias* for debt on the ground of intent to depart and defraud does not lie against a trader whose well-known domicile is in the United States and whose business brings him occasionally to Canada, when on such departure he is only going home, and no special allegation of particulars is sworn to, to justify the charge of "intent to defraud."

The plaintiff declared that the defendant, described as "horse dealer of Westfield in Massachusetts, U.S, presently in the City of Montreal," was indebted to him in $50, as balance of price of a horse sold to him in Montreal some time before; and accordingly upon his return to Montreal in the course of his usual business, plaintiff arrested defendant on *capias*, the following being the only special allegation of his affidavit:

"Que le défendeur est étranger, qu'il ne vient ici que de temps en temps, "pour faire le commerce de chevaux, et qu'il va laisser immédiatement *la* "*Province* sans payer le demandeur et *pour le frauder.*"

Defendant moved to quash the writ "because the affidavit discloses no "fraud on the part of defendant and is altogether insufficient, inasmuch as it "appears that in leaving the province, defendant was only returning to his "home and usual domicile."

There was a contest between the parties on the merits, but as it was of no general interest, all reference to it is omitted from this report.

The Superior Court (BEAUDRY, J., 1 June, 1870,) quashed the *capias*, "Considérant que les allégations de l'affidavit sont insuffisantes en autant que le défendeur s'en retournait aux Etats-Unis où il a son domicile, tel que reconnu par le dit demandeur, met le dit capias au néant."

The Court of Review (31st October, 1870, Mackay, J., Torrance, J., with Mondelet, J., *dissentiente*) confirmed this judgment.

Before the Court of Appeals, *Jetté*, for appellant, submitted :—

Le jugement rendu en première instance et confirmé par celui de la Cour de Révision, est contraire à la loi et à la jurisprudence du Pays.

L'article 797 du code de procédure (qui reproduit le statut) n'exige pas qu'un débiteur *laisse son domicile* pour qu'on puisse l'arrêter sur *capias*, mais qu'il *laisse la Province*.

Cette loi ne s'applique donc pas seulement à ceux qui ont un domicile ici, et qui partent avec l'intention de frauder, mais à tous ceux qui, se trouvant dans le pays et y ayant contracté des dettes, se sont par là soumis à la jurisdiction de nos tribunaux pour le recouvrement ou paiement de ces dettes.

Du moment qu'ils veulent laisser la Province, sans payer ces dettes, que ce soit pour retourner chez eux ou non, ils tentent de se soustraire frauduleusement à cette jurisdiction qu'ils ont acceptée, et notre loi nous permet de les en empêcher, en les retenant sur *capias*.

C'est ainsi que nos tribunaux ont interprété cette loi chaque fois que l'occasion s'en est présentée.

Décis. des trib. Vol. 4, p. 157, Wilson et Reid ; p. 159, Wilson et Ray ; p. 218, Berry et Dixon ; p. 378, Quinn et Atcheson.

Décis. des trib. Vol. 5, page 42, Lefebvre et Vermette. Décis. des trib. Vol. 6, page 15, Hasset et Mulcahey. Jurist B. C. Vol. 5, p. 148, McDougall et Torrance.

Perkins, for respondent :—The affidavit shows no fraud or intended fraudulent departure of defendant. He was only going home, going to his own domicile. Larocque vs. Clarke, 4 L. C. R. 402 and L. R. 67, held "that in an affidavit for capias, the allegation that the defendant, who resides at Rouses Point, in the United States, is upon the point of immediately leaving the Province to go to the United States, and giving the names of the deponent's informants, discloses no intention of fraud and is insufficient."

"PER CURIAM :—The fact that the defendant was going home is no ground for concluding that he was doing so with the intention of defrauding his creditors. The numerous citations of appellant relating to sea captains and mariners do not apply to this case, inasmuch as the cases differ widely; in the one there being intended fraudulent departure, with particulars sworn to; in the other there being simply a return home after business visit made, without any special allegation from which fraudulent intent in departure can be deduced."

The Court of Appeals confirmed the judgments of the Courts below upon the ground stated therein and above cited.

DRUMMOND, J., rendering the judgment of the Court, said : The defendant was always coming and going between the United States and Canada, as plaintiff appears from his own affidavit to have known when he contracted with him. Defendant was only going home, his business here done. He did not leave the province with intent to defraud his creditors. The mere allegation of plaintiff's affidavit of defendant's departure as intended "pour le frauder," unsupported

Renaud and Vandusen.

by particulars of acts to justify such charge, beyond that of the usual going home itself, will not sustain the capias.

The Court * * considering that there is no error * * doth confirm, &c., &c.

Jetté & Archambault, for appellant.
Perkins & Ramsay, for respondent.
(J. J. M.)

Judgment confirmed.

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 18TH DECEMBER, 1876.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 4.

THE CARILLON & GRENVILLE RAILWAY COMPANY,

(*Defendants in the Court below,*)

AND APPELLANTS;

ALVAH BURCH,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—In a district where there is no rule of practice fixing the hours of opening and closing the Prothonotary's office, but the office was usually closed at 4 p.m., that an exception *à la forme* left with the Prothonotary at his office between the hours of 4 and 5 p.m. was properly filed.

This was an appeal from a judgment of the Superior Court, (BERTHELOT, J.) at Terrebonne, granting plaintiff's motion to dismiss an exception *à la forme* pleaded by the defendants, now appellants.

The principal ground stated in the motion was that the exception was filed too late, having been left with the Prothonotary after four o'clock in the afternoon on the fourth day after the return.

Ritchie, Morris & Rose, for appellants:—

The Prothonotary certifies that the exception was filed at his office at half-past four o'clock in the afternoon. It is for the respondent to show that the exception was filed too late. In order to do so he must produce some rule of practice which will have that effect. This he cannot do, for there is none. There have been no rules of practice made for the District of Terrebonne since its establishment. The only rule relating to the hours to be observed in the Prothonotary's office existing in the Superior Court is Rule IV. This rule was made 17th Dec., 1850, when the present District of Terrebonne was included within the limits of the old District of Montreal. Either there is no rule of practice relating to office hours in the District of Terrebonne, or if there be any it is the rule cited, and it is against the pretensions of the respondent, for it provides that the Prothonotary's office shall be open on every Monday, being a juridical day, (the exception, it will be observed, was filed on a Monday), from the hour of eight in the morning until the hour of six in the afternoon.

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MONK, J.:—The action was instituted by the respondent, claiming a certain amount of damages from the appellants. It was returned on the 27th April. On the following day the appellants filed an appearance, and on the 1st May they filed an exception to the form. Burch moved to reject the appearance and also the exception to the form. The Court below considered the appearance regular, but rejected the exception. The only question that arises now is as to the regularity of the service and filing of the exception. Is there any rule of practice in the district of Terrebonne which justified the Court in saying that the service of the exception on the fourth day about or after four o'clock, and the filing between four and five, was irregular? This Court has been unable to find any rule which requires a document such as this to be served or filed before 4 p.m., and the judgment appealed from is, therefore, incorrect and must be reversed.

The judgment is recorded as follows:—

"The Court, etc.

"Considering that the *exception à la forme* in this cause was filed in the Prothonotary's office at half-past four o'clock in the afternoon on the 1st day of May, 1871, being the last day on which the appellants were entitled to file the same;

"And considering that by the Rules of Practice of the Superior Court, the said exception could be served on the respondent's attorneys up to six o'clock in the afternoon, and that there is no rule of law or of practice requiring the same to be filed before 4 p.m. as contended for by the respondent, but that on the contrary the same could be filed as long as the Prothonotary's office remained open for the despatch of business;

"And considering that there is error in the judgment rendered by the Superior Court for the District of Terrebonne, sitting at Ste. Scholastique on the 15th of May, 1871, whereby the said *exception à la forme* was dismissed;

"This Court doth reverse," &c.

Judgment reversed.

Ritchie, Morris & Rose, for the appellants.
C. S. Burroughs, for the respondent.
John A. Perkins, counsel.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 17TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 129.

Akin vs. *Hood*.

DILATORY EXCEPTION—COSTS.

HELD:—That where the defendant has pleaded an *exception dilatoire* on the ground that the plaintiff lives without the jurisdiction of the Court, and must give security for costs, and the plaintiff in answer to the exception gives security, the costs of the exception will be reserved to abide the issue of the suit.

PER CURIAM:—The defendant has filed a dilatory exception to the action on

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the ground that the plaintiff has his domicile without the jurisdiction of the Court. The plaintiff has given security for costs as asked. Who is to pay the costs of the exception? They will abide the event of the suit as already held within a few days by Mr. Justice Dorion. The exception is dismissed, but costs are reserved.

Keller, for the plaintiff.

Abbott & Co., for the defendant.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21st DECEMBER, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 84.

JOSEPH POIRIER,

(Defendant in the Court below,)

APPELLANT;

AND

JOSEPH E. LAREAU,

(Plaintiff in the Court below,)

RESPONDENT.

HELD:—That a *bon* or note is property within the meaning of article 68 C. P. which permits an absent defendant to be summoned by advertisement: but the bon must be produced, or its existence in the possession of the defendant at the date of the institution of the action satisfactorily established.

The appellant, who is domiciled in New Brunswick, complained of a judgment which had been obtained against him by default in the Province of Quebec. The facts will be apparent from the following statement presented by the appellant's counsel in their factum in appeal:

L'appelant demeure au Nouveau-Brunswick, et a été assigné par la voie des journaux à répondre à une action en dommages que lui a intentée devant la cour supérieure de ce district, l'intimé.

Celui-ci croit que l'art. 68 du Code de procédure civile peut venir à son secours et a procédé en vertu d'icelui contre l'appelant, prétendant qu'il n'avait jamais eu de domicile dans le Bas-Canada ou la Province de Québec, mais qu'y ayant des biens il était justiciable des tribunaux de cette Province.

Or, voici les biens qu'on prétend trouver appartenir à l'appelant dans cette Province.

Dans l'automne de 1873, ce dernier vint dans le port de Montréal avec une cargaison d'huitres qu'il vendit à l'intimé, qui lui paya le prix de ses huitres, partie en argent comptant, et partie par un billet négociable, payable à ordre, pour cent et quelques piastres qu'il remit à ce dernier qui retourna chez lui.

Quelque temps après cela, l'intimé prétendant que les huitres qu'il avait achetées de l'appelant, ne valaient rien, poursuivit ce dernier en dommages, en

l'assignant par les journaux, et prouvant, par quelques témoins, qu'il avait donné un billet à l'appelant, il en conclut que c'étaient des biens possédés par lui ici, et obtint plusieurs cents piastres de dommages, déduction faite du montant ou balance du billet qui fut déclaré éteint.

Tout cela, va sans dire, par défaut: car l'appelant n'a jamais eu connaissance de l'action et de l'assignation, comme bien on pense. Puis dans le cours de l'été dernier (1874), l'appelant étant venu ici pour faire quelques achats, chez ses fournisseurs, P. P. Martin & Cie., à qui il avait transporté le billet de l'intimé, pour les avances que ces derniers lui avaient faites antérieurement, il apprit d'eux qu'ils n'avaient pas pu collecter le billet en question et que l'intimé avait obtenu un jugement l'annullant et de plus pour une somme de plusieurs cents piastres de dommages contre lui, dit appelant.

Voici ce jugement:

"La cour, après avoir entendu le demandeur par ses conseils, et vû qu'il appert par le rapport de Charles St. Amand, l'un des huissiers-jurés de cette "cour, écrit au dos du Bref d'assignation, émané en cette cause, que le défendeur n'a pas de domicile dans le district de Montréal et qu'il réside hors des "limites de la Province de Québec, et vu qu'il appert en outre, qu'avis légal et "suffisant a été donné au dit défendeur, par le moyen d'une annonce insérée "deux fois en langue française dans le "National," et deux fois en langue anglaise dans le "Montreal Herald," journaux publiés en la cité de Montréal, de "comparaître et de répondre à la présente demande et action, ce qu'il a négligé "de faire, étant en défaut de comparaître; avoir examiné la procédure, et la "preuve faite et délibéré:

"Considérant que le demandeur a fait une preuve suffisante des allégations "de sa déclaration pour lui faire obtenir le montant accordé par le présent ju"gement, mais pas d'avantage, condamne le défendeur à payer au demandeur "la somme de $567, cours actuel, à laquelle est réduite par la pour la dite de"mande à titre de dommages réels à lui causés par le fait du dit défendeur, "pour les causes et raisons exprimés dans la dite déclaration, sauf à soustraire "sur cette somme celle de $154.41, balance du billet de $233, consenti par le "dit J. E. Lareau & Cie., au dit Poirier en, par ce dernier, remettant sans dé"lai le dit billet au dit faiseur: avec dépens distraits à Messieurs Lareau & "Lebeuf, procureurs du demandeur."

C'est de ce jugement que l'appelant demande l'infirmation par le présent appel, comme étant tout à fait erronné.

L'appelant soumet humblement que l'article 68 du Code de procédure civile ne s'applique pas dans l'espèce et que le fait qu'il aurait eu contre l'intimé, domicilié ici, un billet négociable, ne peut pas être ce que le Code veut ou voulait prévoir, en parlant de biens possédés par un débiteur absent, dans la Province.

L'appelant soumet de plus qu'étant résidant ou ayant son domicile dans la Province du Nouveau-Brunswick, il n'y a aucune loi, soit de procédure, statutaire ou autre qui le rende justiciable des tribunaux de cette Province.

Nos codes devenus en force avant la Confédération qui a fait entrer dans la Puissance du Canada, la Province du Nouveau-Brunswick, n'ont pas pu y pourvoir et parer à cet inconvénient, et à moins d'assigner dans les limites du District

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même où on veut le poursuivre, un débiteur du Nouveau-Brunswick, comme dans l'espèce, n'est justiciable que des tribunaux de cette dernière Province.

La loi et notre législation n'ont pourvu et ne pourvoient d'aucun mode d'assigner un tel débiteur à comparaître ici, même en lui signifiant le bref d'ajournement ou de sommation chez lui. Ce droit et ce mode de procédure n'existant pas dans nos lois, et en conséquence, ne pouvant pas même assigner de cette manière, un débiteur du Nouveau-Brunswick à comparaître ici, semble-t-il clair qu'on ne saurait l'assigner par la voie des journaux, comme dans l'espèce.

L'article 68 du Code de procédure ne s'applique évidemment qu'aux personnes ou aux absents dont le domicile est inconnu et qui ont dans cette province, des biens réels et tangibles, mais non pas des créances résultant d'effets de commerce négociables.

Cet article ne peut pas s'appliquer non plus à des personnes du Nouveau-Brunswick, la Nouvelle-Ecosse, etc., dont le domicile est connu du créancier, comme dans l'espèce, celui de l'appelant était connu de l'intimé qui l'a si bien décrit dans son Bref d'assignation et sa déclaration y annexée.

The respondent in support of the judgment submitted the following argument:—

Il a été prouvé que l'appelant avait à l'époque de l'institution de l'action, des propriétés mobilières, et plus spécialement un Billet Promissoire, alors dû par l'intimé à l'appelant, billet qu'il pouvait réclamer et peut encore réclamer contre le dit intimé. Ce bon ou billet participe de la nature des billets simples; il est fait payable à l'appelant seulement, à Montréal. Ce n'est donc pas un billet négociable; ces faits relèvent de la preuve.

Cette reconnaissance engageait donc l'intimé vis-à-vis l'appelant; c'était pour ce dernier une *valeur personnelle*, un *bien mobilier*, une *propriété*, un titre parfait entre les mains du porteur, l'appelant en cette cause. Or, l'intimé avait senti le besoin de se protéger contre cette créance. C'est pourquoi il voulait, par un jugement contre le défendeur (en Cour Inférieure), en anéantir aussitôt que possible tout l'effet. En cela il a parfaitement réussi, comme le démontre le texte du Jugement.

Il semble que l'interprétation la plus rationnelle que l'on puisse donner à l'article 68 sur ce point consiste à examiner l'intérêt du poursuivant. En [redacted] si le créancier réussit à obtenir Jugement contre son débiteur en prévoyant qu'il fera exécuter ce Jugement d'une manière ou d'une autre, il doit être autorisé à prendre les procédures qui lui permettront d'arriver à l'exécution de ce Jugement. En disant que le débiteur pourra être assigné devant nos tribunaux *s'il a des propriétés* dans la Province, il semble que l'intention de la loi a voulu limiter cette exigence à l'intérêt que le créancier pouvait avoir à exercer son recours contre tel absent.

Dans l'espèce actuelle, par exemple, l'intimé avait consenti un billet pour un montant considérable; ce billet était échu. Mais l'intimé prétendait que l'appelant lui avait causé des dommages pour un montant encore plus considérable. Il avait donc tout à gagner en obtenant un Jugement qui lui permettrait d'opérer sur le champ une compensation avec le montant du billet.

De plus, cette provision (*et qu'il y ait des propriétés*) a été mise dans le

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Code que pour assurer l'exécution du Jugement. Au fait, il semble illusoire de prendre Jugement contre un débiteur si on ne peut entrevoir des moyens qui permettent l'exécution de ce Jugement. Mais dans la cause dont est appel, l'intimé, d'après le texte même du Jugement, a déjà réussi à éteindre, par le seul fait de ce Jugement, une créance qui existait contre lui.

Quelque soit donc la nature des *biens* que possède l'absent dans la Province, si le créancier a un intérêt né et actuel à procéder contre son débiteur, il se conforme à l'esprit si non à la lettre de la loi.

Mais il y a plus, il est également en preuve que l'appelant fait le commerce d'huitres avec Montréal, et qu'à chaque automne il arrive dans le port de cette ville avec des chargements considérables, ce qui permettra encore à l'intimé d'exécuter sur Jugement, et ce qui démontre les liens d'intérêt qui rattachent l'appelant à la Province.

Ainsi l'appelant se trouvait donc dans les conditions requises par l'article 68 du C. P. C. pour les fins de l'assignation. Pouvait-il être assigné autrement? Nous ne le croyons pas. Certainement l'habitant d'une Province autre que celles qui formaient l'ancien Canada-Uni, (c'est-à-dire le Haut et le Bas-Canada,) doit être considéré comme absent et étranger dans le sens de l'article 68 pour les fins de l'assignation. Il n'y a pas de statut spécial qui étende au Nouveau-Brunswick, à la Nouvelle-Ecosse, ou autres Provinces qui forment la Confédération, les dispositions du chapitre 83 des S. R. B. C. Il est bien dit dans ce dernier statut et dans l'article 69 du C. P. C. que lorsque le défendeur réside dans le Haut-Canada, la signification peut s'y faire par toute personne lettrée sur l'ordre du protonotaire; et encore, cela a-t-il lieu, sans préjudice au mode d'assignation contenu dans l'article 68. Mais rien de semblable n'existe pour le Nouveau-Brunswick et les autres Provinces faisant partie du pacte fédéral.

En l'absence d'une disposition statutaire spéciale, l'habitant du Nouveau-Brunswick, sans domicile connu dans le Bas-Canada, peut être régulièrement assigné par la voie des journaux. Il n'y a pas d'autre mode d'assignation possible ou plus rationnel.

Dans le cas actuel le défendeur en Cour Inférieure demeure dans la Province du Nouveau-Brunswick; il n'a pas de domicile connu en Bas-Canada; la cause de l'action a pris naissance ici, l'appelant a des biens, des intérêts, ou si on l'aime mieux des valeurs et créances recouvrables ici seulement; ces créances étaient échues à l'époque de l'institution de l'action;—l'intimé était donc autorisé par les circonstances et par la loi à citer l'appelant devant nos tribunaux en la manière et forme portée en son action.

MONK, J.:—A very important point is presented by this case, and it is one which has given considerable embarrassment to the Court. Poirier in 1873 brought a cargo of oysters to Montreal and disposed of them to Lareau, who paid part in cash and for the balance gave his *bon*. The oysters turned out to be worthless, and thereupon Lareau telegraphed and wrote to Poirier in New Brunswick that he would have to refund the money paid and also restore the *bon*. To this the vendor of the oysters paid no attention. Four months afterwards Lareau brought an action of damages for a large amount against Poirier,

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and called him in by advertisement. The case went by default, and Lareau having made out a serious case of damage, the Court below, on the evidence adduced, condemned the defendant to pay $567; less the amount of the *bon* if that was returned. The evidence seems to be entirely conclusive as to the damage, and if the defendant was properly brought before the Court the judgment must be sustained. But Poirier subsequently appealed to this Court on the ground that he was not properly before the Court, and did not come under the provision of law which allows an absentee defendant who has property in the Province to be summoned by advertisement. This is the whole question. Is this *bon* property within the meaning of the Code? To make it such, it must be proved beyond all doubt. The common mode of proving it would be by producing it. If it is not produced there must be very precise proof that it was in the possession of the payee at the date of the institution of the action. The evidence is altogether inadequate on this point. It may be said that Poirier was bound to guarantee it, but the mere fact of his being liable for the amount would not constitute it property. Care must be taken in such cases that the intention of the law is not frustrated. The judgment holding the *bon* to be property seems, on the evidence, to be incorrect, and it must be reversed.

SANBORN, J.: The only ground on which I acquiesce in reversing the judgment is want of proof that appellant was proprietor of a *bon* at the time when the suit was instituted. It was proved that respondent made and delivered this *bon* to appellant, but there is no proof that appellant was the owner of it when the suit was brought. If appellant's admission is taken, it must be taken as a whole, and he admits that he received the *bon*, but transferred it, and was not holder of it when suit was brought. The ownership of the *bon* being the only thing to give jurisdiction to our courts to compel an absentee to answer by summons served by advertisement, this not appearing the action must fail. I say this, because I would not desire to be understood that a *créance* is not property which may give jurisdiction to summon an absentee by advertisement; and I think such *créance* may be represented by a *bon* or note, but it must appear that the defendant was owner of such *bon* or note when suit is brought.

DORION, C. J., considered that "property" within the meaning of the Code was everything tangible within the reach of the creditor, but the proof of the existence of such property must be clear and complete, for it was an exception to the ordinary rule to permit a defendant to be called in by this mode. In the present case the respondent had failed to make the necessary proof.

RAMSAY, J.:—I concur in the judgment reversing the judgment of the Court below, solely on the ground that there is no evidence of the existence of the promissory note alleged to be the property defendant had in the country. It was for [illegible] to establish this by legal evidence. If we take the admission of the [illegible] factum the note was negotiated.

The judgment is recorded as follows:—

"The Court, &c.,

"Considering that in the judgment rendered by the Superior Court at Montreal on the 17th of June, 1874, there is error, doth reverse, set aside and annul

the said judgment of the said Superior Court, and proceeding to render the judgment which the said Court should have rendered;

"Considering that there is no sufficient allegation or proof of what was the date or nature of the *bon* referred to in the pleadings and proof in this cause, nor where the same was payable, nor to whom or to whose order;

"Considering that the said *bon* is not produced or filed in this cause, nor any legal reason assigned for its non-production;

"Seeing, therefore, that there is no legal or sufficient proof of the existence of the aforesaid *bon*, nor anything to show that it was property of, or belonging to the said appellant, at the time of the institution of the present action or afterwards; and considering that the defendant was and had not been legally summoned before the said Superior Court, nor could he be called in by advertisement to appear or defend the present action in virtue of the said *bon* or otherwise under the circumstances and proof in this case, doth dismiss the said action with costs," &c.

Judgment reversed.

Archambault & De Salaberry, for the appellant.
Lareau & Lebeuf, for the respondent.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21st DECEMBER, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 1.

HENRY J. IBBOTSON,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

MOISE OUIMET,

(*Defendant in the Court below,*)

RESPONDENT.

HELD:—An imperfect wooden drain, connecting the closets and sinks of a house with the common sewer in the street of a city, is a latent defect against which the seller is obliged by law to warrant the buyer, where, from the character of the house, the buyer had reason to believe that the drains were constructed in a proper manner.

The appeal was from a judgment of the Superior Court, 31st March, 1875, (TORRANCE, J.), rejecting part of the appellant's demand.

The action was for the recovery of damages sustained through certain latent defects in two houses in Mansfield street sold by respondent to the appellant.

The defects complained of were bad roofing and improper drainage. The plaintiff succeeded on the first point, but his pretension that he was entitled to a glazed earthen tile drain to connect with the city sewer instead of a wooden drain, was overruled.

With reference to the drain question, TORRANCE, J., in rendering the judg-

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ment of the Superior Court, remarked:—"As to the drains there is more difficulty in giving the plaintiff anything. The defendant well says, where is the law compelling me to build my houses with tile drains? There can be no doubt from a sanitary point of view, that these drains should be of tile or brick instead of wood, but there was no guarantee on the part of the defendant, and the action so far as this demand goes must be dismissed."

The appellant, in asking for the reversal of this judgment, relied upon the Civil Code, art. 1522; and also upon by-law 58 of the Corporation of Montreal which declares of what materials such drains are to be composed, viz., glazed earthen tile of proper size.

The respondent, by his factum, submitted the following:—

La seule question qui se présente en cette cause est celle de savoir si l'intimé, vendeur, était obligé de garantir à l'appelant, acheteur, que les canaux étaient en grès, et si le fait que les canaux étaient en bois constituai un vice caché qui donnait lieu à l'action en diminution de prix.

Il n'y a aucune loi qui obligeait l'intimé à construire ces canaux en grès, et il est en preuve qu'un grand nombre de canaux dans la ville de Montréal sont faits en bois: il n'y avait donc aucun vice cache et conséquemment d'appelant n'avait aucun grief.

Le règlement de la corporation n'a aucun effet quant aux canaux ou égouts sur les propriétés privées. M. McQuisten, inspecteur de la cité, nous dit: "I "consider our By-law defective as to our control over the private drainage as it "reaches to the line of the street only, and no officer has been appointed to see "to the internal drainage. I have no jurisdiction beyond the street line."

SANBORN, J.:—The appellant demands of respondent $357.47 as damages sustained from latent defects in two houses, purchased by appellant of respondent in August, 1873. It is of the nature of an action *quanto minoris*. The action was instituted 4th September, 1874, and the subject of complaint was defects in the roofing of the houses and in the drains. The part of the action relating to the roofing was maintained and the part relating to the drains dismissed. The whole question in the appeal is, did the respondent by his deed of the houses guarantee that there were sufficient drains from them to the common sewer of the street, made in conformity with usage of the city and the by-law of the Corporation, the houses being new, and the respondent, as a builder, having constructed them for sale? It appears that there were three houses in a block and two were sold to appellant. There was one wooden drain made to answer the purpose for the three houses. This wooden drain was eaten through by the rats and the drain became offensive, and appellant was advised to take it up and put in a tile drain of glazed earthenware, in order to render it permanent and serviceable. The expense incurred to do this he claims of respondent. It is contended that appellant had a right to expect that a drain existed to these houses, such as the by-law of the city corporation exacts, inasmuch as the houses were built subsequent to the passing of the by-law, and were made in Mansfield street, where there was a common sewer, which brought them within the provision of the by-law No. 58. It is also said that respondent recognized the by-law by getting a permission from

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the City Surveyor to put in the drain, but did not put in such a drain as the by-law required. The by-law declares that in all cases when there is a common sewer, in any street or highway, "every owner of lots of ground, houses, tenements or other premises, shall cause a sufficient drain of glazed earthen tile, under ground, to be made in connection with the same, to carry off the waste water of the said lot of ground, house, tenement or other premises to such common sewer, but no such drain shall be used until examined and approved of, in writing, by the City Surveyor of the said city, certifying that the same has been built with the proper material and size and with the proper direction and descent." The City Surveyor seems not to have looked after the drain, and no certificate was obtained from him in conformity with the by-law that the drain was made of proper material or with proper direction and descent. He said he would not have given permission to make the drain if he had supposed that a wooden drain was to have been put in. In his evidence he excuses his failure in duty because he thinks the by-law defective because it gives him only jurisdiction to the street line. This is not the terms of the by-law. If the by-law is warranted by law, it certainly extends to the premises and makes it the duty of the Surveyor to see that sufficient drains are put in from the premises to the street sewer. At all events it does not appear that he was asked for, or gave any, certificate as to the deficiency of the drain. It appears from the evidence that the respondent put in a drain not of proper materials and not for one house, and not with proper descent, and it was used without having been approved by the City Surveyor. He sold two of the three houses after this to appellant. Had the appellant good reason to expect that the drain was constructed according to this police regulation, in force when respondent built the houses, and having no means of seeing it; was it a *vice caché?* Without this by-law there would appear to be no warranty as to the drains being constructed of any specified materials. This, however, would not relieve the seller, and particularly a seller of a house, built by himself for sale, from responsibility to guarantee a sufficient drain. It is one of the accessories that is essential to a city house, to render it fit to inhabit, and it cannot be said to be fit for the purpose for which it is intended without it any more than a house would be suitable for habitation with chimnies made solid, or made of wood painted to imitate brick, so as to deceive an unskilled purchaser. The law on this point is sufficiently explicit in art. 1522, Civil Code. Perhaps recent custom to make tile instead of wooden drains, while both have been made, would not, alone, be enough, to impose upon the seller to warrant the existence of a tile drain, if nothing were said about it in the deed, and the drain were sufficient, if he was not bound to observe Police regulations. Lepage, "Des Batimens," pp. 17, 18 and 19, says that a contractor is responsible for defects of construction, in consequence of not following rules of police. The same principle should apply to a seller, who himself builds a house to sell, being himself a builder. Respondent here is "selling his own work, in which he holds himself out as having skill." See 16 Duranton, No. 322. This is a very important case, and the appellant is not far wrong when he says that he is vindicating public, as well as private, interests. It is necessary that parties should be held to their full responsibility in these matters, for the protection of society and the

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preservation of the health and comfort of citizens generally. It is necessary for the prevention of infectious diseases, which are consequent upon defective drainage in a populous city. I think the respondent, under the circumstances, has incurred a liability to appellant to indemnify him for his expenses necessarily incurred in making a sufficient drain to these houses. He made a wooden drain of so imperfect a character as not to be sufficient for the purpose for which it was intended. He made it in violation of by-law No. 58, while he knew its requirements, because he pretended to act under it, and he sold the property to appellant without informing him that he had put in this defective drain. It was not visible, and appellant had no means of examining it, and he had good reason to presume that the drain had been made in a sufficient and customary manner. I think the existence of the by-law No. 58, and the knowledge of its existence possessed by respondent, an important element in the case, but I would not go the length of saying that, alone, it would be sufficient to fix liability upon respondent, if the drain had not been otherwise defective than not being in strict conformity with the by-law. The case from Dalloz affirms that the action *quanto minoris* applies as well to real as personal property. In fact there can be no doubt on this point. Pothier, "Vente," Nos. 207 and 208; Troplong, "Vente," No. 548; Duvergier, "Vente," No. 396; Domat, "Vente," Section 11. Even in England, where the maxim *caveat emptor* prevails, it is held that where the defect is latent, and the purchaser with the greatest attention cannot discover it, it vitiates the sale. Sugden on Vendors and Purchasers, p. 238. The judgment of the Court below maintains appellant's pretensions as to the roof, which is more accessible to the purchaser for examination than the drain. I think it should have sustained the entire claim, and the judgment should be reversed. As appellant did not protest respondent to make good these latent defects, when he discovered them, but proceeded to replace the roofing, and make the drains according to his own wishes, the charges of expenses incurred are not conclusive against the respondent. In fact, as regards the drains, he had them laid from the waterclosets, while it does not appear that he was entitled to expect drains except from the house to the sewer. It would seem that he has laid a greater length of drains than the respondent can be held bound to warrant. To prevent further litigation and expense, the Court have assessed the damage to which he is entitled at $150, for which he has judgment. If he ge s less than he might be entitled to it is his own fault in not putting respondent *en demeure* to do the work, or to give him an opportunity to have the cost of the work settled *contradictoirement*.

RAMSAY, J.:—The judgment of the Court turns entirely upon the fact that the drain which existed in the houses was not sufficient for the apparent necessities of the place. It is proved to have been of wood, which was rotten, eaten by rats, and totally inadequate for the purpose intended to be served. We do not base our judgment upon the by-law. If the appellant knew of this by-law he ought to have asked for the certificate which it requires the City Surveyor to give. It would, I think, be very dangerous to establish as an understood warranty that everything not visible must be in accordance with the by-laws of the Corporation. The by-law in this case may be a very proper one, but it is evident that

it was not followed out, and, if the action were to be sustained on the ground of the by-law, endless litigation might be occasioned.

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DORION, C. J.:—In August, 1873, the appellant purchased from the respondent two houses on Mansfield street. They were new houses, not quite finished, and had only been occupied since the months of May and June preceding. It was soon discovered that the roof was leaking and the drains emitting such a smell as to render the houses untenantable. It was ascertained by a proper examination, that the gravel roof was laid on a double ply of felt instead of on a four ply, as required to make a good roof, and that the drains instead of tile or earthen drains glazed inside, as required by the by-laws of the Corporation, were made of wood and emptied into a single drain also of wood, which was used for three houses, the two sold to the appellant and a third [illegible] the respondent had built at the same time as the other two. The [illegible] the roof to be repaired, the wooden drains to be replaced by earthen [illegible], at a cost of $357.47, which he now seeks to recover from the respondent.

The Court below admitted the claim for repairs to the roof to the extent of $57, and dismissed the demand made for having replaced the drains.

The deed of sale is silent, and contains no express warranty, nor exemption of warranty, as to drains, which are not even mentioned in it. The question at issue is, therefore, whether the legal warranty, as to latent defects under art. 1522 of the Civil Code, attaches in this case. The terms of the article are: "The seller "is obliged by law to warrant the buyer against such latent defects in the thing "sold, and its accessories, as render it unfit for the use for which it was in- "tended, or so diminish its usefulness that the buyer would not have bought or "would not have given so large a price if he had known them."

That this art. applies to the sale of real estate as well as to the sale of chattel property there can be no doubt. Its provisions are not restricted to the sale of any particular description of property, and it is a mere re-enactment of an old rule of law which the unanimous testimony of text writers and a long and unbroken chain of decisions applied to all sales whether of real or personal property. Pothier, Vente, Nos. 200, 202, 203, 206, 230, 232 and 708. Troplong, Vente, Nos. 548 and 556. Marcadé sur l'art. 1641. Rolland de Villargues vo. Vente, Nos. 437, 439, 447, and the arrêts cited by these authors.

In 1872 the Corporation passed a by-law obliging proprietors to have tile-glazed drains to connect their houses with the public drains.

The appellant had a right to expect when he purchased new houses erected since the passing of this by-law, in a fashionable part of the city, provided with bathrooms and waterclosets, and bringing a rental of from £80 to £90 a year, that they were also provided with suitable drains such as are usually placed in such houses and required by the by-laws of the Corporation. The houses, although not yet quite finished, were to be completed by the respondent, and Desgodets, p. 121, indicates the obligations of a builder under such a contract. Yet the evidence shows these drains to have been so badly constructed as to have almost immediately become a nuisance, and the appellant was put to considerable expense to replace them.

The appellant could not ascertain the defect when he purchased, and it is not



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shewn that the respondent who had recently built these houses gave him any information about the drains, nor that the appellant knew of their condition. He would certainly not have given the same price for the houses if he had known that he could immediately be compelled by the Corporation to put in other drains or forced to do so to retain the tenants.

This is a clear case of a latent defect giving rise to the legal warranty invoked under art. 1522 of the Civil Code; and the judgment of the Court below must be reversed. But the appellant seeks to recover the cost of the drains he has made from the public drain in the street to the back part of his yard, and the Court is of opinion that he is only entitled to the cost of drains to connect with the sinks in the two houses he purchased. To ascertain the value of this portion of the work I would have been disposed to order an *expertise*, yet I readily acquiesce in the view of the majority of the Court to settle at once the amount and thereby avoid the costs of an *expertise*, and the judgment will be for $150, including the amount awarded by the Court below for defective roofing.

In rendering this judgment the Court does not intend to lay it down as a rule that in every case of defective drainage, or that whenever the drains will not be in accordance with the by-laws of the Corporation, the purchaser will be entitled to an indemnity. If the purchase is of an old dilapidated house or a small wooden shanty, the buyer cannot expect the accessories to be in the best order or of the best materials, and in that case, an indemnity would very likely be refused. All such cases must depend upon the circumstances established by the evidence, and the Court believes that in the present one it is giving a fair interpretation to the article of the Code in holding the respondent to the warranty thereby established in favor of the purchaser.

The judgment is recorded as follows:—

"The Court, &c.;

"Considering that on the 26th of August, 1873, the appellant purchased from the respondent two houses situate on Mansfield street, in the city of Montreal, which had recently been built by the respondent, and which were provided with sinks and waterclosets such as are usually put in houses of that class in that locality;

"And considering that these houses were not provided with proper and sufficient drains, such as are required by the by-laws of the Corporation of the City of Montreal in force at the time the said houses were erected, ordinarily used for such houses to connect such sinks and waterclosets with the common sewer, then existing in the said street, but that the said closets and sinks were only connected by imperfect wooden drains, and, further, that the felt and gravel roofing of said houses was laid in such unworkmanliko manner as to require them to be renewed in order to make the said roofs water-tight;

"And considering that it is proved that the absence of proper tile drains and also such imperfect roofing rendered the said houses uninhabitable, and that these constituted latent defects which were not perceptible and of which the said appellant was not made aware at the time he made the said purchase;

"And considering that under article 1522 of the Civil Code, the respondent was bound to warrant the said houses against such defects;

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"And considering that appellant has proved that he had to expend considerable sums of money to repair and replace said roofing and to replace said drains;

"And considering that said expense was incurred by appellant according to his own wishes, without calling upon respondent to remove the defects in said roofing and drains, and that these expenses cannot be taken as conclusive against respondent as representing what he might have done to have rendered the roofing and drains sufficient to the extent of his warranty, but that it is sufficiently established that appellant has suffered substantial damages from defects in said roofing and drains, for which the respondent is bound to indemnify him, which amount at least to the sum of $150, and which the Court, to obviate further expense and litigation, assesses at said sum of $150;

"And considering that there is error in the judgment rendered by the Superior Court at Montreal on the 31st day of March, 1875;

"This Court doth reform said judgment, and, proceeding to render the judgment which the said Superior Court ought to have rendered, doth condemn the respondent to pay to said appellant the said sum of $150 with interest," &c.

Judgment reformed.

R. Roy, Q.C., for appellant, *and H. J. Ibbotson*, in person.

Duhamel & Rainville, for respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21ST DECEMBER, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 78.

LOUIS JOSEPH LAJOIE,

(*Plaintiff* es qual. *in the Court below,*)

APPELLANT;

AND

MICHAEL MULLIN ET AL.,

(*Defendants in the Court below,*)

RESPONDENTS.

HELD:—That where a *capias* has been declared good and valid, and the defendant in appealing from such judgment gives security for costs only, and files a declaration that he does not object to the execution of the judgment, the appeal does not suspend proceedings against the bail to the sheriff.

The appeal was from a judgment of the Superior Court, Montreal, (BEAUDRY, J.) 15 November, 1875, dismissing the appellant's action.

The appellant was the assignee in insolvency of Percival B. Winning and William G. Hill, (Winning, Hill & Ware) the plaintiffs in the cause. He had taken up the instance under article 439 of the Code of Civil Procedure, and his petition *en reprise d'instance* not having been contested he was admitted under such article as plaintiff *par reprise d'instance*, and continued the suit which was instituted on the 28th of December, 1874.

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Percival B. Winning and William G. Hill complained of the respondents, defendants, that on the 11th of September, 1874, there issued from the Superior Court, Montreal, a *capias ad respondendum*, Winning *et al.*, against Patrick Downey *et al.*; that thereunder Patrick Downey was arrested and held to bail; that the respondents became bail to the sheriff for the sum of $1,654, the condition of the bond being that Patrick Downey would on the 26th September, 1874, or previous thereto, or within eight days thereafter, give special bail to the action, and that in default thereof they would pay to the plaintiffs the debt, interest and costs for which arrest was made. That said Patrick Downey never gave special bail, or any security whatever, nor did he pay the debt.

That at Montreal, the 22nd of October, 1874, final judgment was rendered, and Patrick Downey was condemned to pay the plaintiffs the sum of $843.47, with interest and costs of suit, and the *capias* was declared good and valid. That the bond having been forfeited defendants became bound, liable and indebted in such amount, and the plaintiffs prayed accordingly.

The plea to the action was as follows: that by law the defendants could not be called upon at the date of the institution of the action to pay, and were not liable to pay, the amount of the judgment of the 22nd October, aforesaid, or the amount of the bond, because the said judgment was not a final judgment as regards the *capias*, the same having been appealed on the 26th November, 1874, by writ of appeal issued such day from the Court of Queen's Bench, (Appeal Side,) Patrick Downey, appellant, and Percival B. Winning *et al.*, respondents, and returnable and returned on the 16th December, which writ was then pending before the Court of Queen's Bench. That by law there was at the date of the institution of the action *litispendence* between the plaintiffs and Patrick Downey with respect to the matters and things raised by the issues between them in the Court below upon the said *capias* and in connection with which *capias* the bail bond was given. That by reason of the premises the plaintiffs were not entitled to recover from defendants the amount of the bond, and the defendants purely and simply prayed for the dismissal of the action with costs.

The plaintiffs answered specially that after final judgment in the case before the Superior Court, Winning *et al.*, against Downey, the defendant Downey, intending to appeal therefrom, and to and for the purpose of appealing therefrom, filed written declaration according to law that the judgment might be executed in terms of the article 1124 of the Code of Civil Procedure, and upon his appeal gave security for costs only, whereby the present action being in execution the judgment was well founded, and should be maintained.

Thereupon on the 15th November, 1875, Mr. Justice Beaudry rendered the following judgment:—

"The Court, etc., considering that it is proved that the writ of *capias* issued at the instance of plaintiffs against Patrick Downey, and on which the said defendants have given their bond, alleged in plaintiffs' declaration, is still at issue before the Court of Queen's Bench, in Appeal, and that therefore plaintiffs' action is premature, and defendants' plea well founded, doth dismiss said plaintiffs' action *quant à présent* with costs, etc."

The appellants, in contending for the reversal of the judgment, submitted the following argument :—

At the date of the judgment of 15th November, 1875, the writ of *capias*, Winning *et al. vs.* Downey, was not at issue before this Court, because on the 22d of March, 1875, the judgment appealed from, Downey, appellant, and Winning *et al.*, respondents, was confirmed by this Court, as appears by the registers of this Court.

The plaintiffs in the Court below filed: first, the bond; second, the assignment in insolvency, and the appointment of Louis J. Lajoie as assignee; third, copy of judgment, Winning *et al.* against Downey; fourth, certified bill of costs in same case; fifth, extract from Plumitif.

It appears therefrom that on the 22nd October, 1874, judgment passed in favor of Winning *et al. vs.* Downey, for $843.47, with interest on $128.75 from the 31st day of July, 1874, and on $391.92 from the 11th of September, 1874, and costs of suit taxed at $101.95. That by such judgment the *capias* was declared good and valid. That on the 26th November, 1874, Patrick Downey filed written declaration that he did not object to the execution of said judgment, and gave security for costs of appeal only.

This declaration, moreover, states "that the defendant does not consider "that he is bound to give security for more than costs on the present appeal, but "inasmuch as the prothonotary of said Court refuses to accept bail for costs "merely, without having a declaration from appellant declaring that the judg- "ment of the 22nd October, aforesaid, may be executed according to law, now "therefore he declares that portion of the judgment whereby he is condemned to "pay plaintiffs the amount claimed in and by said action may be executed "according to law; expressly reserving to himself his recourse in damages "against the plaintiffs."

During the course of the proceedings, the defendants moved to discharge the *délibéré* upon the ground that the sureties had surrendered Patrick Downey into the custody of the sheriff, and they moreover moved that they should be allowed to file a supplementary plea, to the effect that such surrender had taken place in the terms of article 831, Code of Civil Procedure, and to file the certificate of surrender, and that the action should be dismissed. Such right was denied by the Court below on the 19th of May, 1875, the defendants' motion having been dismissed with costs. Therefore, all that is of record for the decision of this Court is the point raised by the respondents by their original plea and by the judgment of the Court below, that the action was premature.

The defendants plead litispendence. The judgment does not find such fact, but finds that the present action is premature. The judgment Winning *et al. vs.* Downey was final. To appeal therefrom Downey gave security for costs only. He did this under article 1124, Code of Civil Procedure; he declared in writing, that he did not object to the judgment rendered being executed according to law. The present case is an action in execution of that judgment only. Had he given the security for debt, interest, and costs, the plaintiffs would have had security under an appeal bond for their debt, interest and costs. He failed in appeal, and the appellant reverts to the present action for the collection of the amount secured by bail bond to the sheriff.

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It cannot be pretended for a moment that the present action was premature, seeing the consent of Patrick Downey to the execution of the judgment.

Dorion & Co., for the respondents: —

It is manifest that the only reason for the existence of the bond on which the present action has been instituted was the issuing of the writ of *capias ad respondendum* in the cause referred to. If that writ was issued illegally, if there were not sufficient grounds to warrant the proceedings of the plaintiffs, now appellants, in taking out that writ, if, in a word, the Court of Queen's Bench sitting in Appeal should set aside the judgment of the Superior Court maintaining the said writ of *capias* and quash the same, the plaintiffs, now appellants, could have no possible claim against the respondents, who merely signed the bond on account of the issuing of the writ of *capias*. Therefore the present action of the appellants was premature; no such action could lie until the appeal on the judgment of the Superior Court maintaining the writ of *capias* has been confirmed.

The judgment of the Superior Court was unanimously reversed in appeal, the reasons being fully set out in the judgment, which is as follows: —

"The Court, etc.,

"Considering that upon a *capias* issued at the instance of Percival B. Winning and William G. Hill against Patrick Downey for the sum of $1054, the respondents, on or about the 11th of September, 1874, became bail to the sheriff for the said Patrick Downey that he would give special bail to the action, and that in default thereof they would pay the debt, interest and costs, for which the arrest was made;

"And considering that the said Patrick Downey has not fulfilled the conditions of the said bail bond by giving special bail to the action;

"And considering that by judgment of the 22nd of October, 1874, the said *capias* was declared valid and the said Patrick Downey condemned to pay to the said Percival B. Winning and William G. Hill the sum of $843.47, with interest, etc., and costs of suit, which costs have since been taxed at $101.95;

"And considering that although the said Patrick Downey has since appealed from the said judgment, he has for the purpose of his said appeal given a written consent that the said judgment should be executed notwithstanding the said appeal, and has given security for the costs to be incurred in appeal only;

"And considering that the effect of such consent is that the execution of the said judgment is not suspended by the appeal, but remains in full force and effect as if no appeal had been instituted, and that pending the said appeal the amount thereof may be recovered as well from the said Patrick Downey as from the said respondents, his sureties;

"And considering that there is error, etc., judgment reversed, and respondents condemned to pay appellant $946.02, with interest, etc."

Judgment reversed.

Perkins, Walker & Major; and Doutre, Doutre, Robidoux, Hutchinson & Walker, for the appellant.

Dorion, Curran & Coyle, for the respondents.

(J.K.)

MONTREAL, 16TH MARCH, 1877.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 109.

MACDOUGALL ET AL., APPELLANTS;

AND

THE UNION NAVIGATION COMPANY, RESPONDENTS.

HELD:—1. That the Provincial Government has power to incorporate by letters patent a company for the purposes of navigation within the limits of the Province.

2.—That a *requête civile*, which does not on its face come within the provisions of Art. 505 of the Code of C. P., may be rejected on motion.

Semble:—That a purchaser, *subsequently* to incorporation, of shares subscribed *prior* to incorporation, and who has paid a call after his purchase, is estopped from contesting the validity of the original subscription.

This was an appeal from the following judgments of the Superior Court at Montreal, in an action by the respondent for calls on stock alleged to be owned and held by the appellants:—

Présent: L'Hon. Juge Johnson.

16 Octobre 1875.

"La Cour, etc.

"Considérant que la demanderesse a suffisamment établi les allégués de la "réponse en droit au deuxième plaidoyer des défendeurs:

"Maintient la dite réponse en droit au deuxième plaidoyer des défendeurs "et renvoie le dit deuxième plaidoyer des défendeurs avec dépens distraits à Mes-"sieurs Jetté, Béique & Choquet, Avocats de la demanderesse."

Present: Hon. Mr. Justice Johnson.

24 December, 1875.

"The Court, etc.,

"Considering that the defendants cannot by law have or maintain the con-"clusions of either of the two first pleas pleaded to the present action, doth dis-"miss both the said pleas with costs; and considering that the said defendants "are indebted to the plaintiffs in the sum of three thousand dollars for and by "reason of the matters and things alleged in the plaintiffs' declaration, and "namely, for the seventh, eighth and ninth instalments of ten per cent. each, now "accrued on two hundred shares in the stock of the said company, doth con-"demn the said defendants jointly and severally to pay and satisfy to plaintiffs "the said sum of three thousand dollars current money of this province, with in-"terest thereon from the tenth day of June, eighteen hundred and seventy-five, "until actual payment, and costs of suit, distraction whereof is granted to Mes-"sieurs Jetté, Béique & Choquet, attorneys for plaintiffs."

Présent: Hon. M. le Juge Mackay.

20 Janvier 1876.

"La Cour, après avoir entendu les parties par leurs conseils sur la motion "de la demanderesse du dix-sept Janvier courant, demandant pour les causes et "raisons énoncées en icelle, que la Requête intitulée *Requête Civile* produite par "les défendeurs en cette cause, le cinq de Janvier courant, soit renvoyée, consi-

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"dérée comme nulle et non avenue et rejetée du dossier, et que l'ordre donné "au bas de la dite requête, par l'Honorable Juge Johnson, accordant sursis de "l'exécution du jugement final rendu en la dite cause le vingt-quatre Décembre "dernier, soit révoqué, cassé et annulé à toutes fins que de droit, avoir examiné "le dossier et la procédure en la dite cause, et délibéré, accorde la dite motion, "renvoie et rejette la dite requête civile, et révoque le susdit ordre de sursis "d'exécution, le tout avec dépens distraits à Messieurs Jetté, Béique & Choquet, "avocats de la demanderesse."

TESSIER, J.:—Cette cause présente une position différente de celle de M. Couillard qui vient d'être décidée, (p. 71).

Les appelants ont été poursuivis par la Compagnie "*Union*" pour les 3, 4, 5 et 6me versements de 10 par cent sur 200 parts de $50 chaque. La demande alléguait les Lettres Patentes émanées le 6 août 1874, incorporant cette Compagnie, que les défendeurs appelants ont été et sont encore porteurs et possesseurs de 200 parts; qu'ils ont payé le 1er et le second versement; que l'appel des 3, 4, 5 et 6me versements a été fait suivant la loi, qu'ils sont dûs et échus, et conclusions à jugement contre les appelants pour $4,000, montant de ces 4 versements. A cette demande les défendeurs plaidèrent:

1o. Par une défense en fait.

2o. Par deux exceptions alléguant:

Du Jure: Que les Lettres Patentes d'incorporation étaient *ultra vires* du Gouvernement de Québec.

La 2me: Que les formalités n'ayant pas été suivies pour l'obtention de ces Lettres Patentes, elles sont illégales et nulles.

A cette deuxième exception l'intimé a répondu en droit et conclu au renvoi de cette exception, parce que tout en alléguant les informalités des Lettres Patentes les défendeurs ne concluaient pas à les faire déclarer nulles.

Par les articles 1021 et 1035 on trouve le moyen de faire annuller des Lettres Patentes illégalement émanées.

Statut de 1868, Québec, 31 Vict., ch. 25, sec. 51, "Dans toute action ou "autre procédure légale, il ne sera pas nécessaire de déclarer le mode d'incorpo- "ration de la compagnie, autrement qu'en en faisant mention sous son nom "d'incorporation, telle qu'incorporée par Lettres Patentes..... "et l'avis dans la *Gazette Officielle de Québec*, de leur émission, sera une preuve "*primâ facie* de toutes les choses y-énoncées; et sur production des lettres "patentes supplémentaires elles-mêmes, ou de tout double ou copie d'icelles, sous "le grand sceau, *le fait de tel avis sera présumé*; et excepté seulement dans toute "procédure, par *scire facias* ou autrement pour en attaquer la validité, les lettres "patentes supplémentaires elles-mêmes ou tout double ou copie d'icelles sous le "grand sceau, *seront une preuve concluante de toutes les matières et choses y "énoncées*."

La Cour Supérieure par son jugement du 16 [illegible]bre 1875 a maintenu cette réponse en droit et renvoyé cette exception.

Quant à la 1ere exception les parties ont lié contestation et fait preuve.

Il n'a été entendu qu'un seul témoin M. Lefebvre, Secrétaire Trésorier de la Compagnie "Union," qui dit que les défendeurs sont actionnaires pour 200

parts, qu'ils ont acheté ces parts de personnes qui avaient payé le 1er versement, et qu'eux-mêmes ont payé le deuxième versement sur ces actions.

Le même témoin produit aussi un certificat conforme à la 28me section de l'acte 31 Vict. chap. 25 à l'effet que les versements demandés ont été duement payés, savoir, à la Compagnie demanderesse par les défendeurs appelants en cette cause.

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Sur cela il est intervenu le 21 décembre 1875 un jugement condamnant les défendeurs à payer ces versements avec intérêt et dépens.

La Cour Inférieure a considéré que ces Lettres Patentes n'étaient pas illégales, que le Gouvernement de Québec avait le pouvoir de les émaner pour une compagnie dont les opérations étaient limitées à la Province de Québec.

Le gouvernement de la Province de Québec avait seul le pouvoir d'accorder des Lettres Patentes pour l'incorporation de la Compagnie Intimée.

La section 92 de l'acte de l'Amérique Britannique du nord, 1867, dit :

"Dans chaque province la législature pourra exclusivement faire des lois "relatives aux matières tombant dans les catégories de sujets ci-dessous énumé-"rés, savoir :

"10o. Les travaux et entreprises d'une nature locale, *autres que ceux "énumérés dans les catégories suivantes :*

"(a) Lignes de bateaux à vapeur ou autres bâtiments, chemins de fer, "canaux, télégraphes et autres travaux et entreprises reliant la province à une "autre ou à d'autres provinces, *ou s'étendant au delà des limites de la province.*"

En 1868, la Législature de la Province de Québec a passé un acte (31 Viot. ch. 25) pour régler l'incorporation des compagnies à fonds social et a donné pouvoir à l'exécutif d'autoriser par Lettres Patentes, la formation et incorporation de telles compagnies pour les objets énumérés au dit acte, et entre autres pour :

"Sec. 1 § 9.—La poursuite de toute affaire du ressort du commerce d'ex-"pédition, et la construction, la possession, l'affrêtement ou la location de "navires, bateaux à vapeur, quais, chemins ou autres choses nécessaires aux "fins de ce commerce d'expédition."

Or les Lettres Patentes octroyées à la Compagnie Intimée en cette cause, l'ont été en vertu des pouvoirs conférés, par ce statut, à l'Exécutif Provincial. L'objet pour lequel cette compagnie est incorporée, est énoncé dans les termes mêmes de la clause du Statut qui vient d'être citée, avec le simple ajouté de ces mots : "*dans notre dite Province.*"

Cette Cour est du même avis et sur ce point concourt dans le jugement de la Cour Inférieure qui a maintenu la réponse en droit et qui en dernier lieu a condamné les appelants ; mais les appelants invoquent d'autres moyens d'appel.

Quelques jours après le jugement final, savoir le 5 janvier, 1876, les appelants, sans en donner avis présentèrent en Chambre une requête civile et obtinrent d'un juge un ordre de sursis du jugement final.

Deux jours plus tard cette requête fut signifiée aux Intimés.

Cette requête civile allègue que ces 200 parts des appelants avaient appartenu à des anciens actionnaires qui avaient payé le 1er versement, que depuis le jugement final rendu contre eux ils s'étaient aperçus que leurs cédants n'étaient pas de véritables actionnaires dans la Compagnie incorporée, quoiqu'ils eussent

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payé le 1er versement, et que c'est dans l'ignorance de ces faits que le 23 Septembre 1874 ils ont acquis ces parts et ont payé le deuxième versement, concluant à ce que le jugement final du 24 décembre 1874 fut revoqué et les parties remises au même état qu'elles étaient auparavant.

La demanderesse fit motion de son côté que cette requête civile fut rejetée pour divers moyens de forme et de fond, et le 20 janvier 1876 la Cour Supérieure accorda cette motion et rejeta la requête civile avec dépens.

C'est aussi de ce jugement qu'il a été interjeté appel. Sans égard aux moyens de forme, y a-t-il lieu en ce cas à requête civile sur les moyens de fond?

L'article 505 du Code de Procédure civile mentionne trois cas donnant lieu à requête civile:

1o. Dol personnel de la partie adverse.

2o. Jugement rendu sur pièces reconnues fausses depuis le jugement.

3o. Pièces découvertes depuis le jugement, *célées* par la partie adverse. Il est nécessaire de remarquer que la Requête civile est un moyen extraordinaire, qui doit être restreint plutôt qu'étendu.

Dans la requête civile il est allégué que le 23 septembre, 1874, le transport des 200 parts a eu lieu en faveur des appelants dans le livre de transport de la *Compagnie* Intimé.

Les appelants allèguent qu'ils ont appris par le jugement rendu en la cause Couillard que le certificat du Secrétaire de la Compagnie était faux.

L'incorporation par Lettres Patentes de cette Compagnie dès le 6 aout 1874 a été précédée de notice publique; les appelants allèguent eux mêmes le transport des actions en leur faveur le 23 septembre, 1874 dans les livres de la Compagnie demanderesse, qui est la Compagnie incorporé. Il n'y a donc pas eu dol ni recel, ni découverte de pièces fausses et les appelants ne tombent pas dans aucun des cas pourvus dans le Code.

Quant au renvoi de cette requête sur une simple motion, le Code n'a pas de disposition prohibitive de ce mode dans le cas de requête civile qui requiert célérité, et la Cour actuelle ne croit pas dans l'intérêt de la justice et des parties intéressées de renverser le jugement sur ce point, mais s'en tenant au mérite des prétentions des parties, cette Cour confirme le jugement rendu en cette cause avec dépens.

Judgment of Superior Court confirmed.

D. Girouard, for appellants.

Jetté, Béique & Choquet, for respondent.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND MARCH, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 153.

JOBIN,

APPELLANT;

AND

SHUTER ET VIR,

RESPONDENTS.

HELD:—In the case of a donation of an immoveable, creating a substitution, followed by another donation of the same property, by the same donor to the same donee, without mention of any substitution, but without any express revocation of the former donation, that the *adjudicataire* of such immoveable at sheriff's sale is justified in claiming to be relieved from the sale, on the ground of fear of trouble in his possession, and that he is entitled to claim to be so relieved in an answer to a rule against him for *folle enchère*.

This was an appeal from a judgment of the Superior Court, at Montreal (BERTHELOT, J.,) rendered on the 28th day of January, 1875, under the following circumstances:

On the 23rd June, 1873, Helen Shuter, one of the respondents, obtained judgment for $2,981.48 against the other respondent, Louis Barré, and other defendants; and upon a writ of *Venditioni Exponas de Terris*, issued on the 20th June 1874, Lot, No. 1163 of the St. Ann's Ward of Montreal, with buildings, seized as belonging to Louis Barré, was adjudged and sold to the appellant.

This property had been given to Louis Barré by his father, Nicolas Barré, by deed of gift of the 6th April, 1857, J. E. O. Labadie, N.P., duly registered, on the 9th March, 1859; but it was charged with a substitution in favor of the donee's children born and to be born.

When the appellant purchased he was not aware of the existence of this substitution; he discovered it shortly afterwards, and then refused to pay the purchase money and complete the sale.

The plaintiff on the 17th October, 1874, presented a petition for a resale.

The appellant contested this petition, alleging the substitution above mentioned, and pleading that the sheriff's sale did not discharge the property from it; that he was exposed and liable to eviction by reason of it, and that he had consequently the right to demand the vacating of the adjudication, and was entitled to set up such right in answer to, and bar of the plaintiff's application for a resale for false bidding; and he prayed that the adjudication and sale made to him should be declared null and void and be vacated, and that he should be discharged from all liability by reason of his purchase, and the plaintiff's petition rejected.

The plaintiff answered that the deed of donation invoked by the appellant had been superseded by another deed of the 19th July, 1867, Ls. Bédard, N.P., by which the substitution was revoked by implication, and the property in question was given to the defendant Louis Barré in full property; and that, more-

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over, it appeared by the first deed of gift that the property in question had belonged to the community of property between the donor and his late wife, and that her half was not subject to the sub[illegible] that the sale as to such half was consequently good and valid.

The following was the judgment rendered by the Superior Court:—

La Cour après avoir entendu les demandeurs et l'adjudicataire par leurs avocats, au mérite, sur la requête pour vente, à la folle-enchère du dit adjudicataire André D. Jobin, de l'immeuble à lui adjugé en cette cause, le quatorze juillet dernier, par le shérif de ce district, et sur la contestation [illegible] produite en cette cause, le dix-sept octobre dernier, par la réponse écrite du dit adjudicataire, a renvoyé la dite réponse comme étant mal fondée en droit, et sans preuves et ordonne qu'il soit procédé en la manière ordinaire et suivant la loi à la vente du dit immeuble désigné comme suit:—Et ce aux frais et risques du dit adjudicataire, à moins qu'il ne paie le montant de la dite première adjudication, avec tous frais encourus par suite de la vente à sa folle-enchère, et sur le présent jugement.

DORION, C. J.:—The appellant became *adjudicataire* of lot No. 1163, St. Ann's Ward, City of Montreal, sold on Louis Barré at the suit of the respondents. In default of payment a rule for *folle enchère* was taken, to which appellant answered that, by a deed of 6th April, 1857, this property was given to Louis Barré, subject to a substitution in favour of his children, and that no valid title could be conferred on him. The respondents answered that by a subsequent donation of the 19th July, 1867, the donor, Nicholas Barré, had given this same property to his son Louis Barré absolutely, and that thereby he had revoked the substitution contained in the former act of donation.

There is no mention of the first donation in the second deed and, therefore, no express revocation. But, without determining whether the substitution in the first donation could be so revoked, it is sufficient to say, that the appellant is entitled to an unobjectionable title deed. In the present case, it is clear that the appellant is exposed to be troubled by the children of Louis Barré for the substitution created in their favor by Nicholas Barré, and whether this substitution is valid or not is immaterial. The *adjudicataire* is not bound to assume the risk of a law suit. He can refuse to pay the price of his purchase, by showing that there is probable ground that he will be troubled. Code Civil, Art. 1535; Code of Civil Procedure, Art. 714 and 717; Ancien Denisart, Vo. Vente, No. 17. "Si un bien grevé de substitution est vendu comme libre, l'acquéreur qui se trouve trompé, peut réclamer contre la vente, vainement lui répondrait-on, que la substitution qu'on lui a cachée n'a rien d'effrayant, qu'elle est [illegible], ou qu'il y a des dettes à payer, et que l'aliénation est utile aux appelés à la substitution, parce que l'acquéreur peut répondre avec succès, qu'il n'a pas entendu s'engager dans de pareilles discussions, et qu'il n'aurait pas traité s'il en avait été instruit, etc.

No. 18.—La jurisprudence des arrêts est conforme à ce principe, etc."

1 Duvergier, No. 425.

1 Troplong, Vo. Vente, No. 610.

12 Dallos, Vo. Vente, p. 938, No. 6.

The judgment must, therefore, be reversed and the rule for *folle enchère* discharged with costs.

The following was the judgment in appeal:—

La Cour * * * considérant que par acte de donation du 6 avril 1857 reçu devant Labadie, notaire, Nicolas Barré a donné à son fils, Louis Barré, à charge de substitution en faveur des enfants de ce dernier, les immeubles adjugés à l'appelant en cette cause et qui sont mentionnés dans la règle pour folle-enchère signifiée au dit appelant, et que cet acte de donation a été accepté par le donataire Louis Barré et duement enrégistré le 9 mars 1859.

Et considérant que par un autre acte de donation, du 19 juillet 1867, le dit Nicolas Barré aurait donné les mêmes immeubles au dit Louis Barré sans aucune charge de substitution, mais sans révoquer expressément la substitution créée par l'acte du 6 avril 1857.

Et considérant que l'appelant, pour être autorisé à se refuser de payer le prix de son adjudication des dits immeubles et à en demander la nullité, n'était pas obligé de prouver qu'il était exposé à une éviction certaine, mais seulement à un trouble éminent, ce qu'il a établi par la production de l'acte de donation du 6 Avril 1857 contenant une substitution duement enrégistrée.

Et considérant qu'il y a erreur dans le Jugement de la Cour Supérieure siégeant à Montréal, et prononcé le vingt-huitième jour de janvier mil huit cent soixante-quinze, qui a renvoyé la demande du dit appelant par laquelle il concluait à être déchargé de son adjudication.

La Cour sans adjuger sur l'effet que peut avoir le second acte de donation du 19 juillet 1867 sur la substitution créée par le dit acte du 6 Avril 1857, mais déclarant que l'appelant a, aux termes de l'article 1535 un juste sujet de craindre d'être troublé pour un prétendu droit de substitution non-purgé par le décret des dits immeubles, casse et annulle le dit jugement du 28 janvier 1875.

Et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, adjuge et déclare la dite adjudication faite à l'appelant des dits immeubles le 14 juillet 1874, nulle et de nul effet, et décharge le dit appelant du paiement du prix de sa dite adjudication et renvoie la règle pour folle-enchère prise contre le dit appelant.

Et la Cour condamne l'Intimée Helen Shuter à payer à l'appelant les dépens tant ceux encourus sur la dite règle en Cour Inférieure que sur le présent appel."

Judgment of Superior Court reversed.

Judah & Wurtele, for appellant.

A. & W. Robertson, for respondent.

(S.B.)

MONTREAL, 22ND MARCH, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 159.

LEVESQUE,

AND

APPELLANT;

McCREADY,

RESPONDENT;

HELD:—*In an action for encroachment on a lot of land, by building beyond the line of division between it and the adjoining lot, that where the encroachment is clearly proved, judgment may be rendered accordingly, without the necessity of a legal bornage.*

DORION, C. J.:—The parties were neighboring proprietors in Bonaventure street. Levesque bought in 1849, and the defendant in 1856. The question was whether the latter, in putting up a wooden building in 1871, had encroached upon Levesque's ground. The Court here found by the evidence that he had encroached eight inches in the rear of the lot. The Court below, notwithstanding this evidence, said the action must be dismissed, and the parties directed to have a *bornage*. It would be cruel to send the parties back to establish a boundary which was shown as clearly as possible by the old fence. The encroachment was proved beyond doubt. The Court would order, therefore, that the building should be removed back to the proper line.

The following was the judgment of the court:—

"La Cour * * * considérant que l'appelant a prouvé les principaux allégués de sa déclaration et notamment qu'il est et qu'il était lorsque les voies de faits ci-après mentionnées ont été commises et lorsque cette action a été portée, propriétaire et en possession d'un immeuble désigné comme suit en sa déclaration savoir: * * * et que feu Thomas McCready représenté par les Intimés par reprise d'instance était aux mêmes époques propriétaire et en possession d'un immeuble joignant le terrain du dit appelant dont il formait la ligne sud-ouest et désigné comme suit en la dite déclaration en cette cause, savoir: * * * considérant que l'appelant a, de plus, établi que le dit feu Thomas McCready en plaçant la maison en bois ayant front sur la dite rue Bonaventure qu'il a transporté dans la ligne sud-ouest du terrain de l'appelant, et en construisant les bâtisses en bois recouvertes en briques qu'il a érigées en arrière de la dite maison dans la dite ligne sud-ouest du terrain de l'appelant, a empiété sur le dit terrain de l'appelant, ainsi qu'il appert au rapport et plan annexé, faits par H. M. Perrault, arpenteur et produit en cette cause le 25 juin 1873, d'une largeur de huit pouces au point "E" dans la profondeur du terrain de l'appelant, se réduisant à une largeur de six pouces au point "D" formant le coin nord-est de la dite maison en bois du dit feu Thomas McCready, et diminuant graduellement jusqu'au point "B" sur la rue Bonaventure qui forme la limite des deux héritages au coin sud-est de la dite maison en bois du dit feu Thomas McCready.

Et considérant qu'il n'était pas nécessaire d'ordonner un bornage des dits héritages comme l'a fait la Cour Supérieure pour déterminer les droits des parties, et, que, partant, il y a erreur dans le jugement rendu par la dite Cour Supérieure siégeant à Montreal, le 30 septembre 1873, qui a débouté l'action de l'appelant.

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Cette cour casse et annulle le dit jugement du 30 septembre, 1873, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, cette cour déclare et adjuge que le dit feu Thomas McCready a empiété sur le terrain du dit appelant, désigné ci-dessus, et qu'il s'est emparé d'une lisière du dit terrain de huit pouces de largeur, dans la profondeur du dit terrain, entre les points désignés par les lettres "E" et "J" au plan du dit H. M. Perrault et se réduisant à six pouces entre les points "D" et "F," et se terminant au point "B" formant le coin sud-est de la dite maison en bois du dit feu Thomas McCready sur la rue Bonaventure, et déclare le dit appelant propriétaire de la dite lisière de terre ci-dessus décrite, et enjoint et ordonne au dits Intimés par reprise d'instance représentant le dit feu Thomas McCready de rendre et remettre la dite lisière de terre au dit appelant, et d'enlever la partie de la dite maison en bois sus-mentionnée, et des dites bâtisses en bois recouvertes en briques qui se trouvent sur la dite lisière de terre, c'est-à-dire toute cette partie des dites bâtisses et de la dite maison en bois qui se trouve à l'est d'une ligne droite tirée du point "J" au point "F", et d'une autre ligne tirée du point "F" au point "B" indiquées sur le dit plan du dit H. M. Perrault, et d'enlever sous quatre mois à compter de la signification du présent jugement la partie des dites bâtisses et maison construites sur la dite lisière de terre appartenant au dit appelant, et à défaut par les dits Intimés par reprise d'instance de faire enlever la partie des dites bâtisses et maison construites sur la dite lisière de terre dans le dit délai de quatre mois, sera permis au dit appelant de les faire enlever sous l'autorité de la dite Cour Supérieure et ce aux frais et dépens des dits Intimés par reprise d'instance, et cette cour condamne en outre les dits Intimés par reprise d'instance à payer au dit appelant une somme de $20 de dommages et les dépens encourus tant en Cour Supérieure que sur le présent appel.

Judgment of S. C. reversed.

Loranger & Co., for appellant.
Lacoste & Co., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 16TH MARCH, 1877.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 97.

THE UNION NAVIGATION COMPANY, APPELLANT;

AND

COUILLARD, RESPONDENT.

HELD:—That a subscriber to a company *to be* incorporated under letters patent, but who never subscribed *after* the incorporation, nor paid calls after such incorporation, is not liable to be sued for calls on the stock thus subscribed for.

This was an appeal from a judgment rendered by the Superior Court at Montreal, MACKAY, J., on the 14th of December, 1875, in an action by the appellant for calls alleged to be due on stock subscribed for by respondent.

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This judgment was worded as follows :—

"The Court, &c., considering that upon the facts proved, the defendant cannot be held liable towards plaintiffs' company as charged; considering that the letters patent referred to were gotten in good faith by the petitioners for them acting, as they thought, for defendant and others; that nevertheless, seeing how they were gotten and upon what named subscriptions, and with what provisoes, particularly as to the qualification of the directors, the defendant, in strictness, need not be bound by them or by his subscription to the stock of the company, now represented by plaintiffs; considering that defendant has failed to prove the fraud charged by him against plaintiffs, or plaintiffs' directors, in and about the obtention of the letters patent referred to, and has failed to prove that the said letters patent were *ultra vires* of the Quebec Government, he, the defendant, may be held free from plaintiffs' demand in the absence of proof of his having approved the said letters patent upon or after actual knowledge of them, and of their particulars; that though the defendant is proved to have promised to pay, this may be held.

"Action dismissed, costs compensés seeing defendant's promise to pay, and failure upon some issues."

TESSIER J. :—Dans le cours de l'été 1874 il se fit à Montréal un projet d'organiser une compagnie dans le but d'établir une ligne de bateaux à vapeur entre Québec et Montréal.

Et le 16 juin 1874 il y eut une assemblée de personnes à laquelle il fut résolu "que les mesures nécessaires soient prises pour obtenir des Lettres Patentes incorporant la Compagnie."

"Le 18 juin 1874 (dit le témoin Lefebvre) le dit Auguste Couillard, défendeur, a souscrit deux actions de $50 chacune. Cette souscription était sur une des feuilles avec l'entête au-dessus comme suit :

"COMPAGNIE DE NAVIGATION "UNION"

"Nous soussignés, *désirant former une société* de navigation sous le nom de société "Union," voyageant entre Montréal et Québec et les ports intermédiaires, souscrivons dans cette Compagnie le nombre de parts mentionnées vis-à-vis de nos noms respectifs, et nous déclarons nous soumettre *aux Règlements* qui seront faits par les directeurs."

Le 4 juillet 1874 il est publié dans la Gazette officielle de Québec un avis daté le 30 juin 1874, à l'effet qu'une demande d'incorporation serait faite le 1 août suivant au Gouvernement de Québec. Cet avis était signé par le notaire Desrosiers pour les requérants; le défendeur Aug. Couillard n'était pas parmi ces requérants.

En vertu de l'acte 31 Vict: ch. 25, de la Législature de Québec, ces requérants ont obtenu des Lettres Patentes d'incorporation et ont établi une ligne de bateaux à vapeur. Le défendeur n'ayant pas payé sa souscription, il a été poursuivi par la Compagnie, l'action a été renvoyée, de là le présent appel.

Le défendeur a plaidé, 1o.: par défense en fait et par exception qu'il n'avait jamais souscrit à la Compagnie telle qu'incorporée.

2o. Que les Lettres Patentes sont *ultra vires* du gouvernement local de Québec.

3o. Que ces Lettres ont été obtenues frauduleusement et sans les formalités nécessaires.

Les deux derniers points ont été mis de côté par la Cour Inférieure, mais le 1er chef d'exception a été maintenu, et si la Cour d'Appel est de même avis le jugement doit être confirmé.

Il est en preuve que pour éviter la mention de 3 ou 400 souscripteurs, il a été fait un autre livre spécial de souscriptions signé par les directeurs provisoires et quelques autres personnes, mais non par le défendeur Couillard, et c'est sur ce livre de souscription que les Lettres Patentes ont été obtenues incorporant les requérants au nombre fatal de 13, sans inclure l'Intimé.

Mr. Desrosiers, notaire, qui représentait les requérants explique pourquoi il a agi ainsi.

Question.—Voulez-vous nous dire, s'il vous plaît, pourquoi vous avez fait un livre particulier pour obtenir les lettres patentes, au lieu de vous servir du livre de stock de la Compagnie ?

Réponse—Parceque d'habitude, le gouvernement exige qu'on lui produise la "preuve que le montant mentionné dans la requête a été souscrit et que quand "il y a, comme dans la formation de la Compagnie de Navigation "Union," un "nombre très considérable de ces livres qui ont été souscrits d'un côté et d'autre, et qu'il est impossible au Notaire de certifier la signature d'un chacun, "les directeurs provisoires ou autres, agissant comme fidéi-commissaires et mandataires, souscrivent un montant proportionnel, font des avances de leurs propres deniers avec l'entente bien entendu, que l'excédant de leur souscription "sera retrocédé et remis aux actionnaires par eux-mêmes.

"Je savais naturellement que les directeurs qui avait payé la proportion sur "ce qu'ils avaient souscrit devant moi, devaient être remboursés au fur et à "mesure qu'ils retrocéderaient les parts aux autres actionnaires. Je ne sais pas "comment ces retrocessions ont été faites depuis l'organisation de la Compagnie."

Où est la preuve de ces retrocession ?

Il eut dû en avoir une, mais elle n'a pas eu lieu ; c'est ce qui empêche Couillard de se trouver lié à la Compagnie incorporée. Par ce livre spécial de souscription le montant des parts se trouvait au nom des requérants.

L'Intimé Couillard n'a payé aucune partie de sa souscription, il n'a fait aucun acte qui le lie envers la Compagnie depuis qu'elle est incorporée. Abbott's Digest, on corporation, *verbo souscription* ; No. 155 dit : "Until all the requirements of the Statute have been complied with and the articles of association "fyled, the subscription of any person to the articles is a mere proposition to take "the number of shares specified, of the capital stock of the corporation there- "after to be formed, which is revocable and not a binding promise to take and "pay."

Il ne reste donc que la prétendue reconnaissance de Couillard prouvée par M. Lefebvre, ce témoin s'est rendu trois fois chez l'Intimé Couillard. "La première "fois que je suis allé chez lui, le défendeur m'a dit qu'il ne paierait pas ; que "ce n'était pas juste, parce qu'il devait payer en marchandises. J'ai laissé "faire quelque temps, après quoi j'y suis retourné et lui ai dit que s'il ne payait "pas, il serait poursuivi. Là dessus il m'a dit de revenir à une certaine date

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"que j'ai oubliée et qu'alors il me paierait. J'y suis retourné à la date indi-
"quée et le défendeur m'a alors dit qu'il ne paierait pas."

Le témoin ajoute qu'il y avait alors 3 ou 4 commis de l'Intimé présent à la seconde conversation.

L'un de ces commis appelé en contre-preuve, *Wilfred Laurian*, dit en effet qu'il était présent et que M. Couillard, l'Intimé, a répondu "qu'il ne paierait "pas, que la Compagnie n'était pas incorporée suivant la loi."

Une reconnaissance négative de cette espèce ne peut justifier la condamnation de l'Intimé et la cour est unanimement d'opinion que le jugement de la Cour inférieure qui l'a absous est correct, et il est en conséquence confirmé avec dépens.

Judgment of Superior Court confirmed.

Jetté, Béique & Choquet, for appellant.

D. Girouard, for respondent.

(S.B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND MARCH, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 117.

CAVERHILL,

APPELLANT;

AND

ROBILLARD,

RESPONDENT.

HELD:—That the Court of Q. B. has discretionary power to allow an appeal to the Supreme Court, after the delay mentioned in the statute has expired.

DORION, CH. J.:—This was a motion for leave to appeal to the Supreme Court. The motion was made after the delays had expired. Judgment was rendered on the last day of term, and on that day a motion was made for leave to appeal to the Privy Council. Now the party wished to go to the Supreme Court instead. The delays were so short—only twenty days—for an appeal to the Supreme Court, that the Court did not think it was going beyond its discretion in now allowing the party to appeal to the Supreme Court instead of going to the Privy Council. The motion for leave to appeal would be granted, security to be given within thirty days.

Motion to appeal to Supreme Court allowed.

A. & W. Robertson, for appellant.

Charles Thibeault, for respondent.

(S.B.)

MONTREAL, 22ND DECEMBER, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 68.

ROBERT STANLEY,
(*Defendant in the Court below,*)
APPELLANT;

AND

JOHN HONLON,
(*Plaintiff in the Court below,*)
RESPONDENT.

HELD:—That non-signification of transfer of the claim sued on must be pleaded; and therefore where the defendant allowed judgment to be obtained *ex parte* it was held that he could not raise the question of non-signification in appeal.

The respondent sued the appellant for $256.75, the action being commenced by a *saisie-arrêt* before judgment. The appellant allowed judgment to be obtained *ex parte*, and then appealed, among other grounds, because there had been no signification of transfer of part of the debt sought to be recovered. On this point the appellant remarked in his factum:—

"The plaintiff established by evidence, that a claim of a certain amount was due to him, that amount is estimated at about from seventy or eighty dollars, but he has added to that amount a sum of $147.25, being the amount of a debt transferred to him by Louis Leer, laborer, of the Parish of St. Martin, in the District of Montreal. This would appear to be for stone sold and delivered in January, February and March at $4.75 a toise. The evidence proves $4.50 a toise, but this transfer is not proved, and is not proved ever to have been served or made known to the appellant, and under article 1571 of the Civil Code, the respondent had not *possession utile*, nor could he bring suit for that debt, seeing the absence of any signification of the transfer."

The respondent in his factum referred to this point as follows:—

"L'intimé ne peut imaginer quels sont les griefs que l'appelant dont articuler contre ce jugement. Si c'était du défaut de signification à l'appelant du transport de Cyr à l'intimé, on lui répondrait victorieusement qu'en tout état de cause la signification de la demande est une signification valable du transport ainsi que consacré par une jurisprudence séculaire, et que le défaut de signification doit être invoqué spécialement et qu'il ne saurait fournir un moyen au [illegible] dans une cause *ex parte*. A tout événement ce moyen ne pouvait atteindre qu'une partie de la demande."

The judgment was unanimously confirmed on all points, RAMSAY, J., remarking that the non-signification ought to have been pleaded; it was not a sufficient ground for reversing a judgment in an *ex parte* case.

Perkins, Walker & Major, for the appellant.
Loranger, Lunanger & Pelletier, for the respondent.
(J. K.)

Judgment confirmed.

MONTREAL, 22ND MARCH, 1876.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 91.

ANGUS MACKAY,

vs. PLAINTIFF;

THE ST. LAWRENCE SALMON FISHING CO., DEFENDANT.

HELD:—That an appeal to this Court does not lie from any judgment of the Superior Court under the Insolvent Act of 1875, which is not a final judgment.

DORION, C. J.:—This was a motion to appeal from an interlocutory judgment rendered by a Judge in Chambers in a bankruptcy matter. Mackay petitioned for a writ of attachment against the estate of the St. Lawrence Salmon Fishing Company, and the Judge made an interlocutory order, directing an assignee to inquire into the insolvency of the Company. From that judgment the Company wished to appeal, under section 128 of the Insolvent Act. The old Insolvent Act gave an appeal from final judgments only. The wording of the new Act was different. Section 128 says that "in the Province of Quebec all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court." If the section had stopped there, an appeal would, no doubt, lie from interlocutory judgments in insolvency, the same as in the Superior Court; but, after saying that decisions in insolvency shall be considered as judgments of the Superior Court, section 128 went on to say that there shall be appeal from final judgments. This evidently meant that the appeal was restricted to final judgments. It would no doubt be very mischievous to give an appeal from interlocutory judgments in such cases. The Court held that it was not the intention of the Legislature to change the law, and that in insolvency there was an appeal from final judgments only. The Court would remark, however, that the affidavit did not appear to justify the proceedings which had been taken. The motion for leave to appeal was rejected, but without costs, as there were some grounds for making the application.

MONK, J., dissented, finding it difficult to concur in the view of the law which had been stated by the Chief Justice. It seemed to him that there were interlocutory judgments in insolvency in which an appeal would lie, and ought to lie. It might be a very important matter for a man who was being put into insolvency that an interlocutory judgment which throws his business off the track should be revised by a superior Court. A man's business might be seriously affected by the urgency or malignity of one creditor without any remedy being open to him unless he could have the order revised.

Motion to appeal rejected.

D. McMaster, for plaintiff.

Trenholme & McLaren, for defendant.

(S.B.)

MONTREAL, 12TH APRIL, 1877.

Coram TORRANCE, J.

Angers, Attorney General pro Regina, vs. *The Queen Insurance Company.*

HELD:—That the Provincial Statute 39th Vic. ch. 7, intituled "An Act to compel assurers to take out a license," is unconstitutional.

The declaration of the plaintiff set out that by an Act of the Legislature of the Province of Quebec, assented to 24th December, 1875, 39 Victoria, chapter 7, every insurer doing business in the Province of Quebec was obliged to take a license, before the first day of May in each year, from the Revenue Officer of the district wherein was situate his principal place of business or head agency, and to remain continually under license. That the price of such license should consist in the payment to the Crown for the use of this Province, at the time of the issue or delivery of any policy of assurance except of maritime assurance, and at the time of the making or delivery of each premium receipt or renewal, respecting any policy issued before or after the coming into force of this Act, of a sum computed at the rate of three per cent. as to assurance against fire, or of one per cent. as to other assurances, for each hundred dollars or fraction of $100 of the amount received as premium or renewal of assurance by the assurer, his agent or employee. And such payments should be made by means of one or more adhesive stamps equivalent in value to the amount required to be affixed by the assurer, his agents, officers, or employees, on the policy of assurance, receipt or renewal, as the case may be, at the time of the drawing up, issue, or delivery thereof. That every assurer bound to take out a license under said Act, for whom or in whose name any policy of assurance or any premium, receipt or renewal shall have been delivered, without the same having been stamped to the amount required, should be liable in each case to a penalty not exceeding $50.

The plaintiff charged the defendants with the infraction of this statute by the issue without stamps of three policies of insurance, and asked for a condemnation for the amount of the penalties $150.

The defendants by their plea admitted that they were liable for the penalties if the statute in question was constitutional and within the powers of the Province of Quebec, but they alleged that the 1st, 2nd, 3rd, 4th, 5th, 7th, 9th, 11th and 12th sections of the Act were unconstitutional and invalid, as being beyond the power and authority of the Legislature of Quebec; that by the Act of the Imperial Parliament of Great Britain and Ireland, known as the British North America Act of 1867, it was provided *inter alia*, that it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons of Canada, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the class of subjects by said Act assigned exclusively to the Legislatures of the Provinces. And for greater certainty, but not so as to restrict the generality of the said in part recited terms of the said section, it was thereby declared that notwithstanding anything in the said Act contained, the exclusively legislative authority of the Parliament of Canada should extend to all matters

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coming within the classes of subjects next thereinafter enumerated; that is to say, amongst other things: The regulation of trade and commerce. The raising of money by any mode or system of taxation. And it was thereby further declared that any matter coming within the class of subjects enumerated in the said section, to wit, amongst others, the classes of subjects hereinbefore mentioned, should not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by the said Act, assigned exclusively to the Legislatures of the said provinces. The defendants pleaded that by virtue of the said provisions of the said last mentioned Act and all other the provisions thereof therein contained to which express reference was thereby made, the said enactments of the said Act of the Legislature of the Province of Quebec purported to infringe upon and were in conflict with, and in opposition to the provisions of the said British North America Act, 1867, in this—

I. That the said provisions violate and infringe upon the exclusive jurisdiction of the Dominion of Canada in matters of trade and commerce.

II. That the duty, or tax which purports to be imposed upon Insurance Companies in and by the said provisions of the said Act constitutes a direct interference with and obstruction to the trade and commerce of the Dominion.

III. That the said Act of the said Legislature of the Province of Quebec purports to provide for the raising of money by a mode or system of taxation, to wit, by the levying of a tax upon insurance policies and insurance contracts by means of a stamp duty upon such policies and contracts.

IV. That the subject matter of the said Act of the said Legislature of Quebec falls within the classes of subjects enumerated in the British North America Act, 1867, as being assigned exclusively to the Parliament of Canada, and it does not fall within matters thereby assigned to the Legislatures of the Provinces comprising the said Dominion of Canada and specially of the Province of Quebec.

The defendants further allege that at all the times and periods mentioned in plaintiff's declaration, the defendants were the holders of the license and extension of the license issued under the Act of the Parliament of Canada 31 Viot., c. 48, and the Acts amending the same, authorizing them to transact the business of insurance in any part of the Dominion of Canada. And that the said Act of the Province of Quebec is therefore unconstitutional and invalid for the further reason that it interferes and conflicts with the privilege of carrying on the business of life and fire insurance within the Dominion of Canada which the defendants hold and possess and have a right to exercise under and by virtue of the said license and of the said extension thereof; and in fact conflicts and interferes with the effect and operation of the said several acts of the Parliament of Canada. That the said duty or tax so attempted to be imposed upon them by virtue of the provisions of the act of the said Legislature of the Province of Quebec does not constitute a direct tax within the meaning of the said British North America Act, 1867, and that the attempt to bring the said illegal duty and tax within the provisions of the said British America Act 1867, by requiring the insurance companies purporting to be affected thereby to take out a license, is illegal and ineffectual, inasmuch as the business carried on by the in-

surance companies is not among those for the licensing of which the Legislature of any Province is thereby authorized to legislate or make laws.

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PER CURIAM.—The facts of this case have been admitted, namely, the issue of three policies of insurance by the defendants in contravention of the provisions of the Provincial statute, the issue of a license by the Dominion Government to the defendants under the 31 Vic., c. 48, implying the deposit of $150,000 in securities of the Dominion. The naked question to decide is whether the Provincial statute 39 Vic., c. 7, is beyond the powers of the Provincial Legislature. It becomes every tribunal to realize the delicacy of the question. To use the language of Chief Justice Marshall in considering a similar question in the United States, "in the case now to be determined, the defendants contest the validity of an act which has been passed by the Legislature of the (State) Province. The Constitution of our country in its most interesting and vital parts, is to be considered; the conflicting powers of the Government of the Union and of its members, as marked in the constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance."

At the outset we may say that the license or stamp required by the Provincial Legislature from the insurance companies is an indirect tax. Smith in his Wealth of Nations, Book V., chapter II., Brande in his Encyclopedia of Science, *vo.* "Taxation," and other works referred to by counsel at the argument, show this, as well as the very nature of the tax. Let us turn next to the clauses of the Confederation Act. It is only necessary to consider the 91st and 92nd clauses. 91 says: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

* * * * * * * *

"2. The regulation of trade and commerce.

"3. The raising of money by any mode or system of taxation.

* * * * * * * *

"29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"Exclusive powers of Provincial Legislatures.—92. In each Province the

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Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,

* * * * * * * *

"2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

* * * * * * * *

"9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes."

The counsel for the Province have laid considerable stress upon this last clause, as authorizing the taxation in question. On the other hand, the defendants find an argument for their immunity in the exclusive powers given to the Dominion Legislature in matters of trade and commerce. Reference has been made to the decisions of the Supreme Court of the United States of America, arising out of the occasional conflicts there between Federal and State rights. It will be remembered that when the civil war began between North and South in 1861, there was much discussion as to the respective rights of the General and State Legislatures, and it was generally conceded that the constitution only gave to the Federal Legislature the powers which had been renounced by the States. This had been understood long before. De Tocqueville in his celebrated work on Democracy in America, chapter 8, says:—"The attributes of the Federal Government were carefully defined, and all that was not included among them was declared to remain to the Governments of the several States. Thus the Government of the States remained the rule, and that of the Confederation was the exception."

Now I think I am safe in saying that the spirit of our Constitution is quite different. Its framers had before them the melancholy warfare which had so long desolated so large a portion of this continent, and determined that there should be no question as to the supremacy of the General Government or the subordinate position of our Provinces. It was intended that the General Legislature should be strong, far stronger than the Federal Legislature of the United States in relation to the State Governments.

Accordingly we find in the clauses of our Constitution already recited that the Dominion Legislature makes laws in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but so as not to restrict the generality of the foregoing terms, it was declared that (notwithstanding anything in the Act), the exclusive legislative authority of Canada extends to all matters coming within the classes of subjects enumerated, *inter alia* "Trade and commerce." "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Reference has been made to the decisions of the Supreme Court of the United States on kindred subjects. "Congress is vested with power to regulate commerce; but this power is not so far exclusive as to prevent regulations by the States also, when they do not conflict with those established by Congress.

* * * * * * * *

Where Congress has not acted at all upon the subject, the State taxation cannot be invalid on this ground; but where national regulations exist, under which rights are established or privileges given, the State can impose no burdens which shall in effect make the enjoyment of those rights and privileges contingent upon the payment of tribute to the State."

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Cooley on Constitutional Limitations, p. 486.

"From the paramount authority of the General Government, the States are restrained, without any express prohibition, from any exercise of their taxing power, which, in its nature, is incompatible with or repugnant to, the constitutional laws of the Union. * * They have no power, by taxation or otherwise, to retard, impede, burden or in any manner to control the operations of constitutional laws enacted by Congress to carry into execution any of the powers vested in the Federal Government."

* * * * * *

Duer's Constitutional Jurisprudence, p. 384.

In McCulloch vs. Maryland, 4 Wheaton 316, Chief Justice Marshall said:—"That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the Government of the Union; that it is to be concurrently exercised by the two governments; are truths which have never been denied. But such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted.

* * * * * *

The same paramount character would seem to restrain * * * a State from such other exercise of this power as is in its nature incompatible with and repugnant to the constitutional laws of the Union—a law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used. * * The claim has been sustained on a principle which so entirely pervades the constitution * * * as to be incapable of being separated from it without rending it into shreds. This great principle is, that the constitution and the laws made in pursuance thereof are supreme * * * From this * * * other propositions are deduced. * * * These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve. 3. That where this repugnancy exists, that authority which is supreme, must control * * * that over which it is supreme."

I think we can make an application of these authorities to the case now under consideration. I think we would be safe in holding that under the constitution of the United States, if the Federal Congress had legislated respecting insurance companies as the Dominion Legislature has done respecting them under 31 Victoria, C. 48, the State would not be allowed to impose another tax. But the Dominion Legislature has greater powers in that it has exclusive control [illegible] trade and commerce.

I do not see that the words of the Confederation Act, s. 92, ss. 9.: "Shop, saloon, tavern, auctioneer, and other licenses," remove the difficulty in the way

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of plaintiff's demand. The clause does not touch upon insurances. We are therefore justified in concluding that the act of the Province of Quebec, 39 Vic., c. 7, has infringed upon the exclusive powers of the Dominion Legislature, and therefore that its enactments should be disregarded in this matter. Judgment for defendants.

Action dismissed.

Edward Carter, Q. C., & Alex. Lacoste, Q. C., for plaintiff.

Hon. J. J. C. Abbott, Q. C., Wm. H. Kerr, Q. C., & Joseph Doutre, Q. C., for defendant.

(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 20TH MARCH, 1877.

Coram DORION, J.

No. 700.

The Molsons Bank vs. *Seymour* et al.

HELD:—(Following The Bank of British North America *vs.* Torrance et al., 17 L. C. Jur. p. 185), that where a bank discounts the draft of A on B, for the purpose of retiring B's acceptance on the faith of a telegram from B to A to draw on B, for the purpose aforesaid, the bank may recover the amount of such draft on B, although he subsequently refuse to accept the same.

PER CURIAM:—This is an action b[illegible] by the plaintiffs against the drawer and the acceptor of a bill of exchan[illegible] was not protested at maturity, under the following circumstances:

This bill of exchange was drawn in T[illegible] by two of the defendants, carrying on business there under the firm of Wm. H. Dunspaugh & Co., upon C. E. Seymour, the other defendant, accepted by him and became due at the Bank of Commerce in Montreal, on the 19th of August, 1875. Before it became due Mr. Seymour wrote a letter to Messrs. Dunspaugh & Co., asking them to recall the said bill of exchange as he was unable to pay the same. The answer to this letter was a telegram from these gentlemen, dated 19th August, in the following terms: "*Too late to recall draft, draw on us.*"

The defendant Seymour then drew another bill upon Dunspaugh & Co. for the same amount as the former one, got it discounted by the plaintiffs on the strength of the said telegram, which was considered by them as an undertaking on the part of Dunspaugh & Co. to accept Seymour's draft to retire the one due on that day and for which they were responsible. Seymour did in fact retire Dunspaugh & Co.'s draft, and handed it over to the plaintiffs, who now hold the same.

When the second bill of exchange was presented to Dunspaugh & Co., they refused to accept it, and it was protested for non-acceptance. Seymour has since failed, and Dunspaugh & Co. repudiate any liability in the matter. A good deal of discussion and a great number of authorities were cited at the argument upon the form and effect of a promise to accept a bill of exchange, but I do not consider that these questions arise in this case. The action is not upon either the one or the other bill of exchange. It is a special action by which the

plaintiffs say that the defendants, Dunspaugh & Co., induced them into error by their telegram; that relying upon their demand made to Seymour to draw on them in order to prevent their own draft from being dishonored, the plaintiffs did consent to advance the money to Seymour for that purpose upon his d[illegible] that Seymour paid the said bill of exchange, and that by such payment [illegible] Dunspaugh & Co. have profited and benefited of so much, and that t[illegible] sequent refusal to accept Seymour's draft after they had the benefit t[illegible] tantamount to a fraud, and they are bound to indemnify the said plaintiffs a[illegible] them the amount they so advanced upon their representation. The position by the plaintiffs appears to me to be a sound one. It is in harmony with the letter and spirit of our laws. "No one can enrich himself at the expense of another." What was the meaning of defendants' telegram if not that they would make good the advances to be made to retire their draft? No man of business could interpret it otherwise. If so, they are in no worse position than they would be had their draft been protested. Had Seymour failed a little later it is probable that this difficulty would not have arisen. I consider the case of Torrance & The Bank of British North America (17 L. C. Jurist, p. 185) quite applicable to this case. And acting upon the same principle I think the plaintiffs in this cause must have judgment for the amount claimed.

Abbott & Co., for plaintiff.
Kerr & Co., for defendants.
(S.B.)

Judgment for plaintiff.

SUPERIOR COURT, 1876.

MONTREAL, 29TH FEBRUARY, 1876.

Coram MACKAY, J.

No. 609.

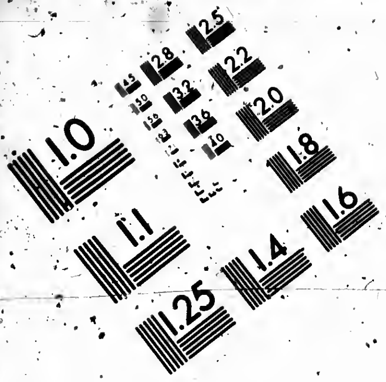
Morin vs. *Henderson*.

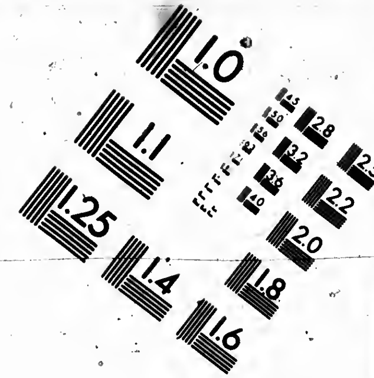
HELD:—1st, That, notwithstanding an assignment made by the defendant under the Insolvent Act, the defendant may still continue to act in the case in his own name.
2nd. That the death of one of the plaintiff's attorneys does not invalidate proceedings had in the case as if both were still such attorneys; the plaintiffs being in such case really represented by the surviving attorney.

PER CURIAM:—This is a *requête civile*, praying to set aside the judgment rendered in the case which dismissed the plaintiff's action, on two grounds, namely because, long prior to the date of the judgment, the defendant had made an assignment under the Insolvent Act, and because J. P. Kelly, Esq., one of the plaintiff's attorneys of record, had died, and the defendant had proceeded in the case as if he were still alive.

As to the first objection, I would merely remark that the assignment did not deprive the defendant of his right to continue the proceedings in his own name. He might have been called on to give security for costs, but that is all.

As to the second objection, I would say that our jurisprudence has always been that, where one of two or more attorneys dies, the party for whom they act is held to be represented, to all intents, by the surviving attorney or attorneys.





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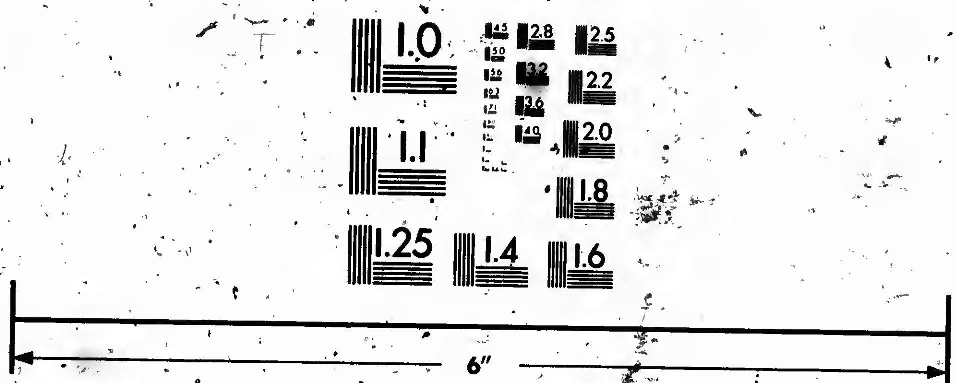

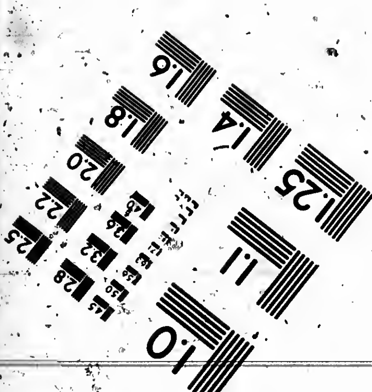

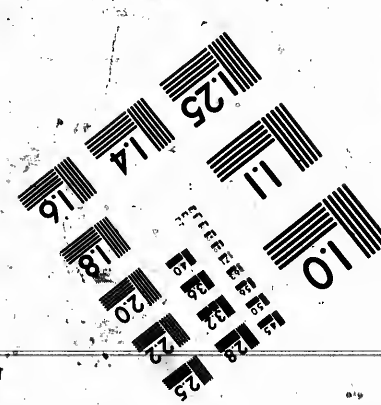

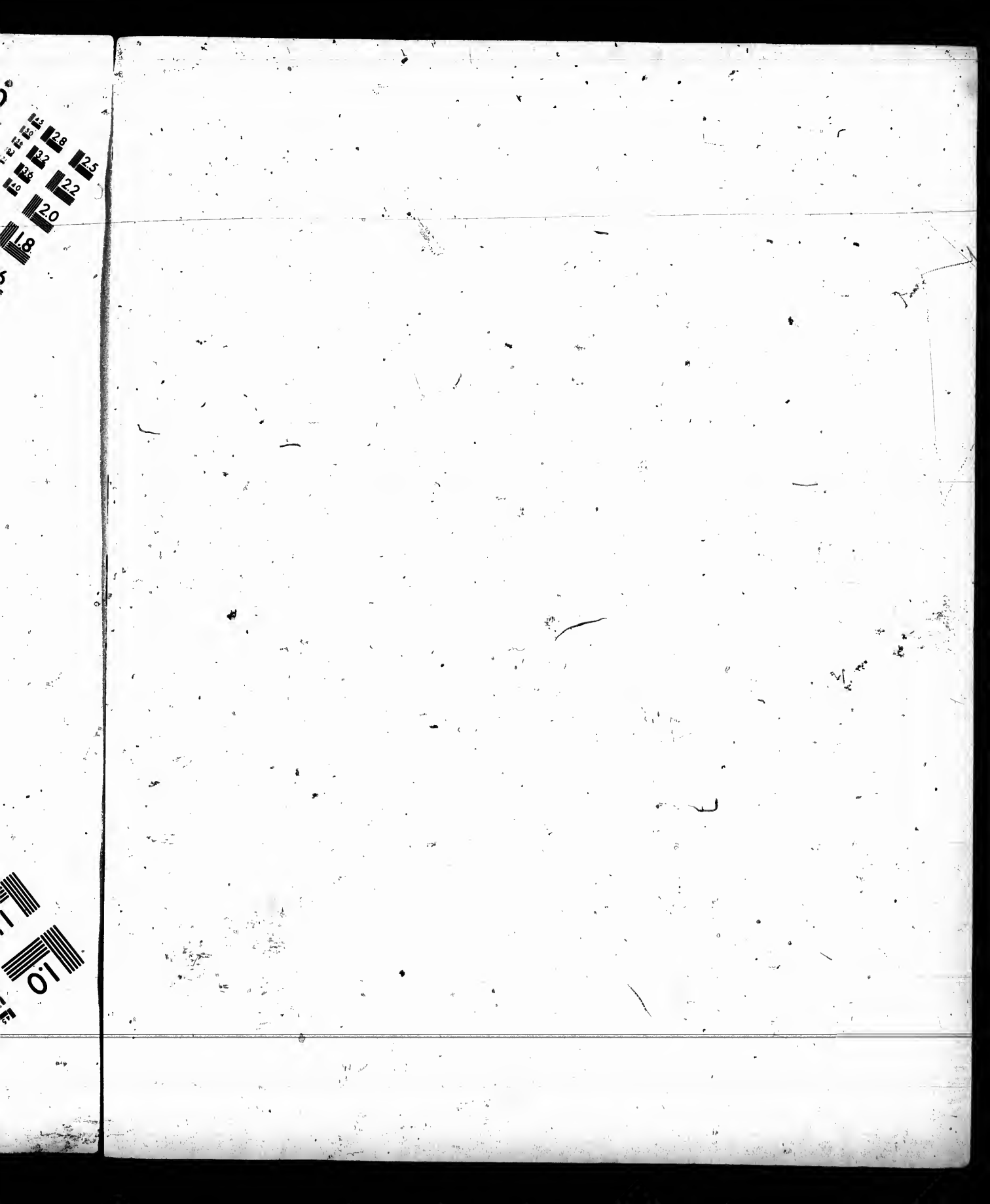

Morin vs. Henderson.

All notices, therefore, served on Kelly & Dorion were good services on Mr. Dorion, who was, under the circumstances, the plaintiff's legal representative in the cause. McCarthy & Hart, 9 L. C. R., p. 194, is directly in point. The petition must, therefore, be rejected.

Requête Civile rejected.

Doutre & Co., for plaintiff.
A. & W. Robertson, for defendant.
(S.B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND MARCH, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 85.

MALLETTE,

APPELLANT;

AND

LENOIR,

RESPONDENT.

HELD:—That a security bond which has been duly signed by the Prothonotary and stamped cannot be set aside by this Court, on the ground that the bond was executed by error and surprise.

DORION, CH. J. There was first a petition to reject an appeal bond given for an appeal to this Court. It appeared that when the security was tendered, the attorneys for the respondent submitted certain interrogatories to the sureties touching their solvency, and while the interrogatories were going on, the Prothonotary, according to his statement of the facts, by mistake signed the bond without getting the sureties to justify. The Court had now an appeal bond before it, which was perfectly regular: But the application to reject the bond was based on this: that the Prothonotary was surprised, and signed before the sureties justified. The Court could not set aside an authentic document on affidavit. The petition which had been presented to set aside the security bond would, therefore, be rejected. No injury could be caused to the respondent, as the sureties had since justified, and it was only a question of costs. There was also a motion made to reject this petition, first, because the attorneys who made it did not fyle an appearance. The Court must reject this ground; a party who fyled a petition appeared by his petition. The second ground was, that the petition was not supported by affidavit or authentic documents. This was not a good ground. The motion would be dismissed with costs. The motion to be allowed to appear would be granted with costs. The point was somewhat the same as in Dallimore & Brooke.

Petition, etc., rejected.

Doutre & Co., for appellant.
Trudel & Co., for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 21st MARCH, 1877.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

THE MAYOR, &c., OF MONTREAL,

APPELLANTS;

AND

HUBERT, STEPHENS, BARRON, PINSONEAULT & STEPHENS,

RESPONDENTS.

HELD:—That a Judge of the Court of Queen's Bench has power in Chambers to extend the delay for giving security on an appeal to the Privy Council beyond the delay ordered by the Court, as that within which security must be given, whenever he is seized of the matter prior to the expiration of such delay; and, on security being put in within such extended delay, the respondents are estopped from executing the judgment appealed from.

DORION, CH. J.:—Le 16 septembre dernier, les appelants obtinrent permission d'appeler à Sa Majesté, en son Conseil Privé, en par eux donnant caution sous six semaines. Ce délai devait expirer le 28 octobre dernier et ce jour même les appelants conformément à un avis qu'ils en avaient donné le 25, offrirent au lieu de cautionnement, de déposer des débentures de la Cité de Montréal au montant de $12,000, ainsi qu'ils prétendaient en avoir le droit en vertu de l'acte 34 Vict., c. 4, s. 14, qui autorise un dépot en argent, en bons de la Puissance ou de la Province de Québec ou en débentures de quelque corporation, pour tenir lieu de cautionnement. Les Intimés s'y opposèrent parce que les bons offerts étant ceux de la corporation appelante ne constituaient pas un cautionnement pour une dette de la cité elle-même en ce qu'ils n'offraient aucune garantie additionnelle. M. le juge Monk prit cette objection en considération, et le 2 novembre il rendit dans chacune des cinq causes le jugement suivant:

"It is hereby held and considered that the said bond or debenture so offered, "as security, by the said The Mayor, Aldermen and Citizens of the city of "Montreal, being a bond of the said corporation of The Mayor, Aldermen and "Citizens of the city of Montreal, cannot be taken as sufficient security.

"It is ordered that The Mayor, Aldermen and Citizens of the city of Mont- "real give security on their said appeal to Her Majesty, on Saturday, the 4th "instant, in pursuance to notice now before me."

Le 4 novembre les appelants déposèrent une somme de $2,012 dans chaque cause et cette somme fut déclarée suffisante, quant aux quatre premières causes et fut reçu au lieu de cautionnement. Dans la cause de Sutherland, le montant du cautionnement ayant été fixé à $2,812, la somme offerte était insuffisante, mais le juge accorda un délai jusqu'au six pour déposer une somme additionnelle de $800 et cette somme fut en effet déposée le 6, ce qui complétait le cautionnement dans les cinq causes.

Les Intimés se sont opposés à la réception des sommes déposées, parce qu'elles auraient dû être offertes, ou le cautionnement donné, avant l'expiration du délai fixé par la cour, c'est-à-dire avant le 29 octobre, et ils ont demandé à ce que les dossiers fussent remis à la Cour Inférieure, pour les mettre à même de procéder à l'exécution des jugements rendus en leur faveur. Leur objection ayant

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été renvoyée, ils demandent par leurs motions "qu'attendu que les appelants "n'ont pas, dans le délai prescrit par cette cour, fourni le cautionnement requis "pour l'appel à Sa Majesté, en son Conseil Privé, suivant l'ordre de cette cour, "en date du 16 septembre dernier, le dossier soit transmis à la Cour Inférieure, "aux fins de l'Art. 1179 du Code de Procédure."

Cet article 1179 est dans les termes suivants:

"Néanmoins, l'exécution du jugement de la Cour du Banc de la Reine, ne "peut être arrêtée ou suspendue, à moins que la partie, qui se prétend lésée, "ne donne dans le délai fixé par ce tribunal, bonne et suffisante caution de "poursuivre effectivement l'appel, de satisfaire à la condamnation et de payer "les dépens et dommages qui seront ordonnés par Sa Majesté au cas ou le "jugement serait infirmé."

Les Intimés prétendent que cet article du Code, qui est clair et impératif, ne laisse au tribunal, et encore moins à un juge en chambre, aucune discrétion à exercer, et qu'après le délai expiré, les juges n'ont aucune autorité soit pour arrêter l'exécution, si le bref n'est pas encore émané, soit pour la suspendre, si les procédés sont commencés.

Cette question s'est déjà présentée plusieurs fois et la solution qui va être donné dans ces cinq causes, devra fixer la jurisprudence sur ce point de pratique.

Une partie n'est déchue de son appel à Sa Majesté que si elle n'a pas commencé ses procédés devant le Conseil Privé et produit au greffe des Appels un certificat à cet effet, dans les six mois de la date du jugement accordant la permission d'appeler. (Art. 1181 du Code de Procédure). Cette cour peut dans l'exercice de sa discrétion fixer un délai plus ou moins long pour donner le cautionnement d'appel, pourvu que ce délai n'excède pas les six mois accordés pour l'appel, ainsi, la cour accorde ordinairement six semaines pour donner le cautionnement lorsque des parties sont demeurées à Montréal et huit semaines lorsqu'elles [redacted] de la campagne. Elle pourrait accorder trois, quatre ou cinq mois, si elle [redacted] avait nécessaire et ce délai n'affecterait nullement le droit d'appel dont la durée est limitée à six mois. Le délai pour donner le cautionnement n'affectant nullement le droit d'appel devient une simple question de procédure, qui comme toutes les questions de procédure est sous le contrôle de la cour. (Solon, des Nullités, p. 255.) Si le délai pour fournir le cautionnement était expiré, rien n'empêcherait la cour pour des raisons suffisantes d'accorder un délai ultérieur, comme elle peut permettre à une partie de comparaître, de produire ses griefs d'appel ou son factum après que les délais fixés par le Code sont expirés.

La cour ayant ce droit, il n'est pas douteux que si elle avait été saisie d'une offre de cautionnement avant l'expiration du délai fixé pour le donner, qu'elle aurait pu ajourner pour décider les objections soulevées ou pour permettre à la partie de suppléer à l'insuffisance des suretés offertes, comme l'a fait M. le juge Monk. Mais l'on dit de la part des Intimés que le juge en chambre était lié par l'ordre de la cour qui avait fixé le délai à six semaines et que ce délai ne pouvait être excédé.

Le juge, en chambre, agit en vertu de la loi, comme le délégué de la cour, pour exécuter ses ordonnances, et dès qu'il est saisi d'une demande qui est dans les limites des pouvoirs qui leur sont délégués, il a le même contrôle sur

les délais et les questions de procédure, que la cour aurait, si elle exerçait elle-même ces pouvoirs.

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L'Acte 34 Vict. c. 4, qui permet au juge d'ordonner la production de documents et de faire une enquête sur la solvabilité des cautions, deviendrait inutile si le juge ne pouvait ajourner ses procédés au-delà du terme fixé pour donner le cautionnement, car au jour fixé il serait obligé d'accepter le cautionnement sans faire l'enquête demandée ou de priver l'appelant de fournir le cautionnement requis, et dans beaucoup de cas le priver de son appel.

Les procédés des cours de justice doivent toujours être appliqués de manière à rencontrer les fins de la justice.

"The maxim of the English law (Broom's Legal Maxims, p. 88) is to amplify its remedies, and, without usurping jurisdiction, to apply its rules to the advancement of substantial justice; and accordingly the principle upon which our courts of law act is to enforce the performance of contracts not injurious to society, and to administer justice to a party, who can make that justice appear, by enlarging the legal remedy, if necessary, in order to attain the justice of the case."

"(P. 89) The general maxim under consideration is also peculiarly applicable "with reference *to a Judge at Chambers* and to the many and important duties "which are there discharged by him."

"The proceeding by application to a Judge at Chambers has indeed been "devised and adopted by the Courts under the sanction of the Legislature, for "the purpose of preventing delay, expense and inconvenience, which must "inevitably ensue, if applications to the Courts were in all cases, and under all "circumstances, indispensably necessary. *A Judge in Chambers indeed acts* "*under the delegated authority of the Court*, and his jurisdiction is essentially "different from that of a Judge sitting at *Nisi Prius*, for in the latter case the "Judge, it is said, has no equitable jurisdiction, and can only look to the "strict legal rights of the parties, whereas, in the former, the Judge has a "wider field for his discretion, and in some instances has a superior jurisdiction, "which is not subject to the review of the Court in Banc."

A la page 110, l'auteur dit que dans certains cas où le délai a été occasionné par le juge, le Jugement peut être rendu *nunc pro tunc* afin de ne pas priver une partie de ses droits.

Ces règles qui sont suivies en Angleterre sont, à plus forte raison, applicables à nos tribunaux dont tous les procédés doivent être conformes à l'équité et dans le but de rendre justice aux parties.

Dans l'espèce actuelle, il eût été souverainement injuste de dire aux appelants que le jugement devait être exécutée contre eux, parceque le juge avait ajourné pendant quarante-huit heures pour décider une question importante soulevée à l'occasion de l'interprétation d'un statut nouveau, ou parcequ'il avait accordé vingt-quatre ou quarante-huit heures aux appelants pour compléter leur cautionnement en ajoutant $800 à la somme de $2,012 qu'ils avaient de bonne foi offerte, sous l'impression que cette somme était suffisante.

Il a été dit lors de l'argument que les décisions sur cette question étaient contradictoires;—mais les seules décisions qui soient applicables à cette cause, sont:—

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1o. La cause de Malot & Mignault, où l'Intimée fut admise par M. le Juge Badgley à donner caution le 5 novembre 1869, six ou sept jours après l'expiration du délai fixé par la Cour. Dans cette cause aucune demande n'avait été faite avant l'expiration des délais. Le 2 décembre suivant, motion fut faite pour faire rejeter le cautionnement et faire remettre le dossier à la Cour Inférieure. Le 9 décembre le cautionnement fut déclaré nul, parcequ'il avait été donné hors des délais fixés, mais la Cour rejeta la partie de la motion demandant la remise du dossier à la Cour Inférieure, et accorda un mois à l'Intimé pour fournir un autre cautionnement, ce second cautionnement fut fourni et les procédés continués sur l'appel.

2o. En janvier 1874, la Corporation de Montréal, Intimée dans une cause où Brown et al., étaient appelants, offrit dans les délais fixés, le cautionnement requis pour un appel au Conseil Privé; à la demande de l'Intimée M. le juge Ramsay ordonna la production d'un extrait du rôle d'évaluation de la cité et d'un certificat du Bureau d'Enrégistrement et le cautionnement ne fut reçu que le 16 février, plus de quinze jours après l'expiration des délais fixés par la Cour.

3o. En juillet 1875, l'appelante dans une cause de "The Queen Insurance Company and Légaré déposa des débentures de la Corporation de Montréal au montant de $11,000 et donna avis que le 3 août, elle demanderait à un juge en chambre d'admettre ce dépôt au lieu d'un cautionnement. Le 3 août il n'y avait pas de juge en chambre, et le 1er septembre l'appelante demanda acte de son dépôt et qu'il fut admis comme cautionnement. L'Intimé contesta cette demande et demanda que l'appel fut renvoyé, parceque le montant déposé était insuffisant et que le cautionnement n'avait pas été admis dans le délai fixé. La Cour déclara que le montant était insuffisant et accorda quinze jours à l'appelante pour déposer une somme additionnelle de $800.

Toutes ces décisions s'accordent avec celle de M. le juge Monk dans laquelle je dois dire que j'ai moi-même concouru me trouvant alors en chambre.

Il reste une autre cause, celle de la Banque de Toronto et Ansell dans laquelle M. le juge Sanborn a refusé une demande de prorogation de délai, les parties ne s'étant pas présentées dans le délai fixé par la Cour, cette décision était conforme au jugement rendu le 9 décembre dans la cause de Malot et Mignault.

Ces différentes décisions établissent que le juge ne peut en chambre, proroger le délai fixé par la Cour pour donner le cautionnement;—mais que si la partie a offert un cautionnement avant l'expiration des délais, le juge saisi de la demande, peut continuer les procédés au-delà des délais soit pour s'enquérir de la suffisance des garanties offertes ou pour permettre d'en offrir de nouvelles.

Cette pratique est sanctionnée par les règles de la procédure et les motions des Intimés sont rejetées.

Motions rejected.

E. Barnard, for respondents.
Rouer Roy, Q. C., for appellants.
(S.B.)

COUR SUPERIEURE, 1877.

ST. HYACINTHE, 6 MARS, 1877.

Coram SICOTTE, J.

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JUGE:—1o. Que le prêtre, dans ses prédications, doit rester dans les limites de la discussion générale des doctrines, et ne peut, sans encourir poursuite en diffamation, indiquer particulièrement une personne comme vivant en concubinage, à raison du fait que le mariage de telle personne est contraire aux lois de l'Eglise catholique et peut être annulé par les Cours de Justice.

2o. Que le prêtre est justiciable des tribunaux civils comme tous les autres citoyens.

PER CURIAM:—Le demandeur reproche au défendeur de l'avoir injurié, diffamé, en disant dans des sermons prêchés en juin et en juillet 1873, qu'il tenait une maison de désordre, qu'il vivait dans le libertinage avec une concubine; et que ses paroissiens ne devaient pas fréquenter l'auberge tenue par lui.

Par ses défenses, le défendeur prétend qu'il a seulement fait des sermons sur les mariages claudestins, sur les empêchements résultant de la parenté et de l'affinité; sur l'obligation des catholiques d'obtenir dispense de ces empêchements, et de faire célébrer leur mariage en présence de leur curé sous peine de nullité du mariage, et d'encourir les châtiments de l'église; que dans ses remarques il est toujours resté dans son rôle de ministre de Dieu et de l'Evangile et de ministre de l'Eglise, et n'avait fait que dénoncer d'une manière générale, le scandale que causaient ceux qui violaient les ordonnances de l'Eglise à ce sujet; que le caractère de sa prédication a été essentiellement religieux; et qu'il n'avait indiqué en aucune manière, aucune personne en particulier.

Voyons ce que disent les témoins.

Joseph Gaucher témoigne comme suit:

"Quelque temps après l'arrivée du demandeur, j'ai entendu le défendeur prêcher durant la messe, un dimanche, sur le compte du demandeur. En cette occasion il a défendu aux paroissiens d'aller dans l'hôtel tenu au coin chez M. Leclerc. Je n'ai pas entendu d'autre chose si ce n'est que le demandeur n'était pas un homme à fréquenter. Le défendeur n'a pas parlé du mariage dans son sermon, sauf qu'il a dit que le demandeur n'était pas marié avec la femme avec laquelle il vivait."

Isaac Jubinville dit: "Il est à ma connaisance que le défendeur dans l'été 1876 a prêché sur le compte du demandeur. Le défendeur en cette occasion a défendu aux paroissiens d'aller chez le demandeur et sur un rond de courses qu'il avait établi près de son hôtel. Dans cette occasion le défendeur a dit que le demandeur n'était pas marié et portait scandale dans la paroisse, et une fois il a ajouté que ceux qui fréquenteraient la maison du demandeur, seraient privés des sacrements."

Michel Lussier parle comme suit: "Durant les mois de juin, juillet et août, j'ai entendu le défendeur plusieurs dimanches durant, parler d'un aubergiste nouvellement arrivé, défendant aux paroissiens de fréquenter sa maison parce qu'elle n'était pas une maison d'exemple. Le défendeur disait que cet aubergiste vivait avec une femme sans être marié avec elle; et c'était là une des raisons qu'il donnait pour empêcher les gens de fréquenter la dite auberge."

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Voici le témoignage de Nestore Lagacé : " Le défendeur défendait aux paroissiens d'aller dans la maison du demandeur, disant que ce n'était pas une maison à fréquenter, que l'homme qui la tenait était seulement assemblé, sans mariage, avec une femme. Il disait que cette maison était au coin. "

Noah Yates est le seul témoin de la défense qui parle des sermons du défendeur, et voici ce qu'il dit : " Le défendeur nous a dit qu'il avait été informé qu'il y avait une personne dans sa paroisse, qui vivait avec sa belle-sœur, sans avoir été mariée en face de l'Eglise. Le défendeur ajouta qu'il était défendu par l'Eglise de se marier avec sa belle-sœur, sans avoir au préalable obtenu la permission de l'Eglise. "

Ces citations des témoignages suffisent pour expliquer les faits.

Il y a preuve que le demandeur avait contracté le mariage attaqué, le 15 mai 1873, qu'un ministre protestant l'avait célébré suivant les formalités requises, et que ces faits étaient connus du défendeur avant les sermons incriminés.

Il ressort de la preuve que le défendeur défendait d'aller dans la maison du demandeur, disant que ce n'était pas une maison à fréquenter, que l'homme qui la tenait était seulement assemblé avec une femme sans mariage, de ne pas l'encourager, que cette maison était au coin, dans l'auberge de Leduc; que cette personne venait d'arriver de St. Hyacinthe, et tenait maison de commerce au coin, que le demandeur était marié, mais par un ministre protestant, et que ce mariage ne valait rien.

Il faut bien admettre que le demandeur a été désigné, indiqué dans ces occasions, de manière à ne laisser aucun doute, que le défendeur parlait de lui, et avec intention de bien faire comprendre cela à ses paroissiens.

L'accusation est toute particulière, personnelle, et en réalité disait, vous, telle personne, vous n'avez pas fait célébrer votre mariage par votre curé, mais par un ministre protestant, vous vivez en concubinage, et je défends à mes paroissiens de fréquenter votre maison, parce que vos rapports avec cette femme sont illicites, et une cause de scandale.

On ne peut nier que cette accusation va au delà d'une prédication générale sur l'enseignement de l'église relativement à la célébration des mariages entre catholiques.

Il peut être bon, pour les fins de la cause, de faire quelques observations sur la légalité des mariages célébrés par des ministres protestants, comme sur les mariages avec une belle-sœur. Quant au premier point, en face de notre constitution, de notre condition sociale et politique, de notre législation, il faut dire de suite, qu'on ne peut refuser d'admettre cette légalité.

Les catholiques en fesant célébrer leur mariages par un ministre protestant encourent des censures et des peines spirituelles, mais le ministre protestant est un fonctionnaire compétent pour célébrer ces mariages.

Quand au second point, le code est positif dans sa prohibition, et indique le mode à suivre pour attaquer ces mariages.

D'après l'enseignement du défendeur l'Eglise catholique considère que cette affinité est un empêchement de mariage ; mais que cet empêchement peut être levé par les dispenses qu'elle accorde ; ainsi, dans l'opinion du défendeur, le de-

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mandeur eut été hors de tout reproche s'il eût obtenu cette dispense, et fait célébrer son mariage par un prêtre catholique.

Le concubinage, alors, ne découlerait pas de la prohibition légale, mais seulement, de faire tel mariage en dehors de son église.

Ce mariage attendu l'affinité peut être attaqué, déclaré nul; mais il faut que ces reproches soient faits, que cette illégalité soit attaquée de la manière voulue par les lois.

Il n'est pas permis de publier dans la chaire, ou autrement, que telles personnes, nommées ou indiquées, qui ont contracté mariage, nonobstant l'affinité, ou sans avoir obtenu les dispenses ecclésiastiques, ou sans avoir fait célébrer leur mariage par le prêtre, vivent en concubinage, et tiennent des maisons qu'il ne faut pas fréquenter.

La discussion sur ces matières au point de vue général, de la doctrine de chaque église, est permise; mais personne n'a le droit de conclure, en disant vous, un tel, vous vivez dans le concubinage et personne ne doit fréquenter vôtre maison. Il y a dans ces paroles une flétrissure qui voue le mari et la femme à l'ignominie, et les enfants au mépris.

Si la chose était permise, il y aurait, dans notre société mêlée de catholiques et de protestants, d'origine et de croyances diverses, autant d'ostracismes que de croyances. On ne coudoierait que des concubinaires et des batards. Pour prévenir les discordes, il faudrait parquer à part, les races et les religions.

La tolérance est dans toute notre législation, elle est la conséquence logique, fatale, de l'ordre social et politique; elle est commandée par les traités que l'Eglise catholique adopte et réclame comme lui garantissant son libre exercice.

La liberté religieuse, l'égalité religieuse, ont toujours été dans nos mœurs et dans nos relations; et il est de la plus haute importance qu'il en soit toujours ainsi.

Si le défendeur eut prêché comme il a parlé par ses défenses, il serait hors la censure des tribunaux; mais il y a dans les défenses une admission tacite que s'il a désigné le demandeur, et s'il a dit de lui [illegible] que les témoins attestent, il est allé en dehors et au delà de sa mission de pasteur.

La vie privée ne peut être envahie pour satisfaire les vues et les théories d'aucune croyance: il y a droit absolu pour chaque église de proclamer ses doctrines, mais aucune n'a le droit de prendre à partie la vie intérieure et intime des familles et de dénoncer publiquement les faits de la vie privée de telle ou telle personne comme entachée d'immoralité, parce que ces personnes agissent contrairement à ses enseignements.

Il y a dans les paroles incriminées une diffamation qui compromet l'honneur de la personne diffamée et dégénère contre elle en injure et en scandale public. C'est ce qui constitue un tort et un dommage, dont est responsable celui qui l'a causé. La condamnation découle de la faute.

La loi est générale dans ses préceptes, elle doit être uniforme dans son application. Elle est la même pour tous les citoyens; c'est une erreur de croire qu'elle accorde des droits exclusifs à telles personnes, à telles croyances, il n'y a réellement qu'un droit, et le même pour tous, celui de vivre libre sous la loi et dans la loi.

Pour décider toute question juridique, il faut appliquer cette loi, avec son

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caractère d'universalité, et ne jamais oublier qu'un moyen infaillible de mal résoudre la question, c'est d'y voir autre chose qu'une question de droit.

Sous les circonstances, il n'y a pas lieu pour la vindicte de la loi de prononcer une condamnation pour une somme considérable.

Le défendeur est condamné à payer 25 piastres et les frais de l'action.

Jugement pour le demandeur.

R. E. Fontaine,, pour le demandeur.
Sicotte & Tellier pour le défendeur.
(J.D.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND JUNE, 1876.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 26.

DARLING,

AND

APPELLANT;

BROWN ET AL.,

RESPONDENTS.

HELD:—1. That a loan of money by a non-trader to a commercial firm is not a "commercial matter," or a debt of a "commercial nature," and is not, therefore, prescriptible by the lapse of either 6 or 5 years.

2. That the prescription, under the Code, of 5 years against arrears of interest cannot be invoked in respect of a debt due prior to the coming into force of the Code.

This was an appeal from a Judgment, rendered by the Superior Court at Montreal (Beaudry, J.) on the 19th of June, 1875, condemning the appellant to pay to the respondents, in their quality of executors of the last will and testament and codicils of the late George Templeton the sum of $1746.72 cy., besides interest and costs.

The action in the Court below was brought by said George Templeton, as the universal legatee of his deceased wife, Isabella Darling, against the appellant and his brother Thomas Darling, to recover $1912.08 cy., besides interest from 31st December, 1865, under the following circumstances:—

The appellant and one Thomas Davidson were co-partners in trade under the name or firm of William Darling & Co., from the 1st of January, 1854, to the 30th of April, 1860, from which date William Darling continued the business alone under the same firm name until the 31st of December, 1864, when said Thomas Darling became his partner.

The late Isabella Darling, on the 3rd of March, 1858, loaned to William Darling & Co. £120 stg. or $584 cy., and on the 14th of April, 1860, the firm collected on her account from the estate of the late David Darling the sum of $800 cy., which she left in their hands by way of loan.

On the 26th of March, 1862, William Darling & Co. rendered to said Isabella Darling the account current, paper 4 of the Record, in which they credit

her with both of said amounts with interest, and bring down a balance in her favor as cash due her on the 31st December, 1861, of $1640.07 cy.

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On the 6th December, 1865, William Darling & Co. rendered to said Isabella Darling the account current, paper 5 of the Record, in which the above balance of $1640.07 cy. is brought forward, and showing due to said Isabella Darling as cash, on the 31st December, 1863, a balance or sum of $1746.72 cy., and on the 31st December, 1865, a balance or sum of $1912.08 cy.; the difference between these two amounts being composed of interest.

The defendants pleaded separately. And the appellant fyled five pleas.

The first plea was limited to an attack on the wills set up in the declaration, and, as the validity of the holograph will set up in the declaration has been settled by the judgments of the Superior Court and of this Court on the proceedings *en faux*, it is unnecessary further to allude to it.

The second plea invoked a prescription of 5 years, and the third plea a prescription of 6 years against the plaintiff's demand.

The fourth plea claimed compensation of plaintiff's demand by a counter claim of appellant, for the alleged board and lodging of his sister, the said Isabella Darling, from the month of September, 1858, to the month of November 1862, at the rate of $300 per annum.

The fifth plea was the general issue. And issue was joined by general answers to the first four pleas and a replication to the last.

The evidence was given orally before the Judge who heard and decided the case, and, being of opinion that the respondents had proved their case, that the demand of the respondents was not subject to the prescription or limitation of either 5 or 6 years, and that the plea of compensation was not sustained by the evidence, dismissed the said first four pleas and gave judgment in favor of the respondents, for the said balance or sum so shown to be due by the account current, paper 5 of the record, on the 31st December, 1863, besides interest and costs.

Cross, Q.C., for the appellant, (besides denying that the evidence justified the judgment as rendered) contended at the argument, that the respondents' claim was "a commercial matter," or a debt of "a commercial nature," and was therefore prescribed by the lapse of 6 years, under the law as it existed before the Code, or by the lapse of 5 years under the Code. He also contended, that the arrears of interest had been prescribed under Art. 2250 of the Code.

Bethune, Q.C., for the respondents, on the other hand contended, on the authority of Wishaw vs. Gilmour et al. (6th L. C. Jur., p. 319, and 15th L. C. Law Rep., p. 177), that the claim in question was not a "commercial matter" or a debt of "a commercial nature," and was consequently only prescriptible by the lapse of 30 years. And that the new law of prescription under the Code against arrears could not be invoked, as their prescription had been begun before the Code came into force, and in support cited Art. 2270 of the Code.

MONK, J.:—This was an appeal from a Judgment rendered by the Superior Court, at Montreal, condemning the defendants Darling to pay to the respondents, plaintiffs in the Court below, as executors of the last will and testament

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of the late George Templeton, the sum of $1746. The action was brought by George Templeton as the universal legatee of his late wife, Isabella Darling, against William Darling and his brother Thomas Darling, to recover $1912, being the amount of two sums, one of £129 stg. loaned to the firm of Wm. Darling & Co., and the other for $800 collected from the estate of the late David Darling on her account, and which she left in the hands of the defendant as a loan. In 1862, the firm rendered to Isabella Darling an account showing that there was due her by them the sum of $1640, and on the 31st December, 1865, another account showing the amount due to be $1912, the difference being for accrued interest. The defendant (the present appellant) attacked the wills of Isabella Darling, but this Court had already declared the holograph will valid; it is unnecessary to refer particularly to that issue. Thomas Darling's plea was maintained and the action dismissed as regards him: it is needless, therefore, to refer to the case so far as he was concerned. There is no cross-appeal from that part of the judgment, and the Court moreover concurs in the view taken by the Court below. William Darling, (the present appellant) by his second plea invoked a prescription of five years, and by his third plea contended that the prescription of six years applied to the plaintiff's demand. His fourth plea was one of compensation for alleged board and lodging of Isabella Darling from September, 1858, to November, 1862, at the rate of $300 per annum. He also pleaded the general issue. To the first four pleas, general answers were produced, and to the fifth, the general issue, a replication was fyled. Upon consideration of the issues thus joined, and after a careful examination of the evidence of record, we are unanimously of opinion that the judgment of the Court below should be confirmed. The accounts sued on are, in the opinion of this Court, proved by legal and sufficient evidence. The amount, therefore, for which judgment was pronounced against the appellant, was, according to the testimony, due by him; but the appellant, by his plea of six years prescription, contended that the transaction was of a commercial character, and that the provision of chapter 67 of the Consolidated Statutes of Lower Canada, section 1, applied to the respondent's claim. We are of opinion that in this also the Court below judged rightly in holding that these transactions were not of a commercial nature. In the case of Wishaw and Gilmour, this Court held that a loan in all essential particulars similar to this was not a matter of a commercial nature. As to the plea of five years prescription, we are of opinion that it does not apply to the present case,—it was created by the Code which came into force in August, 1866, a considerable time after the dates mentioned in the accounts current, and the 2270 article of the Code. Prescriptions begun before the promulgation of this Code must be governed by the common law. We think, therefore, that this plea was rightly overruled. There remains the plea of compensation. The Court cannot refrain from expressing some surprise that this ground of defence should have been raised in this case. These parties appear to be persons of fortune and good position, and that a sister should be charged for board and lodging while on a visit to her brother or other relatives closely connected, seems utterly inadmissible, unless, indeed, there had been a contract or other circumstances justifying such a pretention proved in the case, and as nothing of the kind appears

in the evidence, this Court, confirming what was held in the Court below overrules this plea also. The judgment was consequently confirmed.

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Judgment of Superior Court confirmed.

Cross, Lunn & Davidson, for appellant.

Bethune & Bethune, for respondents.

(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 20TH MARCH, 1877.

Coram DORION, J.

No. 1827.

Doutney vs. Bruyère et al.

HELD:—That the remedy of a purchaser of real estate in case of deficiency of quantity in the land sold is not in damages, but to claim either a diminution of the price or the revocation of the sale.

PER CURIAM:—Les défendeurs qui possédaient des terrains vacants sur la rue Fortier en arrière du Couvent du Bon-Pasteur, les ont fait diviser en lots à bâtir et les ont offert en vente à l'encan le 23 septembre, 1874.

Le demandeur s'est rendu adjudicataire de deux lots contenant 4018 pieds en superficie à raison de 22 cts. par pied ou $883.96 pour le tout, payable un quart comptant et la balance dans dix ans avec intérêt à 7 par cent par année.

Un acte de vente fut passé à ces conditions le 8 octobre 1874, et le demandeur payait le quart du prix aux défendeurs.

Etait compris dans cette vente le droit pour le demandeur de passer en commun dans deux ruelles désignées au dit acte, avec tous autres y ayant droit sans pouvoir les obstruer en aucun temps.

Le 26 octobre 1874 les défendeurs vendirent de plus au demandeur moyennant $30 un droit de mitoyenneté dans le mur de M. Hart, voisin des lots vendus avec la moitié du terrain sur lequel est assis le dit mur, de plus un droit de passage en commun dans une ruelle de 16 pieds qui se trouve en arrière du terrain de M. Hart et communique à la rue St. Dominique.

Le demandeur se plaint maintenant par son action, de défaut de contenance et qu'il est privé de tout accès à la ruelle communiquant à la rue St. Dominique, et il réclame des défendeurs, purement et simplement la somme de $3,091.40 de dommages qu'il établit comme suit: $1,961.60 valeur du terrain qui lui manque à raison de 80 cts. du pied; $400 perte de l'usage de la ruelle; $699.80 diminution de valeur sur ce qui lui reste de terrain et enfin, $30 pour coût de protêts et plans.

Ainsi le demandeur qui a payé $883.76 pour 4018 pieds de terre que les défendeurs lui ont vendu, demande et prétend avoir prouvé que les défendeurs devraient lui rembourser $3,091.40 de dommages parcequ'il lui manque une petite partie de son terrain, et l'usage d'un passage pour lequel il a payé $30 y compris un droit de mitoyenneté et l'usage d'une ruelle entre le terrain vendu et celui de M. Hart.

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Le demandeur ne demande pas la nullité de la vente ainsi qu'il aurait pu le faire en vertu de l'article 1502 du Code Civil. Il ne demande pas non plus une réduction du prix de vente ainsi que l'article 1501 l'autorise à faire suivant la valeur de ce qui manque, il se contente de garder le terrain tel qu'il est et demande simplement des dommages et intérêts pour non délivrance du surplus.

Je crois que le demandeur a confondu les deux remèdes que la loi lui accorde. Il agit suivant les dispositions de l'article 1501 en retenant la propriété et il veut que la Cour applique la pénalité imposée par l'article 1502 qui ne s'applique qu'au cas où l'acheteur répudie la vente.

Il n'y a pas de doute que le demandeur a droit à une réduction du prix de vente. Les défendeurs ne nient pas cela. Ils ont offert au demandeur de lui passer un nouveau titre en réduisant le prix suivant les circonstances, ce que le demandeur a refusé.

D'après les conclusions du demandeur, et la preuve faite par lui, je me vois dans l'impossibilité de rendre un jugement qui puisse régler les droits des parties. L'action doit être renvoyée avec dépens.

Action dismissed.

Abbott & Co., for plaintiff.
Doutre & Co., for defendants.
(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 31ST MAY, 1876.

Coram MACKAY, J.

No. 812.

Desrosiers vs. *Guerin.*

HELD:—That by granting delay to the maker and first endorser of a note, without the consent of the second endorser, the holder's recourse against such second endorser is lost.

The following judgment sufficiently explains the point at issue in the case:

"The Court * * * considering that if the defendant's plea to the effect that the note sued upon was renewed and paid, be not literally proved, it is proved in a way, for the note sued upon having fallen due the plaintiff, without the consent or intervention of the defendant, gave delay of payment to Marcel Fortin, the maker, to the 4th of January, 1875, and again on the 8th of January, 1875, gave delay to J. P. Fortin (the endorser to the defendant) to the 7th of February, 1875, these delays granted in consideration of exorbitant sums paid to plaintiff *à titre d'intérêts*, and during which delays the plaintiff admits in his deposition that he could not have exacted payment of the note sued upon from the Fortins;

"Considering that the granting of the said delays to the said Fortins with remission of right to sue them as aforesaid ought to be held to have operated and to operate discharge to the defendant from or by the plaintiff, as regards plaintiff's demand; seeing that the defendant was only party endorser upon the note sued upon, later than the said Fortins or after them, and that by no suit against the Fortins could they have been compelled to pay the note sued upon

during the delays aforesaid, whether such suit had been brought in the name of the plaintiff or in that of the present defendant, Guerin;

Considering that from Plaintiff's own deposition, it appears that long ago he lost right of action against the defendant upon or as regards the note sued upon, to wit, by giving delays to the maker and to the payee and first endorser without the consent or knowledge of defendant, second endorser, doth dismiss said plaintiff's action with costs."

Action dismissed.

A. Dalbec, for plaintiff.
De Bellefeuille & Turgeon, for defendant.
(S.B.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH JUNE, 1876.

Coram RAINVILLE, J.

No. 1061.

Welch vs. *Baker*.

HELD:—In an action by a creditor of a Railway Company against a shareholder in such Company to recover the amount unpaid on his shares, that the cause of action arose at Montreal, where the Company had its principal office and where judgment was rendered for the debt due by the Company and execution was also issued, and not at Bedford, where the shareholder subscribed for his shares.

This was a declinatory exception, on the ground that the defendant resided in Stanbridge, in the county of Missisquoi, and that the cause of action arose in Bedford, in said county, which was the place where he subscribed for his shares as a shareholder in the Montreal, Portland and Boston Railway Company mentioned in plaintiff's declaration.

The following was the judgment of the Court:

"La Cour * * * Considérant que le droit d'action du demandeur a pris naissance, par le fait qui est allégué, que la compagnie de chemin de fer de Montréal, Portland et Boston n'a pas satisfait au jugement rendu contre elle à la poursuite du Demandeur dans une cause portant le No. 382 des dossiers de cette Cour;

Considérant qu'il est allégué que la dite compagnie de chemin de fer a failli de satisfaire au jugement rendu en la dite cause, et que la dite compagnie a son principal bureau d'affaires en la Cité de Montréal, et que le refus ou défaut du paiement a eu lieu dans les limites du dit District de Montréal;

Considérant que le demandeur n'a son droit d'action contre le défendeur que par suite de tel défaut, et qu'en conséquence son droit d'action a pris naissance dans les limites du dit district de Montréal, déclare l'action du demandeur portée devant le tribunal compétent, et déboute le défendeur de son Exception déclinatoire, avec dépens."

Exception déclinatoire dismissed.

Doutre & Co., for plaintiff.
Abbott & Co., for defendant.
(S. B.)

COUR SUPERIEURE, 1877.

MONTREAL, 12 MAI, 1877.

Coram DORION, J.

No. 835.

Dufresne vs. Bulmer.

JUGE:—Que le Code Civil en ne parlant que des mines, carrières et forêts qui ne tombent pas sous le contrôle de l'usufruitier, n'est pas limitatif du droit commun, mais plutot explicatif, et qu'une sablière ne tombe pas aussi sous tel contrôle.

2. Que dans l'espèce l'usufruitier ne pouvait vendre tout le sable qui se trouvait sur la propriété dont il avait l'usufruit, même pour une durée de cinq ans, la vente étant celle d'un droit réel.

3. Que l'enregistrement tardif d'un testament portant substitution a tout son effet excepté à l'égard de ceux qui auraient acquis quelque droit sur l'immeuble avant tel enrégistrement.

H. W. Austin, pour le défendeur avait soumis les notes suivantes :—

"When the sand was taken off the land Jean-Bte. Dufresne was in possession as proprietor.

"The plaintiffs, children of Jean-Bte., had no rights in the land where the "sand was taken before the death of Jean Bte.

"They (plaintiffs) had no vested right.

"Avant l'ouverture la substitué n'avait aucun droit; il n'avait qu'une espé-"rance. No. 486. Ther. Dessaulles.

"The will of Susan Pepin creating the substitution was never "insinué, lu et publié" within 6 months after the death of Susan Pepin.

"This was an absolute nullity as regards third parties like Bulmer & Sheppard who bought the sand from Jean Bte. Dufresne, proprietor in possession, not knowing of will of Susan Pepin.

"Le défaut de publication et d'enregistrement ne pourra être supposé ni regardé comme couvert par la connaissance que les créanciers ou les tiers acquéreurs pourront avoir eue de la substitution par d'autres voies que celles de la publication et de l'enrégistrement. Voulons que le présent article soit observé à peine de nullité."

"This was an Edict of Louis XIV, to remove doubt about the Ord. de Moulins. This was the law of L. C. when Susan Pepin died (before the Code).

"The Codifiers found this to be law, but substituted registration for insinuation. 2 Ricard, Subst. 495-6—Poth. Subst. p. 495-6.

"There were 8 children living of Jean Bte., joint owners of the land par indivis. They ought all to have joined in the action; only 7 are named in action.

"Some of the children of Jean Bte., approved of his selling sand to Bulmer & Sheppard.

"Many other objections were raised by demurrer, etc.

"It is certain that had Jean Bte. survived his children he would have been absolute proprietor of the land, substitué; and at the date Jean Bte. sold the sand, the present plaintiffs had only an *espérance* of becoming owners."

DORION, J.—Par son Testament solennel fait le 27 Octobre 1828, Suzanne Pepin veuve Dufresne, légua à son fils Jean-Bte. Dufresne, une partie de terre

située à Hochelaga, pour icelui en jouir sa vie durant et après sa mort retourner à ses enfants.

Suzanne Pepin est morte le 30 Juillet 1834. Le testament a été insinué et publié en justice le 15 Avril 1835, c'est-à-dire plus de six mois après le décès de la Testatrice.

Jean Baptiste Dufresne a joui de l'immeuble à lui légué par sa mère jusqu'à l'époque de son décès arrivé le 5 Mars 1872.

Les Demandeurs qui sont au nombre de sept et qui sont les enfants du dit Jean Baptiste Dufresne, ont alors recueilli la dite partie de terre en vertu de la substitution créée en leur faveur par le testament de leur grand-mère.

Pendant que Jean Baptiste Dufresne était en possession de la dite partie de terre, il a vendu aux Défendeurs tout le sable qui se trouvait sur icelle et qu'ils pourraient enlever dans l'espace de cinq années à compter du 15 Décembre 1866. Les Défendeurs ont depuis fait exploiter le sable en question. Ils ont ouvert une sablière sur la dite partie de terre et en ont enlevé tout le sable exploitable qui s'y trouvait ou à peu près.

Les Demandeurs prétendent que leur père qui n'était qu'usufruitier ou grévé de substitution ne pouvait pas faire une vente semblable, laquelle en fait, était une vente d'une partie du fonds même de la propriété, et ils reclament des Défendeurs une somme de $5,980.00 pour la valeur du dit sable. Ils se fondent sur les articles 455 et 460 du Code Civil.

Les Défendeurs ont d'abord plaidé en droit, prétendant que l'usufruitier avait le droit de faire l'exploitation du sable qui se trouvait sur la terre en question, et que dans tous les cas les Demandeurs n'avaient de recours que contre le grévé de substitution et non contre eux.

Cette défense a été justement renvoyée par l'Hon. Juge Torrance. Il n'y a pas de doute que l'usufruitier n'a que la jouissance des biens dont il a l'usufruit. Il ne peut les dépouiller de ce qui quelque fois en fait la plus grande valeur. Il est vrai que le Code ne parle que des mines, carrières et forêts qui ne tombent pas sous le contrôle de l'usufruitier. Mais ceci n'est pas limitatif du droit commun et est plutôt explicatif. Reste la question de savoir si l'action pouvait être portée directement contre les Défendeurs ou si les Demandeurs n'ont de recours que contre les représentants du grevé de substitution. Si le grevé avait ouvert lui même la sablerie et vendu le sable au voyage comme cela se fait ordinairement, il n'y aurait pas lieu de troubler chacun de ceux qui auraient été acheté du sable au voyage, mais le cas actuel est bien différent. C'est une partie intégrante de la propriété que le grevé a vendue. Les Défendeurs devaient s'assurer du titre de leur vendeur. Ils sont dans la même position que s'ils s'étaient emparés de la propriété même. Alors ils seraient sujets à une action pétitoire. Comme le sable est disparu ils sont sujets à une action pour la valeur.

Par les défenses au fond, les Défendeurs ont invoqué les mêmes moyens que ceux de leur défense en droit, et de plus ils ont allégué que le sable avait été enlevé à la connaissance et du consentement des Demandeurs. Ceci ne me parait pas prouvé.

A l'argument, les Défendeurs ont soulevé deux autres points qui n'ont pas été invoqués dans leurs défenses. Le premier c'est que le testament n'a pas été

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insinué dans les six mois du décès de la testatrice. Ce moyen pourrait être invoqué par les Défendeurs s'ils eussent acquis quelques droits entre l'expiration du délai fixé par la loi pour l'insinuation et la date de l'insinuation même, mais comme ils n'ont acquis le sable que longtemps après que le testament a été insinué, ils sont sans intérêt. Le second, c'est que le Dr. Dufresne l'un des Demandeurs représentant trois parts a ratifié l'acte de vente de son père aux Défendeurs. Ces derniers n'ayant pas plaidé cette ratification, ne peuvent maintenant s'en prévaloir si toutefois elle existe.

Ayant disposé des questions de droit qui s'élèvent dans la cause, il s'agit maintenant de déterminer la quantité et la valeur du sable pris par les Défendeurs, ce qui est la plus grande difficulté dans la cause.

Un grand nombre de témoins ont été entendus; aucun ne peut donner précisément la quantité de sable enlevée par les Défendeurs. M. Bulmer, l'un d'eux, admet à peu près 6000 verges cubes. M. Maxwell, son principal témoin, admet 1,646 verges cubes en donnant un pied d'épaisseur comme moyenne. Or il est prouvé par les autres témoins que la moyenne était d'au moins un pied et demi, ce qui ferait 6,969 verges cubes, ou 9,292 voyages.

La preuve des Demandeurs n'excède pas ce chiffre. Quant à la valeur elle doit être estimée au temps de l'ouverture de la substitution. 10 cts. me parait la valeur prouvée. Les Demandeurs doivent avoir jugement pour $929.20.

Jugement pour le Demandeur.

Geoffrion, Rinfret et Archambault, pour le Demandeur.

H. W. Austin, pour le Défendeur.

(G. D.)

COUR SUPERIEURE, 1877.

MONTREAL, 4 AVRIL, 1877.

Coram PAPINEAU, J.

No. 2350.

Deladurantaye vs. *Posé* et *La Société permanente de Construction Jacques Cartier*, Créancière colloquée, et *Lacroix et al.*, Créanciers hypothécaires, contestants.

JUGE:—Qu'il peut être permis à une partie intéressée de contester un rapport de collocation et de distribution après les délais de six jours en montrant cause, pourvu qu'aucun procédé n'ait été adopté pour l'homologation du rapport.

Les Contestants demandaient, le 22 Janvier 1877, la permission de contester le rapport de collocation et de distribution, qui avait été affiché le 8 du même mois. Aucune motion n'avait été faite pour homologuer le rapport. Les contestants n'avaient appris que le 22 Janvier que le rapport était affiché du 8 du même mois et un affidavit à cet effet accompagnait la requête et les moyens de contestation.

Motion accordée en payant $10 à la partie dont les contestants veulent contester la réclamation.

Loranger, Loranger & Pelletier, pour le créancier colloqué.

Doutre, Doutre, Robidoux, Hutchinson & Walker, pour les contestants.

(G.D.)

COUR SUPERIEURE, 1877.

MONTREAL, 12 MAI, 1877.

Coram DORION, J.

No. 1208.

Hogan et al. vs. *Bernier.*

JUGE :—Que l'acquéreur qui a payé son prix de vente ou une partie d'icelui n'a pas le droit de demander à être remboursé de ce qu'il a payé ou à avoir un cautionnement, sous prétexte qu'il est exposé à être troublé.

2. Que l'acquéreur ne peut, encore moins, dans un semblable cas retenir les intérêts dus sur le capital ou sur la balance du prix de vente, tout en jouissant des fruits et revenus de la propriété vendue.

DORION, J.—Le 7 Décembre 1874, les demandeurs ont vendu aux défendeurs un lot de terre contenant environ 16 arpents en superficie, formant partie de la ferme Gale, située près de la ville de Montréal. Cette vente fut faite avec la garantie ordinaire, pour le prix de $32,600.00, dont un quart ($8,150.00) fut payé comptant et la balance ($24,450) fut stipulée payable par termes avec intérêt au taux de sept par cent par année, cet intérêt payable tous les six mois aux premiers Mai et Novembre.

La présente action est portée pour le recouvrement de dix-huit mois d'intérêt sur la dite balance du prix de vente.

Les défendeurs ont opposé à cette action trois moyens de défense dont deux n'ont pas été prouvés et dont il est inutile de s'occuper. Le troisième moyen est que l'immeuble vendu aux défendeurs, était, lors de la vente, et est encore hypothéquée pour une somme de $225,000.00 ce qui excède de beaucoup la balance du prix de vente restée entre leurs mains; qu'ils sont exposés à être troublés et évincés dans leur possession du dit immeuble et qu'ils sont bien fondés à retenir par devers eux la somme reclamée, jusqu'à ce que les demandeurs aient fait cesser la dite crainte de trouble, ou donné caution que les dits défendeurs ne seront jamais troublés à l'occasion de la dite hypothèque.

Les demandeurs ont répondu à cette défense que les défendeurs connaissaient l'existence de la dite hypothèque lorsqu'ils ont acheté, et que, d'ailleurs, tant qu'ils n'étaient pas troublés et qu'ils jouissaient de la propriété, ils ne pouvaient se refuser de servir les intérêts qui ne sont que la représentation des fruits et revenus de la chose vendue.

Si rien n'avait été payé sur le principal du prix de vente, il ne pourrait y avoir aucune difficulté. Le possesseur de bonne foi faisant les fruits siens doit payer l'intérêt tant qu'il n'est pas troublé. Mais dans le cas actuel, les défendeurs disent, nous avons payé $8,150.00 à-compte du prix et si plus tard nous sommes évincés nous perdrons cette somme, et nous voulons retenir les intérêts jusqu'à concurrence d'autant afin d'être parfaitement protégés.

Ce raisonnement paraît, à première vue, bien raisonnable, et il a été adopté dans la cause de Dorion & Hyde, rapportée au 12e vol. du L. C. Jurist, par la majorité de la Cour de Révision siégeant à Montréal, (le Juge Badgley différant) et par la Cour d'Appel. Ce jugement n'est appuyé sur aucune autorité mais seulement sur des raisons qui me paraissent blesser tous les principes.

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En effet celui qui a une fois payé son prix de vente n'a pas le droit de demander à être remboursé de ce qu'il a payé ou à avoir un cautionnement sous prétexte qu'il est exposé à être troublé. En payant il a suivi la bonne foi de son vendeur et il ne peut plus changer sa position. Or s'il ne peut demander ni le remboursement, ni un cautionnement lorsqu'il a payé la totalité du prix il peut encore moins le faire lorsqu'il n'a payé qu'une partie. Maintenant à quel titre les défendeurs veulent-ils retenir les intérêts? Est-ce à titre de remboursement de ce qui a été payé sur le capital? On vient de voir que ce droit n'existe pas. Est ce à titre de cautionnement? Il en est de même. Tous les auteurs s'accordent sur ce point. Serait-ce par hasard à titre de compensation? Cette prétention ne peut pas plus se soutenir que les autres. Une fois le paiement fait sur le principal, l'imputation a eu lieu de plein droit. La créance des demandeurs a été éteinte pour autant. Les défendeurs n'ont pas d'action, pas de créance susceptible de compensation. Ces principes sont consacrés par plusieurs arrêts en France, (*) qui n'ont pas été critiqués par les commentateurs, et que je crois devoir suivre de préférence à celui rendu dans la cause de Dorion & Hyde.

J'avoue que ce n'est pas sans hésitation que j'en suis venu à cette conclusion, non pas que j'eusse des doutes sur la question mais à raison d'un précédent aussi respectable que celui que les défendeurs invoquent au soutien de leur prétention. Cependant je ne me crois pas lié par ce précédent, et je regretterais de donner mon concours à l'établissement d'une jurisprudence que je crois erronée.

Jugement pour les demandeurs.

Doutre, Doutre, Robidoux, Hutchinson & Walker, pour les demandeurs.
Geoffrion, Rinfret & Archambault, pour les défendeurs.
(G. D.)

SUPERIOR COURT, 1877.

MONTREAL, 11TH MAY, 1877.

Coram TORRANCE, J.

No. 2469.

Stevenson vs. *Robertson*.

HELD:—That an affidavit for *capias* is defective which deposes that the departure of the defendant "*may*" deprive the plaintiff of his recourse in place of using the words of the Code, C. C. P. 798, "*will* deprive," &c.

The defendant presented a petition for discharge from *capias*, on the ground that the words of the affidavit upon which the *capias* issued were that the departure of defendant "may deprive plaintiff," and not that the departure "will deprive," &c.

Benjamin, for defendant, cited *Boyd* v. *Freer*, 15 L. C. J. 109.
Lunn, e contra, referred to C. C. P. 812, 813 and form No. 42, of C. C. P.

Lunn, for plaintiff. Petition granted.
Benjamin, for defendant.
(J.K.)

(*) Dalloz P. 32, 2, 160.
Dalloz A. 2, 379.
Palais 62, 105.

COUR SUPERIEURE, 1877.

MONTRÉAL, 12 MAI, 1877.

Coram DORION, J.

No. 2,714.

Crossen vs. O'Hara, et McGee, Opposant.

JUGE :—Que le défaut d'enregistrement d'une donation mobilière, et le défaut de la livraison des effets ainsi donnés, privent le donataire de se prévaloir du droit de propriété qui aurait pu résulter de la donation à l'encontre des créanciers du donateur.

DORION, J.—Opposition afin de distraire sur une saisie de meubles. L'Opposante allègue qu'elle est propriétaire de partie des meubles saisis en vertu de bons titres, et produit avec ses articulations de faits un acte de donation en date du mois de Septembre 1871 à elle consenti par le Défendeur son fils. Cet acte n'a pas été enrégistré. Il n'y a pas eu de livraison des effets et l'Opposante n'en a pas joui publiquement. Elle demeure avec le Défendeur dans une maison louée par ce dernier qui paye lui-même le loyer et les taxes. Sous ces circonstances, appliquant l'article 808 du Code Civil, l'opposition est déboutée.

N. Driscoll, pour l'Opposant.

Joseph & Burroughs, pour le Contestant.

(C. B.)

COUR SUPERIEURE, 1877.

MONTRÉAL, 12 MAI, 1877.

Coram DORION, J.

No. 405.

Poirier vs. Plouffe, et Calvi, Opposant.

JUGE.—1. Que l'Opposant qui a été nommé gardien volontaire à une saisie, et qui a signé le procès-verbal déclarant que les effets saisis étaient la propriété du Défendeur et qui a laissé déclarer la saisie gagerie bonne et valable, a renoncé à son droit de porter opposition, pour faire déclarer qu'au contraire les dits effets étaient plutôt sa propriété.

2. Qu'un document qui n'est pas allégué dans l'opposition et qui n'est pas produit en même temps que l'opposition, ne peut l'être plus tard.

3. Qu'à une vente judiciaire, il faut qu'il y ait plus d'un enchérisseur, quoique le nombre des personnes présentes soit suffisant.

DORION, J.—L'Opposant reclame les effets saisis pour les avoir achetés de son argent sans dire de qui ni comment. Ces effets ont été saisis à la poursuite du Demandeur par saisie gagerie le jour que l'Opposant prétend les avoir achetés et avant qu'il les eut enlevés. L'Opposant a été nommé gardien volontaire. Il a signé comme tel le procès-verbal qui déclare que les effets appartiennent au Défendeur. Il n'est pas intervenu dans la cause pour reclamer ses effets. Il a laissé la saisie gagerie déclarée bonne et valable. Ce n'est que sur le bref de Fieri Facias, lorsque les effets saisis gagés sont sur le point d'être vendus qu'il fait son opposition afin de distraire. Il me semble qu'il est un peu tard. Il ne peut pas prétendre qu'il ne connaissait pas la saisie gagerie. Il y était partie en devenant gardien et signant le procès verbal.

A l'enquête l'Opposant a produit, ou plutôt le Défendeur examiné comme

Poirier vs. Plouffe, et Calvi.

témoin, a produite un double du procès-verbal d'une vente judiciaire faite dans une cause de Calvi et lui pour établir le droit de propriété de l'Opposant sur les effets saisis. Le Demandeur s'est opposé avec raison à la produotion de ce document. Il y a deux raisons pour maintenir cette objection, la première, c'est que ce document n'est pas allégué dans l'Opposition, la seconde c'est qu'il aurait dû être produit avec l'Opposition même.—*Règle de pratique.*

Ce document doit donc être rejeté de la procédure. L'Opposant se trouve alors sans preuve qui puisse empêcher le Demandeur de procéder sur son exécution. Mais en supposant même que ce procès-verbal put être admis, il est en preuve qu'il n'y a pas eu d'enchères sur les effets. Personne autre que l'Opposant n'a mis sur iceux et ils lui ont tous été adjugés à vil prix.

Opposition renvoyée.

Autorités du contestant:—Anderson & Walsh, 3 Rev. Leg—445.

"Une chose appartenant à un tiers et arrêté en vertu d'une saisie avant "jugement doit être reclamée par une intervention et non par une opposition.

"Un opposant qui n'a pas produit ses exhibits on titres avec son opposition "ne peut pas ensuite les produire à l'enquête—4 L. C. R. 126, Major vs. Baby.

Pas d'enchérisseurs—2 Vol. Doutre—C. P. C., No. 874.

Prévost & Préfontaine, pour le Demandeur Contestant.

Bertrand & Sarrasin, pour l'Opposant.

(G. D.)

COUR SUPERIEURE, 1877.

MONTREAL, 21 MARS, 1877.

Coram RAINVILLE, J.

Soulier vs. Lazarus.

JUGE:—Le vol d'une montre mise en gage par le Demandeur chez le Défendeur, qui a été lui même victime d'un vol plus considérable, sans qu'il y ait eu de sa part ni faute ni négligence, constitue un cas fortuit dont le Défendeur ne peut être tenu responsable.

RAINVILLE, J:—Le Demandeur avait placé une montre en gage chez le Défendeur. Ce dernier sur présentation du billet ne peut remettre la montre. De là l'action en recouvrement de la valeur de la montre. Le Défendeur plaide que cette montre lui a été volée, ainsi qu'un grand nombre d'autres, malgré qu'il eut pris le plus grand soin des effets qu'il avait en gage. La preuve constate que le magasin était bien fermé, ainsi que le coffre-fort; mais que le vol a eu lieu sans la faute ni la négligence du Défendeur, qui a été la victime d'un des plus adroits filous que la police connaisse et qui a déjoué ses recherches pendant plusieurs jours. La seule question à décider est de savoir si le vol constitue un cas fortuit.

L'art. 1973 de notre Code s'exprime dans les termes suivants: "Le créancier gagiste répond de la perte ou détérioration du gage selon les règles établies au titre des Obligations." Cette responsabilité est réglée par les articles 1072, 1150 et 1200.

Soulier vs. Lazarus.

L'art. 1072 dit: "Le débiteur n'est pas tenu de payer des dommages, lorsque l'inexécution de l'obligation est causée par cas fortuit ou force majeure, sans aucune faute de sa part, à moins qu'il ne s'y soit obligé spécialement."

Tous les auteurs considèrent le vol comme un cas fortuit. Demolombe, obligations, No. 553, tome 24, p. 550.

Larombière, obligations art. 1148, No. 16, vol. 1, p. 537, dit: "Il ne suffira pas au débiteur de la chose, d'alléguer qu'elle a été volée, il doit prouver qu'il n'y a eu aucun négligence de sa part."

Malleville sur l'art. 1954, No 4. Serres, Institutes, p. 453.

Gélinas pour le Demandeur.
Kerr & Carter pour le Défendeur.
(G. D.)

Action renvoyée.

SUPERIOR COURT, 1876.

MONTREAL, 30TH JUNE, 1876.

Coram RAINVILLE, J.

No. 82.

Dufresne et al. vs. *Lalonde* et al.

HELD:—That the correctness of a duly certified copy of a notarial *acte* may be attacked otherwise than by an inscription *en faux* and that the procedure by way of such inscription is unnecessary and ought to be rejected.

The following was the judgment of the Court:

"La Cour * * * considérant que les demandeurs en faux n'attaquent par leurs moyens de faux que la copie de l'acte produite par le Défendeur en faux, étant la copie d'un bail fait et passé à Montréal le quatre Février 1875, devant Mtre. H. A. A. Brault, Notaire Public, de Montréal, et qu'ils n'allèguent comme moyens de faux que les suivants, savoir;

Que les mots "*La taxe,*" qui se trouvent à la troisième page de la dite copie sont faux en autant qu'ils ont été substitués aux mots "*Le loyer;*"

Considérant qu'en loi, les copies mêmes certifiées par l'officier compétent, ne font foi que de ce qui est contenu au titre lui-même, lorsque l'original subsiste;

Considérant qu'en loi, la partie à qui on oppose une copie, peut se borner à dire que sa conformité à l'original n'est point démontrée et qu'elle ne peut l'être que par la représentation du titre original;

Considérant que, d'après l'original il est établi que dans la copie produite par le dit défendeur Lalonde il a glissé une erreur cléricale, et que les mots "*La taxe*" ont été substitués par une erreur de plume aux mots "*Le loyer,*" qui se trouvent dans le titre original, déclare la dite copie non conforme à l'original et permet au notaire de rectifier la dite erreur en présence du défendeur Lalonde sur avis à lui donné;

Considérant que l'inscription de faux était inutile et que les moyens de faux, invoqués par les Demandeurs en faux, sont insuffisants en loi, rejette la dite inscription de faux et en déboute les Demandeurs;

Dufresne, et al., vs. Lalonde et al.

Mais ce sans frais, considérant que le défendeur Lalonde était de mauvaise foi en se servant, et persistant à se servir, de la dite copie après qu'il eut été notifié par le notaire de l'erreur de plume qui s'était glissée dans la dite copie.

Inscription *en faux* dismissed.

Longpré & Dugas, for plaintiffs.
Desjardins & Prevost, for defendant.
(S. B.)

COUR SUPERIEURE, 1877.

MONTREAL, 31 MARS, 1877.

(En Revision)

Coram Dunkin, J., Dorion, J., Papineau, J.

No. 851.

Smallwood vs. Allaire.

Juge:—Qu'un débiteur qui veut se prévaloir du défaut de demande préalable à son domicile, lorsque la dette est payable chez lui, doit consigner en Cour le montant de sa dette.

2o. Que les intérêts accrus avant la mise en force du Code Civil ne sont prescriptibles que par trente ans, mais que ceux échus depuis le Code sur un titre antérieur sont prescriptibles par cinq ans.

Dorion, J.—Action sur obligation consentie par la défenderesse à feu Charles Smallwood le 13 Avril, 1859, pour £23 6s. 6d., payable à demande avec intérêt du 1 Janvier alors dernier.

L'action est portée par Mathilda M. Smallwood tant comme Exécutrice Testamentaire et Légataire Universelle du dit feu Charles Smallwood que comme héritière de feu Diana Cliff sa mère, Catherine N. Smallwood, Elizabeth Smallwood, Charles Smallwood et John R. Smallwood, tous héritiers de la dite Diana Cliff leur mère.

Au mérite la défenderesse a nié la qualité des Demandeurs et a plaidé qu'on ne lui avait pas fait demande de paiement avant l'action et que partie de la créance était prescrite, quant aux intérêts.

Le Jugement a maintenu les conclusions des demandeurs en totalité, accordant tous les intérêts depuis le 1 Janvier 1859.

Je crois que ce jugement doit être modifié. La défenderesse n'ayant pas fait d'offres en Cour ne peut pas se plaindre du défaut de demande de paiement et doit etre condamnée à payer sa dette, mais comme il y a une partie des intérets qui sont prescrits il devra en être fait déduction.

Le jugement sera donc pour.....	$ 93 30
Les intérêts échus au 1 Aout 1866 qui ne sont prescriptibles que par 30 ans.....	42 39
5 ans d'intérêt échus à l'époque de l'action.....	27 95
	$163 64

Jugement modifié, mais sans frais de Revision.
Joseph & Burroughs, pour les demandeurs.
Ouimet & Ouimet, pour les défendeurs.
(G.D.)

SUPERIOR COURT, 1877.

SWEETSBURG, 25th MAY, 1877.

Coram DUNKIN, J.

No. 48.

Insolvent Act of 1875.

Brockville & Ottawa Railway Company vs. *Foster.*

HELD:—1. That where a trader carries on business in more places than one, a writ of attachment under the Insolvent Act can only issue at his chief or one of his principal places of business.

2. That the return day of a writ of attachment under the Insolvent Act must not be later than five days after service of the writ.

PER CURIAM: The defendant petitions for the setting aside of the attachment made under a writ sued out against him, on affidavit of the president and duly authorized agent of the Company plaintiff. The petition is in two parts: the first, assigning three reasons savoring of form; the second, several reasons on the merits of the case. The three reasons given in the first part read as follows:

"1. That the said affidavit is wholly irregular, informal, null and void; inasmuch as the said defendant is not therein alleged to be a trader carrying on business in the said District of Bedford, or that his chief place of business was within the limits of the District of Bedford, to justify the issuing of a writ of attachment out of the Prothonotary's office for the District of Bedford aforesaid, or to establish that the official assignee of the District of Bedford aforesaid had authority to execute the said writ, or had jurisdiction to administer the estate of said defendant.

"2. That by reason of the omission to allege that the defendant's chief place of business was in the said District of Bedford, the authority and jurisdiction to issue said writ, and the authority of the official assignee to whom the same was addressed, to execute the same, is not shown.

"3. Because the said writ of attachment, No. 48, is illegally made returnable on the 2nd day of May next, it having been executed on the 24th day of April instant, thereby summoning said defendant to appear and show cause against said attachment on a day subsequent to 5 days after service of said writ, which by law he could not do."

The Company, plaintiff, meets this part of the petition by a demurrer, resting on the following assigned reasons:

"1. Because all the allegations required by law as to the defendant being a trader, carrying on business in said District of Bedford, and as to the chief place of business of said defendant, are set forth in the affidavit in this cause fyled, upon which said writ of attachment and concurrent writ issued.

"2. Because the allegations contained in said affidavit were and are sufficient in law to justify the issuing of said writ and concurrent writs, and to establish that the official assignee of the said District of Bedford had authority to execute said writ of attachment, and had jurisdiction to administer the estate of said defendant.

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"3. Because it is not by law requisite or necessary that a writ of attachment "issued under said act should be made returnable in 5 days from the date of "the issue thereof, nor is any limit or delay fixed by law within which a de- "fendant, under such a writ of attachment, should be summoned to appear to "show cause under such writ."

On the issues of law thus raised, the parties have been heard; and I have now to pass upon them accordingly.

The petitioner's three reasons raise in truth but two questions: the one (involved in his reasons No. 1 and 2) as to the sufficiency of the affidavit to warrant issue of the writ in this cause from the office of the Prothonotary of this District; the other, (involved in his reason No. 3) as to the legality of the issue of the writ, returnable as it is on the 8th day after that of its service on the defendant.

In reference to the former of these questions, the Company, plaintiff, relies on the following averments of the affidavit:

"To the best of my knowledge and belief the defendant has no warehouse, "office, or regular place of business apart from his domicile at Waterloo afore- "said. He has for many years carried on, and still carries on the business of a "contractor for building railways, and for furnishing materials therefor for "profit and gain, both within the said District of Bedford and within the "County of Renfrew in the Province of Ontario. And during all the said period, "and now, the defendant has transacted and still transacts business within "the said District of Bedford at his said domicile therein, and hath had and "has no other known place of business therein."

The 9th section of the Insolvent Act, here relied on by the defendant, requires that the affidavit or affidavits "disclose such facts and circumstances as will sa- "tisfy the Judge or Prothonotary of the Superior Court, in the County, Province "or District, as the case may be, in which such trader has his chief or one of his "principal places of business, that, &c." The form B, appended to the Act, has in it no words relative to the matter, perhaps, because the case of a trader having several places of business, being exceptional, was overlooked in the drafting of the form. But I cannot, therefore, hold that the above words of the Statute go for nothing. They limit the liability of a trader having several places of business to the fearfully rigorous process of attachment under the Act [illegible] subject him to it, only within the judicial territory "of his chief or [illegible] "principal places of business." Elsewhere, that process cannot [illegible] The precise words of the Statute may not be sacramental, as words to be used in the affidavit. I do not think they are. But I have no hesitation in holding that their sense must be fairly met by the tenor of the affidavit. In this case, the affidavit was presented, and the writ sued on, here, and in my absence The Prothonotary acting herein for the Judge—had to be satisfied by the affidavit, that the defendant has his chief or one of his principal places of business in the [illegible] now, sitting here to judge of the issue of the writ, have to be satisfied. Otherwise the Prothonotary had by law no function to exercise in the matter; and his act cannot be held to have availed to bring the defendant rightly here. Was, then, the affidavit one to satisfy a Judge or

Prothonotary on that head? It declares the defendant to carry on business elsewhere, as well as in this district—in another province even, as well as in this. In its assignment of debt, it shows such debt as arising out of transactions elsewhere than in this province—presumably, at some place or places of business not within this District or this Province. It even requires concurrent writs for attachment of assets beyond this Province—thereby strengthening such presumption. It sufficiently declares his domicile to be a place of his business, and indeed his only place of business *in this District*. Beyond this District it stops short with saying: "to the best of my knowledge and belief the defendant has "no warehouse, office or *regular place of business* apart from his domicile." But the Act here makes no distinction for warehouse, office, or regular place of business." It deals with places of business, "a chief place of business," "principal places of business," and with nothing else. As already said, where a man has more than one place of business, it subjects him to this most rigorous procedure, only within the territorial jurisdiction of "this chief or one of his "principal places of business." The affidavit must shew what that is. It is an affidavit for the obtaining of a most exceptional and rigorous remedy. As such, it has to be construed. The 13th rule of practice in Insolvency rightly lays it down as subject to the same rigorous construction as an affidavit for *Capias*. I can intend nothing to widen its meaning, or save the process it seeks. Least of all, can I so intend, in the face of its own implication, to the contrary of such intendment. This affidavit clearly imports plurality of places of business of some sort—whether or not warehouses, or offices, or regular places of business (whatever those phrases, according to the mind of the deponent, may mean) can here matter nothing. The fact that the deponent so carefully limits his negation as to places of business, apart from the domicile, is conclusive that there are some. Of the selected place, keeping clear of allusion to any chief or principal place, it says only that is a place, and the only one within this District. In the face of this, I cannot create by intendment a jurisdiction which the Company, plaintiff, manifestly fails to show.

I turn, then, to the second question.

The 9th section of the Act provides that a writ of attachment must require, the official assignee to "summon" the defendant "to appear before the court "or a judge thereof, on a day therein mentioned, to answer the premises." The writ accordingly runs: "We command you to summon the said "to be and appear before us in our Court for "in the County (or District) of on the day "of to shew cause, if any he hath, why his estate should not be placed "in liquidation under the Insolvent Act of 1875," &c.; "and in what manner "you shall have executed this writ, then and there certify unto us with your "doings thereon, and every of them, and have you then and there this writ."

The 11th section of the Act adds, that "writs of attachment shall be made "returnable forthwith after the execution thereof." And lastly, by the 18th section of the Act, the defendant is strictly limited to five days from the service on him of the writ, for the presenting of his petition to quash.

In this case the defendant's complaint is, that service was made on the 24th

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of April, the writ summoning him to show cause, and directing the official assignee to make return, on the 4th May, two days after the last day on which he could by law effectively show cause. The Company, plaintiff, has to contend, and here does contend, that there is no delay fixed by the Act as to this; that the law presumes the defendant to know the fatal delay fixed by it for his petition; and that the tenor of the writ, as regards its summoning of him for any later day, is in law immaterial.

I cannot bring myself so to hold. The express requirement to summon for a day certain, means something; shows that the law does not mean to leave a defendant to the risk of his acquaintance with the statutory limitation of his delay to petition. He is to be put on his guard, and held to appear and show cause on a day named, and that day, obviously, must not be one beyond the delay limited by law; for, if it is, the writ becomes fatally deceptive in its tenor. No statute can be construed as meaning that a summons which it requires should ever have that quality. Even without the "forthwith" of the 11th section, it could not so hold in this case. The day of summons and return, if it can be at all later than the 5th day from that of service, may be indefinitely later. The argument here pressed for the Company plaintiff, so runs. The defendant's counsel does not suggest that any trap has here been intentionally laid for him. But, were the law once authoritatively so interpreted, it would manifestly lead to what might well be a frequent, not to say an almost matter of course, laying of such trap. Supposing even a defendant to be aware of the danger, and vigilant to petition in time, the plaintiff, by his deferred return, would be obtaining obvious advantages which the law cannot possibly mean he should be able so to get. And supposing him not up to the trick, his simplicity in trusting to and obeying the Queen's writ would be his ruin as a litigant, by depriving him of opportunity to defend himself from the demand, however preposterous it might be.

Besides, apart from all this, the "forthwith" of the 11th section comes in decisively. Vaguely as it, perhaps, might be thought to sound, if it stood alone, it here follows the requirement of the summons for a day certain. Equally with all else in the statute, it must be held to mean something, and that something of meaning cannot but preclude the taking of a day certain, later than the fatal delay within which alone a defendant can by law show cause, as the summons bids him do.

It is true that the 18th section of the Act, and the 3rd section of the amending Act, 39 Vic., c. 30, purport to enumerate the grounds on which a defendant may petition, and that this particular ground of objection is not one of those so specified. For the Company, plaintiff, this objection is, of course, urged as fatal. On reflection, I do not find that I can so hold it. I do not think that the list of grounds given can fairly be construed in a sense so restrictive. Holding as I do, that the law clearly and with reason requires a summons for a day certain, not beyond five days from that of service, I cannot make that requirement nugatory, by also holding that the omission to say that failure in this behalf may be urged as a ground of petition, precludes its being so urged. The redaction of a statute may be, as here, imperfect. But I must so interpret it as to give to all its pro-

visions the fairest and most harmonious construction, and the fullest practical effect I can.

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Nor may I hold that the fact of the defendant's not having in this case made the mistake of appearing and petitioning on the day named in his summons, cuts him off from the right to complain of this flaw as regards his summons. To do so, would be, in effect, to rule that what I hold to be the requirement of the law is a mere play of words; for, under such ruling, any defendant who should appear and answer within the shorter time limited by the statute, would be cut off from complaint on that score, and one who should appear and try to answer at the later time named in his summons would be cut off from all manner of complaint, by the letter of the Act. It might possibly be argued that, in such case, he must of necessity have the right to urge this one ground of grievance; but hardly, I fancy, that he could urge (as he ought to have a chance to do) any other. Either proposition would involve a straining of interpretation for which I am not prepared. I fall back on that construction of the whole law which seems to me to be the fairest that I can give to it. And that construction, as I have said, precludes my regarding this second ground of objection on the defendant's part, either as one that the law will not let him take at all, or as one that, by reason of his having appeared in time, he has lost his right to take.

The demurrer only strikes collectively at the two grounds taken by the defendant; and can stand, therefore, only by my ruling that both are bad. I have thought it fairer to the parties, in view especially of the novelty and interest of both the questions raised, to go fully into both, and not merely to rest my decision on one or other.

That decision must be adverse to the demurrer.

Demurrer dismissed.

Buchanan, Q.C., & Baker, Q.C., for the plaintiff.
O'Halloran, Q.C., for the defendant.
(S B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 21st DECEMBER, 1876.

Coram DORION, C.J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 122.

MARC AURELE PACAUD,
(*Plaintiff in the Court below,*)
APPELLANT;
AND
THE QUEEN INSURANCE COMPANY,
(*Defendant in the Court below,*)
RESPONDENT.

HELD:—Where the insured in his application for insurance described a building as "isolated," which it was in the ordinary sense of the term, that a printed note on the application, *below* the signature of the insured, explaining "isolated" as meaning 100 feet from any building, did not bind the insured, he being in good faith and his attention not having been called to the note.

2. That, no bad faith being proved, the over-valuation did not vitiate the policy, and judgment was rendered for such sum as appeared to be supported by the evidence.

The appellant's action in the Court below was brought for the recovery of

$2,000, amount of a policy of insurance against fire, granted by the respondent to the appellant, on a dwelling-house owned and occupied by him, situated at St. Norbert, county of Arthabaska.

The respondents' defence rested on the following grounds:

1st. Mis-description of premises by appellant.

2nd. Breach of condition No. 7 of the policy. "The Company will not be "answerable for any loss where fires are used in buildings unprovided with good "and substantial brick or stone chimneys," and mis-description of premises in reference to chimneys.

3rd. Over-valuation. The mis-description by the appellant of the premises offered by him for insurance was pleaded by two pleas, the first and second pleas of defendants. The same mis-description and misrepresentation were set up in both pleas; the first alleging a warranty as to correctness and accuracy of description and plan of premises, and a breach of the same; and the second setting forth that the misrepresentations and omissions were of facts material to be known by respondents, and that a lower rate of premium was charged, by reason of the false description, than would have been exacted had the real facts been disclosed.

The printed application for insurance was filled up by an agent of the defendant, but signed by plaintiff; below his signature was a printed note, with divers instructions, &c., among which was this:—

"*Isolated*" must always mean 100 feet from any building whatever." The description inserted was "situate on the *south* side of the *main road of the Parish of St. Norbert;* on the east side *isolated;* on the west side by a *two-story* "*house*, built of wood, covered with *wood*, distant 50 feet; and in rear by a *dairy* "*and a small wood house*, built of *wood*, covered with *wood*, distant 20 feet."

The words in italics were filled in writing by the Company's agent; the others were in the printed form.

The question 15. "Value. What is the present cash value?" was answered, $2,500. "The application also had the usual clause, making it part of the policy, and its correctness a condition precedent to the policy.

It was proved that on the east side, where the property was described as "isolated" it was so in the usual sense of the word, "detached, unconnected with other buildings," but that there were other buildings at a distance of 48 feet, so that the property was not "isolated" in the meaning given to the word by the footnote above referred to.

As to the value of the property, the evidence was conflicting.

The other facts and the issues in this case sufficiently appear from the remarks of the Court in rendering judgment.

TESSIER, J., said the action was instituted for the recovery of $2,000, insurance on buildings in Arthabaska, which were destroyed by fire. On the 5th October, 1871, Pacaud insured a house and other buildings with the respondents, the insurance being effected on application to the agent of the Company at Three Rivers. The property having been destroyed by fire, and a claim being made under the policy, the Company refused to pay on the ground of misdescription of the premises by Pacaud and over-valuation. The Court below maintained the plea and dismissed the action, whereupon the present appeal

was brought. The question was whether the defendants' grounds of exception had been established. The first was mis-description of the premises, in stating that the house was isolated, which meant, according to the Company, that it was 100 feet from other buildings. It must be remarked that the application was altogether in the writing of the agent, except the signature. The words explanatory of the meaning of isolated were not over the signature, but below. The agent did not explain the matter to Pacaud, namely, that *isolated* meant a distance of 100 feet between each building. There was no bad faith on the part of the latter; no intention to deceive the Company. The Court here was of opinion that the words underneath the signature did not bind Pacaud, and that there was no breach of warranty as to the distance from other buildings. The second objection of the Company was that the chimneys of the house were not as stated in the application, that they ought to have been of brick or stone, but one was constructed of an old sheet iron pipe. The evidence was not very clear on this point, but the Court came to the conclusion that there was no defect that involved the violation of the policy. The next question was whether there had been an over-valuation. The property had been insured for $2,000, and the evidence hardly justified so high a valuation, but the plaintiff did not intentionally over-value. It was common for persons to differ widely as to values. The amount would, therefore, simply be reduced to what the evidence supported. Judgment reversed, and the Company condemned to pay $1,500.

Judge Tessier cited the case of Casey et Goldsmith 4 vol. L. C. Reports; le No. 79 du contrat d'assurance de Pothier: "Celui qui a fait assurer ses effets "pour une somme au-delà de leur valeur, est (dans le doute) présumé l'avoir "fait de bonne foi et par ignorance; car la fraude ne se présume pas; c'est aux "assureurs, lorsqu'ils allèguent et qu'ils demandent en conséquence la nullité "de l'assurance à la justifier." Also Pothier, Confrat d'Assurance No. 199; Littleton, Digest of Insurance Decisions page 84. "The leaning of Courts "is to hold stipulations to be representations rather than warranties, in all cases "where there is room for construction," idem p. 91. "In matters of mis-"description, if difference immaterial, policy not vitiated."

RAMSAY, J., remarked that the Company endeavored to give a meaning to the word "isolated" which was not its ordinary meaning. There was nothing to show that the insured had notice that, in the jargon of the insurance companies, the word bore a different meaning. As to the chimney, it was for the Company to prove clearly that the pipe went through the roof. They had not done so, and, in default of evidence, it must be assumed that there was no mis-description. The last point was as to the valuation. The amount was certainly a high valuation, but it did not appear that it was a fraudulent valuation. The plaintiff could not be deprived of his claim altogether because he had erroneously placed too high a value upon his property.

The judgment is as follows:—

"La Cour, &c.,

"Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure pour le District de Montréal le 31 jour d'Octobre, 1874;

"Considérant que d'après la preuve faite en cette cause, les exceptions

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produites par l'intimée en cette cause, défenderesse en cour inférieure, sont mal fondées ;

" Considérant que l'appelant, demandeur en cour inférieure, a prouvé sa demande pour le recouvrement d'une Police d'assurance mentionnée dans la dite demande sur une maison appartenant à l'appelant située à St. Norbert dans le comté d'Arthabaska dans la Province de Québec, en date du 16 jour d'Octobre, 1871, par laquelle l'Intimée s'était obligée envers l'appelant moyennant une prime reçue de lui payer la somme de $2,000 au cas de la perte par incendie de la dite maison durant l'année à courir du 5 Octobre 1871 au 5 Octobre 1872 ;

" Considérant que la dite maison a été ainsi détruite par un incendie accidentel arrivé le 25 Juillet, 1872 ;

" Considérant qu'il est en preuve que la maison ainsi détruite était de la valeur assurée, mais considérant que cette Cour après avoir posé toutes circonstances prouvées, réduit la perte ainsi soufferte par l'appelant à cause de l'incendie de la dite maison à la somme de $1500 ;

" En conséquence cette Cour casse et infirme le jugement rendu en cette cause par la dite Cour Supérieure le 31 Octobre 1874, et procédant à rendre le jugement qui aurait dû être rendu, &c. " Jugement pour $1,500.

Judgment reversed.

Doutre, Doutre & Hutchinson, for appellant.
G. B. Cramp, for respondent.
(J. K.)

COUR SUPERIEURE, 1877.

MONTREAL, 7 FEVRIER, 1877.

Coram PAPINEAU, J.

No. 2700.

Mulholland et al. vs. *La Compagnie de Fonderie de A. Chagnon et al.*

JUGE:—Que l'action en recouvrement du montant d'un billet promissoire, doit être instituée au lieu où la dette a été contractée et non à celui où le billet est payable.

Que dans la présente cause, les défendeurs résidant à St. Hyacinthe, ont été poursuivis à Montréal, sur des billets promissoires datés à St. Hyacinthe, mais payables à Montréal, et que l'action des demandeurs sera déboutée sur *exception déclinatoire*.

PAPINEAU, J. :—Cette action est basée sur quatre billets promissoires, faits, signés et datés à St. Hyacinthe, par l'un des défendeurs, à l'ordre de l'autre, qui les a endossés. Trois sont payables au bureau de la Banque de la Cité et l'autre, au bureau de la Banque du Peuple, à Montréal. Les deux défendeurs résident à St. Hyacinthe où le bref leur a été signifié.

Ils proposent comme moyen de défense, une exception déclinatoire, fondée sur ce que les billets en question ont été faits à St Hyacinthe, lieu de leur domicile, et sur le fait qu'ils sont appelés à se défendre à Montréal.

En réponse à cette exception, les demandeurs soutiennent :—

1o. Que leur droit d'action a originé à Montréal où les billets sont faits payables et où ils sont devenus exigibles. 2o. Qu'en faisant ces billets payables à Montréal, les défendeurs ont fait implicitement élection de domicile à Montréal et se sont soumis à la juridiction de ce tribunal. 3o. Ils ont soutenu lors de

l'audition, que par faveur pour le commerce, les tribunaux doivent interpréter libéralement l'article 85 du Code Civil et l'appliquer aux billets promissoires.

Les demandeurs ont cité à l'appui de leurs prétentions, nombre de décisions qui malheureusement ne sont pas rapportées dans nos recueils de jurisprudence.

Les défendeurs s'autorisent de décisions supportant l'opinion contraire.

Dans ce conflit d'autorités, que je n'ai pas l'avantage ni le temps de pouvoir consulter sans les rechercher dans les archives de la Cour, il me faut trouver une interprétation raisonnable de ces termes de l'article 34 du Code de Procédure : la poursuite doit se faire " devant le tribunal du lieu où le droit d'action " a pris naissance." Cet article est tiré du ch. 82 S. R. B. C. sec. 26 qui dit :— " pourvu que *la cause de telle action*, poursuite, ou procédure, soit née dans le " dit district."

Les demandeurs prétendent que le Code contient une modification sur le droit qui régissait cette matière avant sa promulgation. Ils font une distinction entre *la cause de l'action* qui est, suivant eux, l'ensemble de tous les faits qui donnent lieu à l'action depuis le contrat, jusqu'à l'infraction inclusivement, pendant que *le droit d'action*, ne serait que le droit résultant immédiatement de l'inexécution du contrat, et conséquemment, ils font leur demande où les billets sont payables et où ils n'ont pas été payés.

Quelle est la cause efficiente, la cause essentielle de l'action ? C'est le lien de droit qui oblige le défendeur envers le demandeur. Sans ce lien, l'un n'a pas droit d'action contre l'autre. Tous les tribunaux du pays, je devrais dire du monde entier, ont décidé que là où ce lien manque, il n'y a pas de droit d'action. C'est de ce lien que le droit d'action procède comme de sa source. Il en reçoit non seulement toute sa force et vertu, mais son existence même. C'est donc dans ce lien, qu'il a son origine, sa naissance.

La cause efficiente de l'action et le droit d'action, à sa naissance, sont donc une seule et même chose ; ils ont une seule et même origine : le lien qui oblige une partie envers l'autre.

Aussi, tous nos auteurs s'accordent-ils à dire que toutes les actions naissent des *contrats*, des *quasi contrats*, des *délits* et des *quasi délits*, qui sont les quatre grandes sources d'où sortent toutes les obligations ; et les codificateurs n'ont pas prétendu innover et n'ont de fait pas innové, quand aux mots *où la cause d'action est née*, ils ont substitué ceux-ci : *" où le droit d'action a pris naissance."* Ces deux expressions se rapportent au droit dans sa source, dans sa naissance, à son origine même et non à son échéance.

Dans le cas des billets promissoires en question, nous trouvons ce lien sans lequel il n'existe pas d'action, dans la promesse faite de payer, à Montréal, à l'ordre du créancier le montant de ces billets. Mais ce lien s'est formé à St. Hyacinthe, où les billets ont été faits et datés.

Le terme et le lieu du paiement, ne changent rien à la nature ni à l'efficacité de ce lien. Ils ne peuvent qu'en modifier ou suspendre l'effet.

Mais disent les demandeurs : le créancier du billet ne peut poursuivre son débiteur que sur le défaut de ce dernier de le payer, il ne peut agir judiciairement qu'après ce défaut ; donc ce n'est qu'à ce moment, que naît son droit d'ac-

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tion. Ce défaut a lieu à Montréal où les billets sont payables dans le cas actuel ; c'est donc ici le lieu où le droit d'action a pris naissance.

On doit faire une distinction entre le droit d'action et l'action elle-même. Celle-ci n'est que l'exercice de l'autre. Le droit est la cause efficiente de l'action ; l'action est la poursuite, la demande en justice de ce droit. Le droit d'action est né, il subsiste dans l'obligation créée par la promesse, quoique son effet soit suspendu par le terme, et qu'il ne soit ouvert et mûr que par le défaut d'exécution de la promesse.

Je vois une différence aussi, entre les actions résultant des contrats, et celles résultant des quasi-contrats, des délits et quasi délits. Dans les premières, le droit naît au moment où se forme le contrat, mais il n'est ouvert que par l'inexécution de l'obligation.

Dans les cas de quasi-contrats, de délits ou de quasi-délits, le droit d'action n'est pas suspendu : dans les cas de délits ou quasi-délits particulièrement. Dès l'instant où la faute est commise, la loi oblige à la réparation du préjudice qui s'en suit et le droit à la réparation naît au même instant que le tort à réparer : le droit d'action naît à l'instant et à l'endroit où le délit est commis.

Cette distinction faite, voyons s'il est bien vrai, dans le cas d'un billet promissoire que le défaut donnant ouverture à l'action a lieu où le billet est payable et n'a pas été payé.

Est-ce le billet ou la personne qui est en défaut ? Une faute présuppose un être capable de volonté pour la commettre. Dans le cas présent, ces billets sont bien à Montréal à l'heure du défaut, mais où sont les personnes qui seules peuvent faire la faute ? Elle sont à St. Hyacinthe, à leur domicile, au moins, elles sont presumées y être. Elles n'ont pas pris la peine de se rendre à Montréal, pour manquer à leur promesse. Leur défaut est constaté à Montréal, sans doute, mais la faute ou la négligence des payeurs, comme on voudra l'appeler, est en eux-mêmes, à leur domicile. Et si l'on pouvait interpréter le Code comme donnant le droit de poursuivre où le défaut a lieu, il faudrait encore poursuivre devant le tribunal du domicile.

Une preuve que je ne m'écarte pas trop de la jurisprudence, dans la signification que j'attribue aux mots "droit d'action a sa naissance et cause d'action," c'est que dans des jugements prononcés par la Cour de Révision à Montréal, ces expressions ont été employées indifféremment l'une pour l'autre. Pattison v. The Mutual Insurance Company, 16 L. C. J. p. 25 ; Lapierre vs. Gauvreau, 17 L. C. J. p. 241.)

Examinons maintenant si les autres prétentions des demandeurs sont bien fondées.

Est-il bien vrai que le faiseur d'un billet, en fixant le lieu du paiement dans un autre district, y fait tacitement élection de domicile et se soumet à la juridiction des Cours de ce domicile élu ?

Le domicile joue un rôle si important en loi, qu'on n'est pas facilement présumé l'avoir changé et le Code exige pour cela, outre le fait d'une habitation réelle dans un autre lieu, *l'intention d'y faire son principal établissement.* (Code Civil, Art. 80.) La preuve de l'intention, résulte des déclarations de la personne et des circonstances. (Art. 81.) Celui qui est appelé à une fonc-

tion publique temporaire ou révocable, conserve son domicile, s'il ne manifeste l'intention contraire. (Art. 82.)

" Lorsque les parties à un acte, y font, pour son exécution, élection de domi-
" cile, dans un autre lieu que celui du domicile réel, les significations, demandes
" et poursuites qui y sont relatives, peuvent être faites au domicile convenu et
" devant le juge de ce domicile. (Art. 85.)

Cette disposition est pour le cas des actes, autres que les billets promissoires et n'a jamais été interprétée comme s'y rapportant. A-t-on jamais vu un praticien s'aviser de faire signifier une action sur billet promissoire, au lieu particulier où il est payable dans un district autre que celui où réside le débiteur ? Et, pourtant, si cet article du Code était applicable aux billets promissoires, la chose serait logique et légale.

On n'est jamais présumé avoir renoncé à un droit, sans que cette renonciation ne soit expresse ; or, il est incontestable que le débiteur a le droit d'être traduit devant le juge de son domicile, à moins d'une disposition expresse de la loi prescrivant le contraire. Il n'existe pas de dispositions à cet effet dans le droit français tel qu'il nous a été donné, ni dans notre droit statutaire.

Dans le droit français actuel, il existe une disposition spéciale (Art. 420 Code de Procédure français,) qui permet d'assigner le débiteur devant le tribunal du lieu où le paiement devait être fait. Elle ne nous affecte nullement.

Quant à la faveur que les tribunaux doivent accorder au commerce, je ne vois pas qu'elle puisse s'étendre juqu'à favoriser une classe de la société au détriment des autres.

Si les commerçants veulent soumettre leurs pratiques à la juridiction du tribunal où ils résident eux-mêmes, ils peuvent formuler leurs billets expressément à cette fin ; mais ils ne doivent pas espérer que les tribunaux feront pour eux, plus qu'ils n'ont exigé eux-mêmes.

D'ailleurs, il y aurait injustice à traduire devant la Cour de Montréal, et à leur faire payer une taxe considérable, les défendeurs qui sont du district de St. Hyacinthe, où ils n'ont à payer qu'une taxe relativement légère, pour la construction du Palais de Justice.

L'exception déclinatoire est bien fondée et elle est maintenue avec dépens ; l'action est déboutée sauf recours devant le tribunal compétent.

Depuis que ces considérations ont été écrites, j'ai eu occasion de prendre communication des raisons données par le Juge en Chef de cette Cour, dans une cause analogue à celle-ci (Wurtele vs. Lenghan & al. 1 R. J. de Q. p. 61 ;) et je suis heureux de voir qu'en déboutant l'action, il s'est appuyé sur les motifs qui ont déterminé ma décision, tout en les exprimant avec plus de netteté et de précision que je n'ai pu le faire moi-même.

Exception déclinatoire maintenue.

Abbott & aossciés, pour les demandeurs.

Loranger & associés, pour les défendeurs.

(J. G. D.)

COUR SUPERIEURE, 1876.

MONTRÉAL, 4 DECEMBRE, 1876.

Coram PAPINEAU, J.

No. 482.

Wilkes vs. *Marchand* et al.

JUGE:—Qu'après l'échéance d'un billet promissoire, il n'est pas permis d'y ajouter un endossement, dans le seul but de soustraire le faiseur et les endosseurs *bona fide*, à la juridiction de leur juge naturel, pour les traduire devant le tribunal du domicile de cet endosseur putatif.

L'action en cette cause est fondée sur un billet promissoire, fait et daté à St. Jean, district d'Iberville, par le défendeur Marchand, et payable à l'ordre du défendeur Paradis. Il est endossé après échéance et protêt, par Davidson, l'un des défendeurs, résidant à Montréal, afin que ce dernier puisse être poursuivi et les deux autres avec lui à Montréal.

Les deux défendeurs, Marchand et Paradis, comparaissent séparément, et se plaignent, par exception déclinatoire, de ce procédé adopté uniquement pour les forcer d'aller se défendre dans un autre district.

Le jugement est dans les termes suivants:

Considérant que le billet en question a été fait et daté à St. Jean, district d'Iberville, sans mentionner aucun lieu particulier où il serait payable et qu'il est par conséquent au domicile du faiseur;

Considérant que le faiseur du dit billet, L. H. Marchand et le premier endosseur, E. Z. Paradis, deux des défendeurs, ont leur domicile à St. Jean susdit, où ils résidaient quand le dit billet a été fait;

Considérant qu'il est prouvé par le témoin Jones, que J. Davidson, l'autre défendeur, domicilié dans le district de Montréal, n'est devenu partie au dit billet, qu'après son échéance, après protêt et après que le dit billet fut devenu la propriété du demandeur;

Considérant que le défendeur Davidson, était, lors de son endossement du dit billet, dans l'emploi du demandeur, à titre de commis, et qu'il n'a pas endossé le dit billet, dans le cours ordinaire des affaires et de bonne foi, comme partie effectivement responsable du paiement de ce billet, mais dans le seul but d'être fait défendeur dans la cause et de faire traduire, par ce moyen, les deux autres défendeurs hors de leur district, dans celui de Montréal, et de les priver ainsi du droit qu'ils ont, par la loi, d'être jugés par le juge de leur domicile;

Considérant que l'endossement du défendeur Davidson, a été fait en fraude de la loi;

Considérant qu'en ajoutant ou faisant ajouter une partie de plus dans l'action qu'il a prise contre les défendeurs, Marchand et Paradis, le demandeur a empiré la condition de ces deux défendeurs, en les exposant à payer des frais additionnels;

Considérant que la fraude à la loi, pratiquée par ce moyen, au préjudice des défendeurs, Marchand et Paradis, ne peut être un moyen légitime de les soustraire à leur tribunal naturel, et que, par conséquent, cette fraude ne peut

donner à cette Cour juridiction sur eux, leur exception déclinatoire est déclarée bien fondée et elle est maintenue avec dépens contre le demandeur, et l'action de ce dernier est déboutée quant à eux, avec dépens, distraits à M. Charland, leur avocat, sauf recours, devant le tribunal compétent.

Wilkes vs. Marchand et al.

Doutre & Associés, pour le demandeur.

Charland, pour les défendeurs, Marchand et Paradis.

Exception déclinatoire maintenue.

(J.G.D.)

CIRCUIT COURT, 1876.

LACHUTE, 15TH SEPTEMBER, 1876.

Coram BOURGEOIS, J.

Ex parte ISRAEL SAUVÉ,

PETITIONER;

AND

THE CORPORATION OF THE COUNTY OF ARGENTEUIL,

RESPONDENTS.

HELD:—That the Municipal Code of the Province of Quebec has not totally abrogated the provisions of the Temperance Act of 1864.

On a petition to quash a by-law passed by the County Council of the County Argenteuil under the authority, and for the enforcement of the Temperance Act of 1864, the following judgment was rendered:—

BOURGEOIS, J.—The main and only question raised is whether the Temperance Act of 1864 is repealed totally, or repealed at all by the "Municipal Code." Now the reading of section 201 of License Act of 1870 shows clearly that the intention of the Legislature was not to repeal the Act of 1864. That such was the intention of the Legislature appears also evident from the wording of section 1086 of the "Municipal Code," passed during the same session.

It is true the License Act of 1870 partially repealed the Temperance Act of 1864 by section 197, and, why? because the sections so repealed were inserted in a modified form in the License Act, and all clauses not so repealed by section 197 are still in force unless repealed by the "Municipal Code," or some other statute since passed.

The judge proceeded to strengthen his argument on this point by reference to the analogous position of the Agricultural Act, many of the provisions of which were as specially repealed by subsequent enactments as were those of the Dunkin Act, and yet no one pretended that such clauses of the original act as referred to trespasses, cutting down woods, fences, etc., which were not referred to in subsequent Acts, were in consequence repealed.

He further combated the pretensions of petitioner that the Municipal Code enumerated all the powers of Municipal Councils, and referred to section 449 of the Code in support, declaring that County Councils have all the powers ever granted to them by either general or special Acts, where such are not inconsistent

Israel Sauvé and Corporation of the County of Argenteuil.

with those specified in the Municipal Code. Section 572 of the Code upon which the petitioner's Counsel so strongly depended, might tend to show the intention of the Legislature, were it not counteracted by other sections of the same Code.

In the latter there is not one word which refers to the powers of County Councils as to prohibition. The procedure of Local Councils on this subject is there set out; but nothing is said respecting that of County Councils; and when power has been once vested in any body it requires language in the most express and explicit terms to take it away.

The by-law here in question was not passed by a local, but by a County Council and in so doing the latter acted within its legal powers. By adopting the views of petitioner, the Court would not be interpreting but making laws.

His Honor concluded as follows: "I do not now decide whether the by-law in question is legal, and whether all the formalities have been complied with in passing it or not, or whether it could be quashed by a petition, or whether the petitioners can apply to another Court by any other measure."

The following is the formal judgment of the Court:—"The Court, etc.,

"Considering that the Municipal Code of the Province of Quebec has not totally abrogated the provisions of "the Temperance Act of 1864," but affects them only in so far as the former contains provisions which have either expressly or impliedly this effect, or which are contrary to or incompatible with the said Temperance Act, or in so far as the said Code contains express provisions on the subject;

"Considering that by the terms of the said Municipal Code, Municipal Councils beyond the powers conferred upon them by the said code, can still exercise those which have been given to them by the provisions of any other law not incompatible with the said code;

"Considering that the Municipal Council of the County of Argenteuil had the right in virtue of the provisions of "the Temperance Act of 1864" of passing the by-law, whose annulment is demanded in the present case, that this right conferred on County Municipal Councils is not incompatible with the provisions of the Municipal Code, which does not contain any provision either impliedly or expressly taking away this right, and contains no express provision on this particular subject;

"Considering that it was not even necessary that the by-law, whose annulment is demanded in the present instance should be published in the manner prescribed by ordinary municipal rules;

"Considering that the facts and *moyens* set forth by the petitioner in his petition are insufficient in law to have the said by-law delared null, doth dismiss and reject the said petition of the said petitioner, with costs, *distraits* to Messrs. Davidson & Cushing, attorneys for the respondent."

J. A. Filion, for petitioner.
J. A. N. Mackay, counsel.
Davidson & Cushing, for respondent.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 7th JULY, 1877.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 345.

In re *Cable*, Insolvent, and *Stewart*, Assignee, and *Bayard*, Petitioner, and *Stewart*, Petitioner for *Requête Civile*, and *Bayard*, Contestant.

Held:—That under the circumstances of this case, the creditor had obtained an order for the delivery of goods by fraud and artifice, and said order was, in consequence, set aside on petition of the assignee.

On the 21st June, 1876, the contestant Bayard, by his petition, prayed to be declared proprietor of certain moveables in the hands of the insolvent, and that the assignee be ordered to deliver them to him. The assignee was served with the petition, and by his attorneys declared that he submitted to the order of the Court, and on the 22nd August a judgment was pronounced, granting the conclusions of the petition. On the 6th September last, the assignee, A. B. Stewart, presented a petition in insolvency, and represented that the petitioner Bayard in his petition had omitted to state that, on or about the 29th July, 1875, by notarial act he had leased to the insolvent the moveables in question for a period of five years, and that the insolvent had paid him rent for the same term; that the assignee, now petitioner, when the petitioner Cable presented his petition, was ignorant of the fact that the said insolvent held receipts for said rent, except what said insolvent told him, which was denied by said Bayard; that it was only on the 5th of September then instant, that the assignee came into possession of said receipts; that, by reason of said lease and receipts, said insolvent had a right to the lease and goods thereby leased for the unexpired term of said lease, which lease was of the value of $1,000, and, until its expiry, said Bayard could not get possession of said goods; that said Bayard, by his petition, wilfully and fraudulently omitted to state the circumstances of said lease, with the sole object of getting possession of said goods, and fraud and artifice had been used by said Bayard in obtaining judgment in his favor, to wit, on the 22nd August; that, further, said judgment was rendered upon documents which have been discovered to be erroneous, and since said judgment documents have been discovered of a conclusive nature against the granting of his petition. The assignee Stewart, therefore prayed that the judgment of date 22nd August might be set aside, and that the conclusions of the petition of Bayard be rejected, that the petitioner Stewart be allowed to retain the goods in question and the use of the lease thereof for the benefit of himself and the creditors.

PER CURIAM:—It is in evidence that the insolvent had receipts from Bayard for $850, as rent for the goods in question. The insolvent at the meeting of creditors at which Bayard was present, stated that he held receipts for rent from Bayard, and the statement was positively denied by Bayard, and the assignee then took Bayard's word for his denial, as the receipts had been mislaid. The receipts only came into the possession of the assignee on the 6th September, on which day this petition was fyled. Bayard has fyled a claim against the estate of

In re Cable, Insolvent, and Stewart, Assignee.

the insolvent for rent of the furniture in question. Can we say that there was fraud and artifice on the part of the petitioner Bayard in obtaining the judgment of 22nd August, now sought to be annulled? He must have known of the payment of the rent, for he had acknowledged payment. The insolvent affirmed the existence of the receipts, but that they had been mislaid, and his statement was stoutly denied by Bayard. The assignee who acquiesced in the judgment of 22nd August did so in ignorance of the facts, and as soon as the proofs were found he endeavors to set himself right and to protect the estate. I think he may fairly say that the judgment of 22nd August was obtained by fraud and artifice of Bayard. He claimed the goods and he claimed rent, neither of which he should have. He seems to have trusted to the loss of proof of the payment. He obtained judgment by representing facts which were untrue, and which he knew to be untrue, so we must assume. I think the conclusions of the assignee on ground of fraud and artifice by Bayard should be granted.

Macmaster & Hall, for assignee.

Dugas, for Bayard.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 7th JULY, 1877.

Coram TORRANCE, J.

No. 1514.

Les Curé et Marguilliers de la Paroisse de St. Clement de Beauharnois v. *Robillard.*

HELD:—That an account rendered and fyled under a judgment of the Court, will be rejected as irregular if it does not exhibit the three heads of receipts, disbursements (*mise*) and what remains to be recovered (*reprise*).

By a judgment of the Court of Queen's Bench, 16th March, 1877, the defendant was ordered to render to the plaintiffs an account within thirty days from the service upon him of the judgment. An account, accompanied by vouchers, in compliance with this judgment, was fyled in this Court on the 3rd May last. The plaintiff on the 7th May made a motion to reject the account for reasons specified in the motion.

PER CURIAM:—The Court calls attention to the third reason to the effect that the account is not detailed as to receipts, and that it is impossible for plaintiff to produce a contestation of the account, inasmuch as the defendant has not made a chapter of what remains to be recovered. I have looked at the account, and it contains two heads of receipts and expenditures. C. C. P. 523 says: "The account must contain, under separate heads, the receipts and expenditure, and close with a recapitulation of such receipts and expenditure, establishing the balance; whatever remains to be recovered being reserved for a separate head." 524: "Under the head of receipts must be placed all sums which the accounting party has received, and all those which he ought to have received during his management." I do not see any separate head for what remained to

be recovered, and the defendant has not charged himself with what he ought to have received. There is the greatest wisdom in the rules which govern the preparation of these accounts, which are fully explained in Jousse, Ordonnance of 1667. Tit. 29; Pigeau Procedure Civile, vol. 2, p. 40 et seq.; and Pothier, Procedure Civile, p. 40 of quarto edition.

The account not having conformed to the rules governing these accounts, the motion of plaintiffs will be granted for the above reason, and thirty days allowed to defendant to produce another account in due form with the requisite vouchers.

Siméon Pagnuelo, for plaintiffs.

J. Doutre, Q.C., for the defendant.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH JULY, 1877.

In Insolvency.

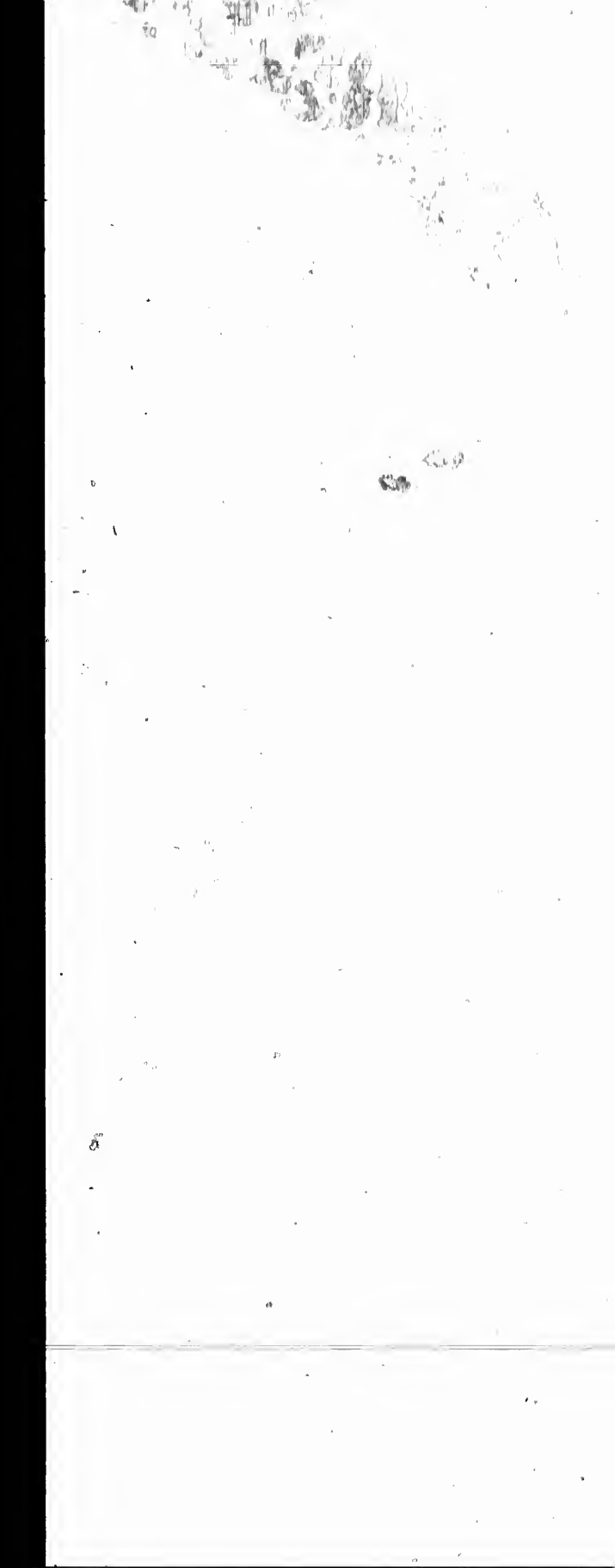
Coram TORRANCE, J.

No. 771.

In re *William Murray*, Insolvent, and *Andrew B. Stewart*, Assignee, and *Zachariah Auerbach*, Petitioner.

HELD:—That where a composition deed provides that the insolvent shall be entitled to a re-conveyance of his estate on placing in the hands of the assignee, notes covering the composition for his creditors, and the assignee has reconveyed the estate without receiving a note for a creditor who had fyled a claim against the estate, the Court will order the assignee to deliver such note to such creditor.

The petitioner set forth in his petition that he was a creditor of the insolvent for the sum of $1,017.43, and his claim had been duly fyled with the assignee; that, on the 28th April, 1875, the insolvent obtained from his creditors a composition at the rate of 45 cents in the dollar; that by the deed it was provided that, upon the deposit with the assignee of promissory notes signed, endorsed and payable as in said deed, and upon furnishing the assignee with promissory notes similarly made and endorsed, sufficient to pay a like composition on all other liabilities, the insolvent should be discharged; that petitioner was included among the other creditors of the insolvent in the schedule by him made and fyled, but petitioner did not sign the composition deed and discharge; that a dividend sheet was prepared in accordance with said deed, and your petitioner included in said sheet; that after the passing of the deed the assignee delivered over to the insolvent his said estate; that the assignee is bound to obtain for petitioner said notes, but assignee refuses to deliver said notes to petitioner, wherefore he prayed that the assignee might be ordered to deliver over to petitioner said notes, &c. The assignee answered the petition by alleging that petitioner never was a creditor of the insolvent within the meaning of the Acts, and never filed any claim against the estate while it was being liquidated, but, on the contrary, denied that he was a creditor; that after the deed of composition was deposited with the assignee, he gave due notice requiring all persons having claims to file them, and subsequently in due course prepared a first and final dividend sheet in which were collocated all persons who had proved their claims against the estate, which



In re Murray, Insolvent, and A. B. Stewart, Assignee.

dividend sheet was duly published, and the amount of the collocations became payable on the 1st June, 1875; that petitioner was not collocated for any amount inasmuch as he had not proved or filed a claim; that petitioner failed to take any notice of said dividend sheet or to contest the same, and the same was homologated by lapse of time on the 1st June, 1875, and by reason thereof petitioner ceased to have any claim upon the estate or the assignee.

TORRANCE, J.—First in order of time we have the assignment by the insolvent, and by the schedule of liabilities the petitioner is very plainly exhibited as a creditor for $1,017. Next there is the composition deed, of date the 20th of April, 1875. It declares that "the parties" * * * "do agree that for and in consideration of a composition at a dollar rate on their several and respective claims upon the said insolvent as exhibited by the schedule thereof hereunto annexed, and upon all other claims thereon of 45 cents on the dollar of the said claims, etc, * * * * * they will fully and entirely discharge the said William Murray, * * * and do hereby agree with the said insolvent, that upon the deposit with the assignee of his estate of promissory notes signed, endorsed and payable as aforesaid, and upon furnishing the said assignee with promissory notes similarly made and endorsed, sufficient to pay a like composition on all his other liabilities, he, the said insolvent, shall be fully and entirely discharged of and from all such liabilities within the meaning of the said Act. And it is hereby declared to be a condition of this deed of composition and discharge, without which the same would not have been made, and with which the assignee of the said insolvent is hereby required to conform himself and to carry out; that so soon as the said insolvent shall have deposited with the assignee of his estate the said promissory notes, made and payable at the dates aforesaid, and shall have paid all privileged claims upon his estate, the commission of the said assignee, the costs of the present composition and discharge and the confirmation thereof, and all other charges and expenses of the said insolvent estate, then and thereupon, and without any other delay, the said assignee, in consideration thereof, shall execute a deed of transfer and reconveyance to the said insolvent, &c., or to any other person, &c." A reconveyance was made of the estate on the 19th of May, 1875, a dividend of composition was prepared and became payable on the 1st of June, 1875. In it there appears the name of the petitioner, but without dividend to him. On the 2nd November, 1876, the petitioner fyled his claim with the assignee. On the 7th December, 1876, the deed of composition was confirmed by the Court. The assignee contends that the petitioner having failed to fyle his claim in time, and having failed also to contest the dividend sheet, he is estopped from urging any claim at this date. But the terms of the composition deed show plainly that notes were to be given for all claims on the estate, whether fyled or not. The statute, s. 94, further requires the assignee to reserve sufficient moneys to meet these claims when he prepares the dividend. Until the promissory notes were furnished to the assignee, he was not bound to reconvey the estate to the insolvent or other person. I come, therefore, to the conclusion that the order should be made to the assignee as prayed for.

W. H. Kerr, Q.C., for petitioner.

I. Wotherspoon, for assignee.

(J. K.)

SUPREME COURT, 1877.

OTTAWA, 28TH JUNE, 1877.

Coram RICHARDS, CH. J., RITCHIE, J., STRONG, J., TASCHEREAU, J., HENRY, J., FOURNIER, J.

DARLING *et al.*, APPELLANTS;

AND

BROWN *et al.*, RESPONDENTS.

HELD:—1. That executors are not liable, jointly and severally, for the payment of the balance of moneys collected by them, but are only liable each for the share of which he had possession.

2. That executors are not liable to pay more than six per cent. interest on the moneys collected by them, after their account has been demanded, in the absence of proof that they realized a greater rate of interest by the use of such moneys.

This was an appeal from a judgment rendered by the Court of Queen's Bench of the Province of Quebec (Appeal side) on the 18th of December, 1876, which confirmed the judgment rendered by the Superior Court at Montreal, (Mackay, J.) on the 22nd of January, 1876, maintaining the *debats de compte*, fyled by the respondents, and condemning the appellants, jointly and severally, to pay to the respondents the sum of $6,360.80 cy., besides interest at seven per cent. from 19th January, 1871, and costs.

The questions raised sufficiently appear from the remarks of the judges. The judgment in the Court of Queen's Bench was pronounced by RAMSAY, J., as follows:—

The objections to the judgment of the Court below involve a variety of considerations. It is maintained that there is no indebtedness, that, if there ever was any, it was prescribed, that the judgment is bad in mixing up the affairs of Wm. Darling & Co. with those of Wm. Darling, executor, and that the judgment should not have been jointly and severally against the defendants, but only condemning them in so far as they have received a share of the estate.

As to the indebtedness, its proof seems to me to be beyond all question. The evidence by the books of Wm. Darling & Co., and by the annual statements, is complete, unless it can be shown that there was error. In appellants' factum it is argued that an entry in a book of account is not always conclusive of what it seems to indicate. That is perfectly true, but the whole entries relating to the transaction ought to establish the real transaction. But what is the case before us? Mr. Darling, Jr., purchased the stock in trade of D. Darling, and, having valued the goods, he placed the balance over and above what he paid for them, to his father's credit, he being interested in the estate of David Darling, representing D. & C. Darling. This was in 1853, and from that time till after the death of Wm. Darling, Sr., in 1871, Wm. Darling, Jr., continued this credit and paid interest on it. This very short statement contains all that appears to us essential in that part of the factum.

We are now told that this account was never adjusted, and the adjustment now is to say that it never had any reality at all,—that Mr. Darling, Sr., never

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had any property in this balance of £2,831. 1. 1½., that Mr. Darling, Jr., never gave it to him, and that the latter was only willing his father should draw upon it according to his requirements, but that Darling, Jr., always retained the control of it. It is not easy to see how any testimony, but admissions of a very formal kind from the late Wm. Darling, Sr., could establish this story, but nothing of the kind is produced, and no evidence is attempted to be produced to prove more than this, that David Darling's stock in trade did not realize the £4,000 Wm. Darling, Jr., paid for it. Even if this had been established, it would not have proved the pretention of Wm. Darling, Jr., it would only have proved that he had made a bad bargain. He evidently took the goods at £6,831 and he must pay for them, no matter at what price he sold them. But if the fact were material that they were unsaleable, and that the £4,000 paid by Wm. Darling had not been recovered, it is not proved. Davidson's evidence, in its vagueness, leaves a totally different impression on our minds. At all events, if Wm. Darling, Jr., had even thought of the mode of adjustment now proposed, it would have been perfectly easy for him to have shown to a nicety what these goods had brought in; and the fact that he cannot produce such evidence is perfectly conclusive that this adjustment is a hastily got up excuse for not paying so much of his liability to his father's estate.

The same may be said of the commissions which he now wishes to charge against his father, for business previous to January, 1861, and which are revived after a regular *arrêté de compte* accepted on all hands. Besides there is no proof that all the commissions due were not paid. So far as there is any evidence, it would appear commission was charged.

The question of what prescription—whether that prior to the Code or that under the Code—shall affect this debt is immaterial, for we are of opinion that it is the prescription of thirty years that applies.

We now come to the question of the form of the action, and here we think the allegations support the conclusion. It is fully alleged that the firm of Wm. Darling & Co., and all its liabilities centre in Mr. Darling, Jr. There is no non-joinder and none is pleaded. Wm. Darling's position as sole member of the firm of Wm. Darling & Co. stands out clearly, and his co-executors have left all the affairs in the hands of Wm. Darling to manage, there is, therefore, a complete confusion of the interests of Wm. Darling & Co., and those of the executors. It is idle to shift the position and to say "if we did not intermeddle we are not liable." You have endorsed the pretended account; you have defended on the *Débat de Compte;* (p. 8. Appellants' Factum.) and among yourselves you have settled on this estimation of the estate. Incidental to this, there is a question of interest, and whether the executors can be charged at 7 p. c.; but Wm. Darling & Co., that is to say Wm. Darling, was to pay that rate, and the executors must pay it, whether we consider it as a loan to Wm. Darling & Co., or as an undertaking of Wm. Darling, representing himself and the executors.

The judgment in the Supreme Court was rendered as follows:—

TASCHEREAU, J.—This is an appeal by William Darling, Thomas Darling and Henry Darling, under their qualities of executors of the last will and testament of the late William Darling, Sr., from a judgment condemning them jointly

and severally to pay to the respondents, in their qualities of executors and trustees under the last will and testament and codicils of the late George Templeton, the sum of $6,360. 80, balance of their gestion and administration, as being the share of said George Templeton as representative of his late wife, Isabella Darling, who was one of the seven universal legatees of the late William Darling, Sr. The appellants rendered an account, which was contested by the respondents, and who succeeded in the Superior Court, and in the Court of Queen's Bench, at Montreal, the condemnation being for $6,360.80, with interest at 7 per cent., from 19th Jan., 1871. The principal difficulty in the case was as to the debt of $30,015.83, which, on the first day of January, 1871, appeared to have been due by the firm of Wm. Darling & Co. to the said late William Darling, Sr., and which was in the hands of the said William Darling. He, William Darling, Jr., denied the debt, and pleaded prescription of five and six years against the same. It was satisfactorily proved that all accounts between the late William Darling, Sr., and William Darling & Co., were settled yearly for seventeen years, up to 1st January, 1871, and that there was a balance of account at this last date, of $30.028.85, with interest thereon, in favor of William Darling, Sr. But it is contended by the appellants, that, though this balance appears in the books of William Darling & Co., still this was no sufficient acknowledgment of the debt, inasmuch as this entry was not signed by the parties thereto, and besides that this debt was prescribed by five and six years. I differ from these pretentions of the appellants, for it is admitted that entries in a trader's books regularly are a complete proof against him, unless an error has been proved; no such error has been proved, and I say that it would be a singular circumstance if, after 17 years continuous acknowledgment, that error had been discovered for the first time by the debtor, the amount appearing to be due only repudiated after the death of the creditor. Moreover, the fact that the appellants have settled with the other legatees of Wm. Darling on the same basis affords a very strong presumption in favour of the legitimate existence of the debt. The appellants, I have said, contend also that this claim is prescribed by either five or six years. This prescription cannot apply, as the transaction was not of a commercial nature, the loan by a non-trader to a trader not being a commercial transaction—not subject to the limitation of six years, as decided in the case of Wishaw vs. Gilmour, reported in 15 L. C. R., p. 117. The following authorities also favour this decision, viz.;—1 Pardessus, Droit Commercial, pp. 5 to 89. 1 Goujet et Merger, Dict. de Drt. Com. Acte de Commerce, pp. 24, 25—and many others. Even admitting, for the sake of argument, that the claim in question could be regarded as one of a commercial nature, chapter 67 of the Consolidated Statutes of Lower Canada, on which the appellants rely to maintain their six years' prescription, does not apply, inasmuch as the entries in the books of Wm. Darling & Co., up to the 30th September, 1871, take the case out of the Statute of Limitations. The prescription of five years being a new prescription introduced by the Civil Code cannot be invoked, as, under article 2270 of the same code, prescriptions begun before the promulgation of that Code must be governed by the former law. Moreover, the appellants, since the opening of the succession in January, 1871, came into possession of the

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moneys, not as contracting parties, but as trustees or executors, and in such quality they could not prescribe the claim by such short prescription. Their relations with the estate of William Darling were not of a commercial nature, and, therefore, the only prescription which could apply would be that of thirty years, which this case has not yet reached. The most serious objection of the appellants is that they were jointly and severally condemned to pay the sum in question—that there is error so far as to a joint and several condemnation. The matter is regulated by Article 913 of the Canadian Civil Code, which is in these words:—"Executors exercising joint powers are jointly and severally bound to render one and the same account, unless the testator has divided their functions and each of them has kept within the scope assigned to him. They are responsible only each for his share for the property, of which they took possession in their joint capacity, and for the payment of the balance due, saving the distinct liability of such as are authorized to act separately." There may be some ambiguity in that article but, it seems to us that, though the article 913 of the Civil Code obliges the executors to render jointly and severally an account of their gestion and administration, it does not condemn them to pay the balance jointly and severally, but merely each of them for his share in the property of which they have taken possession in their joint quality. This is in conformity also with article 1105 of the same Code which says that, in purely civil cases, an obligation is not presumed to be joint and several, it requires express terms to make it such, but, in commercial cases, the joint and several liability is presumed. We are all of opinion that there is error: 1. In the part of the judgment appealed from condemning the defendants jointly and severally. 2. In relation to the rate of interest from 7 per cent. We don't see our way clearly enough to say that the executors have undertaken to pay the 7 per cent. It should be reduced to 6 per cent. 3. That the date from which the interest is allowed by the judgment to run, should be altered from the 19th of January, 1871, to 11th August, 1871, when the executors were *mis en demeure* to render an account. The judgment will, therefore, be confirmed, with costs, save and except the above modifications. As to that part of the judgment now being about to be pronounced, which declares that the three appellants, William Darling, Thomas Darling and Henry William Darling, shall be condemned each in different sums of money, I must here enter my dissent. I think that this is against, not only the spirit, but the letter of the 913th article of the Code Civil, which says the executors are each responsible only for his share of the balance of the account, saving the distinct responsibility of those authorized to act separately (which is not the case in this instance.) For I say they took the whole estate under their common charge, allowed William Darling, who was a debtor of the estate, to keep a large sum of money in his hands, and though they had, under article 919 of the Civil Code, the right to sue him for that sum, they allow him to keep it, and this contrary to article 919 of the Civil Code. In this way they had a certain discretion to exercise, and if, with the view of favoring their brother William, they did not force him to settle that part of the assets of the estate, which the law invests them with as executors, they become answerable for the consequences of a possible loss for their allowing their brother William to keep that

sum, in fact, he became their joint depositary for that amount. It is with the view of avoiding a loss somewhere that the Code says that an executor will be answerable for his share of the balance of account. With the distinction made by the judgment of this court, should William Darling become insolvent, a great portion of the assets would be lost, inasmuch as the two others are only condemned to pay comparatively a very small sum. As I interpret the law, each executor, unless his duty is distinctly pointed out by the will, is bound to see that his co-executors do their duty and, though he may rely on them for the administration, he is still answerable for his share in common with the other executors. It would be, in my opinion, opening the way to fraud, and endangering the condition of children and heirs in general, to allow the executors to claim an exemption of their joint liability for the balance due in their administration. I therefore differ from that part of the judgment to be rendered.

FOURNIER, J. Proceeded against for a statement of account as executors of the will of the late William Darling, their father, the appellants jointly rendered an account of the sum of $15,938.01, acknowledging also to have it in their possession or at least at their disposal. The defendants replied to this account by contesting the item of $10,620.48 appearing in the expenditures for pretended costs of commission, interest, &c., claimed by William Darling & Co. against the succession of their father. The appellants are, in other terms, accountable for the sum of $30.015, 33 due to the said succession by William Darling. These contestations terminate by a conclusion demanding that the said testamentary executors be jointly and severally condemned to pay the sum of $6,360. 80, being a seventh of the sum of $44,525.65, which had to be divided between the seven legatees of William Darling, senior. In reply to the said contestation of accounts, William Darling denied that he owed the sum of $30,015.33 to the succession of his father. This plea was accompanied by a *défense en droit* (special demurrer) by all the appellants, alleging that it did not appear by the contestation of account by the testamentary executors how any of them had recovered or come into possession of, or were accountable for any sum which could be due by William Darling, or William Darling & Company, to the succession of the late William Darling, Sr.; that, moreover, it did not appear by the said contestations that, as testamentary executors they were obliged in law to take proceedings for the recovery of this sum, nor that they had been wanting in their duty in this particular. By consent of the parties, the hearing of this *défense en droit* was reserved for the final hearing on the merits. Appreciating the testimony in the case as it had been done by the judges in the Court *de première instance*, and of the Court of Appeal, I, with them, and for the same reasons, arrive at the conclusion that the total value of the succession is $44,525.65, of which a seventh, that is to say $6,360.80, ought to go to each of the seven legatees of the late William Darling, Sr., but I do not concur in that part of the judgment pronouncing against the appellants, a several condemnation for that amount, with interest at seven per cent. It is to these two last points that I shall confine my observations on the judgment submitted to our review. The question raised by the demurrers of the appellants as to the question of responsibility of conjoint

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testamentary executors does not lack importance, nor indeed is it without difficulty. The Court of Queen's Bench admitted the principle of solidarity and condemned them in consequence. Upon what did it rest to arrive at that conclusion? Was it because the facts of the case established against them acts of maladministration or of gross negligence committed in their capacity of joint executors, and which would be of a nature to involve solidarity as a consequence? Or, rather, was it by invoking Article 913 of the Civil Code that the Court of Appeal believed itself to be justified in declaring that the appellants were severally responsible for the amount of the condemnation? Neitlier of these two reasons appears to me to be sufficient. The solidarity could not result from their bad administration, for it is neither proved nor alleged that there was malversation, and even in such a case each one would be only responsible for the consequences of his own individual acts. The testamentary executors not having made an inventory were not in a position to say that they were placed in this manner in possession of the whole of the succession. Their statement of accounts is the only proof that they came jointly into possession of a part of the effects which composed it, that is to say, to the amount of $15,938.01 for which they have admitted their accountability. As for the surplus, consisting of the sum of $30,015.33 due by William Darling, who has denied that he owes it, it never passed into the possession of the other executors. William Darling, with whom there has been a confusion of his qualities of debtor and testamentary executor, always continued in sole possession, and ought to be held alone responsible, in his quality of testamentary executor. According to what precedes, one cannot certainly conclude that the testamentary executors became separately responsible. It was in no way by virtue of article 913 of the Civil Code that they could be held severally bound to pay the balance of the account. The third paragraph of this article is there expressed, "Executors who exercise joint powers are bound severally to render one and the same account." The solidarity established here evidently only applies to the obligation to render one and the same account. If there had been intention to extend it to the payment of the balance of the account, the codifiers would not have failed to express it formally, since it is an important departure from the old law, which did not admit this solidarity, which it would have been their duty to point out. As it is a principle that solidarity cannot by analogy be extended from one case to another, the codifiers having applied it only to the obligation to render one and the same account, one cannot conclude by induction that they proposed to extend it to the payment of the balance of an account. It seems to me that by this article, far from declaring this solidarity, the fourth paragraph positively says the contrary. It is there declared in these terms "they (the executors) are only declared responsible each for his own part of the goods, which they have taken into their possession in their joint capacity, and for the payment of the balance of the account. According to my manner of reading article 913 the third paragraph obliges separately the conjoint executors to render one and the same account. This would be more exactly expressed by saying that this obligation to render an account is indivisible, and the 4th paragraph defines and limits their responsibility to the portion of the goods of which each has taken

possession. This conclusion appears the more reasonable when we reflect that the functions of testamentary executors are gratuitous, and altogether confidential. One understands, then, more easily the motives of the Legislature in not attaching to it the rigorous condition of solidarity—a condition which would be of a nature, under many circumstances, to make them decline these functions. In their report upon this article the codifiers declare that it is according to the authorities, French as well as English. Under neither one nor the other of these two systems are testamentary executors bound in solidarity by each other's acts. Article 1033 of the French Civil Code says: "If there are several testamentary executors, they are severally responsible for the personal property which has been entrusted to them. According to Demolombe, several commentators have given too wide a scope to this solidarity, which, according to his opinion, ought to be limited to the obligation of giving one account only, and does not extend to making them severally liable for the payment of the balance of the account. Here is how he expresses himself on this subject. (Vol. 3, 9 and 50.) "If it is a question of responsibility for facts relative to testamentary executions each replies for himself without doubt for the whole, but each only answers for himself and is not *solidaire* with the others." Nevertheless, they have taught the contrary doctrine, and that article 1033 derogating Article 1995, established the solidarity of the testamentary executors relatively to the acts of their administration. Delvincourt, vol. 11, p. 95, note 8; Coin-Delisle, article 1033; Marcadé, article 1033, No. 1. But article 1023 does not appear to us to say anything like this; what results from it only is that the testamentary executors are severally responsible for the account of the personal effects which have been confided to them. Then it does not establish solidarity for the doings of the testamentary executors, but only for an account of the moveable property. Hence there are two consequences, First, in any case where the personal property has been entrusted to them, the executors are not *solidaires* of their reciprocal administration, and that is very just, since each of them can act alone without the concurrence of the others. We know well that it has been replied, that if this solidarity frightens them, they can decline it. Oh! certainly, and doubtless they would not require, if such were the condition, to submit, but apparently they do not name testamentary executors in order that they should refuse, and the law ought not then in consequence to place them in an unacceptable position. Secondly, they are not solidarily responsible for the account of the personal property, except in the case where it has been confided to them—that is to say solely when the testator has given them possession. (Duranton, vol. 9, No. 423; Demante, vol. 4, No. 178; Bayle-Mouillard, Grenier, vol. 3, No. 329, note 6; Troplong, vol. 4, No. 2,041.) And even as regards that which concerns the individual responsibility on account of the personal effects the manner in which it is generally explained induces us to believe that it has been extended beyond its express terms. The conclusion to be deduced in general from article 1,083 appears to be in effect that the testamentary executors whose functions have not been divided, and to whom the testator has given possession of the personal effects are individually responsible for the property itself, that is to say, for the effective representation of this property, or of its value. But it seems to us that such is not the purport of Article 1033,

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when it declares that the testamentary executors are individually responsible for the personal effects; it also says, in effect, severally responsible for the property, and these two formulas are certainly different. One of the executors, for instance, has made away with a portion of the moveable property of the succession, are the others severally responsible for its value, in the same sense that they are bound to pay themselves out of their own pockets? We would not believe it. Obliged, as they are, to render account of the moveable property, it will be doubtless necessary for them to prove that this diversion was committed by one of the executors; but, this proof once made, will it not be sufficient for them? Will it not be sufficient to place it in the account without any fact which may be imputed to them? It is necessary, in our estimation, to answer affirmatively, without which they would establish a true solidarity between the executors, who found themselves each responsible for the faults of the others (see Article 205); there would be there besides a contradiction in Article 1,033 itself, which, whilst declaring that each of the executors only replies for his own doings, would render him at the same time responsible for the diversions committed by others. Duranton, vol. 9, No. 423, p. 394, lays down the same doctrine. Poujol "Donations and Wills," vol. 2, p. 356, thus explains the same point—"This responsibility is limited to the surplus to the personal property account, which has been confided to them." Troplong, on "Donations and Wills," No. 2,041, says: "That in principle the testamentary executors, even in the case where their functions were not divided, are not severally responsible the one to the other." Grenier, on "Donations and Wills," No. 2,041, says: "That in principle the testamentary executors, even in the case where their functions are not divided, are not severally responsible the one from the other." Grenier, on "Donations," vol. 3, p. 8., note of Bayle-Mouillard; "But it is necessary to refrain from adding to the rigour of this responsibility." De Laporte, "Pandectes Françaises," p. 190, upon Article 1,033, says: "All the authors lay down that each of the testamentary executors is only responsible for his part of the balance, recognizing that the obligation to render the account is several, to avoid the multiplication of contestations." It was evidently this doctrine which the codifiers adopted in Article 913. The solidarity is bounded then by the obligation to render an account, and, as for the payment of balances, each one pays his proportion of them, according to the goods which he had in his possession. Making application of this doctrine to the facts of the case, I am of opinion that the three testamentary executors, the appellants in this case rendering account, ought to be jointly condemned to pay a seventh of the sum of $14,510.33, and William Darling, as being and having always been in possession of the sum of $30,015.33, should be condemned singly to pay a seventh of the said sum. These amounts together make the sum of $6,360.80 coming to each of the legatees of the total value of the succession. The interest ought to be reduced to six per cent.

Richards, Ch. J., and Justices Ritchie, Strong and Henry concurred with Fournier, J.

Judgment of Queen's Bench confirmed and reformed.

Cross, Lunn & Davidson, for appellants.

Bethune & Bethune, for respondents.

(S. B.)

COUR DU BANC DE LA REINE, 1873.

MONTREAL, 22 MARS, 1873.

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

No. 50.

BUCKLEY,

(*Défendeur en Cour Inférieure*),

APPELANT;

ET

BRUNELLE ET VIR,

(*Demanderesse en Cour Inférieure*).

INTIMÉE.

JUGE:—1o. Que la femme séparée de biens, qui s'étant rendue caution pour son mari, acquitte son cautionnement, a droit de répéter ce qu'elle a ainsi payé.

2o. Que dans une action en répétition, *condictio indebiti* par une femme séparée de biens, par suite de la nullité de son cautionnement, les intérêts ne lui seront accordés, lorsque le débiteur des deniers réclamés est de bonne foi, que du jour de l'assignation.

Cet appel fut interjeté d'un jugement de la Cour Supérieure siégeant à Montréal, comme Cour de Révision, (Berthelot, Mackay and Beaudry, J J.,) le 30 janvier 1872, par lequel le jugement de la Cour Supérieure, (Mondelet, J.,) prononcé à Montréal, le 31 octobre 1871, fut réformé. Le jugement de la Cour de Révision, est dans les termes suivants:

"Considering that there is no error in the said judgment of the 31st October, 1871, in declaring null as regards the female plaintiff *séparée de biens* from her husband and so admitted to have been, the obligation of 8th April, 1857, and the *transport* of the 5th September, 1859, and in condemning defendant for the reasons set forth in said judgment, to repay to female plaintiff the £200 and interest thereon, received by defendant from Girard, on or about the 18th January, 1862, under the *transport* to defendant of the 5th September, 1859; doth confirm said judgment in those respects; but considering that the defendant ought to have been condemned to pay interest on said £200 and interest, paid by Girard, but from day of service of process in this cause, doth, revising said judgment, alter it in this last respect; and, upon the whole, considering that the defendant did not take from Girard but what was due to him, the defendant, though not from the female plaintiff, according to law;

"Considering that the female plaintiff knew, or had reason to know, the law as well as did the defendant, and made the *transport* referred to not by error, though it must be held null, made, as it was, by the female plaintiff to free herself from antecedent obligation, by her to the defendant, without lawful cause;

"Considering that the defendant is, in the circumstances of this case, not in bad faith, so that he ought to be condemned to pay interest, except from service of process, upon what he is condemned to repay the female plaintiff, of capital, or *quasi* capital.

"Doth condemn defendant," &c.

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L'Intimée, épouse séparée de biens contractuellement de Hilaire Mathieu, réclamait de l'appelant, par action en répétition, *condictio indebiti*, la somme de $800 en principal payée par elle indûment à l'appelant, le 5 septembre 1859, et $512 pour intérêt de cette somme depuis la date de ce paiement, en tout: $1312.

L'appelant opposa à cette demande:

1o. La prescription de dix ans; mais abandonna ensuite ce moyen sur lequel il ne fut pas adjugé.

2o. Une exception péremptoire en droit perpétuelle.

3o. Une défense au fond en fait.

Contestation fut liée suivant les prétentions respectives des parties; l'on procéda à la preuve et des admissions de fait furent données, la cause fut plaidée et jugée en Cour de première instance et en Révision comme il vient d'être mentionné. Mais l'appelant se croyant lésé par ces jugements, porta la cause en appel.

L'Hon. A. A. Dorion, pour l'appelant:—

Le 6 avril 1857, Hilaire Mathieu, le mari de l'Intimée, Demanderesse en Cour Inférieure, consentit une obligation, devant Taché, Notaire, en faveur de l'appelant, Défendeur en Cour Inférieure, pour £620, argent prêté.

Par le même acte, il transporta à l'appelant, comme lui appartenant, une somme de £400 courant, due à l'Intimée, par Michel Girard et Joseph Dansereau, et il hypothéqua aussi, comme lui appartenant, deux terres qui appartenaient à sa femme séparée de biens d'avec lui.

L'Intimée, autorisée de son mari, intervint à l'acte et renonça à toute hypothèque qu'elle pouvait avoir sur ces terres pour son douaire et autres droits matrimoniaux, quoique de fait elle n'eût aucune hypothèque, ces terres étant sa propriété.

Deux jours après, savoir, le 8 avril 1857, l'appelant à qui Mathieu, de connivence avec l'Intimée avait transporté une créance et avait hypothéqué des immeubles qui ne lui appartenaient pas, résilia ce transport et acquitta l'obligation du 6 avril; et par un acte séparé passé le même jour, Mathieu consentit une autre obligation pour la même somme de £620, avec hypothèque sur une terre située à St. Simon et qu'il avait achetée le 6 avril 1857, des deniers mêmes empruntés de l'appelant.

L'Intimée intervint à cette seconde obligation donnée pour remplacer la première. Elle se porta caution de son mari et hypothéqua ses deux terres.

Le 5 septembre 1859, l'Intimée, autorisée de son mari, transporta à l'appelant pour valeur reçue £200. Cette somme était la balance due par Girard à Dansereau sur celle de £400, que Mathieu avait cédée à l'appelant par l'acte du 6 avril 1857, résilié comme il est dit plus haut, le 8 avril 1857.

Le même jour, 5 septembre 1859, l'appelant donna main levée de l'hypothèque qu'il avait sur la terre située à St. Simon, que Mathieu lui avait hypothéquée, ainsi que de celle que l'Intimée lui avait donnée sur les deux terres, par l'obligation du 8 avril 1857.

Le 18 janvier 1862, l'appelant reçut de Girard les £200 que lui avait transportés l'Intimée par l'acte du 5 septembre 1859.

Le 16 janvier 1867, Mathieu fit cession de ses biens sous l'acte de faillite 1864, et le 2 février 1869, il obtint sa décharge. Tous ces faits sont prouvés par des actes authentiques et par l'admission des parties.

L'Intimée alléguant que le cautionnement qu'elle avait donné pour son mari dans l'obligation du 8 avril 1857, était nul, que le transport du 5 septembre 1859 avait été fait par erreur pour payer ce cautionnement et qu'il était également nul, poursuivit l'appelant pour recouvrer les $800, qu'il avait reçues de Girard en vertu de ce transport, plus $512, pour intérêts depuis le 5 septembre 1859, faisant en tout $1312 avec intérêt du 5 Mai 1870 sur $800 et sur la balance, du jour de l'assignation.

L'appelant croit qu'il aurait dû être entièrement déchargé de la demande en répétition formé contre lui.

De là le présent appel qui soulève deux questions, l'une de fait et l'autre de droit.

En fait, est-il vrai que ce soit pour une dette purement personnelle à son mari, par erreur et sans cause, que l'Intimée a consenti le cautionnement du 8 avril 1857 ?

Et lors même que ce cautionnement aurait été nul et que l'appelant n'aurait pu exiger devant une Cour de Justice le paiement de la dette cautionnée, l'Intimée l'ayant payé volontairement, peut-elle, en droit, exiger le remboursement de ce qu'elle a ainsi payé ?

Sur le première de ces deux questions, l'appelant soumet :

1o. Que bien qu'une femme mariée ne puisse s'obliger, avec ou pour son mari, qu'en qualité de commune (code civil, art. 1301,) cependant rien n'empêche que la femme commune ou séparée, ne cède ses biens ou les créances qui lui sont dues, même pour acquitter les dettes de son mari.

Bréard de Neuville, dans sa traduction des Pandectes de Pothier, t. 6, p. 247, 1er al. : " On a ensuite rejeté cette comparaison, parce qu'une femme ne s'oblige pas (3) en déclarant son débiteur. " (déclarant, c'est-à-dire en déléguant son débiteur.)

Note 3, au bas de la même page.

" Elle aliène sa créance, mais ne contracte pas d'obligation. Enfin, le senatus consulte Velléien, ne défend pas aux femmes d'aliéner leurs biens, mais seulement de s'obliger ou d'engager leurs biens."

Quoique le sénatus consulte Velléien, n'ait jamais été en force ici, ce passage, comme règle d'interprétation, est parfaitement applicable à l'article 1301 du Code et à la clause 55 du ch. 37, des Status Refondus du Bas-Canada.

Le même auteur, p. 249, 4e al. :

" Il importe peu, &c., 5e al. : " Si une femme, en intervenant, a délégué un de ses débiteurs, le sénatus consulte n'est pas applicable." Voir aussi note 1ère au bas de la même page.

Le transport de la somme de £400 que Mathieu, le mari de l'Intimée, fit de son consentement, par l'acte du 6 avril 1857, auquel elle était partie, était valable, comme si elle l'eût fait elle-même.

Le Merle, des fins de non recevoir, pp. 144, 186, 7, 8, 191, 192, 193, 194, 195 et 199.

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Bréard de Neuville, t. 6, p. 233, note 2, p. 265, 5e al.

Par ce transport du 6 avril 1857, l'appelant était devenu propriétaire de cette créance de £400, l'obligation du 8 avril 1857, avec cautionnement, ayant été donnée pour remplacer l'obligation et le transport du 6 avril (voir admissions et déposition de l'Intimée,) la cause de l'obligation du 8 avril a été pour partie la résiliation du transport de £400, contenu dans la première obligation. Or, comme par cette résiliation, l'Intimée est rentrée dans l'exercice de son droit de recouvrer cette créance, elle était personnellement intéressée dans cette transaction. Son intérêt était une considération suffisante pour rendre son cautionnement valable, du moins jusqu'à concurrence des £400, qui lui furent rétrocédés par la résiliation de l'acte du 6 avril 1857.

Bréard de Neuville, traduction des Pandectes de Pothier, t. 6, p. 257, 5e al.: "De même si une femme est intervenue pour quelqu'un, mais dans une affaire où elle a profité de cette intervention, l'exception du sénatus consulte n'a plus lieu, n'en étant pas devenue plus pauvre." Ibidem, p. 261, No. 27, p. 263, 1er. 2e, 3e, 4e, 5e, 6e, 7e al.

Le code ne défend pas à la femme mariée de s'obliger pour ses propres intérêts, mais il lui défend de s'obliger pour les affaires de son mari.

L'on ne doit donc pas dire, comme l'a fait le jugement du 31 octobre 1871, confirmé par celui du 30 janvier 1872, que l'Intimée s'est obligée par l'acte du 8 avril 1857, pour une *dette personnelle de son mari et sans cause;* puisqu'il y avait une cause valable jusqu'à concurrence de £400 et qu'elle n'a en tout payé que £200.

2o. Le mari de l'Intimée, en hypothéquant comme lui appartenant, des immeubles de sa femme, par l'acte du 6 avril 1857, s'est rendu coupable d'une fraude à l'égard de l'appelant. L'Intimée a elle-même participé à cette fraude en renonçant à ses prétendues hypothèques pour douaire et autres droits matrimoniaux et en faisant croire à l'appelant que les immeubles hypothéqués appartenaient à son mari. Cette fraude les rendait tous deux sujets à des poursuites pour *misdemeanor et passibles d'amendes et d'emprisonnement.*

Statuts du Canada, 16 Vic. ch. 206, s. 8; Statuts Refondus du Bas Canada, c. 37, s. 114.

L'Intimée pouvait s'obliger comme elle l'a fait par l'acte du 8 avril 1857, pour soustraire son mari et à plus forte raison pour se soustraire elle-même, aux poursuites et aux condamnations dont ils étaient menacés. Telle était la jurisprudence sous le sénatus consulte Velléien, dont les dispositions avaient plus de portée et étaient plus rigoureuses que l'art. 1301 du Code Civil.

Répertoire de Jurisprudence, vo. sénatus consulte Velléien, p. 197, No. 12, 1ère col., 1er et 2e. al.

3o. Si l'on veut appliquer à cette cause la jurisprudence établie sous l'empire du sénatus consulte Velléien, il faut encore dire que l'Intimée, ayant participé à la fraude commise par son mari, n'aurait pu revendiquer les immeubles qu'il avait hypothéquées comme lui appartenant, ni la créance qu'il avait transportée comme sienne, par l'acte du 6 avril, et qu'ayant remplacé cette obligation du 6 avril par le cautionnement du 8 avril, moins onéreux pour elle, puisqu'il ne contient pas le transport de £400 cédés par le premier acte, elle ne peut faire

annuler son cautionnement, puisqu'elle ne pouvait faire annuler l'acte du 6 avril: la règle étant que la fraude de la femme la privait des avantages du sénatus consulte Velléien.

Répertoire de Jurisprudence, vo. sénatus consulte Velléien, p. 196.

Bréard de Neuville, t. 6, p. 233, 5e al.:

"Si un créancier sachant (2) que votre père engageait un fonds de terre de sa femme pour sa propre dette l'a accepté pour gage, même avec le consentement de la femme, le sénatus consulte s'oppose en ce qu'en vendant ce fonds, il en ait transmis la propriété, &c."

Note (2) "*S'il ne l'eût pas su*," (le créancier,) la femme en dissimulant que ce fonds de terre lui appartenait, aurait trompé le créancier, et le sénatus consulte Velléien n'aurait pas lieu comme on le verra ci-après." No. 31.

Le même, p. 265.

4o. L'appelant n'a reçu que £200, c'est-à-dire moitié de la somme qui lui avait été transportée par l'acte du 6 avril et qu'il aurait pu recouvrer en entier, s'il n'avait pas consenti à résilier ce transport. L'Intimée n'a donc rien souffert, au contraire, elle a bénéficié par la transaction au moyen de laquelle l'obligation du 6 avril a été remplacée par celle du 8 du même mois.

Il ne peut donc pas y avoir lieu en sa faveur à l'action *condictio indebiti*, qui est un recours donné à ceux qui ont payé sans cause.

Pothier t. 5, p. 109, No. 156 et 157.

Bréard de Neuville, t. 6, p. 257:

"L'exception du sénatus consulte n'a pas lieu, la femme n'en étant pas devenue plus pauvre."

Il est évident par ce qui a été dit plus haut, que le cautionnement donné par l'Intimée, dans l'acte du 8 avril 1857, n'était pas un cautionnement sans cause, mais qu'au contraire elle a bénéficié par ce cautionnement qui l'a rendue propriétaire d'une créance de £400 qu'elle avait aliénée par l'acte du 6 avril. L'Intimée n'aurait pu souffrir de cette transaction, que dans le cas ou elle aurait été appelée à payer le montant entier de son cautionnement, ou dans tous les cas, plus que les £400 rétrocédés.

Il n'est donc pas exact de dire que l'Intimée ne s'est obligée que pour son mari et sans cause.

Mais en supposant qu'il n'y aurait pas eu de cause valable pour le cautionnement de l'Intimée, et qu'elle aurait payé une dette à laquelle on ne pouvait la contraindre, pourrait-elle dans ce cas répéter ce qu'elle aurait ainsi payé? Cela se rapporte à la seconde question dont la solution dépend de principes qui ne sont pas douteux.

La répétition ne peut avoir lieu que lorsque la personne qui a payé, l'a fait par erreur, sans aucune obligation, soit civile, soit naturelle.

Pothier, obligations, Nos. 192, 195 et 196. Le même, *condictio indebiti*, No. 156.

Larombière, traité des obligations, t. 5, p. 635.

"Il faut, en outre, qu'il n'existe à son égard, aucune obligation naturelle, aucun devoir de conscience, d'honneur."

Larombière, t. 5, p. 621, Nos. 20 et 21, p. 631, No. 26.

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"Il n'y a pas que l'existence d'une obligation naturelle, d'un devoir de conscience, d'honneur, de piété, qui puisse servir de cause au paiement et empêcher la répétition, il suffit d'un esprit de libéralité."

Duranton, t. 10, Nos. 331 et 339.

" t. 13, p. 682.

Ainsi l'on ne peut répéter la somme payée pour un pari, pour une dette de jeu. Le mineur ne peut répéter la somme payée depuis qu'il est devenu majeur, pour dettes contractées pendant sa minorité.

La femme qui a payée une dette contractée sans l'autorisation de son mari ou avec cette autorisation, dans les coutumes où la femme sous puissance de mari ne peut s'obliger, ne peut répéter ce qu'elle a payé.

Domat, liv. 2, titre 7, sec. 1, No. 11, t. 1, p. 466-7 de l'ed. 8e.

L'art. 177 du code déclare que la femme même non commune, ne peut s'obliger sans le concours de son mari.

L'art. 183 dit; "Le défaut d'autorisation du mari, ... comporte une nullité que rien ne peut couvrir."

L'art. 1301 est en ces termes;

"La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute autre obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet."

Ainsi, dans les deux cas, il y a même prohibition, même sanction; c'est-à-dire que dans l'un ou l'autre cas, la loi prononce la nullité de l'acte.

Lorsque la femme contracte sans l'autorisation de son mari, il n'y a pas de répétition; pourquoi veut-on qu'elle ait lieu lorsque la femme s'oblige avec ou pour son mari?

D'un autre côté, la législation moderne nous fournit une disposition parfaitement analogue à celle contenue dans l'art. 1301 du code civil. Cette disposition se trouve dans l'art. 2412 du code de la Louisiane, dont les termes sont comme suit;

Art. 2412. "La femme, soit commune, soit séparée de biens par contrat ou par jugement, ne peut s'obliger valablement, ni pour son mari, ni conjointement avec lui, pour les dettes par lui contractées avant ou depuis le *mariage*."

Les cours de la Louisiane ont jugé que d'après cet article, une obligation naturelle était une cause suffisante pour le paiement qui avait été fait et formait une fin de non recevoir contre toute demande en répétition. Boivers vs. Hale, 14 Louisiana Annual Reports, p. 419.

Une femme qui avait donné ses billets pour des arrérages de loyer dus par son mari et qui les avait tous payé moins un, poursuivit pour se faire rembourser ce qu'elle avait payé et se faire relever de l'obligation qu'elle avait contractée par le billet non payé. La cour renvoya sa demande quant aux billets qu'elle avait payés et lui accorda ses conclusions, quant au billet non payé. Cette décision confirmée en appel, prouve que "quoiqu'un créancier ne puisse exiger le paiement de l'obligation qu'une femme a contractée pour son mari, celle-ci ne peut répéter ce qu'elle a payé sur cette même obligation."

On ne peut rien citer à l'encontre de la décision qui vient d'être mentionnée, si ce n'est ce qui se pratiquait sous l'empire du sénatus consulte Velléien qui

n'a jamais été en force ici et dont les dispositions s'appliquent aux filles et aux veuves tout aussi bien qu'aux femmes mariées, démontrant que non-seulement il contenait d'autres dispositions que celles contenues dans le Code, mais aussi qu'il avait été fait pour un état de société bien différent du nôtre.

Du reste, si l'on veut appliquer ici les règles du sénatus consulte Velléien, il faut les appliquer dans leur intégralité, comme on le faisait dans les pays de droit écrit et à la Louisiane. Alors, il faut reconnaître les nombreuses exceptions où la femme ne pouvait invoquer le sénatus consulte Velléien et que l'on trouve énumérées dans le Répertoire de Guyot, vo. sénatus consulte Velléien, pp. 196 et suivantes; exceptions, dont plusieurs sont applicables à l'Intimée.

Mais pour répéter ce qui a été payé, il faut prouver que le paiement a été fait par erreur, lors même que c'est par erreur de droit, car l'erreur, même l'erreur de droit ne se présume jamais. Lorsque celui qui a payé par erreur de droit, a payé ce qui n'était pas dû, comme dans ce cas, il n'y a aucun motif pour payer, c'est à celui qui a reçu à prouver que celui qui a payé a voulu lui faire un don; mais lorsque c'est une dette réelle qui a été payée et que le créancier n'a fait que recevoir ce qui lui était dû, c'est à celui qui a payé à prouver qu'il a payé par erreur, et il ne lui suffit pas de prouver que la dette n'était pas due par lui. Cette preuve, lorsqu'il s'agit d'une erreur de droit, est sans doute difficile à faire, mais elle est de rigueur, autrement, une foule de paiements faits en connaissance de cause, pourraient être annulés sur le simple allégué de la partie, qu'ils ont été faits par erreur.

Larombière, t. 5, p. 636, 3e al., p. 637, no. 32, 2e al.:

"Mais il y a cette différence entre l'erreur de fait et l'erreur de droit, que celle-ci ne se présume jamais et que celui qui l'invoque, doit toujours la prouver. Personne n'est en effet, jusqu'à preuve contraire, censé ignorer la loi."

Dans cette cause, l'Intimée a compris qu'elle ne pouvait recouvrer sans prouver l'erreur et elle a produit un témoin, son beau-frère, qui dit que quelques jours avant de porter son action, elle lui a dit qu'elle ne savait pas qu'elle avait le droit de répéter ce qu'elle avait payé à l'appelant. L'Intimée ne pouvait ainsi par sa propre déclaration faite quelques jours seulement avant l'institution de son action, prouver son erreur. De plus, cette déclaration est pour le moins suspecte, puisqu'elle est contredite par le fait qu'elle avait déjà auparavant contesté trois actions portées contre elle, en se fondant sur ce qu'elle s'était obligée pour son mari. L'existence de ces contestations est admise.

Il ne peut non plus y avoir répétition de la somme payée par erreur, lorsque le créancier, à raison de ce paiement, a supprimé son titre ou perdu l'occasion de se faire payer.

Code Civil, art. 1048.

Larombière, t. 5, p. 647, No. 10.

Duranton, t. 13, No. 685.

Teulet, t. 1, p. 465, No. 11.

Dans l'espèce actuelle, l'appelant a donné quittance à Mathieu, le mari de l'Intimée; il a déchargé les hypothèques qu'il avait sur sa propriété qui a été vendue depuis; et plus de dix ans après ce paiement, Mathieu a obtenu sa décharge, en vertu de l'acte des faillites, pendant tout ce temps, l'Intimée n'a

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fait aucune démarche pour faire mettre de côté le paiement qu'elle prétend avoir fait par erreur. Ces faits établissent une fin de non recevoir que l'appelant est, d'après les autorités ci-dessus, bien fondé à opposer à l'Intimée.

Le jugement de la Cour de Révision doit donc être infirmée:

1o Parceque le paiement fait par l'Intimée, avait une cause valable dans le cautionnement du 8 avril 1857, qui avait remplacé son obligation du 6 avril.

2o Parcequ'en supposant qu'il n'y aurait pas eu d'obligation civile, l'Intimée a contracté par les actes du 6 avril et du 8 avril 1857, une obligation naturelle qui était une cause suffisante pour le paiement qu'elle a fait.

3o Parceque l'Intimée n'a pas prouvé qu'elle eût payé par erreur et sans cause.

4o Parceque lors de la demande en répétition, l'appelant, à raison du paiement à lui fait, par l'Intimée, avait supprimé son titre de créance contre Mathieu et perdu tout recours contre lui.

H. F. Rainville, pour l'Intimée:—

L'Intimée, demanderesse en Cour Inférieure, en qualité de femme séparée contractuellement de biens de Hilaire Mathieu, réclamait du défendeur, appelant par l'action en répétition de l'indu (*condictio indebiti*,) une somme de $1312, savoir $800 en capital payé au défendeur le 5 septembre 1859 et $512, pour intérêts accrus sur cette somme indûment payée.

La Cour Inférieure rendit jugement en faveur de la demanderesse suivant les conclusions de sa demande. Ce jugement porté devant la Cour de Révision fut réformé. Cette Cour n'accorda que la somme principale et retrancha les intérêts.

La demanderesse acquiesça à ce jugement; mais le défendeur crut, malgré l'autorité de deux jugements prononcés à l'unanimité contre lui, devoir soumettre sa cause à l'appréciation de cette Cour.

Voici les faits qui ont donné naissance à cette action.

Le 8 avril 1857, Hilaire Mathieu, l'époux de l'Intimée, consentit en faveur de l'appelant, une obligation pour £620. L'Intimée comparut à cet acte, se porta *caution solidaire* pour son mari et hypothéqua, pour garantie du paiement de cette somme, un immeuble à elle propre.

Le 5 septembre 1859, l'Intimée transporta à l'appelant, une créance de $800, à elle due par Girard et Dansereau; cette créance formait partie du prix d'un de ses propres aliénés.

Le 18 janvier 1862, Girard et Dansereau payèrent à l'appelant, la dite somme de $800 et les intérêts accrus jusqu'alors.

L'acte de transport ne mentionne pas la considération pour laquelle il a été consenti; mais l'appelant par sa réponse à la 3e articulation de faits de l'Intimée, admet que cette somme de $800 lui a été transportée pour acquitter d'autant l'Intimée sur son cautionnement, donné pour son mari, en sa faveur, par l'acte du 8 avril 1857.

L'Intimée allègue tous ces faits dans son action: nullité de son cautionnement, paiement par erreur d'une somme qu'elle ne devait pas, &c. Elle conclut en conséquence à la répétition de ce qu'elle a payé.

Défenses:

L'appelant a plaidé d'abord, par une exception de prescription, prétendant que l'action était prescrite, par le laps de dix ans.

Par une seconde exception, il a plaidé: que le 6 avril 1857, Hilaire Mathieu avait consenti en sa faveur une obligation pour la somme de £620, que par cet acte, il avait hypothéqué deux immeubles appartenant à sa femme, lui avait transporté £400 dus par Girard et Dansereau, créance qui était propre à l'Intimée; que cette dernière avait comparu à cet acte et avait renoncé à son douaire et à toutes hypothèques qu'elle pouvait avoir sur les immeubles en question; que par suite de cet acte, Hilaire Mathieu s'était rendu coupable de stellionat en hypothéquant des propriétés qui ne lui appartenaient pas et qu'il s'était par là assujéti à l'emprisonnement; que l'Intimée avait participé à la fraude pratiquée par son mari et avait trompé l'appelant, en ne lui dévoilant pas ses droits de propriété sur les immeubles qu'elle laissait hypothéquer par son mari; que l'acte du 8 avril avait été consenti pour remplacer celui du 6 avril et comme transaction sur ce dernier dans l'intérêt de l'Intimée, pour soustraire son mari à la prison; enfin, que l'Intimée ayant payé, n'avaient aucune action en répétition, en autant qu'elle acquittait une dette naturelle: il concluait en conséquence, au débouté de l'action.

A ces deux exceptions l'Intimée a répondu spécialement; mais en réalité, ces réponses spéciales [illegible] sent à des réponses générales.

Sur la contestation [illegible] liée, les parties procédèrent à l'enquête.

Il n'y a guère de difficultés quant aux faits; les parties les ont consignés dans des admissions succintes et précises: nous y référerons en temps et lieu.

La première question qui se présente en cette cause est de savoir si l'action de l'Intimée n'était pas prescrite.

L'appelant a paru abandonner son exception de prescription en cour de première instance aussi bien qu'en révision; mais en cas qu'il veuille la faire renaître devant cette cour, nous croyons devoir en dire quelques mots.

La première objection que nous présentons à cette exception est que, en vertu de l'Art. 2234 de notre Code, "*La prescription ne court pas contre la femme mariée*, dans tous les cas où l'action contre le débiteur, *réfléchirait* "contre le mari."

Dans le cas qui nous occupe, il n'y a donc pas de prescription possible contre l'Intimée, tant qu'elle sera sous puissance de mari.

En second lieu l'action de l'Intimée n'est pas basée sur l'Art. 2258 de notre Code, article qui n'a trait qu'aux contrats simplement *annulables*, mais bien sur les articles 989 et 900, qui ont rapport aux contrats *nuls*.

"Le contrat sans considération ou fondée sur une considération illégale, est "sans effet," dit l'art. 989, "et la considération est *illégale*," ajoute l'art. 990, "quand elle est *prohibée* par la loi."

Or le cautionnement que l'Intimée a donné pour son mari, par l'acte du 8 Avril 1857, est prohibé par l'art. 1301 de notre Code, qui le déclare *nul et sans effet*.

Delà il suit, que ce cautionnement étant basé sur une cause *illégale* et *prohibée* par la loi, ne donne pas seulement lieu à une action en *nullité*, mais qu'il est de plein droit frappé de *nullité absolue*; *nullité* d'où résultent trois consé-

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quences directement opposées à celles que l'on peut déduire de la simple *annulabilité.*

1o. Qu'elle est proposable par toute personne intéressée : e. g., dans le cas actuel, par l'appelant qui aurait pu poursuivre le mari de l'Intimée malgré le paiement fait par cette dernière et opposer à l'exception du paiement, la nullité du cautionnement et par suite, la nullité du paiement fait en exécution de ce cautionnement.

2o. Qu'elle est proposable, non seulement pendant 10 ans, mais pendant 30 ans.

3o. Qu'elle n'est susceptible de s'effacer par aucune ratification ou confirmation.

Demolombe, oblig. t. 1, p. 361, No. 381.

Marc. art. 1304, no. 881, vol. 4, p. 659.

Guyot, Rép. vo. nullité §7, p. 266 et seq.

L'exception de prescription de l'appelant n'est donc pas tenable.

La seconde question qui se présente est de savoir si une femme mariée, encore sous puissance, qui paie le cautionnement qu'elle avait donné pour son mari, en faveur d'un tiers, peut poursuivre en répétition. (*Condictio indebiti.*)

La solution de cette question dépend en grande partie de celle de savoir quelle est la *nature* de l'obligation que contracte une femme en cautionnant la dette de son mari.

L'art. 1301 de notre Code déclare ce cautionnement "*nul et sans effet*" : il ne peut donc y avoir aucune obligation civile par suite d'un semblable cautionnement. Le doute sur ce point n'est pas possible. Mais nous allons plus loin et nous émettons comme proposition légale, que ce cautionnement est tellement *nul*, qu'il n'oblige pas la femme, *même naturellement.*

En droit romain, la classe des obligations naturelles, était bien autrement considérable que dans notre droit ; là, toute obligation qui n'était pas contractée d'après les formes sacramentelles réglées par la loi, n'était que *naturelles.* Si les mots sacramentels de la stipulation (*spondes-ne ? spondeo,*) avaient été prononcées, il y avait obligation civile, quand même le consentement aurait été entaché d'erreur, de vol ou de violence, ou même encore que le promettant eût été mineur ou autrement incapable. Mais sans ses mots lériques, *seuls générateurs du droit,* il n'y avait qu'obligation naturelle, quand même le consentement aurait été exempt de tous vices et aurait été positivement avoué.

Dans notre droit, au contraire, on a abandonné les mots pour les choses, et toute obligation conventionnelle peut se former par le simple consentement : notre loi reconnaît, en principe, toutes les obligations que reconnaît l'équité.

" Ainsi, pour ce qui est des obligations des incapables, il faut bien se garder " de croire qu'une telle obligation, une fois qu'elle est annulée, continue de " constituer aux yeux de la loi une *obligation naturelle.* Quand notre législateur " déclare nulle la promesse du mineur, de l'interdit ou de la femme mariée, ce " n'est pas avec la pensée qu'elle est *valable en équité* ; (car s'il avait cette " pensée, il la déclarerait *valable en droit* :) c'est précisément parce qu'il lui " semble que ceux qui l'ont contractée, n'étaient pas dans les conditions voulues " pour s'obliger raisonnablement. S'il la déclare *nulle civilement,* c'est parce-

"qu'il la présume *nulle naturellement.* Il suit de là que, dans l'esprit de "notre loi française, la promesse que l'incapable a fait annuler, se trouve inexis- "tante en équité comme en droit, et ne présente pas plus d'obligation *naturelle*, "que d'obligation *civile.*"

Marc. art. 1272, No. 752, vol. 4, p. 573 et 574.
Ib. art. 1235, Nos. 669 et 670, vol. 4, 512 et seq.
Duranton, Oblig. No. 12.
Poth. Oblig. No. 52.

Aussi, notre loi déclare-t-elle l'obligation du mineur, de la femme, etc., valide jusqu'à concurrence de ce dont ils ont profité : ils sont tenus *civilement*, par ce qu'ils le sont *naturellement.*

Poth. Oblig. No. 193.

Mais il n'en est pas de même dans le cas du cautionnement d'une femme pour son mari. Elle ne tire aucun avantage ni bénéfice de son obligation, et la loi présume que son engagement n'a été donné que sous la pression de la volonté maritale et que son consentement n'est autre que celui de son mari.

Si donc l'art. 1301 de notre code déclare "*nul et sans effet*" le cautionnement de la femme en faveur de son mari, c'est parcequ'il présume que le consentement de la femme n'a pas été volontaire et n'est que le résultat d'une fraude concertée entre son mari et le créancier ; il ne peut pas y avoir là d'obligation naturelle, du moins la loi ne pourra jamais la reconnaître.

"Aussi," dit Marcadé, "il faut bien se garder de ranger au nombre des obli- "gations *naturelles*, celles dont l'invalidité tient à une défense de la loi, qui "les réprouve et les condamne comme contraire à l'ordre public. Il est en "effet impossible d'admettre que tout en prohibant une convention, comme "contraire au bon ordre ou à l'intérêt général, la loi se charge de protéger "l'exécution de cette convention : ce serait mettre le législateur en flagrante "contradiction avec lui-même."

Marc. (Art. 1235, No. 670, vol. 4, p. 513.

Et ailleurs, il ajoute :

"On a vu que l'obligation naturelle est celle qui existe vraiment en conscience, "quoique à l'insu de la loi (qui la croit sans fondement et refuse dès lors de la "reconnaître) et qui sera sanctionnée par le législateur dès qu'un aveu du débi- "teur viendra en manifester la réalité et la justice. On a vu de même qu'il ne "peut jamais y avoir d'obligation naturelle dans l'engagement que la loi, non "contente de ne pas reconnaître, va jusqu'à prohiber, parceque, en effet, si la "loi peut offrir sa sanction à l'obligation qui ne lui était pas d'abord suffisam- "ment connue et *qu'elle connait mieux plus tard*, elle ne pourrait l'offrir égale- "ment à *celle qu'elle sait positivement contraire à ses prescriptions.* En un mot, "l'obligation naturelle est celle qui, sans être actuellement sanctionnée par la loi "est cependant susceptible de l'être : or on ne peut évidemment pas reconnaître "ce caractère, à l'engagement que la loi *frappe de prescription.*"

Marc. Art. 1340, §2, vol. 5, p. 97.
Larombière, oblig. Art. 1338, No. 8, vol. 4, p. 594.

Il est facile de conclure de là que le cautionnement de la femme pour son mari, ne l'engage pas même naturellement ; car, la prohibition de l'art. 1301 de

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notre code est très certainement d'ordre public et faite dans l'intérêt général. C'est ainsi que l'a toujours compris et déclaré la jurisprudence de nos tribunaux.

L. C. J. vol. 4, p. 51 (opinion de M. le Juge Meredith.)

L'Art. 1554 du code Nap. contient une prohibition du même genre et du même caractère que celle de l'art. 1301, de notre code: il déclare inaliénable le fonds dotal, même du consentement de la femme. Or, on a toujours regardé cette prohibition de la loi, comme étant d'ordre public. (Tropl. Cont. de Mar. No. 3269, vol. 4, p. 356.) Et la ratification faite par la femme, pendant le mariage, de l'aliénation de son fonds dotal par le mari, a toujours été jugée nulle, comme l'aliénation elle-même: elle ne peut être opposée à la femme après la dissolution du mariage.

Vazeille, Prescrip. t. 2, No. 555.

Dall. p. 25, 1, 180,

On a donc raison de regarder la prohibition de notre Art. 1301, comme étant d'ordre public et de traiter comme nulle, la ratification que la femme encore sous puissance, ferait de son cautionnement, soit d'une manière tacite, en l'exécutant, soit d'une manière expresse, en le confirmant par un acte formel.

Maintenant, si nous remontons aux sources de notre loi, que nous croyons trouver dans le sénatus consulte Velléien, nous retrouvons encore la même opinion, et dans les jurisconsultes qui l'ont commenté et dans les nombreux arrêts qui ont été rendus en France, en interprétation de ce sénatus consulte.

Originairement, le Velléien ne défendait qu'une chose à la femme: *intercéder pour son mari.* Plus tard, il lui fut défendu d'intercéder pour quelque personne que ce fût; (*pro quacumque persona.*) La seule différence entre ces deux dispositions, c'est que lorsque la femme intercédait pour son mari, son obligation était radicalement nulle et elle ne pouvait jamais la ratifier, tandisqu'elle le pouvait si elle intervenait pour toute autre personne.

Froland, Mém. sur le Velléien, p. 39 et 123.

Chabot de l'Allier, vo. Velléien, § 3.

Salviat, Jurisp. du Parl. de Bord., vo. Velléien, p. 424.

Aussi, décidait-on sous l'empire de ce sénatus consulte, que la femme qui intervenait pour son mari, n'était pas obligée, même *naturellement.*

Froland, loc. cit., pp. 131, 355, 356, 364.

Hugues Doneau, vol. 3, p. 737, No. 8.

Telle est aussi l'opinion de Cujas, rapportée par D'Aguesseau, vol. 5, p. 497.

Si donc la prohibition de l'art. 1301 de notre Code, est d'ordre public, et entraîne la nullité absolue de l'obligation contractée en contravention à cet article au point de ne pas même lier *naturellement* la femme qui cautionne pour son mari, il est facile d'arriver à la conclusion que, lorsqu'elle acquitte ce cautionnement par erreur, elle doit avoir l'action en répétition. *Condictio indebiti.*

Froland, loc. cit. pp. 163, 357.

Despeisses vol. 1. p. 660, No. 7.

Bacquet, Droits de J. ch. 21, Nos. 129, 130 et s., vol. 1, p. 234.

Guyot, Rép. sén. cons. Vell., p. 198.

Poth. Pandectes, Liv. 16, Tit. 1, No. 38.

Et elle avait cette action, dit Dumoulin, soit qu'elle eût payé par erreur de droit ou par erreur de fait: *si solverit, sive per errorem juris, sive facti.*

Dumoulin, vol. 3, p. 659.

En vain l'on opposerait que l'Intimée a ratifié et confirmé son cautionnement, en a reconnu la validité, en l'exécutant, cette ratification est aussi nulle que le cautionnement lui-même. Un acte nul ne peut pas être confirmé ni ratifié: la raison dit assez en effet qu'on ne peut pas ratifier ce qui n'existe pas: le néant ne peut pas plus être confirmé, qu'il ne peut être détruit: *quod non est confirmari nequit.* Buckley et Brunelle et vir.

Marc. Art. 1338, § 1, vol. 5, p. 89 et s.

Id. Art. 1304, § 4, vol. 4, p. 665 et s.

Larombière, oblig., Art. 1338, Nos. 12 et 13, vol. 4, p. 598 et s.

Mais admettons pour un instant, que l'Intimée, par suite du cautionnement qu'elle a donné pour son mari en faveur de l'appelant, se soit obligée naturellement: nous soumettons que la ratification de ce cautionnement, ratification que l'on prétend faire découler de l'exécution, le paiement est tout aussi nul que le cautionnement lui-même, car, cette ratification n'a pas été faite dans un temps utile.

En effet, c'est un principe fondamental, en matière de ratification, que l'exécution ou le fait quelconque d'où l'on veut induire la ratification, se soit accompli à une époque où le débiteur avait toute sa *capacité*, et dans un temps où *aucune des causes qui font annuler les conventions primitives n'existaient plus*, puisque, sans cela, la confirmation ne serait pas plus valide que l'obligation elle-même.

Marc. Art. 1338, § 3, vol. 5, p. 93.

Rolf. de Villarg., vo. Ratification, No. 60.

Toull. vol. 8, No. 504.

Poth. Proc. Civ., No. 744.

"Règle générale," dit Larombière, "les actes de ratification, ne peuvent efficacement intervenir, que lorsque la partie de qui ils émanent peut, régulièrement et valablement, contracter l'obligation à laquelle ils s'appliquent, sous les divers rapports du consentement, de la *capacité*, de l'*objet* et de la *cause*."

Larombière, Oblig. Art, 1338, No. 15, vol. 4, p. 602.

S'il s'agit d'un vice de capacité, l'obligation ne pourra être confirmée par les femmes mariées, *qu'après la dissolution* du mariage. Larombière, Loc. Cit., no. 16.

Il en est de même, des vices de *cause* qui entachent l'obligation, soit parce qu'elle est contraire aux bonnes mœurs, à l'ordre public, ou *aux prohibitions de la loi*: Comme la nullité dont l'obligation est frappée, se fonde sur des motifs d'intérêt général, *tant que ces motifs subsistent*, l'engagement ne peut être valablement confirmé par aucune des parties. Le même vice qui l'infecte se communiquerait à l'instant même, à l'acte de confirmation.

Larombière, Loc. Cit., No. 8.

Donc, lorsque l'Intimée, a fait le transport du 5 septembre 1859, pour payer l'appelant de son cautionnement, elle ne pouvait pas ratifier sa première obligation, puisqu'elle était encore sous puissance de mari, et, par conséquent, soumise à la prohibition de l'art. 1301 de notre Code.

Nous ne croyons pas avoir besoin de mentionner que, sous l'empire du Velléien, toute ratification expresse ou tacite, de l'intercession de la femme, était radicalement nulle.

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Froland, Loc. Cit., p. 140, 162, 163 et 331.

Et Froland soutient que cette ratification était nulle, même si elle était faite par la femme, pendant sa viduité.

Il en est de même à la Louisiane, où l'Art. 2412 du Code de cet Etat a une disposition analogue à celle de l'Art. 1301 de notre Code.

Ann. Louis. Rep. p. 628.

Vainement argumenterait-on que le mineur ou la femme mariée qui contracte, sans autorisation, peut ratifier son obligation: cela n'est vrai que lorsque la ratification est faite par le mineur devenu majeur et par la femme devenu veuve; c'est-à-dire, lorsqu'ils ont recouvré leur capacité.

Donnat, Liv. 2, t. 7, sec. XI, et Liv. 1, sec. V, Art. 889.

Mais tel n'est pas le cas pour la femme qui cautionne son mari. Son obligation n'est pas nulle par suite d'incapacité soit civile, soit naturelle, mais parce que la *cause* de son obligation est vicieuse, défendue et prohibée par la loi. Aussi longtemps que les motifs de cette prohibition subsisteront, l'obligation ne pourra être valablement confirmée. Donc, toute ratification expresse ou tacite, du vivant du mari, est radicalement nulle, aussi nulle que l'obligation elle-même.

Froland Loc. Cit. p. 130 et 131.

Mais l'Intimée, peut-elle répéter ce qu'elle a payé? Nous entrons dans le vif de la question: mais à l'aide des principes que nous venons d'exposer, cette question est à moitié résolue. Son droit est soumis aux dispositions des Arts. 1047 et 1048 de notre Code, qui reproduisent presque textuellement les Arts. 1376 et 1377 du C. Nap.

Ces deux articles prévoient deux cas bien distincts. Dans l'Art. 1047, celui qui a reçu le paiement (paiement purement apparent,) n'était pas créancier; il ne lui était rien dû, c'est à un autre que la chose était due, ou même, elle n'était due à personne. Au contraire, dans l'Art. 1048, celui qui a reçu le paiement, était vraiment créancier: seulement, ce n'est pas celui qui a payé qui était débiteur.

Nous croyons que les parties en cette cause se trouvent soumises à l'Art. 1047, et que c'est par les dispositions de cet article, que l'on doit décider si l'appelant est ou non, obligé de restituer ce qu'il a reçu de l'Intimée; et dans ce cas, la restitution doit avoir lieu, soit qu'il ait reçu par erreur de droit ou de fait et soit que l'Intimée sût ou non qu'elle ne devait pas.

Marc. Art. 1371, §1, vol. 5, p. 254 et 255.

Pour arriver à cette conclusion, il s'agit de déterminer ce que l'Intimée a payé. Le paiement n'est rien autre chose que l'exécution d'une obligation. Or, quelle obligation l'Intimée a-t-elle exécutée ou voulu exécuter? Evidemment le cautionnement qu'elle avait donné pour son mari, et rien autre chose. Elle n'a pas voulu payer la dette de son mari;—elle n'a voulu que se libérer de son cautionnement, et si elle n'avait pas été liée ou si elle ne s'était pas cru liée, par ce cautionnement, il y a tout lieu de croire qu'elle n'aurait jamais payé, du moins on doit le présumer, si donc, comme nous l'avons démontré, ce cautionnement n'engageait l'Intimée, ni civilement, ni naturellement, l'appelant n'était aucunement créancier et il est obligé à la restitution, sans s'occuper de la question de

savoir si l'Intimée a payé par erreur ou non et si l'appelant se croyait ou non créancier.

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Marc. Loc. cit.

Admettons maintenant que la question doit se décider d'après les dispositions de l'Art. 1048, nous soutenons encore que, même dans ce cas, l'Intimée a droit de répéter ce qu'elle a payé se croyant *erronément* débitrice.

D'abord, nous posons comme maxime certaine et incontestable, que l'erreur de droit aussi bien que l'erreur de fait, donnent également lieu à la répétition. Cette question, ne souffre plus de difficulté aujourd'hui et l'opinion contraire de Pothier (*Condictio indebiti* No. 162,) nous paraît une erreur certaine.

Marc., Art. 1377, § 2, vol. 5, p. 255.

Duranton, t. 10, No. 128. Toull., t. 6, No. 75 et t. 11, No. 63. Solon, Nullités, t. 1; No. 205. D'Aguesseau, vol. 5, p. 475 et 476.

Bien que la dette soit due *naturellement*, la répétition a encore lieu, si cette dette n'a été payée que par *erreur*.

"La répétition n'est pas admise à l'égard des obligations *naturelles* qui ont "été *volontairement* acquittées," dit l'art. 1140 de notre Code, lequel reproduit l'Art. 1235 du C. Nap. Or, rien n'est plus opposé à la *volonté* que l'erreur. Donc &c.

Roll. de Vill., Vo. Répétition, No. 58 et s.

Dur. oblig., Nos. 671 et 678.

"Notre Art. 1235 (C. C. Bas Canada Art. 1140,) dit Marcadé, demande "pour refuser la répétition, que le débiteur ait payé *volontairement*, c'est-à-dire "en connaissance de cause, sachant bien que sa dette était *purement naturelle* "et ne pouvait pas être exigée. S'il en était autrement, si le débiteur n'avait "payé que par erreur, se croyant *lié civilement*, son paiement ne prouverait "plus qu'il veut reconnaître sa dette naturelle."

Marc. Art. 1235, Nos. 670 et 671, vol. 4, p. 513 et s.

D'Aguesseau soutient la même opinion et cite à l'appui de sa thèse, précisément le cas du sénatus consulte Velléien, parce que dans ce cas, dit-il, l'exception est établie en faveur de la femme et non en haine du créancier. "La "résolution de cette question, ajoute-t-il, serait encore plus facile si l'on adoptait l'opinion de Cujas qui soutient que la femme n'était pas même obligée "naturellement."

D'Aguesseau, vol. 5, p. 497.

D'ailleurs, c'est un principe qui est passé à l'état de maxime en jurisprudence que l'erreur de droit ne nuit pas aux femmes sous puissance de mari, non plus qu'aux mineurs, tant qu'ils sont en minorité.

Hugues Doneau, vol. 3, p. 1130, No. 10.

Arrêts du Parl. de Provence, p. 176.

D'Aguesseau, vol. 5, p. 497 et s.

L'on dira, et c'est une objection qui peut paraître sérieuse à première vue, "La loi ne défend à la femme que de cautionner son mari et non pas de payer "pour lui." Oui, mais cela n'est vrai que lorsqu'elle paie sans être précédemment obligée. *Cum prius obligata non esset.* Car lorsque la femme s'est obligée pour son mari, la loi présume, lorsqu'elle paie, qu'elle n'entend pas payer pour son mari mais bien pour elle-même.

Buckley et Brunelle et vir.

Aussi, depuis la première loi romaine, promulguée sous Augusto, jusqu'au dernier des arrêts rendus en France, sur cette question, il n'est pas un auteur, pas un tribunal, qui n'ait décidé que la femme eût, dans ce cas, droit à l'action en répétition.

Code, Loi 9, Ad. sen. cons. Vell.

Pothier, Pand. Liv., 16, Titre 1, No. 38.

Bacquet, Droits de Justice, ch. 21, No. 129, vol. 1, p. 234.

Poth. Condict. Indeb., No. 144, vol. 5, p. 105, (Ed. Bug.)

Despeisses, vol. 1, p. 660, No. 7.

Hugues Doneau, vol. 3, p. 725, Nos. 12 et 13.

Dumeulin, vol. 3, p. 659.

"La femme, dit Guyot, qui s'étant cautionnée, pour un capital qu'elle a "payé, ignorant qu'elle eût l'exception du Velléien, peut s'en servir ensuite "pour répéter ce qu'elle a indûment payé."

Guyot, Rép. vo. sen. cons.-Vell. ; p. 198, col. 2me.

Brillon, Dict. des Arrêts, vo. Vell. p. 826, no. 6.

Salviat, Jurisp. du Parl. de Bordeaux, vo. Velléien.

Froland, dans ses mémoires sur le sénatus consulte Velléien, a traité cette question *ex-professo*, et soutient que la femme, dans l'espèce en question, a, sans contredit, l'action en répétition.

Froland, p. 154, 163, 330 à 376.

L'action de l'Intimée était donc bien fondée ; mais il y a une condition : il faut qu'elle ait payée ignorant qu'elle eût droit de se faire relever de son cautionnement : *Senatus consulti beneficio munitam se ignorans.*

La question se réduit à savoir, à qui incombe la preuve de la confirmation où ratification d'une obligation frappée de nullité : car le paiement, dans le cas qui nous occupe, n'est rien autre chose qu'une ratification tacite du cautionnement que l'Intimée avait donné pour son mari en faveur de l'appelant.

Supposant que ce cautionnement produisit une obligation naturelle (ce que nous n'admettons toutefois, que par forme d'argumentation ;) supposant encore que l'Intimée, lors du paiement, le 5 septembre 1859, fût dans les conditions voulues par la loi pour pouvoir ratifier son cautionnement (nous avons démontré qu'elle ne l'était pas ;) nous soumettons que, même dans ce cas, pour écarter son action, il incombait à l'appelant, de prouver que lors de ce paiement, l'Intimée connaissait que son cautionnement *était nul, que la dette était purement naturelle (si toutefois elle l'était) et qu'elle ne pouvait être exigée par la loi.*

"En effet," dit Marcadé, "puisque c'est au créancier, dans le cas même où il "rapporterait un acte contenant confirmation expresse, mais sans spécifier le "vice qu'on a entendu couvrir, *d'établir que le débiteur a bien connu ce vice "et entendu le réparer, à plus forte raison*, serait-ce à lui de faire cette même "justification, dans le cas où il argumenterait seulement d'une ratification "tacite résultant de l'exécution : la doctrine contraire de Toullier, Merlin et "Rolland de Villargues, nous paraît comme à Zachariae, une *erreur certaine.*"

Marc. art 1338, § 4. vol. 5, p. 93.

"Quid, dit Pothier, lorsqu'il est incertain si celui qui a payé ce qu'il ne devait "pas, ignorait ou savait qu'il ne le devait pas."

" Il faut, dans le doute, répond-il, présumer qu'il l'ignorait et lui accorder la répétition : car c'est le cas de la règle de droit: *Jure obscura, melius est favere repetitioni quam adventitio lucro.*"

Poth. Condict. Indeb. No. 161.

"Si le demandeur, dit Molitor, prouve le fait du paiement, et que ce paiement était indu, il doit, pour ce qui est de l'erreur, être cru à son serment : car cette preuve n'est que très-supplétoire."

Molitor, des oblig. en Dr. Rom., vol. 2, p. 262, No. 860.

Comment croire en effet que l'Intimée a payé en connaissance de cause ?

Tout fait présumer que depuis le commencement jusqu'à la fin, elle n'a été que l'esclave des désirs de son mari. Ce dernier faisait toute espèce de transaction, engageait les biens de sa femme, faisait rédiger les actes dans lesquels il la faisait intervenir comme sa caution, sans lui en avoir parlé, puis la conduisait chez le notaire pour signer tout ce qu'il lui disait de signer ; si bien, qu'il a, par ce moyen, engagé et dissipé tous les biens de sa femme, lui laissant espérer qu'il rembourserait dans un avenir plus ou moins éloigné. L'Intimée a attendu tant qu'elle a eu l'espoir que son mari paierait : ce n'est que lorsqu'elle eût perdu toute espérance qu'elle recourut aux tribunaux et son action doit être reçue avec d'autant plus de faveur, qu'elle a été la victime de la pression de l'autorité maritale.

L'acte de transport du 5 septembre 1859, pour mieux cacher la fraude, ne mentionne même pas qu'il était consenti pour acquitter l'Intimée de son cautionnement ; si bien qu'une fois l'appelant mort, elle était dans l'impossibilité de faire aucune preuve à ce sujet. Delà, nous concluons que l'appelant savait que l'Intimée n'était aucunement liée par son cautionnement. D'ailleurs, il admet lui-même, dans sa déposition, que son avocat l'avait averti que ce cautionnement était nul. Cette connaissance le constituait en *mauvaise foi.*

L'appelant ne peut donc pas se plaindre avec raison qu'il a anéanti son titre contre le mari de l'Intimée, en lui accordant une décharge : car il n'était pas de bonne foi lorsqu'il lui a donné quittance, ainsi que l'exige l'Art. 1048 de notre Code. "Et, nous disons avec Froland, p. 364, lorsqu'il a accepté le cautionnement de l'Intimée, il a dû savoir que suivant le sen. cons. Velléien, elle ne contractait aucune obligation, qu'il ne pouvait lui demander aucune chose ; qu'elle n'était engagée ni civilement, ni naturellement envers lui... ; que le paiement qu'elle en ferait serait nul comme le cautionnement lui-même et que par conséquent, elle serait en droit de répéter les sommes payées...."

Aussi, sous l'empire du Velléien, le contrat d'intercession de la femme pour son mari, était tellement nul, que le créancier était remis en ses premiers droits et pouvait agir contre le vrai débiteur, par suite de la répétition de la femme *sans égard à la décharge que le créancier lui avait donnée.*

Bacquet, ch. 21, No. 131, vol. 1, p. 234.

Ferrière, Dict. de Droit, vo. Velléien.

Il ne reste plus que la question de savoir si l'acte du 6 avril 1857, peut influer sur celui du 8 avril 1857, deux jours plus tard, et rendre valide le cautionnement de l'Intimée : en d'autres termes, si l'acte du 6 avril est la cause de celui du 8, et si ce dernier a été passé pour couvrir les illégalités du premier.

Buckley et Brunelle et vir.

L'appelant, en cour Inférieure, a paru attacher une assez grande importance à ce point, sans cependant, croyons-nous, le regarder comme décisif. Quant à nous, nous n'y attachons pas la moindre importance et à notre point de vue, l'acte du 8 avril, ne nous paraît qu'une seconde fraude qu'on voulait commettre vis-à-vis l'Intimée pour cacher la première perpétrée par l'acte du 6 avril.

L'appelant prétend que sous l'empire du Velléien, la femme qui laissait son mari hypothéquer ses propres sans réclamer commettait une fraude vis-à-vis du créancier, fraude qui ne lui permettait pas d'invoquer par la suite, le bénéfice du sénatus-consulte. Nous l'admettons pour le moment; mais il fallait pour cela qu'il n'y eut aucune négligence de la part du créancier pour s'assurer si le mari était bien en réalité le propriétaire; car s'il savait ou devait savoir que la femme était propriétaire, cette dernière n'était pas obligée et pouvait invoquer le bénéfice de la loi.

Despeisses, t. 1, p. 248, col. 2me.
Pothier, Pand. livr. 16, titre, No. 31.
Bréard de Neuville, vol. 6, p. 265.

Or, voit-on dans toute cette affaire, le moindre indice que l'Intimée ait voulu tromper ou frauder l'appelant? Aucunement: tout au contraire, il est établi par la preuve, que lorsque l'Intimée a signée l'acte du 6 avril, elle n'a pas vu l'appelant et qu'elle ne l'avait pas même vu auparavant. Le notaire a préparé l'acte, a fait signer l'appelant et le mari; puis ce dernier a conduit sa femme chez le notaire pour signer cet acte, et elle a donné sa renonciation à toutes hypothèques qu'elle pouvait avoir sur les biens que son mari grevait par le même acte, sans trop savoir probablement ce qu'on lui faisait faire.

Il paraîtrait que lorsque le notaire s'aperçut qu'il y avait une erreur dans l'acte du 6 avril, il fit venir le mari de l'Intimée et l'appelant et leur fit résilier cet acte. Il est bon de remarquer, qu'on a pas même pris la peine de faire comparaître l'Intimée à cet acte de résiliation; preuve que l'appelant ne la considérait pas comme son obligée et comme ayant commis une fraude à son égard, par son silence sur ses droits de propriété, puisqu'il n'a pas même pris la peine de la faire comparaître à cet acte et de lui faire donner une déclaration à cet effet.

L'acte du 8 avril, ne mentionne rien de semblable. Il ne mentionne pas non plus que l'Intimée cautionnait l'obligation de son mari, par le fait qu'elle se reconnaissait liée envers l'appelant par l'acte du 6 avril. Non, elle comparait au dernier acte comme elle avait comparu au premier, esclave de la volonté maritale.

On a dit que l'acte du 8 avril avait été passé comme transaction sur celui du 6, et pour sauver de la prison le mari de l'Intimée. Mais cela n'existe que dans l'imagination de l'appelant et dans ses plaidoyers, mais nullement dans la preuve. Il n'en a même jamais été question. Toute la preuve qui existe au dossier à ce sujet, résulte de l'admission de l'Intimée que l'acte du 8 avril a été consenti, pour remplacer celui du 6, par suite de *l'erreur que le notaire avait commise dans ce dernier acte.* C'est là la seule cause de l'acte du 8 avril, et si l'appelant veut en trouver une autre, c'est à lui à la prouver.

Enfin l'appelant a jugé lui-même l'acte du 6 avril, en le résiliant sans la participation de l'Intimée. Ce tribunal ne peut mieux faire que de confirmer ce

jugement de l'appelant en considérant, comme lui, l'acte du 6 avril, comme n'engageant aucunement l'Intimée. Il ne pourra se plaindre si la justice se rend à son opinion.

Si la Cour adoptait les vues de l'appelant, il suffirait à un créancier astucieux, de faire consentir une obligation par le mari et de lui faire hypothéquer les propres de sa femme en faisant intervenir cette dernière pour renoncer à ses hypothèques sur ces immeubles; et pour éluder et frauder la loi, faire résilier cet acte et se faire ensuite consentir une obligation par la femme. La chose serait trop facile pour que la loi se prête à une semblable manœuvre.

Résumons:

1o. Le cautionnement donné par l'Intimée est nul et sans effet.

2o. Ce cautionnement n'a produit aucune obligation civile.

3o. Pas même d'obligation naturelle.

4o. Ce cautionnement étant frappé de nullité absolue, ne pouvait être ratifié: *quod nullum est confirmari nequit.*

5o. Aurait-il pu l'être, l'Intimée ne pouvait le ratifier tant qu'elle était sous puissance de mari.

6o. En supposant que l'Intimée eût été capable de ratifier ce cautionnement, elle ne l'a fait que par erreur.

7o. Les femmes sous puissance de mari, de même que les mineurs, sont restituables, même contre les erreurs *de droit*.

8o. L'Intimée est présumée n'avoir ratifié son cautionnement, que par suite d'erreur,

9o. La preuve du contraire, savoir, de la connaissance où était l'Intimée, des vices qui affectaient ce cautionnement, incombait à l'appelant.

10o. L'Intimée a payé ce qu'elle ne devait pas.

11o. L'appelant a reçu ce qui ne lui était pas dû; et comme conséquence, l'action de l'Intimée est bien fondée.

L'Intimée a obtenu gain de cause pour le capital et les intérêts: ce jugement a été confirmé à l'unanimité par la Cour de Révision, quant au principal: nous avons la confiance que cette Cour confirmera ces deux jugements, avec la même unanimité, du moins quant au principal.

DRUMMOND, J., en prononçant le jugement de la Cour, fit les remarques suivantes:

L'Intimée, demanderesse en Cour Inférieure, en qualité de femme séparée de H. Mathieu, réclamait du Défendeur, appelant, par l'action en répétition de l'indu (*condictio indebiti,*) une somme de $1312, savoir $800, en capital payé au défendeur le 5 septembre 1859, et $512 pour intérêts accrus sur cette somme indûment payée.

La Cour Inférieure rendit jugement en faveur de la demanderesse, suivant les conclusions de sa demande. Ce jugement porté devant la Cour de Révision, fut réformé. Cette Cour n'accorda que la somme principale et retrancha les intérêts.

La demanderesse acquiesça à ce jugement, mais le défendeur en appelle à cette Cour.

Voici les faits qui ont donné naissance à cette action.

Buckley et Brunelle et vir.

Le 8 Avril 1857, Hilaire Mathieu, l'époux de l'Intimée, consentit en faveur de l'appelant, une obligation pour £620 ; l'Intimée comparut à cet acte, se porta caution solidaire pour son mari et hypothéqua pour garantie du paiement de cette somme, un immeuble à elle propre.

Le 5 septembre 1859, l'Intimée transporta à l'appelant, une créance de $800, à elle due par Girard & Dansereau : cette créance formait partie du prix d'un de ses propres aliénés.

Le 18 janvier 1862, Girard & Dansereau payèrent à l'appelant, cette somme de $800 et les intérêts accrus jusqu'alors.

L'Intimée allègue tous ces faits dans son action : nullité de son cautionnement, paiement par erreur, d'une somme qu'elle ne devait pas, etc. Elle conclut, en conséquence, à la répétition de ce qu'elle a ainsi payé.

L'appelant a plaidé d'abord par une exception de prescription, prétendant que l'action était prescrite par le laps de dix ans.

Par une seconde exception, il a plaidé : que le 6 avril 1857, Hilaire Mathieu avait consenti en sa faveur, une obligation pour la somme de £620; que par cet acte, il avait hypothéqué deux immeubles appartenant à sa femme, lui avait transporté £400 dus par Girard & Dansereau, créance qui était propre à l'Intimée; que cette dernière avait comparu à cet acte et avait renoncé à son douaire et à toutes hypothèques qu'elle pouvait avoir sur les immeubles en question; que par suite de cet acte, Hilaire Mathieu s'était rendu coupable de stellionat en hypothéquant des propriétés qui ne lui appartenaient pas et qu'il s'était par là assujéti à l'emprisonnement; que l'Intimée avait participé à la fraude pratiquée par son mari et avait trompé l'appelant, en ne lui dévoilant pas ses droits de propriété sur les immeubles qu'elle laissait hypothéquer par son mari ; que l'acte du 8 avril avait été consenti pour remplacer celui du 6 avril et comme transaction sur ce dernier, dans l'intérêt de l'Intimée pour soustraire son mari à la prison ; enfin, que l'Intimée ayant payé, n'avait aucune action en répétition, en autant qu'elle acquittait une dette naturelle : il concluait en conséquence, au débouté de l'action.

L'appelant allègue plusieurs autres faits qui me paraissent avoir peu de rapport à la cause.

A ces deux exceptions, l'Intimée a répondu spécialement ; mais en réalité ses réponses spéciales se réduisent à des réponses générales.

Sur la contestation ainsi liée, les parties procédèrent à l'enquête et furent entendues au mérite.

Le 31 octobre 1871, Son Hon. le Juge Mondelet, prononça jugement en faveur de l'Intimée (demanderesse) non-seulement pour le principal, mais aussi pour les intérêts à compter du jour du paiement. Sur demande en Révision, les trois Juges composant cette Cour, le 30 janvier 1872, confirmèrent ce jugement quant au principal, mais l'infirmèrent pour les intérêts avant la signification de l'action.

L'Intimée, renonçant à cette partie du jugement en première instance, qui lui accordait les intérêts exorbitants du droit, demande purement et simplement la confirmation du jugement dont est appel.

La première exception à la demande, celle de prescription, pourrait avoir été

abandonnée et avec raison, car *contra non valentem et non agentem, nulla currit præscriptio.* L'Intimée était sous puissance de mari, on ne pouvait donc invoquer la prescription contre elle.

Les autres exceptions à l'action, sont résumées comme suit, dans le factum de l'appelant :

1o. Parce que le paiement fait par l'Intimée, avait une cause valable, dans le cautionnement du 8 avril 1857, qui avait remplacé son obligation du 6 avril.

2o. Parce qu'en supposant qu'il n'y aurait pas eu d'obligation civile, l'Intimée a contracté par les actes du 6 avril et du 8 avril 1857, une obligation naturelle, qui était une cause suffisante pour le paiement qu'elle a fait.

3o. Parce que l'Intimée n'a pas prouvé qu'elle eût payé par erreur et sans cause.

4o. Parce que lors de la demande de l'Intimée en répétition, l'appelant, à raison du paiement qu'elle lui avait fait, avait supprimé son titre de créance contre Mathieu et perdu tout recours contre lui.

En discutant ces questions, les avocats de part et d'autre, ont fait preuve d'une grande habileté, et avec un luxe extraordinaire d'érudition légale, nous ont fait remonter aux sources vénérées de notre droit, jusqu'au sénatus consulte Velléien et nous ont aidé dans nos délibérations, des opinions de presque tous les commentateurs, sur cette fameuse disposition légale.

Ce travail louable a non seulement prouvé le dévoûment des avocats en cette cause vis-à-vis leurs clients et fait honneur à eux-mêmes et au Barreau dont ils sont des membres distingués, mais a du servir à éclairer la religion des Juges, qui pouvaient entretenir des doutes sur le sens des articles de notre Code, ayant rapport au litige dont nous nous occupons.

Quels sont ces articles ?

C'est d'abord :

L'article 989 qui proclame :

" Que le contrat sans considération ou fondé sur une considération illégale, est sans effet. " Ce n'est que la consécration d'un principe fondamental du droit commun et du droit naturel.

Ensuite, l'article 1301 décrète :

" Que la femme ne peut s'obliger avec ou pour son mari, qu'en qualité de " commune ; toute obligation qu'elle contracte en autre qualité, est sans effet. "

Le premier acte, par lequel l'Intimée séparée contractuellement de biens d'avec son mari, se porte caution pour son mari, hypothéquant un propre à elle, pour une dette due par son mari à l'appelant, était donc nul.

Le second acte par lequel elle transporte à l'appelant, pour la dette de son mari, une créance formant partie du prix d'un de ses propres aliénés, était également nul.

Le paiement à l'appelant par Girard & Dansereau, de la somme demandée par l'action ($800,00,) fut fait pour acquitter d'autant le cautionnement donné par l'Intimée pour son mari, par l'acte du 8 avril 1857.

Cet acte de cautionnement étant nul, ces deniers illégalement payés pour son mari, doivent lui être remboursés, ainsi que la Cour Supérieure, siégeant en Révision, l'a ordonné.

Buckley et Brunelle et vir.

Le jugement dont est appel, doit donc être confirmé suivant mon avis, qui est aussi celui de toute la Cour.

Quant à l'affirmation qu'il y avait obligation naturelle de la part de l'Intimée, je nie cette proposition. Il ne peut exister aucune obligation naturelle, lorsque la convention est faite en opposition à la loi et surtout à une loi d'ordre public, comme celle que l'on invoque.

Quant à la suppression du titre de créance contre Mathieu, si ce titre est perdu, la perte en est due à l'appelant qui a fait des conventions illégales avec son débiteur et la femme de ce dernier.

Le jugement de la Cour d'Appel, est motivé comme suit:

"La Cour, etc: Considérant qu'il n'y a pas mal jugé dans le jugement dont est appel, confirme le dit jugement avec dépens."*

Jugement de la Cour de Révision confirmé.

Dorion, Dorion & Goffrion, pour l'Appelant.

Duhamel & Rainville, pour l'Intimée.

(J. G. D.)

COURT OF QUEEN'S BENCH, 1877.

[CROWN SIDE.]

MONTREAL, 19TH APRIL, 1877.

Coram RAMSAY, J.

The Queen vs. *William H. Mondelet.*

HELD:—On an indictment for abducting a girl under the age of 16, where it appeared that the girl had left her guardian's house for a particular purpose with his sanction, that she did not cease to be in his possession, within the meaning of the Statute 32 & 33 Vict. cap. 20, sec. 56.

The prisoner was indicted for abducting a girl under the age of 16 years. It being objected, when the case for the Crown was closed, that the evidence did not sustain the indictment, as the girl was not proved to have been in the possession of her guardian at the time of the abduction, the following judgment was rendered:—

RAMSAY, J.—The indictment is under 32 & 33 Vic., cap. 20, sec. 56.

The evidence of the Crown is to the effect that the girl was under the age of 16 years, that she was under the care of James Worthington, and that by his consent, on the 18th of February, she was allowed to dine at the house of the defendant, who was married to Worthington's sister, and that she was to return to Worthington's house that night. That in the afternoon the defendant offered to take her out to drive. They were to go for another young lady and bring her home to tea. Instead of this the defendant drove her to Chambly, where they arrived before 5 o'clock; he then put up his horse and ordered rooms at Mrs. Perrault's hotel, where he debauched the girl. Next day he brought her back to town and left her at Worthington's house. On this evidence it was contended. 1st. That

* Voir 19 L. C. J., p. 98.

there was no proof of her age; 2nd. That Worthington had not the lawful care or charge of her, and 3rd. That she was not taken out of the possession of Worthington, that is, provided he stood in the relation to her mentioned in the statute.

With regard to the first point: there can be no doubt of her age. The girl establishes it herself, and her father tells us precisely the day of her birth, which makes her a little over 14. The ground that this should be established by certificate is not supported by authority, and at any rate would not avail in this case, for the defence undertook to establish that the girl was not baptised.

As to the second objection, the statute says, "of the father or mother or of any person having the lawful care or charge of her." It seems to me that the words of the statute are made expressly wide to avoid the necessity of proving any strict guardianship. All that is required is to show that the person from whose possession she was taken had the lawful care or charge of her. Now I think it cannot be said that Worthington had not the lawful charge of her, for he was a person having such charge of her from her father, as the father has proved.

With regard to the third objection, I have gone over carefully the cases cited at the bar, and I do not think, with the exception of the case of Meadows, they give rise to any embarrassment. It is quite clear that the girl must be in the charge or care of some one, or the offence cannot be committed. So in the case of Green, where the girl was picked up in the street, and it did not appear that the accused knew in whose charge she was, it was held not to be an offence, and so also it was held in the case of Hibbert. But if she be in the lawful charge or care of any one, the consent of the girl to go will not take the case out of the statute. If it did it would be necessary to prove that the accused used violence, real or constructive, to induce her to go. This would be importing into the case an element of which we find no trace in the section of the statute under which the accusation is brought. In Mankletow's case, this was the view taken by the Court, and, in giving judgment, Jervis, C. J., said "it is immaterial whether the taking be with or without the consent of the girl." It has been contended that Wightman, J., ruled somewhat differently in the case of Handley. It will however, be observed that Wightman, J., concurred in the decision in Mankletow's case, and it is not probable that he would, without comment, have overruled the decision of six judges, including himself. On the contrary, he seems to have affirmed the ruling in that case by rejecting the idea that force was required, real or constructive, and when he says that the prisoner could not be guilty if the going away was entirely voluntary, he evidently means that there has been no offence if there was no *taking*, that is, if the girl had put herself voluntarily, and without collusion with the accused, out of the possession of the person having the lawful care of her. This view receives confirmation from the case of Robins (1 C. & K., 456) and from the case of Booth (12 Cox.)

The difficulty, if there be any in this case, does not appear to me to lie in the question of consent, but it is whether the possession of Worthington existed on the 18th of February, or whether she was then in the lawful charge of the defendant. If she was then in his charge the case is not within the statute, for he could not take her out of his own possession. The real question then is, what is the possession of the father or mother? C. J. Jervis' remarks in Mankletow's

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case furnish a reasonable commentary on the statute. He says: "A manual possession is not necessary. If the girl were a member of the family and under the father's control, there is a sufficient possession. If the girl leaves her father's house for a particular purpose with his sanction, she cannot legally be said to be out of her father's possession." This is precisely the case here. The girl left her uncle's house for the purpose of spending the afternoon at the house of the accused, and she was to return that night to her uncle's. The possession of the uncle was not determined; she was not wandering unprotected and in the street, as in the Green and Hibbert cases, and she was taken out of that possession when taken to Chambly, unless the Crown case can be answered, and, therefore, I think the case must go to the jury.

T. W. Ritchie, Q.C., for the Crown. The defendant was convicted.

D. Macmaster, and *St. Pierre* for the prisoner.

(J.K.)

COURT OF QUEEN'S BENCH, 1877.

[CROWN SIDE.]

MONTREAL, 10TH MAY, 1877.

Coram RAMSAY, J.

The Queen vs. *Adolphe Martin*.

HELD.—That perjury cannot be assigned upon a deposition taken under Art. 284 C. P., where the consent in writing required by that article has been omitted.

The defendant was indicted for perjury in a deposition taken in a civil suit in the Superior Court. The deposition purports to have been taken before Mr. Justice Berthelot, on the 2nd May, 1876. In fact, the deposition was begun on that day, adjourned to the 3rd May, and closed on the 8th May.

The perjury is contained in the examination-in-chief taken on the 2nd May, and it was proved that the oath was taken at *enquête* sittings by the prothonotary, there being no consent in writing that the *enquête* should be taken otherwise than by a judge taking notes.

It was contended for the defence that the prothonotary had no authority to administer such an oath without a consent in writing under art. 284. The case of Reg. v. Gibson, a reserved case, was also relied on. For the prosecution it was contended that the Act of 1870 (33 Vic., cap. 18, s. 2.) covered the case, and that there was a subsequent consent.

RAMSAY, J., Having conferred with the Chief Justice, Monk and Sanborn, JJ., said that, in a contested case, an *enquête* at length, under the old system, required a consent *in writing*, and that, without such consent, the oath was only a voluntary one on which perjury could not be assigned. It had been argued that the absence of the consent in writing might be waived and the irregularity covered by a subsequent proceeding. This might be true as between the parties, but no *subsequent* proceeding of the parties could make perjury that which was not so at the time the oath was taken. (1)

W. Prevost, for the CROWN. Verdict, not guilty.

O. Loranger, for the Defence.

(J. K.)

(1) See *Reg.* v. *Ewington*, 1 C. & M. 324.

COUR SUPERIEURE, 1877.

MONTREAL, 16 JANVIER 1877.

Coram PAPINEAU, J.

No. 860.

Lebrun vs. *Bédard.*

JUGE:—Que le créancier d'une obligation portant hypothèque conventionnelle, a droit d'instituer l'action hypothécaire contre son débiteur personnel, pendant que celui-ci possède encore l'immeuble affecté, et ce de la même manière que cette action, dans notre droit actuel, peut être exercée contre le tiers détenteur des biens hypothéqués.

PER CURIAM:—La présente action est en déclaration d'hypothèque, contre le défendeur en vertu d'une obligation notariée, consentie par le défendeur lui-même au demandeur, avec création d'hypothèque spéciale et enrégistrée.

La déclaration allègue ces faits, puis la possession par le défendeur de l'immeuble hypothéqué, et conclut à ce que la propriété soit déclarée affectée et hypothéquée au paiement de $275.60, balance due en capital et intérêts, sur l'obligation; à ce que le défendeur, comme propriétaire, possesseur et détenteur de l'immeuble affecté, soit condamné à payer au demandeur cette somme, si mieux il n'aime faire le délaissement, comme cela se pratique ordinairement, dans l'action hypothécaire contre un tiers détenteur.

Le 23 septembre, le demandeur produit un certificat de défaut de plaider.

Le 25 septembre, le défendeur fait une requête pour être relevé de son défaut et la fait signifier au demandeur le 26, avec copie du plaidoyer qu'il demande permission de produire.

Ce même jour 25 septembre, le demandeur inscrit pour audition au mérite *ex parte* le 2 octobre, et fait signifier son inscription le 26 septembre.

Le 26 septembre, probablement aussitôt après avoir reçu copie de la défense le demandeur se désiste de ses conclusions hypothécaires, pour s'en tenir à ses conclusions personnelles, et fait signifier au défendeur son désistement le même jour, l'heure n'est pas indiquée.

Le 28 septembre, le défendeur est relevé de son défaut et produit son plaidoyer, dont il avait fourni copie le 26.

Ce plaidoyer se compose d'une défense en droit et d'une défense en fait.

Le résumé des différents moyens de droit, est que l'action hypothécaire ne peut être intentée contre le débiteur personnel originaire, mais seulement contre le tiers détenteur.

La cause a été inscrite par le défendeur, pour audition sur le mérite de la défense en droit.

Lors de l'audition, il a été question d'irrégularité, d'informalité et de nullité dans le désistement; l'on a prétendu qu'il ne pouvait empêcher la défense en droit d'avoir son cours.

Comme il a été produit après la signification de celle-ci, et que la cour a permis la production de cette défense, qui seule est régulièrement devant elle pour le moment, on ne doit s'occuper que de cette défense en droit.

Le créancier d'une obligation portant hypothèque conventionnelle, a-t-il

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l'action hypothécaire contre son débiteur personnel pendant que celui-ci possède encore la propriété affectée; ou bien cette action, dans notre droit actuel, ne peut-elle être exercée qu'à l'encontre du tiers détenteur des biens hypothéqués?

Pour bien répondre à cette question, il est utile de se rappeler quelle est la nature de cette action personnelle hypothécaire, quel est son objet et dans quelle procède.

Cette action est réelle et personnelle en même temps, ou mieux c'est la réunion de deux actions distinctes, qui peuvent se poursuivre séparément ou se réunir au gré du créancier, parcequ'il n'y a aucune incompatibilité entre elles. Quelquefois, et c'est le cas dans la présente instance, on n'en fait qu'une seule action, qui est la combinaison des deux, en laissant au débiteur personnel l'option de payer ou de délaisser, quoique tenu personnellement au paiement de la dette, parce qu'elle résulte d'un droit dans la chose hypothéquée, et que ce droit s'attache à cette chose et la suit en quelques mains qu'elle passe. Elle est en même temps personnelle parce qu'elle résulte d'une obligation qui s'attache à la personne et, comme partout, comme la lèpre s'attache à la peau, pour me servir d'une comparaison souvent employée par nos vieux auteurs; elle suit la personne jusque dans ses héritiers. Elle est personnelle encore, dans une autre acception, en ce sens qu'elle doit toujours être dirigée contre une personne pour atteindre la chose hypothéquée.

En tant que personnelle, son but est la condamnation du débiteur à faire ou à donner ce qu'on demande de lui. En tant que réelle, son objet est de faire déclarer la propriété affectée à la sureté du paiement de la somme demandée et à la mise sous main de justice de la propriété hypothéquée, pour parvenir effectivement à ce paiement.

D'où vient au créancier, ce droit sur la chose? Est-ce de l'aliénation que son débiteur fait à un tiers de la propriété sujette à l'hypothèque? Evidemment non. Cette aliénation, à laquelle le créancier n'est pas partie, ne peut pas donner à celui-ci, un droit qu'il n'aurait pas eu déjà sur cette propriété. Le droit du créancier naît et procède de la convention par laquelle le débiteur, outre le lien qu'il a donné contre sa personne, en donne encore un autre contre sa chose. En bien! en loi, l'action n'étant que l'exercice, devant les tribunaux, d'un droit que l'on possède, l'action hypothécaire n'est rien autre chose que l'exercice du droit résultant au créancier de l'affectation spéciale de l'immeuble au paiement de sa créance.

Ce droit étant sur ou dans la chose même, peut être considéré et traité indépendamment du lien personnel et s'exercer sur elle et non sur la personne.

La personne alors est citée devant la cour qu'à raison de la chose et [illegible] ement de représenter celle-ci, tellement que si l'on pouvait assigner [illegible] elle-même, on n'aurait pas besoin de oiter la personne.

Dans l'hypothèque conventionnelle, le lien contre la propriété [illegible] dans celle-ci, s'établit en même temps que le lien contre la person[illegible] droit à l'action hypothécaire qui en résulte, naît au même instant; or, [illegible] dans ce premier instant de la naissance de l'action hypothécaire, le propri[illegible] le possesseur et le détenteur de la propriété affectée? Le débiteur pers[illegible] pas

d'autre. C'est donc contre lui que ce droit est né. Pourquoi celui en faveur de qui ce droit est créé, ne pourrait-il pas l'exercer contre celui qui l'a donné? Pourquoi ce droit ne pourrait-il pas être exigé de celui qui s'y est soumis lui-même, tout aussi bien qu'à l'encontre des tiers qui s'y trouvent sujets, eux, sans l'avoir voulu ni même connu bien souvent?

Je ne vois rien dans la nature de l'action hypothécaire, qui empêche de l'exercer contre celui qui a constitué l'hypothèque. En affectant sa propriété, il l'a offerte à son créancier pour sureté de son paiement. Comment peut-il nier à son créancier un droit qu'il lui a concédé de son plein gré?

Je ne vois rien non plus dans notre code, qui défend d'instituer l'action hypothécaire contre celui qui a consenti l'hypothèque. Au contraire, j'y vois (art. 2058) que: "l'action hypothécaire est accordée au créancier qui a une créance liquide et exigible *contre tout possesseur* à titre de propriétaire de la totalité ou de partie de l'immeuble hypothéqué à cette créance."

Pourquoi dans l'ancien droit français, ne voit-on que rarement l'action hypothécaire exercée contre le débiteur même qui avait créé l'hypothèque?

C'est que le créancier d'une obligation notariée, avait l'exécution parée contre son débiteur personnel et qu'il pouvait saisir l'immeuble sur ce débiteur, sans aucune action préalable: son droit d'action s'exerçait immédiatement, par la saisie immobilière. Il n'avait pas besoin, comme nous, d'une poursuite, celle-ci devenait nécessaire seulement dans le cas de prescription par trente ans, de l'action personnelle: l'action hypothécaire qui s'y trouvait unie, ne se prescrivant que par quarante ans.

La poursuite était nécessaire aussi contre le tiers détenteur, vu qu'il n'avait pas été partie au contrat créant l'hypothèque, et qu'on ne pouvait conséquemment avoir exécution contre lui, sans une condamnation préalable.

Dans notre système, où la poursuite et le jugement doivent nécessairement précéder la saisie-exécution, même contre le débiteur personnel, le créancier a peu d'intérêt à procéder par voie d'action hypothécaire contre son débiteur personnel, parcequ'en règle générale, il trouve après jugement rendu, l'immeuble affecté, encore dans la possession de son débiteur pour l'y saisir.

Cependant il se présente des cas, où l'exercice de cette action peut devenir très-utile, par exemple, pour empêcher le débiteur personnel, de chercher, dans l'aliénation du bien hypothéqué, un moyen de retarder le paiement de sa dette hypothécaire, l'article 2074, du Code Civil, frappant de nullité, à l'égard du poursuivant, l'aliénation par un détenteur poursuivi hypothécairement, à moins de consignation du montant dû au créancier poursuivant.

Cette action peut être exercé utilement encore, lorsque le créancier veut éviter de faire vendre les meubles de son débiteur et faire saisir immédiatement l'immeuble hypothéqué suivant les articles 1087 et 1102 du Code de Procédure Civile.

L'action personnelle hypothécaire existe donc, et les allégations du Demandeur sont suffisantes pour justifier ses conclusions. La défense en droit est mal fondée et est déboutée avec dépens.

Revenons maintenant au désistement.

Le demandeur avait droit de recourir à deux actions; l'une personnelle, l'autre

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hypothécaire. Il a combiné les deux en une seule, et il demande condamnation personnelle contre le défendeur, à moins que ce dernier n'aime mieux délaisser l'immeuble hypothéqué.

Après cela il se désiste de ses conclusions hypothécaires pour s'en tenir à sa demande de condamnation personnelle contre le défendeur.

A-t-il ce droit? S'il avait réellement intenté deux actions, l'une personnelle, l'autre hypothécaire, par un même exploit, il pourrait renoncer à l'une ou l'autre des deux. Ayant combiné les deux en une seule, et donné au défendeur l'option de payer la somme demandée ou de délaisser, il semble qu'il n'a plus le droit de se désister, sans le consentement du défendeur, de cette partie des conclusions où il lui laisse l'option entre ces deux alternatives. Il a concédé un droit au défendeur; il ne peut pas lui retirer.

Au reste, cette question ne doit être déterminée que lors de l'audition finale.

Défense en droit déboutée avec dépens.

H. C. St. Pierre, pour le demandeur.

Bonin & Archambault, pour le défendeur.

(J.G.D.)

COUR SUPERIEURE, 1877.

MONTREAL, 20 AVRIL, 1877.

Coram DORION, J.

No. 148.

Boyer vs. *McIver*, et *Craig*, Intervenant.

JUGE:—1o Que le propriétaire peut exercer simultanément son action contre son locataire pour le loyer et son privilége sur les meubles qui garnissent les lieux loués et qui appartiennent à un sous-locataire non reconnu du propriétaire, lors même que ce sous-locataire serait en faillite et que le Syndic aurait pris possession des dits meubles.

2o. Que le fait d'avoir reçu plusieurs termes de loyer du sous-locataire, n'a pas l'effet d'opérer novation et de décharger le principal locataire.

DORION, J:—Le demandeur poursuit le défendeur pour un quartier de loyer et a accompagné son action d'un bref de saisie gagerie en la manière ordinaire. En vertu de ce bref toutes les marchandises qui se trouvaient dans les premisses louées ont été saisies. Ces marchandises n'appartenaient pas au défendeur, mais bien à Shultz, Reinhart & Co., qui avaient sous-loué du défendeur et qui avaient failli quelques jours auparavant. L'intervenant qui avait été nommé Syndic à la faillite de Shultz, Reinhart & Co. et qui avait pris possession de leur fonds de magasin avant la saisie-gagerie exécutée, prétend, par son intervention, que l'action n'aurait pas dû être dirigée contre le défendeur, qui n'était pas le débiteur du demandeur; que ce dernier l'avait déchargé, et avait accepté Shultz, Reinhart & Co., comme ses locateurs et débiteurs, et que ceux-ci ayant été mis en faillite, le demandeur ne pouvait faire saisir leurs biens par voie de saisie-gagerie, mais devait produire sa réclamation devant le Syndic. Le défendeur n'a pas plaidé. La question est donc de savoir d'abord s'il y a eu novation c'est-à-dire substitution d'un débiteur à un autre qui serait déchargé. Le bail a été fait par les exécuteurs testamentaires de feu Louis Boyer au défendeur pour sept

ans et n'est pas encore expiré. Le défendeur ayant sous-loué à Shultz, Reinhart & Co., ces derniers ont payé d'abord aux exécuteurs et ensuite au demandeur qui est un des légataires de feu M. Boyer, et dans le lot duquel la propriété en question est tombé par le partage de la succession; mais les exécuteurs tout en recevant le loyer des sous-locataires ont formellement refusé de décharger le défendeur. Ceci est prouvé par M. Smith qui collectait les loyers pour eux. Quant au demandeur il n'a pu le faire non plus, car il dit qu'il ne connaissait pas le bail qui existait entre les exécuteurs et le défendeur. Ce n'est que lorsqu'il s'agit de poursuivre qu'il a appris que son locataire était le défendeur, et non Shultz, Reinhart & Co. Ainsi il n'y a pas eu novation. L'action était bien dirigée contre le défendeur et la saisie-gagerie qui n'en est que l'accessoire me paraît bien fondée. Le demandeur n'a aucune action personnelle directe contre les faillis. Il n'a pas de réclamation à faire contre eux. Il a son action contre le défendeur et il a son privilège sur les meubles qui garnissent les lieux et il peut exercer ces deux recours, que le propriétaire des effets saisis soient en faillite ou non.

Il doit y avoir jugement pour le Demandeur.

Doutre, Doutre, Robidoux, Hutchinson & Walker pour le demandeur.

E. Carter, C. R., pour l'Intervenant.

(G. D.)

SUPERIOR COURT, 1877.

MONTREAL, 11TH MAY, 1877.

Coram TORRANCE, J.

No. 2450.

McMaster vs. *Robertson.*

HELD:—That an affidavit for *capias*, which deposes in the alternative that "the defendant has "secreted or made away with, *or* is about immediately to secrete or make away with his "property, &c.," is defective.

The affidavit under which the defendant was arrested contained the following charge in the alternative, "the defendant has secreted, *or* made away with, *or* "is about immediately to secrete or make away with his property, &c."

Benjamin, for defendant, argued that the affidavit was insufficient, citing *Ostell v. Peloquin*, 20 L. C. J. 48.

L. H. Davidson, for plaintiff, cited Marler v. Aubrey, Superior Court, A. D. 1875, (Mackay, J.), deciding on a motion by defendant in favor of plaintiff.

The Court ordered the discharge of defendant.

Petition granted.

L. H. Davidson, for plaintiff.

Benjamin, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 14TH MAY, 1877.

[illegible]CE, J.

[illegible]748.

Gravel vs. *Mallette*; and *Mallette*, Opposant.

HELD:—That where an opposant is non resident though his domicile has been in the Province, he will be required to give security for costs.

The plaintiff demanded security for costs and produced an affidavit to the effect that the opposant was absent from the [illegible]ince and earning a living in the United States of America.

Dalbec, for opposant, said that opposant was only absent for the summer, and that the question was one of domicile.

PER CURIAM.—By C.C. 29, security should be given in case of non-residence. The opposant is now non-resident, and should give security.

Motion granted.

Lord, Cour & Pelletier, for plaintiff.
Dalbec, for opposant.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 7th JULY, 1877.

Coram TORRANCE, J.

No. 1688.

Gehereux vs. *Howley* et al., and *Jones*, Petitioner.

HELD:—That where a rule is taken out against a judgment debtor to show cause why he should not be imprisoned for non-payment of the judgment, and the rule has been declared absolute, notwithstanding the answer made by the debtor, it is not competent for the debtor, by a subsequent petition, to allege payment and non-indebtedness previous to the judgment on the rule.

Semble, That a Judge in Chambers is without jurisdiction to adjudicate upon the merits of such petition.

The plaintiff after judgment had taken a rule *nisi* for imprisonment against the defendants, whose indebtedness arose out of a security bond which they had signed on behalf of one James H. Springle. The amount then demanded was $195.26, with interest from 30th September, 1870, and costs of the rule. The rule was issued on the 26th of March, 1877. The defendant Howley made default. The other defendant, Charles G. Jones, appeared, and answered in writing to the effect that imprisonment could not be granted against him, as he was not a judicial surety; and, further, that no demand had been made upon him for the amount of the judgment, but a demand had been made upon him for the sum of $376.76, and the plaintiff had received on account of the judgment $150, which had not been credited, and which should be deducted from the amount sought to be enforced by the rule. After a hearing on the merits of the rule and answer the rule was declared absolute with costs on the 9th April last. On this judgment a warrant of arrest issued on the 11th April for a balance of $142.57 against Jones. The latter thereupon presented a petition to a judge

setting forth that a judgment on the 9th December, 1876, condemned the petitioner Jones and James Howley to pay to plaintiff $227.01 and costs; that petitioner did not employ an attorney in said suit; that on the 11th April, petitioner was informed that the said suit had been contested on his behalf, the proceedings having been signed by L. L. Maillet as attorney for petitioner; that he never authorized Maillet to appear and contest said suit; that the plea had been prepared and fyled and paid for by the plaintiff's attorneys in order to make costs; that petitioner was not aware of said proceedings until the 11th April; that on the 27th March a rule *nisi* issued against petitioner and said Howley, demanding payment of $195.26, unless petitioner and Howley showed cause on the 3rd April why they should not be imprisoned until they had paid said sum and costs of rule; that they did show cause, but that, by the judgment, said rule was made absolute; that petitioner had since learned that the sum of $348.25 had been paid on account of plaintiff's demand, and Howley had paid $200 on account, and these two sums together more than paid the judgment in this cause. Petitioner therefore prayed for an order staying the proceedings upon the rule and warrant, and that it be declared that said warrant had issued illegally, and that petitioner be discharged from all liability. Upon this petition a Judge's order was obtained to stay proceedings under the warrant, and subsequently the plaintiff answered the petition by saying that the judgment of 9th December against the defendants had been regularly rendered; that it was true that the plea had been paid for by the attorneys of the plaintiff, but it was done at the request of the defendants' attorney, who pleaded for delay and obtained thereby a delay of two months according to the practice of the Court; that the said Jones was aware of said proceedings and asked for delay and promised a settlement, that it was true that plaintiff's attorneys had been paid the sum of $348.25, but in the case of Genereux v. Springle, out of which the liability of defendants arose, and making the proper imputations of payment in that case, and also crediting the said sum of $200 which was paid by Howley, there was still an indebtedness of $142.57, which was the only amount demanded by the warrant; plaintiff, therefore, prayed that the petition might be dismissed.

PER CURIAM.—The first pretension of the petitioner is that by the unauthorized appearance of L. L. Maillet as his attorney he is made liable to pay a contested bill of costs in place of a bill of costs *ex parte*. I hold that I cannot at this stage of the proceedings consider this point without violation of the principle *non bis idem*. The amount of indebtedness was formally decided by the judgment on the rule on the 9th April. That judgment has not been appealed from, and no *requête civile* has complained of it. If I have any jurisdiction here, and I doubt it much, for a reason which I shall give immediately, it is only with regard to matters which may have arisen since the judgment of the 9th April. I may here remark as to the appearance of Mr. Maillet as the attorney of the defendant, Jones, that the latter on being served with the action immediately took it to Springle, his principal and warrantor, and asked his intervention. He knew nothing more of the case, but it appears that Springle at once took the action to his attorney, Mr. Maillet, with instructions to

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plead and get delay, which was done. Whether Jones should be bound by all these subsequent proceedings, I am not called upon to say, for I have already said that the maxim *non bis in idem* applies. Next, looking over the items of plaintiff's bill, I only find an error of a few dollars. The balance due is $129.-79, in place of $142, and the plaintiff fyled a statement to that effect on the 9th May last. Having come to this conclusion, I submit to the counsel whether I have any jurisdiction in Chambers to decide whether the debt of the plaintiff is extinguished. The proceeding of the defendant Jones is in the nature of an opposition alleging payment. A Judge in Chambers may order a stay of proceedings, but it is the Court which decides as to the indebtedness and payment. On the whole my conclusion is to dismiss the petition without costs.

Petition dismissed.

W. H. Kerr, Q.C., and *C. C. Carter*, for petitioner.
DeBellefeuille, for plaintiff.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 15TH MAY, 1877.

Coram TORRANCE, J.

No. 665.

Beckham vs. *Farmer.*

HELD :—That under article 1690 C.C. the plaintiff is not allowed to make proof, either by parol testimony or the oath of defendant, of the making or furnishing of extras in a contract for the erection of buildings.

The action was by a builder to recover from a proprietor the sum of over $1800 alleged to be a balance due on a contract for the construction of several houses and for extras in connection therewith. The plaintiff admitted by his declaration that he had received $15,715. The price by the contract was $16,000, and the defendant shewed receipts for $16,177 47.

PER CURIAM. One important question in the first place to be decided was whether the plaintiff should be allowed to prove the extras by the oath of the defendant and by parol evidence. It was so held in the case of Kennedy vs. Smith, 6 L. Can. R. 260, decided in the court below in favour of the defendant but reversed in appeal.

The court below was guided by the article of the French Code 1793 which was not then law in Lower Canada, but which has become law in C.C. 1690. This article, say the codifiers of our Code, "is suggested for the establishment "of a rule, the want of which has been much felt in this country. The neces-"sity imposed upon the contractor to obtain written authority to enable him "to recover for extra work, has been wisely adopted in France, and is spoken of "with commendation by all the commentators on the Code Napoléon.—The "writing is essential and its absence cannot be supplied by the oath of the "proprietor." The court conceives it to be its duty under this law to reject the evidence for the extras. The question remained whether the plaintiff had been paid the entire amount due under the contract. The receipts produced

by the defendant showed payments to the amount of $16,177 47. One of the items so proved was $12,200 in a receipt of date 15 June, 1875, and the plaintiff applied to be allowed to re-open his enquête in order to prove an error in this receipt, but the application was not supported in such a way as would justify the court in granting it. He admitted the receipt of $15,715; he said he would only be entitled to $15,788 25 under the contract, apart from the extras, which was only a difference of $73 25, the question of the extras being decided against him.

Action dismissed.

F. W. Terrill, for plaintiff.

Doutre, Robidoux, Hutchinson & Walker, for defendant.

(W. S. W.)

SUPERIOR COURT, 1877.

MONTREAL, 3RD MAY, 1877.

Coram TORRANCE, J.

No. 1088.

Fournier vs. Delisle.

HELD:—That the Court in Montreal has no jurisdiction to order that the security for costs offered by the plaintiff, who appealed against a judgment of the Court in the District of Montreal, should be taken before the prothonotary or a judge in the District of Rimouski.

The action of the plaintiff in the District of Montreal had been dismissed. He appealed from the judgment, and offered as sureties for costs in appeal two persons resident in the District of Rimouski. He accordingly petitioned the Court in Montreal for an order permitting the giving of surety by the plaintiff in the District of Rimouski before the Prothonotary of that District or a judge.

The application was refused by the Court, citing C. C. P. 1125.

Petition rejected.

J. Doutre, Q.C., for Plaintiff.

E. Barnard, for Defendant

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 24TH APRIL, 1877.

Coram TORRANCE, J.

INSOLVENT ACT OF 1875.

In the matter of *Hatchette* et al., insolvents, and *Gooderham* et al., petitioners.

HELD:—That the 82nd Section of the Insolvent Act of 1875 has not taken away the right of the vendor to revendicate goods sold by him to the insolvent, and the price whereof has not been paid.

This was a summary petition under sec. 125 of the Act.

The petitioners received an order from the firm of John Hatchette & Co. for one carload of spirits and rye whiskey, to be shipped from Toronto for Montreal at the rate for 57 cents per imperial gallon for the spirits and 34 cents for the rye whiskey, freight to be deducted. The spirits and whiskey reached Montreal in

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bond, and at the time of the insolvency of the purchasers were, or what remained, were in the private bonded warehouse of the insolvents, the duties not having been paid. The price had not been paid to petitioners. The petitioners alleged that the goods were entirely under the control of the authorities, and that the barrels were unbroken; also that they, on the 8th March, stopped the goods *in transitu* by a notice to the Collector of Inland Revenue in Montreal. The prayer of the petitioners was that the assignee be ordered to deliver to the petitioners the spirits and whiskey in question.

PER CURIAM:—There is no dispute as to the facts. It is in evidence that 30 barrels are still in the bonded warehouse of the insolvents, and under 31 Vict. c. 8, s. 89, the warehouse is secured under the joint locks of the Crown and the owner of the goods. By s. 102, they cannot be removed for consumption except on payment of duties, and if removed without payment or a permit they shall be seized and forfeited to the Crown. The only question discussed by counsel has been the stoppage *in transitu*, the petitioners claiming the right, and the assignee affirming that it had been terminated. By s. 82 of the Insolvent Act of 1875, the privilege of the unpaid vendor has been taken away from the delivery of the goods, but it has been doubted whether the right of revendication which the unpaid vendor has in certain cases in this Province is affected by the clause under consideration. The case of Henderson and Tremblay, 21 L. C. J. 24, throws considerable light upon the law of Lower Canada, in this matter. That was the case of an unpaid vendor who asked for the resiliation of the sale, and that he be declared proprietor of the goods which he seized, and in case the seizure was not good as a revendication it might avail as a conservatory process to secure him his debt. The Court below maintained the revendication. In appeal the rights of the vendor were protected, though the judgment was reformed in this that the sale was rescinded, that the seizure held good as a conservatory process, and the order went that the goods should be restored. Chief Justice Dorion in rendering judgment, said:—"Mais de ce que la revendication n'existe plus, il "ne s'ensuit pas que le vendeur non payé n'ait plus le droit de faire résilier la vente "en vertu de l'article 1543 du Code Civil, tant que la chose est encore entre les "mains de l'acheteur et meme après que le délai de huit jours pour revendiquer "est expiré. * * * La Cour Supérieure aurait du traiter cette saisie comme "une saisie conservatoire, résilier la rente et ordonner à l'appelant comme elle "l'a fait, de remettre le bois à l'intimé ou de lui en payer le prix." In the present case the petitioners do not ask a privilege, which they could not do under sec. 82 of the Insolvent Act, but simply re-delivery of the property which is unpaid for, and I think, under the authority of Henderson and Tremblay, the order may go for the 30 barrels still remaining.

Petition granted.

D. Girouard, Q. C., for petitioner.
Abbott & Co., for assignee.
(s. c.)

COUR DE CIRCUIT, 1877.

MONTREAL, 14 MARS, 1877.

Coram DORION, J.

No. 372.

Larose vs. *Michaud* et vir.

JUGE : Que la femme *separée de biens*, n'est pas responsable *solidairement* avec son mari, d'aucune partie du prix d'effets achetés d'un épicier, bien que *nécessaires à la vie*, si ces effets n'ont pas été achetés par elle-même, en son propre nom, s'ils sont portés au nom seul du mari, dans les livres du marchand.

Le demandeur poursuit la défenderesse en recouvrement de la somme de $25, balance du prix de certains effets d'épicerie allégués être *indispensables à la défenderesse et à sa famille*, et dont la plus grande partie a été livrée à elle-même, ou sur ses ordres.

Il allègue, en outre, que le 13 novembre dernier, il aurait institué contre Henri Giroux, mari de la défenderesse, semblable action pour le recouvrement de la même somme de $25, et aurait obtenu jugement contre lui, le 2 décembre dernier.

En vertu de ce jugement, une exécution aurait émané, et tous les meubles et effets saisissables se trouvant au domicile de Giroux auraient été saisis ; mais la défenderesse, se déclarant alors seulement *séparée de biens*, aurait fait opposition à cette saisie et réclamée comme sa propriété, les meubles et effets en question.

Le demandeur ayant appris par cette opposition l'existence d'une séparation de biens qu'on lui avait jusqu'alors soigneusement cachée ; sans s'inquiéter de sa première poursuite, institua contre la défenderesse la présente action, la tenant *responsable* au même degré que son mari et *solidairement* avec lui de la balance du prix des effets réclamés par cette action.

Telles sont, en résumé, les allégations et prétentions du demandeur.

De son côté, la défenderesse a proposé divers moyens de défenses, à l'encontre de cette action.

En premier lieu, une défense au fond en droit, par laquelle elle allègue que le demandeur ne pouvait instituer sa seconde action, sans se désister de la première, prétendant qu'il était censé connaître l'existence de la séparation de biens dont il s'agit et aurait dû la poursuivre *conjointement et solidairement* et avec mari par une seule et même action. Elle allègue aussi que le demandeur ne fait pas voir par sa déclaration que son mari est insolvable et incapable de le payer.

En second lieu elle produit l'exception de *chose jugée* finalement, une défense au fond en fait.

Contestation fut liée et le demandeur prouva que tous les effets vendus étaient *nécessaires à la vie* et que la plus grande partie de ces effets avait été livrée à la défenderesse elle-même, ou sur ses ordres.

Inutile d'ajouter que le compte était au nom du mari, puisqu'il n'avait pas jugé à propos de faire connaître sa séparation de biens au demandeur.

A l'appui de ses prétentions touchant la responsabilité de la défenderesse dans le cas actuel, le demandeur cita les décisions rendues dans les causes suivantes :

Larose vs. Michaud.

Paquette vs. Limoges & vir, 7 L. C. J., p. 30.
Robert vs. Rombert & vir 14 L. C. J., p. 162.
Elliott vs. Grenier & ux., 12 L. C. J., p. 91.
Courcelles vs. Dubois & al., 4 R. L., p. 284.
St. Amand vs. Bourret & al., 13 L. C. R., p. 238.
Léger & al. vs. Lang & vir, 1 R.J. de Q., p 223.

Dans cette dernière cause, parfaitement analogue à celle-ci, il a été jugé; Que la femme *séparée de biens*, est responsable *conjointement et solidairement* avec son mari, du prix " d'effets obtenus par elle, malgré que les mêmes effets fus- " sent chargés au mari et que ce dernier eût donné son billet promissoire, en " paiement d'iceux."

Le demandeur cita de plus :
C. C. art. 1423.
11 Pand. Franç., pp. 192 & 193.
Pothier, communauté, No. 464.
3 Delvincourt, 53.
C. Nap. Art. 1537.

Toutes ces dernières autorités, établissent de la manière la plus certaine, que dans les cas analogues à celui dont il s'agit, la femme *séparée de biens*, est tenue de contribuer avec son mari, dans la mesure de ses moyens, aux charges et obligations résultant du mariage.

Sur la question de savoir s'il était nécessaire que le demandeur se désistât de sa première poursuite, avant d'instituer la seconde, le demandeur cita :

Poth. vol. 7, No. 10, p. 50, (petit format.)

Sirey, Codes annotés, Supplément, Art. 1402, p. 323.

Cette article du C. N. décrète que : " Les époux, à défaut de " *représentation* " d'un contrat de mariage, sont *présumés* mariés sous le régime de la commu- " nauté légale....."

Le demandeur inférait de là que la défenderesse et son mari, ne lui ayant pas fait connaître leur *séparation de biens*, en contractant avec lui, sa première action était valablement dirigée contre le mari seul, en sa qualité de chef, de cette *communauté de biens présumée par la loi* ; et il ne voyait aucune raison de s'en désister ; il n'y avait d'ailleurs aucun intérêt.

A l'encontre de l'exception de *chose jugée*, le demandeur cita l'Art. 1241 C. C., qui déclare que cette exception n'a lieu, que si la seconde poursuite est entre les *mêmes parties agissant dans les mêmes qualités &c.*

Dans la présente cause, la poursuite n'etant pas entre les *mêmes parties*, cette exception n'avait aucune application.

La défenderesse n'avait pas de preuve à faire et ne cita non plus aucune autorité au soutien de ses prétentions.

La cause fut plaidée et prise *en délibéré* le 9 Mars courant et le 14, l'action du demandeur fut déboutée avec dépens. Les seules raisons données par l'Hon. Juge étaient qu'il n'y avait entre le demandeur et la defenderesse, aucun lien de droit ; que cette dernière, n'avait pas contracté la dette elle-même, et que le compte des effets vendus était tenu dans les livres du demandeur, au nom seul du mari.

J. G. D'Amour, Proc. du Demandeur. Action déboutée.
Laflamme & Associés, Proc. de la défenderesse.

(J. G. D.)

SUPREME COURT, 1877.

OTTAWA, 28TH JUNE, 1877.

Coram RICHARDS, CH. J., RITCHIE, J., STRONG, J., TASCHEREAU, J., HENRY, J., FOURNIER, J.

DARLING, APPELLANT;

AND

BROWN ET AL, RESPONDENTS.

HELD:—1. (Following Gilmour et al. and Whishaw, 15th Lower Canada Law Reports, p. 177) That a loan by a non-trader to a commercial firm is not subject to the limitation of six years (before the Code), or to the prescription of five years (under the Code).

2. That the prescription of five years against arrears of interest, under Art. 2250 of the Civil Code, does not apply to a debt, the prescription of which had commenced before the Code came into force.

3. That the entries in a merchant's books make complete proof against him.

4. That the transmission of an unsigned account in a letter signed by the debtor takes the case out of the statute Ch. 67 Consolidated Statutes of Lower Canada.

This was an appeal from the judgment of the Court of Queen's Bench at Montreal, reported in the 21st Vol. of the Lower Canada Jurist, p. 92.

Cross, Q. C., for the appellant, submitted the following propositions and authorities:—

If the debt was a non-commercial one, the proof was insufficient, Art. 1233 C. C. And, if it was commercial, the proof was also insufficient, Art. 1235 C. C.

The debt was a commercial one, and was therefore barred, either by the limitation of six years under the statute Ch. 67 Consolidated Stat. of L. C., or by the prescription of 5 years under Art. 2260 of the C. C. Edict of King of France, 1563. Pozer & Meiklejohn, Stuart's Rep. p. 122. Morragh vs. Munn, Stuart's Rep. p. 44, Lalonde vs. Rolland, 10 L. C. Jur. p. 321, Bédarride, Jur. Com. pp. 116, 128, Bravard-Veyrières, Droit Coml. p. 52. Goujet & Merger, Vo. acte de Commerce, Nos. 9 and 12, 1 Pardessus pp. 7, 44, 84, 86, 1 Namur, Cours de Droit Coml., p. 47, Orillard, Trib. de Com. p. 303.

The plea of prescription, moreover, belongs to the debtor, Art. 2209, C. C., and prescription could not be interrupted by a new promise. Angell on limitations Ch. 20, No. 211, Bowker vs. Fenn, 15 L. C. Law Rep. p. 73, and a new law of prescription is retroactive, 2 Mailher de Chassat, Ret. des lois, p. 283 to p. 298.

As to the legacy under David Darling's will, it could only be recovered from the universal legatee, Art. 919, C. C.

Under any circumstances, the interest accrued since the code came into force was prescribed under Art. 2250 of the C. C.

Martin, Q. C., followed, and submitted following propositions and authorities:

The first item in the accounts was with the firm, but the second one is due by David Darling's estate, and William Darling is not proved to have been present, or had knowledge of the entering of this item, in the accounts, and is not bound by such entry. 16 Weekly Rep. p. 958, re Farin L. R. 5 Ch. Ap. p. 118, Gen. Pitt's case p. 130. 2nd Williams Exrs. pp. 12, 43.

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The case is distinguishable from Gilmour & Whishaw. The declarations in the cases were different, and the case of Whishaw went on demurrer, for want of allegation of debt being of a commercial nature.

The compound interest was not recoverable, Art. 1078 C. C. Warring and Cunliffe, 1 Vesey, 98. Then the account not being signed could not take case out of the statute. And the letter, being of different date, could not be connected with the account. Clark & Alexander, 8 Jur. p. 496. And the entries in the books were not sufficient to take case out of the statute, Bush & Martin, 2 H. & C. Exch. p. 311.

Bethune, Q. C., for respondents, contended, that treating case either as a commercial or a non-commercial one, the entries in the appellant's books made complete proof against him. Pothier, Obligations, No. 757. Danty, Traité de la Preuve, p. 551, Nos. 26 and 27. 2 Dickson on Ev. p. 697 § 1183. And the appellant could not by his own evidence make proof in his own favor.—Art. 251, Code of C. P.

Then as to character of debt it was clearly not commercial. It might be and no doubt was commercial *quoad* the appellant, but was not so *quoad* Isabella Darling and the respondents, and consequently, the debt cannot be designated as a debt of a "commercial nature," or as a "commercial matter." And, not being so, neither the limitation of six years under Ch. 67 of Cons. Stat. of L. C., nor the prescription of 5 years under the Code can apply. Whishaw vs. Gilmour et al., 6 L. C. Jurist p. 319, and Gilmour et al. and Whishaw, 15 L. C. Law Rep. p. 177. 1 Pardessus, Droit Coml., from p. 5 to 89 and specially Nos. 5, 20, 48, 49, 50, 52.

1 Goujet & Merger—Dict. de Droit Commercial.—Vo. Acte de Com. pp. 24 and 25, Nos. 1, 2, 4, 5, 6.

Devilleneuve & Massé—Dict. du Contentieux Commercial.—Vo. Acte de Com. p. 15, No. 153.

1 Dalloz—Dict. Vo. Acte de Com., p. 34, Nos. 4, 5, 6.

Bédarride—Des Commerçants, &c., Nos. 26, 27, 246, 247, 248.

1 Bravard-Veyrières—Droit Coml., p. 51, and 6, Do. pp. 236, 237, 322.

Orillard—Compétence des Trib. Com., No. 245.

Encyclopédie de Droit, &c., par Sebire et Carteret—Vo. Commerce, p. 560, Nos. 204 and 207.

Then, if the debt be of a commercial nature, the sending of the last account current with the letter of the 6th November, 1865, took the case out of the statute.

As to Fenn & Bowker, it has no application to this case, and was, moreover, overruled by Walker & Sweet, 21 L. C. Jurist p. 29.

The legacy of $800 was clearly recoverable from the appellant. He was the sole executor of David Darling and when the legacy was past due and payable under the will, he credited Isabella Darling with the amount thereof in his books of account, and debited the estate with the same.

Art. 2250 of the Code could not be invoked, as against arrears of interest, inasmuch as the prescription of the debt had commenced prior to the passing of the Code.—Art. 2270 of the C. C.

RICHARDS, CH. J.:—

The principal item composing the original claim in this matter arose in this way. Isabella Darling, the testator, and William Darling, the defendant, were brother and sister. Isabella resided with her father in Scotland; defendant resided in Montreal, Canada. Isabella had about £100 in money, which she wished invested. It appears from a letter written by William Darling to Isabella, dated 1st September, 1857, that Isabella contemplated visiting Canada to relieve Mary, William's wife, in her household duty, who intended visiting Scotland. On the 4th of January, 1858, he wrote a letter, in answer to one from her, with reference to the £100. He said, "your best way will be to keep it until I give you notice that I have invested the money; I will advance the amount, and, after having done so, will ask you to pay the money over, to my father on my account." In the account current of William Darling & Co., of Montreal, with William Darling, Esquire, of Edinburgh, to 31st December, 1858, is entered February 27th, 1858. To cash from Isabella, £120.00; and in the account current (produced in the cause) of Miss Isabella Darling, in account interest at 6 per cent. to 31st December, 1858, with W. Darling & Co., is entered March 3rd, 1858. By cash to William Darling, senior, £120 sterling. A balance is struck at the expiration of the year and of every year thereafter, according to the accounts current produced, showing a balance (in which this £120 sterling and the interest thereon is included) on the 31st December, 1865, of $1,912.08. Under the will of David Darling, a brother of William and Isabella, made the 9th October, 1856, £200 currency was devised to each of his sisters, Margaret, Grace and Isabella. Probate was granted to William Darling, sole executor of the will, on the 2nd of June, 1857. In the account current already referred to, showing the balance on 31st of December, 1858, Isabella Darling is credited 14th April, 6 months interest on $800 at 12½ per cent., less ½ per cent., collection $51.74; a similar amount is credited October 14th of the same year; in the account current for 1859, on the 14th April a credit entry of a similar amount is made, and another entry on 14th of October of same amount. In the entries on the account current for 1860, on the 14th April, there is a credit of a like sum of $51.74, and on the same day D. Darling's legacy of $800. These entries with interest at 6 per cent., making yearly rests, charging cash, goods, &c., are continued in the accounts current produced to the last one in which the balance is brought down to the 31st December 1865, as already mentioned, the amount due Miss Darling being $1,912.08. The account current filed, which is first in date, shows the account from March, 1858, to 31st December, 1861, is dated 26 March, 1862, and shows a balance of $1,640.07. That showing the state of the account from January, 1862, to 31st December, 1865, when the balance of $1,962.08 is shown, is dated Montreal, 6th December, 1865. They are transcripts from the entries in the books of W. Darling & Co. This suit was instituted on 5th October, 1871, and entered into Court on the 20th day of the same month. There was evidence offered with a view to showing that William Darling was not aware of the entries of the items in the books of the firm, and that the credit of the legacy of $800 to Isabella, and the charging the estate of David Darling with the amount of the legacy to Isabella in the books

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was not made on the authority of William Darling. The statement dated 26th March, 1862, Thomas Darling said was made up by him, and the items in the books were entered by him, and he was not aware that William knew what he had done. He (Thomas) was aware of the fact that Isabella was entitled to the legacy of $800. The entry as to the cash paid William Darling, senior, and the two items of interest of $51.74 each, were in the books before he made up the full statement of 26th March, 1862. The statement was made out because Isabella asked him to make a statement of what she termed her fortune, he at that time being the bookkeeper of the firm of William Darling & Co. The statement of account dated 6th December, 1865, was made out by Defendant's bookkeeper, Ross, he did not know by whose directions, but he said he must have been directed to do so by some one. He did not recollect what he did with it after it was made out. The balance being made up to the 31st December, 1865, and as shown in that account, was $1,912.08 due Isabella. The plaintiff produced a letter signed by William Darling, dated "Montreal, *6th November*, 1865." It contains the following paragraph: "I did not get your letter till three weeks after it was written, and *I now send you the statement of your account*. There was an amount paid to Morgan that I do not know whether it should be charged to you or my father, and I have omitted it altogether from your account and from his. I will send you a corset if I can get one with the articles ordered in your letter from Mary, and which are not sent, because the expense would be more than they are worth. Perhaps there are some other articles you wish: if not, I will send them by express to Orillia." It was urged on behalf of the plaintiffs, that in this letter the month in the date was, by mistake, written November instead of December, and the statement of account referred to in it was the account made out by Ross, dated the 6th December, 1865. Both William Darling an the bookkeeper, Ross, were very closely examined on this matter, and failed to give any satisfactory explanation as to what statement of account was referred to in William Darling's letter. If it was not this account, dated 6th December, 1865, that account undoubtedly existed in William Darling & Co.'s books—books connected with his business and to which he had constant access, and in it were charged against Isabella, from time to time, cash, goods, paid for furs, for box to pack piano, and very trifling amounts such as goods, T. Davidson, 22 cents. In the absence of any satisfactory explanation, the judges in the courts below were of opinion that the statement of account referred to and sent in that letter was the one dated 6th December, 1865. Isabella, of course, was well aware that she had an account with William Darling & Co., and the letter dated 6th November would warrant the inference that she had written for a statement of her account. He seems to apologize for not sending it before. He says: "I did not get your letter till three weeks after it was written, and I now send you *the statement* of your account." At this time Isabella was not living in Montreal, but somewhere near Orillia, in the Province of Ontario. An attempt was made to show that these entries which were made in William Darling's books, which remained there so long, showing a large balance due to Isabella, were entirely a mistake; the first attempt to put the matter right by cross entries and the "*magic powers of book-keep-*

ing" were made after this action was commenced. In the meantime Isabella Darling had married George Templeton, and in the marriage contract between them, dated 9th August, 1870, her property is referred to as wearing apparel, jewelry, trinkets, and paraphernalia, the sum of about *two thousand four hundred dollars in the hands of William Darling & Co.*, &c. William Darling was examined as to this contract. He says the amount to Isabella's credit on 1st January, 1871, was $2.535.10. He says he was spoken to about it, but he could not say if he ever saw the contract. In answer to the question if he had not informed Mr. Hunter, the Notary, who prepared the contract, that the sum of about $2,400, the property of Isabella Darling, was then in the hands of William Darling & Co., he answered, "I am quite satisfied I never gave Mr. Hunter, or anybody else any information of that kind. I may have stated that there was such an amount to the credit of Isabella Darling, but subject to all the adjustments I have stated in my previous evidence. As to the language that is used there, it is not my language." He was asked, is it not a fact that the information, such as it was, was derived from conversations between you and Mr. Hunter, the Notary? He answered, "it may have been." Isabella Darling, having married, died 13th May, 1871; this action was instituted on 5th October, 1875. George Templeton died 28th March, 1876, and the suit was continued by his executors. The fair inference is, that William Darling, about the time of his sister's marriage, was aware that a considerable amount stood to her credit in the books of William Darling & Co., and no steps whatever were taken to rectify any errors, if they existed, until after the commencement of this action. As to the principal items of £120 sterling, equal to $584, and the $800, the devise of David Darling, I fail to see how there are any errors to correct. Isabella had a little money that she wished invested in this country, which she contemplated visiting soon. Her brother intimated to her that he would be looking out for an investment for her, and when he found one he would make it, and told her she could then pay the money to his father, on his account. Before he advised her as to an investment, she paid to his father, to his credit, the £120 sterling. That amount is charged in the books of William Darling, of Edinburgh, to Wm. Darling & Co., Feb. 1, 1858, as cash from Isabella; £120 is credited to her 3rd March, 1858, by cash paid to William Darling, sen., £120—$584—and this item is contained in the accounts rendered to Isabella, and down to the commencement of this suit. Isabella is made aware of the fact—has enquired as to the state of her account—has had statements rendered to her, and in the last one sent to her the balance brought down includes this item and the interest. I think we must assume, under the evidence, that William Darling knew what was in his own books, and how the account which he sent Isabella in his letter of the 6th November was made up, as I can come to no other conclusion than that the account of the 6th December was sent in the letter dated 6th November. William himself is as much bound by the account as if he had signed it at the bottom, or as if he had annexed it to the letter, and it had been verified by witnesses, as to account annexed and referred to in it. Having recognized the payment by her to William, sen., on his account, having

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charged this amount to William, sen., and credited the amount to her, I fail to see how there was any error to be corrected, or how there could be, without her consent, any re-charging, because William, sen., may or may not have paid W. Darling & Co. Then, as to the legacy, as I understand the law, until an Executor or any other Trustee acknowledges to hold money which comes into his hands intended for another as the money of the devisee, *cestui qui trust*, he cannot be sued at law for it; but when he sets it apart as the money of the devisee, and charges the estate of the testator with it, and credits the same to the devisee, then it is money had and received to the use of the devisee. Now, in the case before us, this appears to have been done. On the 14th April, 1860, Isabella Darling was credited with D. Darling's legacy, $800, and the estate of David Darling was debited 31st May, 1862, with the legacy of $800 and interest at 12½ per cent., to 14th April, 1860, and 6 per cent. from 14th April, 1860, to 12th September, 1861, $67.73. So here was debiting of the estate of the testator with the legacy, and a crediting of it to the legatee, and an account rendered afterwards, allowing interest on it. It seems to me this enables the legatee to sue the Executor for money had and received. There may be some question how far the interest credited at 12½ per cent. is proper to be considered as accruing from the legacy, and as belonging to the legatee. It is stated that there was a mortgage owned by David Darling's Estate, which it was thought would bear 12½ per cent. interest, and this was set aside for the £200 each, devised to the three sisters, and when the interest was paid at this high rate, it was credited to Isabella for her $800, but subsequently, in a proceeding in Chancery, the Court would not allow this excessive interest, and it was reduced to 6 per cent., by considering this excess as paid on the principal. Notwithstanding this, and the compromise that was effected, the amount still remained to the credit of Isabella Darling in the books of William Darling & Co. until after the commencement of this suit. Perhaps a defense might have been raised as to the excess of interest beyond 6 per cent. credited as the first 4 or 5 payments of interest, if it had been shown that the estate of David Darling had really lost the excess. I do not understand that question to have been especially raised in the Court below. The broad question as to William not being liable for the legacy is what was discussed, and that I think was properly decided against him. There is no question raised as to the solvency of the estate of David Darling, so there can be no pretence for retaining any portion of the legacy to pay debts. As to interest, the general rule is that the legacy bears interest from the time it is payable, but if the executor uses the funds of the testator for his own business or purposes, the rate of interest will be affected thereby (1 Williams, 1284-1288). It does not clearly appear at what time David Darling died. His will is dated 9th October, 1856, and the probate is dated the 2nd June, 1857. The legacy to Isabella is payable one year from the death of the testator. The first interest on the $800 is credited on the 14th April, 1858, for six months, at 12½ per cent., $51.74 and there are five of such payments credited. There is some mistake in this, for six months' interest at 12½ per cent. does not amount to $51.74. If the question had been discussed in the Court below, and it had ap-

peared that the funds of the testator were only bearing 6 per cent., interest or sum credited to Isabella was too much by 6 per cent., the claim might have been reduced by about $130, and the interest, according to the mode of calculating by the account rendered, and, perhaps, that would be the correct mode to treat this matter now. Assuming, then, that the transaction is to be considered as binding, whether as one of commerce or as non-commercial. If non-commercial, the entries in the books of Darling & Co., the statement of the account of the 6th December, 1865, and the letter enclosing the same are sufficient evidence of the indebtedness to bind William Darling, and if commercial, equally so. The next question is as to the statute of limitations. If the transaction is non-commercial, then it is conceded on all hands, as I understand, that the claim is not barred by prescription. If the matter is to be considered as one of commerce, then is the plaintiff's claim barred by the statutes of Lower Canada or by the provisions of the Code Civil? The 2270 Article of the Code reads: "Prescriptions begun before the promulgation of this Code must be governed by the former laws." The Code came into operation on the 1st August, 1866, and the statement of account to which the letter of William Darling refers is dated 6th December, 1865, from which day the prescription began to run. According to the literal wording of the Code it does not apply, and the case must be governed by the former laws. Under the Consolidated Statutes of Lower Canada, in force until the Code was promulgated, cap. 67, sec. 1, it was enacted that "no action of account or upon the case nor any action grounded upon any lending or contract without specialty, shall be maintainable in or with regard to any commercial matter, unless such action is commenced within six years after the cause of such action." Under sec. 2 it was provided that "no acknowledgment or promise by words only shall be sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the preceding section, or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made, or contained by, or in some writing, to be signed by the party chargeable thereby." Is the acknowledgment put forward on behalf of the plaintiff sufficient? I think it is. The account is in writing: it purports on the face of it to show the indebtedness of William Darling & Co. to Isabella Darling; the amount is stated to be, as made up to the 31st December, 1865, $1,912.08. The evidence, I think, as already stated, leads to the conclusion that Isabella wrote William Darling, asking for the statement of her account, and in the letter, purporting to be dated 6th November, 1865, *he sends her that very account*, saying, "I now send you the statement of your account." Taking both together, both being in writing, and the letter signed by him, I think this sufficiently complies with the statute. Suppose the account current had been continued over half a sheet of paper, and the letter had followed immediately after the striking of the balance, and these had been signed by the defendant at the end of the letter, would there be any doubt that the statute would have been complied with; or, as already suggested, suppose they had been attached together with a ribbon and the ends sealed with William Darling's seal unbroken, would it not be said that the two papers were incorporate together? If sent together, which I do not doubt they were, may they not be considered as one document for the purposes of the statute? I think they may. In Hartly *vs.* Wharton,

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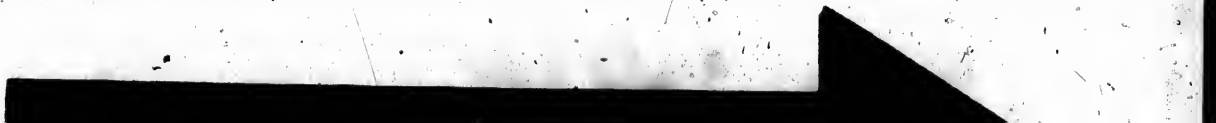
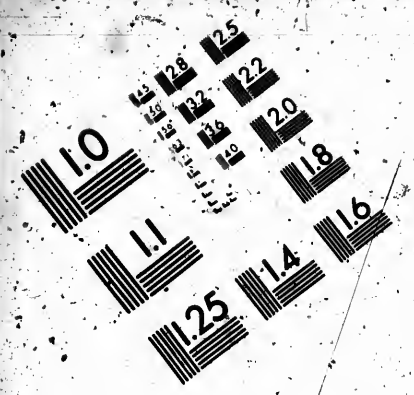
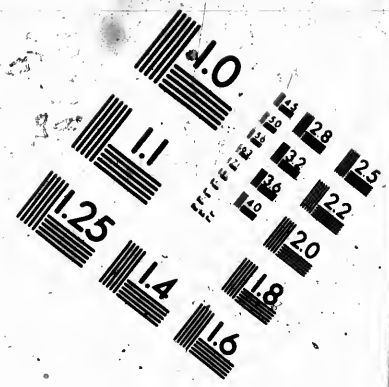
11 A. and E. 934, where defendant was an infant when goods were sold to him, it was sought to make him liable on a written promise or ratification under 9 Geo. 4th chap. 14, sec. 1. The written document was in the form of a letter, but was not addressed to any one and contained no date. Lord Denman, in giving judgment, said, "there is no date to the writing, the Act requires none, but only a promise or ratification made by some writing, signed by the party to be charged therewith." Then it is urged that the party to whom the promise was made is not named. That I do not think necessary. If such a promise were in a letter the address would be evidence, and if that were in an envelope evidence might be given to connect the two, and so evidence may be given for or to whom the written acknowledgment was made by delivery or otherwise." So here we connect the letter and the statement of the account by evidence, and thus connected together they are an admission of the balance due signed by William Darling. The later cases seem to sustain the view that you may use another document or paper referring to the contract to make it binding under the statute of frauds. In a recent case, a learned judge said;—"On the document itself there must be some reference from one to the other, leaving nothing to be supplied by parole evidence, except the identity, as it were, of the document." 1 Pinn *vs.* Carf, L. R. Q. B., 117; Buck *vs.* Keep, L. R. T.-Exch. 282. If the object of the statute be taken into consideration, I can hardly conceive a more satisfactory way of acknowledging an amount due than the rendering of an account showing the balance, and a letter accompanying it, saying:—"I send you a statement of your account, and this in reply to a written request to send it." Here there is nothing transacted by "parole" between the parties. It is all in writing signed by the party to be charged therewith. Suppose the account had been running five years, and Isabella had been in Montreal and asked William Darling for a statement of her account, and one had been made out showing a balance due her of $1,000, and this, though not signed, had been handed her by William Darling, there is no doubt if she had sued William Darling within a month for that balance, and had proved just what has been stated, she would have recovered as for the admitted balance of the account. She could not have recovered after the six years, because the admission is not in writing. But, being sent in a letter signed by him, it then became an admitted balance under his signature, and so taken out of the statute—see Bauman vs. James, L. R. 3 Ch. App. 509; Maxwell, on statutes, p. 262. There is a very late case as to an acknowledgment taking the case out of the statute, in the Exchequer Division Court, before Baron Cleasby. It was argued at some length and many cases were referred to. The learned Baron adopted the language of Meilish, in the case of the River Steam Co.—Mitchell's claim reported in L. R. 6 Ch. App. 822. There must be one of these three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or *secondly*, there must be an unconditional promise to pay the debt; or, *thirdly*, there must be a conditional promise to pay the debt, and then the evidence that the condition has been performed.

Here there is the clearest evidence of the acknowledgment of the debt, the

account current showing the amounts and the balance due. The law then implies the promise to pay, this was less than six years before the entry of this case into court, and, therefore, considering the matter as a fairly commercial one, and the rules of evidence in commercial cases in England to apply, I think we ought to hold that the action is properly maintainable. It was pressed upon us in argument that we should hold that, if the statute had been so as to bar the remedy, the subsequent admission should not take the case out of the statute, and the debt should be considered as wholly extinguished. The case of Fenn *vs.* Bowker, 10 L. C. J. 120, was referred to. How far [illegible] affected by Walker *vs.* Sweet, in the Court of Appeals in Que[illegible] is not necessary to determine. Under the decided cases [illegible] be no doubt that the legal effect of an acknowledgment of a [illegible]ute of limitations, it is that of a promise to pay an old debt, a[illegible] the old debt may be said to be revived. It is received as a consi[illegible] of a new promise. If the creditor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. This is the language of Vice-Chancellor Wigram, used in Phillips *vs.* Philipps, reported in 3 H. 281, 299, and referred to in subsequent cases, particularly in Buckmaster *et al. vs.* Russell, 10 C.B., N.S. 745. At this late day I do not think we should lay down a different rule as to the effect of acknowledgments, to take a case out of the statute. The evidence showed that Thomas Darling was not the party bound to pay the indebtedness of the firm to Isabella Darling, and as to Thomas it was not argued before this Court that the case was not properly decided in his favour; and as against William, if the evidence to establish liability was sufficient, he, William, being charged as jointly and severally liable, the judgment was proper enough, he being solely liable. As to the first question submitted to this Court, I think there was sufficient evidence of William Darling's indebtedness to the amount of $2,288.44 with interest at 6 per cent. since 1st January, 1871. As to the second, I do not think the explanations given in the evidence in behalf of William Darling were sufficient to exonerate him from liability. Third—The articles of the Code as to the prescription of interest to five years does not apply in this case, as the prescription began before the Code was promulgated. Fourth—Whether the matter in question was commercial or not, the remedy is not barred by the lapse of five years before the bringing of the action. Fifth—Six years had not elapsed before the commencement of this action since the written acknowledgment was made by William Darling, which took the case out of the Statute. Sixth—It was not argued before this Court that the plea of compensation for board and lodging was established by appellant. If it had been argued I think the evidence was not sufficient to sustain the plea. The rate of interest in this account was six per cent. per annum making annual rests. In this way the account was rendered by Darling & Co., and Isabella Darling did not object. It may be considered, therefore, that this was the mode agreed upon between the parties as to the interest, and, according to that mode, the plaintiffs should be entitled to recover. I do not quite understand how the learned Judge in the Superior Court fixed the amount to be recovered from the defendant, William Dar-







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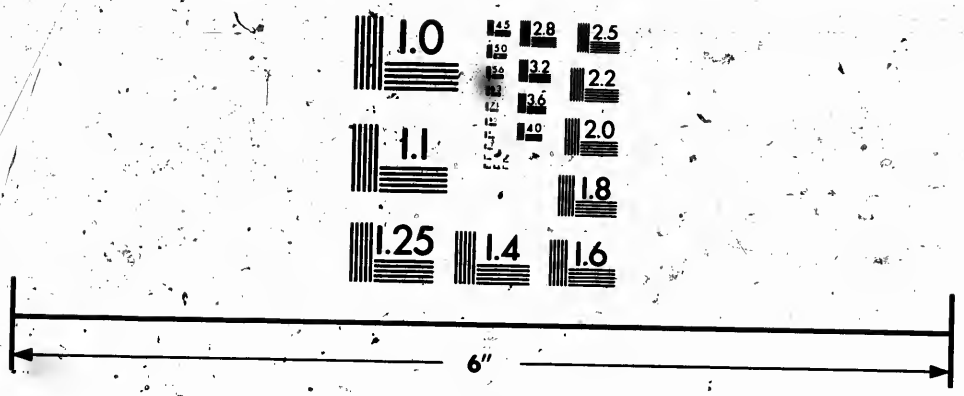

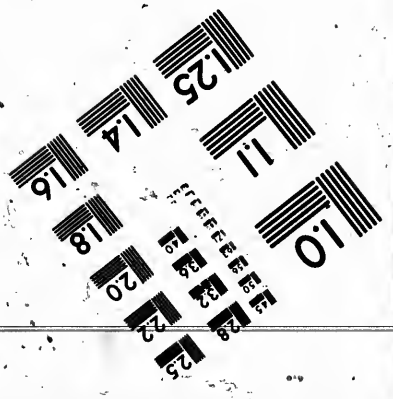

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ling, at $1,746.42 balance shown to be due on 31st December, 1863, under plaintiff's exhibit No. 2, with interest on $1,661.23, balance due 31st December, 1863, until perfect payment and costs. I fail to see why the balance on 31st December, 1863, should be fixed as the sum due, or why that balance should not carry interest until payment. If the mode adopted of computing interest, and making annual rests anterior to 1863, be correct, it seems to me it should be followed up to the time of the bringing of the suit, or to the last balance which would have been struck previous to the bringing of this action. Taking the balance of the account, say on 1st January, 1871, as stated in William Darling's account at $2,535, and allowing for the excess of the five payments of interest credited with the interest thereon computed in the same way, I make the balance due the plaintiff, $2288.42, bearing interest from the 1st January, 1871, which, I think is the proper amount to find against the defendant, with costs.

RITCHIE, J., concurred.

STRONG, J., agreed with the Chief Justice. He was fully of opinion that the transaction was not of a commercial character, and the rule laid down in the case of Whishaw *vs.* Gilmour must be adhered to.

TASCHEREAU, J.—The action in the Superior Court was instituted by George Templeton, as universal legatee of his deceased wife, Isabella Darling. Templeton died during the pendency of the suit; the respondents, as executors of his will, took up the instance in the place of said Templeton. The action was brought against the appellant and his brother Thomas Darling for $1,912.08, and interest from 31st December, 1865, as per settlement of account, for loan of monies at different times from 1858 to 1860. The appellant filed several pleas, but only the following need be considered under the present appeal: 1st. Plea of prescription of 5 years; 2nd. Plea of prescription of 6 years; 3rd. Plea of compensation by a counter claim for board and lodging from September, 1858, to November, 1862, at the rate of $300 per annum; 4th The general issue. We are of opinion that the judgment of the Court below should be confirmed. It is evident that the pleas of prescription of five and six years cannot be maintained for one instant, the debt claimed not being of a commercial nature. It consists in two separate loans of money bearing interest, made by a non-trader to traders, it is true, but such a loan cannot be considered as a commercial transaction. This proposition was adhered to in the case of Whishaw vs. Gilmour, 15 L. C. L. R. p. 177, and we find the same rule of law laid down in 1 Pardessus Droit Commercial, pp. 5 to 89; Goujet & Merger, Acte de Commerce, p. 15, No. 153; 1 Dalloz Dictr., Acte de Commerce, p. 34, No 456; Bédarride des Commerçants, Nos. 26, 27, 246-247-248; Sebire & Carteret, Commerce, p. 560, Nos. 204 to 267, and the Court of Queen's Bench which confirmed the judgment appealed from assented to the same doctrine. Even admitting, for the sake of argument, that the debt claimed was one of a commercial nature, the prescription of five years would not apply as being a new prescription created by the code (which came in force on the 1st August, 1866,) and under article 2260. All prescriptions begun before the code must be governed by the former laws. The debt being of a civil, and not of a commercial nature, the prescription of six years cannot apply, nor, if commercial, can

the contention of the appellants, that the debt has not been acknowledged by any writing of his, be of any avail, for the entries in his books are, according to our laws, conclusive proof against him unless otherwise explained, or an error is accounted for, and in this case I am satisfied that there has been no error. This also disposes of the plea of general issue fyled by the appellant. Now, as to the plea of compensation, claiming $1,200 from the respondent for board and lodging, at different times, from 1858 to 1862, we are of opinion that the claim cannot be entertained. No proof of a contract for board was made; on the contrary, it seems that it was on the invitation of the appellant that Isabella Darling went to live with him. To show his intention of charging for this board, appellant should have included this item in the accounts he furnished Mrs. Templeton whilst she was living with him. If we take into consideration the relationship of the parties, the rendering of the accounts without such a charge, and all the surrounding circumstances, I think we may safely come to the conclusion that no intention ever existed in appellant's mind to charge board or lodging to a sister who came to his house by invitation. We, therefore, dismiss this plea as not proved, and confirm the judgment of the Court of Queen's Bench, for the Province of Quebec, with costs in this Court as well as in the other Courts appealed from, with a slight alteration as to the amount.

FOURNIER, J.—The principal question raised in this case may be resumed in the enquiry, whether the contract upon which the action is based in this case is a commercial transaction or not. It is sufficient to determine the true character of it, and to record a few words as to what has taken place, and the quality of the contracting parties at this period. On 3rd March, 1858, William Darling, merchant, of Montreal, received from Wm. Darling, senior, his father, for the benefit of his sister Isabella Darling, the sum of £120 sterling, equal to $581 currency; subsequently the latter became legatee of another sum of $800, by virtue of the will of David Darling, her brother. William Darling alone was charged with attending to the execution of this will. These two sums having been left with him by way of a loan at six per cent. interest per annum he gave an account of it to his sister up to the 31st December, 1867. At this time he appeared to be by so much indebted, by the books to the firm of William Darling & Company, as well as by a statement of account furnished by the said William Darling, comprising therein accrued interest, in the sum of $1,746.72 currency. Isabella Darling had never done any business, and did not appear to have done anything save placing her money in the firm of William Darling and Co., with a view to traffic and speculation. By the mere fact that William Darling was a merchant, did the loan then made to him partake on that account of a commercial character, and be an act to which prescription, as established by the 10th and 11th Victoria, chap. 11, became applicable? It is understood that, on the part of Isabella Darling, that act was not a commercial one. It was a civil contract for the placing of her funds in a manner with which speculation had nothing to do, and, consequently, removed, in so far as the proof and prescription is concerned, under the rules relating to loans. As will be seen by the following authorities, the contract can be considered in France as a civil operation on the part of Isabella Darling and as a commercial transaction on the part of William

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Darling (Dalloz, 1st vol. Dictionnaire de Législation, No. 5), "The same act can only be commercial on the part of one of the parties.". Thus in the case of a sale the purchaser could break an act of sale, whilst the seller could only bind himself to a civil and reciprocal co-operation (De Villeneuve & Massé, Dictionnaire du Contentieux, p. 15, No. 153.) "The obligations of a merchant for the benefit of a non-merchant when the case is commercial are commercial transactions in regard to the merchant only." This double character given to the same act in the French Legislation provides for a division of jurisdictions, attributing to a commercial tribunal the decision of commercial matters and to civil tribunals that of cases of a civil nature. There are many cases in France in which is given a commercial character to an act only to define jurisdiction. For example, if the loan made to a merchant is declared to be for him a commercial act, that is to submit it to the jurisdiction of a commercial tribunal which can decree against him *contrainte par corps* to force him to fulfil his obligations, or declare himself insolvent. But the merchant cannot bring there his opponent. If he or she did not enter into a commercial act, he would be obliged to summon them before the civil tribunal, which would apply to the contract all the rules of civil law which govern it. This is what Dalloz, vol. 1, Dictionnaire de Législation, No. 207 says: "but consular jurisdiction does not extend to the lender, who has not personally entered into a commercial act, even when the agreement entered into between them and the merchant had for its object the business in which the latter was engaged." Goujet & Merger, Dictionnaire de Commerce, No. 2,425, No. 1. "That which gives in general to an act a commercial character is speculation; every operation with a view to business with the intention of obtaining benefit from it, constitutes a commercial transaction," No. 23, 24. Hence, from the same principle, it results that a contract can be commercial on the part of one of the parties, and civil on the part of the other, if one of them only has had in view the realization of benefit. However, there exists this difference between merchants and non-merchants, that the former are, until proved to the contrary, supposed to have acted in the interest of their business, whilst the latter are also considered, until proved to the contrary, not to have intended to enter upon a commercial operation. In the Province of Quebec, where this division of jurisdiction does not exist, there is not the same reason for giving to the same transaction this double significance. If the contract is civil in its nature, it does not change its character, because one of the parties in it is a merchant. A question exactly similar to this was decided by the Court of Queen's Bench, in Appeal. It was that of Whishaw vs. Gilmour, 15 L. C. Reports, p. 117. In this case the question was also of a loan of a sum of money, by a non-merchant to merchants, who opposed to the suit the plea of prescription of six years, invoked upon the principle, that the transaction was, upon their part, a business act, and it was due to them that this right of prescription should prevail. Their pretention was rejected. Although the judges were divided in opinion, there never was a decision to the contrary, and this point has been considered settled by that judgment. I am of opinion that, in this case as in that of Whishaw and Gilmour, the only prescription applicable is that of thirty years. There was also a plea of compensation, which was not like that of prescription.

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No proof has been made establishing an agreement that the said Isabella Darling should pay for her board and lodging in the family of her brother William Darling, and nothing was shown that he had ever the intention of making such an account. For these reasons I am of opinion that the judgment of the Queen's Bench in appeal should be confirmed with costs, modified in the manner mentioned by the Honourable Chief Justice.

HENRY, J.—I agree with the views expressed by the Chief, and my other colleagues, as to the nature of the transaction. The case of Whishaw vs. Gilmour is in point, and the transaction must be considered as being non-commercial, and the only prescription applicable is that of thirty years.

Judgment of Q. B. confirmed.

Cross, Lunn & Davidson, for appellants.
Bethune & Bethune, for respondents.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 20TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 453.

Ex parte *McCambridge*, Petitioner for Writ of Certiorari,

AND

M. C. Desnoyers, Police Magistrate,

AND

R. Bellemare, Prosecutor.

CERTIORARI—CONDITION PRECEDENT.

HELD:—That an applicant for a writ of *certiorari* to remove a conviction for violation of the Quebec License Act, A. D. 1870, is required to make the deposit provided for by s. 195 of that Act before he can make the application.

The petitioner had been convicted for violation of the Quebec License Act, A. D. 1870.

Devlin, for petitioner, applied to the Court for a writ of *certiorari* to bring up the proceedings before the Court.

Bourgouin, for the prosecutor, objected that the petitioner had not complied with the requirements of the Statute of Quebec, 34 Vic. c. 2, s. 195, which required the previous deposit, within forty-eight hours after the conviction, of the penalty or sum, and all costs.

PER CURIAM:—This point has already been decided by this Court, MACKAY, J., Ex parte *Doray*, 31 October, 1874, and Ex parte *Coupal*, 17 October, 1874, in which cases the writ was refused because the deposit had not been made.

Writ refused.

B. Devlin, for petitioner.
Bourgouin, for prosecutor.
(J.K.)

CIRCUIT COURT, 1877.

DISTRICT OF BEDFORD, 20TH JULY, 1877.

Coram DUNKIN, J.

Ex parte Cooey, Jr.,

PETITIONER;

AND

The Municipality of the County of Brome,

RESPONDENT.

HELD:—1.—That the provisions of the Temperance Act of 1864 have not been repealed or amended by the Municipal Code or subsequent legislation, so as to prevent the enactment of a by-law thereunder for the prohibition of the sale of spirituous liquors.

2.—That the regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada.

PER CURIAM.—The Petitioner, a municipal elector of the County of Brome, petitions, under article 698 of the Municipal Code, for the annulment of a by-law under authority and for enforcement of the Temperance Act of 1864, in force for that County, as having been by the County Council passed and submitted for approval of the municipal electors of the County, and by them approved in April last.

His petition sets forth in a variety of forms the proposition that the by-law is a nullity, because the Temperance Act of 1864 is not now so in force in this Province as to warrant the passing of such a by-law; and adds, as a further reason, that "as matter of fact the municipal electors of said County of Brome did not vote for the approval or disapproval of said by-law, and more especially in the municipality of the west part of the Township of Bolton, in said County of Brome, no vote was taken on said by-law, nor was an opportunity afforded the municipal electors of said local municipality of the west part of the Township of Bolton to vote for the approval or disapproval of said by-law."

The Council have put in no written answer to the petition.

It is shown, at *enquête*, that the petitioner was at the time, and is, a duly qualified municipal elector of the Township and County of Brome; that the by-law impugned is in the form required by the Temperance Act; that the number of votes polled for it in the County stands duly certified by the Warden, under counter-signature of the Secretary-Treasurer, as 579,—and the number of votes polled against it, as 58,—showing a majority of 521 in its favor; and that from the local municipality of West Bolton (one of the six of which the County is composed) the return of the Mayor, who presided at the meeting held for the poll there, was as follows:—

"I hereby certify that I opened the meeting at the Brill school house, for the purpose of taking the votes for or against the by-law for the prohibition of the sale of spirituous liquors, on Monday the 16th instant. After the reading of the by-law, there being no opposition, I deemed it my duty to declare the by-law carried, according to the provisions of the amendments of 35 Vic., chap.

8, sec. 8, and 36 Vic., chap. 21, sec. 17, which laws I supposed attained [*sic*] in case of such election."

Three questions present themselves; the first and second, directly—the third, incidentally.

1. Has the Temperance Act of 1864 so lost force, from repeal or amendment, that this by-law is a nullity?

2. Is this by-law a nullity, by reason of the procedure in West Bolton thus objected to?

3. Is it a "municipal by-law," within the purview of Articles 698–708 inclusive, of the Municipal Code; so as to fall within the exceptional summary jurisdiction thereby created, of the Circuit Court or District Magistrate's Court, on petition by any municipal elector?

These questions, and more especially the first and second, have been very ably argued before the Court; and it has now to pass upon them.

On the first and chief of them, several judgments have been rendered, independently of one another, adverse to the pretentions of the petitioner; one in this Court, last September, by the learned Judge (Caron) then sitting here; two others, in the Circuit Court for the District of Terrebonne and County of Argenteuil respectively, by the learned Judges (Papineau and Bourgeois) there sitting. The importance, however, of the matter, the interest taken in it, and the earnestness with which this petition has been argued, seem to warrant (if not to require) that the decision here to be given as to it should not at all rest, or seem to rest, upon this fact.

The Lower Canada Municipal and Road Act, 1855, (18 Vic., c. 100) the first that provided in Lower Canada for joint action of County and Local Councils, was also the first to give express power of local by-law regulation, within Lower Canada, as to sale of intoxicating liquors. By its Section 23, subsection 6, it gave this power in apparently large measure to its Local Councils. They might regulate all retailers "in places other than houses of public entertainment,"—the conditions and price of their licenses,—and their number. Or, they might prevent absolutely "the sale of wine or brandy, or other spirituous liquors, ale or beer, or any of them, by retail." And they might otherwise enact as they pleased, "for giving full effect to any such by-law, and for imposing penalties for the contravention thereof."

The amending Municipal Act of 1856, (18, 20 Vic., c. 101,) by its 8th section, gave power to County Councils, in the month of March, yearly, by by-law—

1. Either to prohibit all sale of intoxicating liquors, or to permit such sale subject to such limitations as they might deem expedient.

2. To determine under what restrictions and conditions, and in what manner, licenses for such sale, whether in taverns or elsewhere, should be granted.

3. To fix the price of such licenses,—only not reducing them below what then (1855) was payable.

4. To order and govern all retailers, "as they may deem proper for the prevention of drunkenness."

By its 11th Section, the same Act gave power to all Local Councils "to pre-

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vent or prohibit" such sale, in any year when the County Council should have failed to pass a March by-law in the premises.

The Municipal Act of 1860—reproduced as the Lower Canada Consolidated Municipal Act (C.S.L.C., c. 24)—maintained in force these provisions of 1856, but repealed those above recited, of 1855.

It was in this state of the law for Lower Canada, that the Temperance Act of 1864 was passed; applicable equally to Lower and Upper Canada, and purporting to make no change in the municipal system of either. Sections 1-10 inclusive, and sections 37 and 38, deal with the enactment and repeal of by-laws under it, and in some measure with their possible annulment. Sections 11-36 inclusive deal with the effect of such by-laws as prohibitive and penal, and with the procedure for their enforcement; and on all these points, aim at completeness of enactment, leaving nothing to other statutes, and no margin of detail to be filled in or varied by by-law legislation. Sections 39-49 inclusive are not of local application, and are here immaterial; as also are the interpreting Sections 50 and 51, and the other two Sections of the Act.

The Act provides that "the municipal council of any county, city, town, township, parish or incorporated village," in what was then the Province of Canada,—that is to say, within Lower Canada, every County, City or Local Council—"besides the powers at present conferred upon it by law," has "power at any time to pass a by-law" of short and simple form, for prohibiting sale of intoxicating liquors, and issue of licenses therefor, "within such county, city, town, township, parish or incorporated village, under authority and for enforcement of this Act, and subject to the provisions hereby enacted." When passing such by-law, any Council, if it pleases, may order its submission for approval, to the municipal electors of the municipality. Where no such by-law is in force,—but, in cases where a popular vote has gone against it, then only after a term of two years from such vote,—any thirty or more electors, by a procedure easy to follow, may themselves obtain a direct vote of the electors on the adoption of such a by-law. No such by-law can be repealed within a year after the day of its communication to the Revenue Officer; nor yet, if approved or adopted by the electors, unless with the approval of the repeal on their part. Repeal of a county by-law leaves in force any antecedent local by-laws. And the Councils of any two or more neighboring municipalities, having such a by-law in force, may by a further by-law (approved always by their electors, respectively) concur in and confirm each other's by-laws. In which case repeal thereof can only be obtained "with the like concurrence in and confirmation of such repeal, on the part of the municipalities in question."

In 1866, by the Act 29, 30 Vic., c. 32, ss 2-13 inclusive, the intoxicating liquors clauses of the Consolidated Municipal Act were so amended as to give to Local Councils, in place of the mere power to prohibit in any year, when their County Council failed to act, the more substantive power, yearly, before the second Wednesday in March, to pass any of the various kinds of by-law (prohibitory or otherwise regulative) which, under the Consolidated Municipal Act, a County Council might pass at any time during that month.

With the law in this state, came the great change in our legislative system,

brought about by Confederation. A precise appreciation of this change, in one of its many aspects, is necessary in order to the forming of a right and thorough judgment on the matter here involved.

The 129th section of the British North America Act, 1867, maintains in force all laws subsisting at the Union, subject (save in so far as they might be of imperial enactment) to repeal or amendment by the Parliament of Canada or by the Legislature of the proper Province,—according to the authority of either under that Act.

The 91st Section declares that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects therein enumerated,—"the regulation of trade and commerce" being the second of them. And, as if to give extreme emphasis to this plain and strong enactment, it adds unnecessarily, that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

The 92nd section goes on to provide, that in each Province "the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated," four of these being,—"8. Municipal institutions in the Province,—9. Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes,"—"13. Property and civil rights in the Province,"—and "16. Generally, all matters of a merely local or private nature in the Province."

It must be admitted that the wording of these sections is open to criticism. It has been said, and truly said, that the exclusive power to legislate as to "shop, saloon, tavern, auctioneer and other licenses," is necessarily a power of interference, to a certain extent, with "the regulation of trade and commerce." But, at least this much is clear and certain, that such power of interference is narrowly enough and precisely enough restricted by the after words, "in order to the raising of a revenue for provincial, local or municipal purposes." Legislative power over licenses is obviously given to that end only. The indirect interference with trade which it involves can go no further.

There is, again, a possible sense of words, under which the exclusive power to legislate as to "property and civil rights in the Province" might involve a power to legislate at least in some measure for "regulation of trade and commerce" therein. But a sense must be sought, on the one hand for the words "trade and commerce," and on the other for the words "property and civil rights," which shall not involve this consequence. And such sense readily presents itself. The distinction between commercial and ordinary (that is to say, civil non-commercial) law, familiar to everybody, rests upon it. Whatever of civil law affecting men's trading and commercial relations is not common to these and to men's relations otherwise, is law regulative of trade and commerce. Whatever else of civil law affects men's property and civil rights, is what we call law regulative of property and civil rights. The former, here, rests wholly with Parliament. Only the latter rests with the Legislatures; and even that, subject to heavy further reduc-

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tions, on the score of fisheries, currency and coinage, paper money, weights and measures, promissory notes, interest, legal tender, insolvency, patents of invention and discovery, copyrights, naturalization, marriage and divorce, etc., all reserved exclusively, by section 91, for Parliament, and all trenching widely on what otherwise would have fallen (under section 92) within the range of property and civil rights.

Nor is there wanting a sense of the words "municipal institutions in the Province," which would extend them also over ground assigned exclusively to Parliament, and notably would limit its trade and commerce powers. Under legislation not federally limited in that behalf, all sorts of powers are of course more or less delegated to municipal bodies, whenever convenience may seem so to require. But for a Legislature of strictly limited jurisdiction, nothing is clearer than that it can delegate no powers beyond those it can directly exercise. Our Legislature can delegate no power of regulation of trade and commerce, nor over fisheries, nor weights and measures, nor anything else matter of merely Parliamentary legislation. Each Provincial Legislature, alone, can create, municipalities, properly so called, establish their functionaries, and assign them their proper duties and their powers,—but always within the limits of its own. Whether or not it can render them incapable of other duties and powers, to be delegated by Parliament, is a question that need not here be considered. Our Legislature, as will presently be seen, has been careful (by Article 449 of the Municipal Code) to declare them not so. And as to all powers, not of Provincial competency, so to speak, which they may hold under antecedent delegation of the unlimited Legislature of the late Province of Canada, these can be resumed or altered by Parliament alone. As being exercised by municipalities, they may be styled in a certain sense municipal. But such sense is not that of the Union Act; nor even, as mere matter of presumption *prima facie*, is it that of Provincial legislation under authority of the Union Act.

Two Acts, then, of the Quebec Legislature, passed in the same year (1870) purport to interfere with the operation of the Temperance Act of 1864; one of them, the Quebec License Act, (34 Vic., c. 2); the other, the Municipal Code, (34 Vic., c. 7).

The Municipal Code, by article 1086, professes to repeal it and a number of other statutes,—but in reference to three cases only:—

1. Where there is a provision of the Code "having expressly or impliedly that effect;"

2. Where such repealed "laws are contrary to or inconsistent with any provision" of the Code;

3. Where "express provision is" in the Code "made upon the particular matter to which such laws relate."

The License Act, by section 197, professes to repeal parts of it, along with other Acts and parts of Acts; but only "in so far as the same relate to this Province, and to matters within the control of the Legislature of Quebec." The parts excepted from such repeal are,—

1. Sections 1–10 inclusive, and sections 37 and 38; dealing (as already stated) with the enactment, repeal and possible annulment of Temperance Act by-laws;—

2. The 2d sub-section of section 11, section 34, the 2nd sub-section of section 35, and the 3rd sub-section of section 44; all (strange to say) relating exclusively to Upper Canada: —

3. Sections 47 and 50–53 inclusive; all immaterial here.

Does either of these Acts, or do the two together, effectively repeal the Temperance Act of 1864, as to any provision here material? Or, to put the case more precisely. Does either, or do the two, show intention on the part of the Legislature so to do? And, whether or not, has the Legislature constitutionally the power so to do?

To begin with the Code. The only articles in it which the Court finds relevant in any sense whatever to the former of these questions are the following:

1. Article 449, already referred to,—which, by expressly providing that all councils, besides the powers vested in them by the Code, "may further exercise those conferred on them by any other law not inconsistent with this Code," at least shows that the Legislature knew or presumed there existed other powers so conferred, and which it did not mean or did not assume to take away.

2. Articles 525 and 561–570 inclusive,—which assume to substitute for the power of prohibition or other regulation, held by County and Local Councils respectively, under the Consolidated Municipal Act as amended in 1866, and which have been above set forth in outline, certain powers of prohibition or other regulation much less extensive, to be held by Local Councils only. But these powers no more conflict with those given by the Temperance Act of 1864 than did the larger powers for which alone they stand substituted.

3. Article 572,—which provides that "all municipal by-laws and all provisions in any municipal by-law, relating to the sale of intoxicating liquors, in force at the time when this Code comes into effect, other than those which have been made in virtue of articles 561 and 568," (that is to say, other than those made under the limited powers just referred to as newly given by the Code to Local Councils only) "are repealed, dating from the first day of May following the coming into force of this Code." But this clause indicative though it doubtless is of the intention of its framers to give full effect to the repeal by the Code of the provisions just referred to, of the Consolidated Municipal Act as amended in 1866, deals only with by-laws passed, and not with the power of passing them. Inference may be drawn from it—to which the Court will presently have to allude further—that the framers of the Code, in their use of the term "municipal by-laws," meant only by-laws passed under the old Consolidated Municipal Act and its amendments, or to be passed under the new Code, and were not thinking of such as might have been or might be passed under authority of other legislation, such as that of the Temperance Act of 1864. But certainly no inference can be drawn from it, that they meant (always without having said so) to repeal such other legislation.

The contrary inference, indeed, becomes even clear, when we pass on to the License Act. As already stated, that Act, by its 197th section, purports to repeal (in so far only as the Legislature could) certain parts only of the Temperance Act. And among the parts specially excepted from repeal are all those clauses which provide for the passing of Temperance Act by-laws, either by

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Councils, with or without popular vote, or by direct popular vote without Council action, and of further by-laws of neighboring municipalities for mutual concurrence in enforcing the Temperance Act. Those provisions of law, therefore, the Legislature by this Act declare they have no thought of touching. And indeed, as if to make this clearer still, the 201st section proceeds to enact, that "none of the provisions of this Act shall be superseded or affected by any Act passed during the present session,"—the Municipal Code being one of such Acts. By distinct avowal of the Legislature, therefore, it was thus not meant to supersede or affect those provisions of the Temperance Act.

It is no answer to this, to say that the License Act imports repeal—as it does, in so far as the Legislature could effect repeal—of sections 11–36 inclusive, of the Temperance Act, which went (as already stated) to lay down the effect of its by-laws as prohibitive and penal, and the procedure for enforcing them. The Legislature cannot be presumed to have maintained the machinery for passing them, in sheer mockery; must be held to have supposed that in the License act or elsewhere there could be found a sufficient substitute for the provisions it meant to sweep away. Whether it was right or wrong as to this, or as to its own power to make the change it meant to make, can here matter nothing. The Court has here to do with the mere matter of the passing of this by-law. A statute declares—unnecessarily—that the sections under which it was passed are not repealed.

Nor is the force of this fact at all met by the hypothesis ingeniously presented at the hearing; that the exception of these sections from repeal was meant, and operates, to save them in respect, only, of Temperance Act by-laws passed by Local Councils,—that, as the Municipal Code purports to give power on the subject to these alone, and none to County Councils, the former only can be held to have power under the Temperance Act either. As already stated, the Municipal Code, in its articles on the subject, utterly ignores the Temperance Act. If, notwithstanding the fact that it gives Local Councils powers quite different from those given them by the Temperance Act, they can—as they surely can, and as this hypothesis admits they can—hold also those given by the Temperance Act, why may not County Councils equally hold the powers given them by the Temperance Act, though the Municipal Code gives them none at all? The Temperance Act is left in force by the License Act, precisely to the same extent for both.

Another line of argument strongly insisted on for the petitioner, was this: One of the powers given to Local Councils by the Municipal Code,—that under article 568,—is the power "to limit and determine the number of licenses which the Collector of Inland Revenue for the district may issue, for the sale of intoxicating liquors in taverns, inns, and other places of public entertainment, or in stores or shops." Supposing the County Council to have power of prohibition under the Temperance Act, it was contended that such power would conflict with this. Not so. For the Code power is not that of ruling that such number shall be issuable, but that of limiting and determining that more than such number shall not be. And had it gone the further length, even then this Code power of Local Councils, and this Temperance Act power of Counties might in

law have co-existed; all the trouble being, that in special cases the one might be found now and then, in its exercise, to suspend the exercise of the other. Article 568 is by no means "contrary to or inconsistent with" anything in the Temperance Act; so as, under article 1086, to have repealed any provision of it.

But, were it even as clear that the Legislature meant to repeal these sections, wholly or in part, as in truth it is clear that they did not,—there would remain the question of their constitutional right to do so. Is the answer any less clear as to this?

It was ably and earnestly urged at the argument, that the course taken in the Legislature of the late Province of Canada, when dealing with the bill (now the Temperance Act) shows that it was not then regarded by the House as a bill relating to trade. There is no doubt that, in 1855, on occasion of the third reading of a bill then before the House, "to prevent the traffic in alcoholic and intoxicating liquors," objection was taken that, as relating to trade, it ought to have originated in committee of the whole. The Journals (30 April, 1855,) show that thereupon "Mr. Speaker stated that by the 51st Rule of the House, in all unprovided cases, the rule of the Parliament of Great Britain should be followed, and the standing order of the Commons of England, of 1772, declared that bills relating to trade be not brought into the House, until the proposition should first have been considered in Committee of the whole House; and as his duty was to declare what the rule was, he declared that the bill before the House, regulating the sale of all intoxicating liquors, was a bill relating to trade, and altering the laws relating to the trade, and came within the meaning of the standing order; and he further stated that the practice in the House of Commons had not been uniform, but that when the objection had been taken, the rule had always been enforced." On appeal from this ruling, it was sustained by a vote of 59 to 46; and the bill was dropped. It is further certain, from the Journals, that the bill (now the Temperance Act) did not originate in committee of the whole; and that no objection to it on that ground was taken, at any time during its course through the House. It is a fair inference, that being a measure of merely local and possibly temporary application, and, in fact, of a municipal character,—in the sense then universally given to that term,—it was not regarded as a measure relating to trade, within the sense of the rule in question. But it is not that sense that is here in issue. We are dealing here, not with an elastic rule of a parliamentary body adopted from considerations of convenience, and relaxed by it in practice whenever it may please,—but with the iron rule of a Constitutional Act, from the true intent and meaning of which neither Parliament, nor Legislature, nor Court of Law, can on any account in the least derogate. If the Temperance Act, in respect of its purely prohibitive by-laws, their enactment, effect and enforcement, is not—within the sense of this latter rule—a measure for "regulation of trade and commerce," what is it? Passed by a Legislature having power to that end, it goes to prohibit—locally, no doubt, and conditionally, perhaps even temporarily, but still to prohibit—a specified branch of trade; defining precisely the prohibition, and providing for giving it effect. Prohibition is an incident of regulation; can be enacted only by a body having power

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to regulate. A law regulative of trade, like any other, may be of local, temporary and conditional application; and may be in form a delegation of the power to regulate, to a body or officer therewith charged. Within the sense of the 92d section of the Union Act, these provisions of the Temperance Act, and the by-laws passed under them, are neither municipal, nor matter of mere property and civil rights in the Province, nor matter of merely local or private nature in the Province. The 91st section of the Union Act reserves them to all intents,—reserves indeed, for that matter, with them the analogous liquor-trade clauses of the Consolidated Municipal Act, as amended in 1866, (which the Legislature, no doubt, did mean to repeal,) in so far, that is to say, as these deal with prohibition or other regulation of the liquor trade, apart from issue of revenue licenses,—for the sole legislative control of the Parliament of the Dominion.

Is this by-law, then, to be annulled, on the minor ground of objection urged by the petitioner,—the alleged irregularity of the proceedings had as to it in West Bolton?

Section 5 of the Temperance Act lays down the course to be followed for the taking of a vote of the municipal electors, whenever required, in reference to any Temperance Act by-law; and imports (subsections 3 and 4) that at every meeting held for that purpose a poll must be taken. Article 678*a* of the Municipal Code, as last amended in 1875, (38 Vic., c. 25, s. 2), enacts the same thing as to any voting on by-laws under the Code. But under that article and articles 678*b* and 678*c*, as they stood for some short time before 1875, the presiding officer, after observance of certain formalities, if no one disapproved, might at once declare the by-law to be unanimously approved. The return shows that at the West Bolton meeting held relative to this by-law, the presiding officer, thinking he was to follow the Code, and not aware of the amendment made to it in 1875, took this course. In so doing he was clearly quite wrong. The question is, as to the effect of his mistake. The petition does not allege it to have been fraudulent; nor even, that but for its occurrence, the vote of the electors of the County would or might have been other than it was. The whole complaint is, that the poll was not held,—and so, opportunity was not afforded the electors of West Bolton to vote. But the return states,—and being unimpeached, its statement may be held presumably true,—that there was no opposition. And in the face of this, and of the fact established otherwise, that the vote of the other five municipalities stood only 58 against the by-law, to 579 for it,—and of the fact that the petitioner does not pretend that any voting in West Bolton could have affected the result,—the matter resolves itself practically into a mere question of regularity of procedure. And as to this, nothing can be plainer than the 37th section of the Temperance Act,—"No by-law passed under authority and for enforcement of this Act, shall be set aside by any Court, for any defect of procedure or form whatever." The Court must treat this injunction of the statute as absolute in this case: must hold that this mere defect of procedure, serious in itself as it is, is not here fatal.

As shown at the argument, this view has repeatedly prevailed in analogous cases, with the Courts in Upper Canada. (*In re* Lake and the Corporation of

the County of Prince Edward, Hagarty C. J.; 26 Common Pleas Rep., pp. 173 *et seq.*—*In re* Day and the Corporation of Storrington; Harrison C. J.; 38 Queen's Bench Rep., pp. 528 *et seq.*—*In re* Wycott and the Corporation of the Township of Ernestown, Harrison C. J.; *Ibid.* pp. 533 *et seq.*—*In re* Johnson and the Corporation of the County of Lambton, Hagarty, C. J., Morrison and A. Wilson, JJ., 40 Queen's Bench Rep., pp. 297 *et seq.*)

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Had the decision of the Court upon either of the two questions thus far dealt with been other than it is, the third question stated at the outset, though not directly raised by any pleading, would have required consideration. Incidentally it was held at the argument on both sides, though it happened not to be material for the case on either side,—and no doubt it was rightly held,—that Temperance Act by-laws do not fall under Articles 671–686 inclusive, of the Municipal Code, but are regulated, as to procedure for electors voting thereon, by Section 5 of the Temperance Act, notwithstanding the absolute generality of those Articles, purporting as they do to cover all by-laws that may have to be voted on by the electors. And it is not obvious that Temperance Act by-laws any more fall under the generality of Articles 698–708 inclusive, in respect of the exceptionally summary jurisdiction and procedure then created as to municipal by-laws properly so called, and here resorted to. Those articles cover wider ground than the rest of the Code; and notably, than the Articles 671-697 immediately preceding, which relate to approval by electors, approval of the Lieutenant Governor in Council, and promulgation of municipal by-laws,—but none of which cover the case of a Temperance Act by-law. This question may hereafter so present itself, as to be of practical interest. The Court here thus alludes to it only that the judgment rendered may not be understood to be a tacit assumption by the Court of the right to annul this description of by-law under this procedure.

The petition is dismissed, with costs in favor of the Corporation respondent.

Petition dismissed.

O'Halloran, Q. C., for petitioner.

Lynch, for Corp. respondent.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 4TH SEPTEMBER, 1877.

IN CHAMBERS.

Coram TORRANCE, J.

No. 1385.

Ford vs. *Léger*.

HELD:—That an affidavit for capias is defective which used the words "peut être privé de son recours" in place of the words "privera, &c.," and which omitted to depose as to the intent to defraud.

The plaintiff arrested the defendant under a writ of *capias ad respondendum*. His affidavit contained the following words: "croit vraiment dans sa conscience

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"que le dit Eléazar Léger va laisser et est sur le point de laisser la Province de "Québec et la Puissance du Canada et partir immédiatement pour les Etats "Unis d'Amérique ou autres lieux inconnus, où il a demeuré et demeure depuis "trois années, au moyen de quoi le dit Daniel Ford sans le bénéfice d'un man- "dat de prise de corps contre la personne du dit Eléazar Léger peut être privé "de son recours contre le dit Eléazar Léger et perdre sa dette."

The defendant petitioned for his discharge from custody.

Greenshields, for petitioner, said that the affidavit was insufficient inasmuch as it did not depose as to the intention to defraud, and it had the words "peut être privé de son recours" in place of the word "privera" required by C. C. P. 798. He cited Stevenson v. Robertson, 21 L. C. J. 102, and No. 839, S. C., Montreal, Anderson v. Kirkby, A. D. 1877. (Papineau, J.)

Turgeon, for plaintiff, è contra.

The petition was granted.

Turgeón, for plaintiff.
Greenshields, for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

IN CHAMBERS.

MONTREAL, 3RD NOVEMBER, 1876.

Coram DORION, C. J., and MONK, J.

JETTÉ ET AL., APPELLANTS;

AND

McNAUGHTON, RESPONDENT.

HELD:—Where leave was granted to appeal to the Privy Council, and the appellant filed a consent that the judgment should be executed, and at the same time a city of Montreal debenture was deposited with the clerk of the Court as security for the costs of the appeal, that the seizure of such bond in execution of the judgment will not prevent the Court from accepting it as security.

Quære: whether a seizure or attachment of monies or securities in the hands of the clerk of the Court is valid.

The question presented was the sufficiency of the security offered by McNaughton for the costs of an appeal to the Privy Council. On the 22nd September, 1876, a judgment was rendered by the Court of Queen's Bench,* reforming the judgment of the Superior Court. McNaughton, the defendant in the suit, obtained leave to appeal from this judgment to the Privy Council, with six weeks delay to put in security. This delay expired November 3. Shortly before the expiration of the delay, McNaughton filed a consent that the judgment should be executed, and he was thus relieved from giving security except for costs only.† The security offered was a bond or debenture of the City of Montreal for the sum of $2000. After this debenture was deposited the plaintiffs' counsel, accompanied by a bailiff, called at the office of the Court, and having obtained commu-

* Vide 20 L. C. Jurist, p. 255.
† Vide Art. 1146, C. C. P.

nication of the bond, directed the Sheriff to seize it under a writ of *saisie-arrêt* after judgment which had been issued under the judgment. The facts attending this seizure are stated as follows in the declaration made by Mr. Marchand, the Clerk of the Court, at the suggestion of his Honor Mr. Justice Monk:—

"Je soussigné, Greffier des Appels de la Cour du Banc de la Reine pour le Bas-Canada, déclare ce qui suit: Que le 31 Octobre dernier, l'Intimé par son avocat procureur, Désiré Girouard, Ecr., C.R., a produit au Greffe des Appels un avis de cautionnement pour frais sur appel à Sa Majesté en son Conseil Privé pour aujourd'hui, deux Novembre courant, un consentement à exécution et un *fiat* pour cautionnement contenant la description du consentement offert, comme suit: 'The said bond consists of a bond or debenture of the City of Montreal, bearing No. 167, for the sum of £500 cy, &c., au bas de ce *fiat* Messrs. Jetté, Beique & Choquette ont reconnu avoir reçu communication de la débenture ci-dessus décrite et avoir eu avis de son dépot, savoir du dépot qui en a été fait au Greffe des appels comme ci-après expliqué;

"Que le même jour, 31 Octobre dernier, Henry Hogan, Ecr., de Montréal, a déposé personnellement entre mes amis la dite débenture ci-dessus décrite comme étant la valeur par lui offerte pour tenir lieu de cautionnement pour les frais sur l'appel du dit William McNaughton à Sa Majesté en son Conseil Privé, et s'est fait donner un reçu du dit dépot; que le dit M. Girouard a, là et alors, dit que le dépôt de la dite débenture était ainsi fait au Greffe pour donner à la partie adverse toute facilité d'en prendre communication avant l'exécution de l'acte de cautionnement.

"Que ce matin L. A. Jetté, Ecr., l'un des avocats et procureurs des appelants en même temps que l'un des appelants, est venu au Greffe demander communication de la dite débenture, communication que je lui donnai; aussitôt que M. Jetté eut reçu la débenture il la passa à une personne que je ne connaissais pas alors, mais que je sais maintenant être J. U. Laporte, huissier de la Cour Supérieure, en me disant, "Nous saisissons cette débenture, et voici l'huissier chargé de la saisie," ou autres paroles ayant le même sens. Je répondis que j'avais donné la débenture en communication à l'avocat des appelants et non à la partie saisissante; que la débenture avait été déposée entre mes mains par une autre personne que M. McNaughton, et que je n'avais rien en ma possession appartenant à ce dernier, ou autres paroles comportant le même sens. Je répétai les mêmes paroles à l'huissier saisissant, lui déclarant que je m'opposais à la saisie faite entre mes mains sur M. McNaughton de la débenture déposée par M. Hogan, et refusai de signer le procès-verbal de saisie.

"L'huissier ayant constitué gardien d'office sur la saisie par lui ainsi pratiquée, Monsieur Côme Duteau de Grandpré, mon député, il lui a remis la dite débenture et elle est actuellement entre les mains de ce Monsieur.

"Je déclare en outre que les appelants m'ont fait signifier en même temps un bref de saisie-arrêt après jugement, auquel bref je répondrai en temps et lieu, affirmant de nouveau toutefois en ce qui concerne la dite débenture que je l'ai reçu de M. Henry Hogan.

"Enfin je certifie que le délai de six semaines pour donner le cautionnement sur l'appel à Sa Majesté commençant à courir le 22 Septembre dernier jour

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auquel le dit Appel a été accordé, n'expirera que demain le 3 de Novembre courant."

The appellants objected to the security offered by the respondent for the following reasons:—

"1. Parceque le 31 Octobre dernier le défendeur Intimé a produit au Greffe de cette cour une déclaration, consentant à l'exécution du jugement en cette cause et acquiesçant au dit jugement formellement et sans aucune réserve de son droit d'appel au Conseil Privé de Sa Majesté.

"2. Parceque la débenture de £500 courant offerte pour constituer tel cautionnement est actuellement sous saisie, entre les mains d'un gardien régulier, nommé dans une cause portant sur le role de la Cour Supérieure de ce District, le No. 2114, où les appelants sont demandeurs et où l'Intimé est défendeur, et que la dite débenture est également sous saisie en vertu d'un bref de saisie-arrêt émané dans la même cause entre les mains du Greffier des Appels de cette cour et de diverses autres personnes mentionnées au dit bref de saisie dont copie est produite.

"3. Parceque cette débenture n'étant que pour £500 courant, est payable seulement en 1885, et étant dépouillé de tous les coupons d'intérêt semi-annuel à devenir dûs de cette date au premier Novembre 1878, n'offre pas aux appelants une garantie suffisante pour les frais qu'ils auront à encourir sur l'appel au Conseil Privé de Sa Majesté, ces frais devant s'élever au moins du côté des dits appelants seuls, Intimés au Conseil Privé, à la somme de £850 stg., et à une somme plus considérable du côté du dit Intimé, appelant au Conseil Privé."

The case was heard before Monk, J., the Chief Justice being also present.

Monk, J.—McNaughton has given notice in this case, in pursuance of the order of the Court, that he would give bail in his appeal to the Privy Council in England. The notice that he had offered bail was within the time, and the notices seem to have been perfectly regular; there is no difficulty upon that point. For the purpose, however, of placing the matter beyond doubt as to what was the nature of the bail, on a particular day mentioned, the 31st October, three days before the delay had expired, he filed a consent that the judgment should be executed, and a bond for $2,000 belonging to a gentleman of the name of Hogan was produced as security for the costs of the appeal. The bond was received simultaneously with the consent that the judgment should be executed, and McNaughton's pretension is that he was obliged then to give security for costs only. This bond was placed in the hands of the Clerk of the Court for the purpose, I believe, of communicating it to the opposite party, in order that he might see that all was perfectly regular and sufficient. Matters remained in this state until, I think, the evening of the 31st, or until the 31st at all events. Mr. Jetté then came to the office of the Court of Appeals accompanied by an individual, and asked communication of this bond. Communication was immediately given to him; he examined it, and then it was handed to the individual who accompanied him, and, according to the statement of our Clerk, Mr. Jetté then said to the person who accompanied him, "Seize this bond," and thereupon he delivered it to the man, who was a bailiff and held at the time a warrant or a writ of *saisie arrêt* after judgment, and a writ of *fieri facias de bonis*. Mr. Marchand, in his statement to us, which we have to take as conclu-

sive upon these questions of fact, says that he protested against this seizure, telling Mr. Jetté that the bond had been entrusted to him for a particular purpose, and that in communicating it to Mr. Jetté he communicated it for the purpose solely of enabling him to see that it was all right. Mr. Marchand refused to be named guardian to the seizure, and then the Deputy Clerk was named guardian. In pursuance of the notice given, McNaughton's counsel, Mr. Girouard, presented himself here, and desired that this bond should be received as security, and that the security should be entered up as security for costs of the proceeding in England. To this, however, was opposed the objection, first, that this bond was under seizure and therefore it could not be received as security. Secondly, that, by filing this consent that the judgment might be executed, McNaughton had waived the right of appeal which had been granted by this Court; and thirdly, that the security is insufficient in amount.

This matter is one of considerable novelty, and also of some importance, and I have to deal with these three points successively. The first question I will take up is whether, by the consent that the judgment should be executed, McNaughton has waived his right of appeal. It is quite true that he does not specially reserve the right in the consent; but the fact of his having given notice, and also the fact that he had the right granted by this Court to appeal to the Privy Council, and that he had six weeks to put in security—which delay does not expire until to-day, these facts, taken together, entirely refute the idea that he intended to acquiesce in the judgment. *Per se*, the consent is not an acquiescence. It is an acquiescence to this extent only—that the respondents would have a right to execute the judgment. But it is not a waiver of the right of appeal, and all the circumstances surrounding the affair plainly show that there was no acquiescence whatever. I hold, therefore, and without difficulty, that McNaughton has not waived his right of appeal.

I now come to the next point, whether the bond being under seizure, it can be offered as security. The fact of the seizure has come before us because we have the statement of the clerk, with a copy of the warrant, and the fact that our deputy-clerk has been named guardian to this very bond. I am not called upon to give any judgment upon the proceeding that has been adopted. All I can say is this—and I think it is my duty to say it—it is sharp, it is perhaps excessively vigilant, but I have nothing to do with that. But I have the fact of the seizure before me. The bond is taken out of the hands of our clerk and has been placed in the hands of a guardian. Now, it is stated, and with considerable probability, that the seizure and removal of the bond from the hands of our clerk prevent our receiving this bond as security in this case. But I am disposed to ignore all the proceedings that have been taken out of this Court. There is a permission to appeal to the Privy Council, and to give security within six weeks. The six weeks have not expired, and this bond has been deposited as money. There does not seem to be any objection to the bond. It is formal and right. In view of that fact alone, for I shall not enter into the question whether this bond has been properly seized or not, but ignoring all those proceedings, and taking into consideration that McNaughton acted under an order of this Court, which, for the present, at all events, is supreme,—I say that this bond is regular in form, and, notwithstanding that a seizure has been made, I

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consider that the bond is still before the Court for all the purposes for which it was intended; and the security will be accepted and the bond will be ordered to be received.

There is, I may remark, rather an anomalous feature of this case. This bond appears to have been deposited by Mr. Hogan for the costs of the appeal to the Privy Council. I do not see anything extraordinary in this; it is perhaps novel; it may be of importance hereafter. This bond is in the Court as security for costs. Perhaps it is lent to Mr. McNaughton, just as Mr. Hogan might have lent him a sum of money, or have mortgaged his property. But Mr. Hogan has a perfect right to lend this bond for the purpose of giving security. So far as the respondents are concerned, this bond has become security to them for the payment of the costs, but not necessarily falling into the estate of Mr. McNaughton. Mr. Hogan has deposited it here for a particular purpose. I simply notice this, because it is a feature in the case which might militate against the seizure, and rather goes to confirm me in the impression that probably there are some very serious irregularities about this seizure. At all events, this bond stands before the Court, and I shall order it to be received as security. Then, the only question is, is it sufficient? The bond is for $2,000. Two of the interest coupons have been taken off, but I am not aware that this is important, for the costs do not bear interest. I think the bond is a sufficient security, and I do not know any case where a higher security has been given. I think not only that the bond is sufficient in amount, but that the circumstances by which it is at present surrounded do not prevent it from being received as security.

I may add that the Chief Justice entirely concurs with me in this judgment.

Security received.

Jetté, Béique & Choquette, for Jetté et al.
Girouard, Q. C., for McNaughton.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 24TH AUGUST, 1877.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 611.

In Re *E. E. Beaudry*, Insolvent; and *Robert Wilkes*, Petitioner.

HELD:—That an insolvent is not bound to answer a question which may tend to criminate him.

The insolvent was being examined before the Judge by a creditor. The following question was put to the insolvent by the creditor:—"Cet état Exhibit "C," est il faux ou vrai?" referring to a statement furnished by the insolvent.

Answer.—"Je ne puis répondre à cette question parcequ'elle tend à m'incriminer."

Girouard, Q.C., for the creditor, asked the Judge to order the insolvent to answer the question.

L. O. Loranger, è contra, cited Insolvent Act 1875, S. 140 and C. C. P. 274.

Girouard, for creditor.

Order refused.

L. O. Loranger, for insolvent.

(J. K.)

* The case being settled, no further proceedings were had.

SUPERIOR COURT, 1877.

MONTREAL, 23RD AUGUST, 1877.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 439.

In re *Plessis dit Belair* et al., insolvents, and *John Fair*, assignee, and *Dame Delphine Landerman*, petitioner.

HELD:—That the principle of the law Quintus Mucius, by which acquisitions made by a married woman were presumed to have been paid with the money of the husband until proof to the contrary, is applicable in the Province of Quebec.

The petitioner, by her petition, set forth that she was wife of Telesphore Plessis dit Belair, one of the insolvents, and separated as to property from her husband by marriage contract of date 10th March, 1870; that on the 10th July, 1875, she acquired by purchase from Demoiselle Catherine Poitras certain moveables specified in the schedule annexed to a deed of sale thereof before Mtre. P. Mainville, N. P.; that on the 18th September, 1876, the insolvents made an assignment, and subsequently, on the 16th April, 1877, the assignee, John Fair, advertised for sale the said effects of the petitioner as belonging to the insolvent Telesphore Belair, and also other effects of the petitioner, specified in the petition; she therefore prayed that the sale might be suspended, and that she be declared to be the proprietor of said effects. The assignee answered the petition that said effects were the property of said insolvent, and bought with his money; that on the 4th June, 1875, the insolvent was in possession as proprietor of said effects; that by a simulated sale of same date, the insolvent pretended to have sold said articles to said Catherine Poitras for $1,029, but that, in fact, she never paid any money, and never took possession of said effects; that on the 10th of July, 1875, by another simulated deed, the said Catherine Poitras is supposed to have sold said effects and others to the petitioner for $1,564; but that the petitioner never paid any money and never took possession; and further said deeds were made by the insolvent for the purpose of conveying undue advantages to his wife.

PER CURIAM:—The deed from the insolvent to Catherine Poitras only preceded that from Mlle. Poitras to the petitioner Mme. Belair thirty-six days. The intermediary Mlle. Poitras is cousin by marriage of the petitioner. At the trial it was admitted that no money was passed. Mlle. Poitras said she did not receive any for the deed, but said she was to be boarded in the house and it does not appear for how long, and her story as to the consideration varies from that of the petitioner who is examined as a witness. Mdme. Belair had no means of her own, and whatever she has must be presumed to come from her husband. The Cour de Cassation reaffirmed this principle 22nd January, 1877: Regis c. Semenadine, J. P., 1877, p. 375. The transaction was plainly made to withdraw from the estate of the insolvent moveables which belonged to it. The deeds were made in the family by its members and cannot stand. An attempt

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was made to show that the creditors were not interested in a transaction which took place two years ago, but I am satisfied that there are now claims against the estate which had their origin before the 1st July, 1875.

Petition rejected.

Bouin, for petitioner.
Girouard, for assignee.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 30TH AUGUST, 1877.

IN INSOLVENCY.

Coram TORRANCE, J.

No. 810.

Ford vs. *Short*.

HELD:—Where an attachment issued against the petitioner under the Insolvent Act of 1875, and he petitioned within five days that the attachment be quashed, and afterwards the plaintiff fyled a discontinuance; held, that, notwithstanding the discontinuance, the petitioner having proved his petition, was entitled to a judgment on it.

On the 15th August, 1877, the plaintiff, by his agent William C. Ford, made an affidavit under the Insolvent Act of 1875, under which a writ of compulsory liquidation issued to attach the estate of the defendant. The plaintiff's claim was for moneys advanced and goods, and amounted to a balance of $237.68. The defendant within five days presented a petition to a judge, setting forth that he was not a trader, that he was not a debtor of the plaintiff, that the writ of attachment was obtained maliciously, that the allegations of the affidavit were maliciously false. The plaintiff met the petition by a general answer. The merits of the petition were tried before a judge on the 22nd August, and after the petitioner had closed his case, the plaintiff fyled a discontinuance of his proceedings with costs.

Trenholme, for the petitioner, asked for a judgment on the petition, which prayed that the attachment might be quashed. He argued that the proceedings after the five days were no longer under the control of the plaintiff, but that they inured to the benefit of creditors generally, citing Clarke on the Insolvent Act, 1875, p. 51. He contended also that he was entitled to a judgment on the petition.

Hutchinson, for the plaintiff, cited C. C. P. 450, which allowed him to discontinue at any time on payment of costs.

PER CURIAM:— A number of witnesses have been examined by the petitioner in order to disprove the allegations of the affidavit upon which the attachment issued. It is much to be regretted that the plaintiff has taken these proceedings. His agent has been examined as a witness, and has been unable to make any justification of the proceedings. No indebtedness has been proved to exist against the petitioner. He is not a trader, and not liable to the operation of the

Insolvent Act. On the facts proved in the case, the petitioner is entitled to the conclusions of his petition. Does the fyling of the discontinuance deprive him of this right? In an ordinary case between two litigants the plaintiff may discontinue on payment of costs, and service upon the defendant, but the proceedings in insolvency are for the benefit of creditors generally. After five days from the issue of the writ the defendant is in insolvency unless he has petitioned to be relieved within the five days, and the act of the plaintiff subsequently done cannot relieve. I therefore hold that the defendant is entitled to a judgment on his petition and the conclusions are granted. Something was said at the argument about treble costs. The facts would justify such a condemnation, but the rule does not apply to the case of an attachment. I make nothing of the objection that the petitioner did not ask for treble costs by his petition.

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Monahan, for plaintiff.

Trenholme, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH JUNE, 1877.

Coram DORION, J.

No. 2107.

Mallette et al. vs. *Hudon*.

HELD:—1o. That the vendor of real property has a right to sue the purchaser for the price, notwithstanding that by the deed of sale the payment of such price was delegated in favor of a third party, so long as the delegation be not accepted.

2o. That the registration of the deed of sale at full length does not operate an acceptance of such delegation.

PER CURIAM:—Les demandeurs poursuivent le défendeur pour la somme de $1120.00, arrérages d'intérêt sur prix de vente.

Le défendeur plaide 1. que par l'acte de vente allégué par les demandeurs, ces derniers ont délégué le prix de vente en question au Séminaire de Montréal; que l'acte de vente ayant été enrégistré au long, la délégation est devenue parfaite, de même que si elle eut été acceptée par le délégataire, et qu'en conséquence les demandeurs n'ont plus d'action contre lui. 2. que la créance des demandeurs était payable au domicile du défendeur, et que demande de paiement ne lui a jamais été faite avant l'institution de l'action, ni personnellement ni à son domicile.

Au soutien de sa première prétention le défendeur cite le jugement dans la cause de *Pattenaude & Lérigé dit Laplante*, 7 L. C. R. p. 66, qui contient le considérant suivant: "*Considérant qu'en cas de délégation, cette délégation "devient parfaite par l'enrégistrement, ou inscription, qui en est pris par le "créancier ou à son profit.*"

Ce jugement a été rendu par la Cour d'Appel en 1857. Précédemment la même cour avait consacré le même principe dans la cause de Ryan & Halpin, 6 L. C. R., p. 61.

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Il est bon de remarquer que dans ces deux cas il s'agissait de droits réels qui étaient réclamés par les délégataires. La Cour se fondait sur la sec. 4 de l'ordonnance d'enrégistrement, reproduite dans notre code dans les termes suivants: art. 2093. *L'enrégistrement a effet en faveur de toutes les parties dont les droits sont mentionnés dans le document présenté.* Quels sont les *droits* dont veut parler cet article? Ce ne peut être que des droits sujets à l'enrégistrement et qui seraient affectés par l'enrégistrement ou non enrégistrement d'iceux. Je ne puis pas croire que la Cour ait voulu étendre l'application de cette disposition de la loi aux droits purement personnels comme ceux dont il s'agit dans la présente cause. Dans les causes citées plus haut, il n'était pas même nécessaire de décider qu'il y avait acceptation par l'enrégistrement. Les poursuites étaient des acceptations suffisantes.

Ici ce n'est pas le délégataire qui se présente pour exercer un droit. C'est le délégué qui dit au déléguant qui demande l'exécution d'un contrat, vous vous êtes dénanti de votre droit en faveur d'un tiers. Mais ce tiers n'a jamais manifesté l'intention d'accepter cette délégation. Or, sans acception par ce tiers il n'y a pas de lien de droit entre vous et lui. Il n'a pas d'action personnelle contre vous, et par conséquent vous pouvez payer valablement au créancier déléguant. Que la créance soit garantie par une hypothèque ou non, cela ne change pas les relations personnelles des parties. L'hypothèque d'ailleurs n'est pas l'accessoire de la créance même et la suit dans quelques mains qu'elle passe. Mais voyons quels sont les droits que le Séminaire peut avoir en vertu de l'acte de vente des demandeurs au défendeur. Je ne lui en vois qu'un, celui d'accepter la délégation faite en sa faveur. Or ce droit ne peut pas être affecté par l'enrégistrement, et, suivant moi, l'art. 2093 n'a pas d'application (1).

La seconde prétention du défendeur est qu'avant qu'une demande préalable de paiement lui ait été faite à son domicile, il n'y a pas d'action contre lui; qu'il n'est pas obligé de se déplacer pour faire son paiement, et qu'il n'est pas même obligé de consigner en cour pour se libérer des frais d'action.

Cette question a déjà été soulevée plusieurs fois depuis le code et n'a pas encore reçu une solution bien satisfaisante de la part de nos tribunaux. Je sais qu'il y a des différences d'opinion parmi les juges de la Cour Supérieure. Quant à la Cour d'Appel elle n'a encore eu à se prononcer que dans des causes où les défendeurs avaient consigné avec leur défenses. J'ai déjà décidé et je ne vois pas de raison de changer mon opinion, que le défendeur qui se plaint de ce qu'on ne lui a pas fait de demande à son domicile, doit faire voir qu'il est prêt à payer et consigner les deniers en Cour. Il est dans la même position que celui qui a fait des offres réelles lorsque la créance est payable au domicile du créancier. Une fois les offres faites, le débiteur se trouve exactement comme si la dette était originairement payable à son domicile. Si le créancier veut ensuite accepter les offres il faut qu'il se transporte chez son débiteur. Or, dans ce cas, l'art. 1162 de notre code, dit qu'il faut renouveler les offres en cour et consigner. Les deux cas me paraissant identiques, je ne vois pas pourquoi nous aurions deux procédures différentes.

(1) Sirey, Codes annotés. Art. 1275, 1277, N°. 1 à 9.

Les demandeurs doivent avoir leur jugement suivant les conclusions de leur action. Mallette et al. vs. Hudon.

Jetté & Co., for plaintiffs. Judgment for plaintiffs.
Judah & Co., for defendant.
(S. B.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH DECEMBER, 1876.

Coram JOHNSON, J.

No. 2163.

The Metropolitan Bank vs. *Symes et vir.*

HELD:—That where an account kept in a bank in the name of M. C., as the agent expressly of C. S., is closed, and a new account opened in the name simply of "M. C., agent," and it is proved that M. C. was in reality (although unknown to the bank) the agent not only of C. S. but of various other parties, all of whose funds were indiscriminately deposited and withdrawn in the name of "M. C., agent," C. S. cannot be held for an overdrawn balance due by "M. C., agent," in the absence of any special evidence to establish indebtedness to the Bank by C. S. personally.

PER CURIAM:—The issue in this case is a very simple one in point of form; but the facts offered in evidence on the plaintiff's side are of a rather unusual nature. The bank brings its action against the defendant to recover $10,693.34, the amount to which they allege she has overdrawn.

The form of the declaration is the old form of *assumpsit*, and contains the usual counts. The plea is a *défense au fond en fait*. It is not denied that the plaintiff would be entitled to recover on this declaration, if the evidence supported it; but it is contended that the facts proved do not support the demand. The evidence was heard before me at *enquête* and merits on two different days, and was of unusual length to prove a case apparently so simple in its nature. The plaintiff examined five witnesses. It appears from this evidence that the defendant had an account with the bank while she was unmarried, and that Mr. Maurice Cuvillier was her agent under a power of attorney, which he lodged with the institution. He opened this account in August, 1871, in the name of Miss Clara Symes, and it was kept in that way up to the 27th of September, 1872. On that day there was $39,061.93 to her credit in her own name, and that amount was drawn out by cheque, and Miss Clara Symes ceased to have any account with the bank in her own name. The balance that had been drawn when her account was closed, was, however, re-deposited by Cuvillier, as appears by another account which he opened with the bank, under the name of "M. Cuvillier, agent." After this, of course, the money that had been re-deposited could only be drawn in the name of the person who had opened the new account; and large and numerous sums appear to have been drawn; and it is on these amounts that a balance is said to be due to the bank by the defendant. The counsel of the plaintiffs took great pains to prove the correctness of all these charges in the bank's account against "M. Cuvillier, agent." There is no doubt in one sense, and only in one sense,

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of the correctness of this account, that is to say, all these charges truly represent payments made to Cuvillier. The money went out of the bank, and he got it; that much is certain. The cheques are produced and proved; and so are the monthly acknowledgments by Cuvillier of the correctness of this account. But by the present action the bank, in a direct manner, asserts that it paid out all this money to the defendant, against whom they ask a personal condemnation for the balance still said to be due; and they must show when and how they paid it to her, and, therefore, being unable to prove their case in the direct sense of their allegations, they fall back on their transactions with "M. Cuvillier, agent." There is no question here about figures, no complication of accounts, or any difficulty of that sort. It is a question of facts, and of facts only. I have to see what it is that the bank says, and what it is that it proves. I have mentioned that this lady had executed a power of attorney to Cuvillier before her marriage. She also executed another shortly after her marriage. Both are as ample as could be required. She had a large income, and it was necessary, when she was abroad, that some one here should act for her as fully as she could have done for herself if she had been present. Her attorney had power to sign and endorse, draw and accept bills, notes and cheques, and buy and sell stocks, and transact banking business of all descriptions; but always, of course, in harmony with the objects of these powers, and with the obvious intention and interests of the principal party. As regards these objects the powers given were as full as they usually are in such instruments; but they cannot possibly be held to have given him authority to go upon the Stock Exchange and speculate, and supply margins for his speculations, with her funds. Such a thing would have been as completely foreign to the obvious objects of the powers given him by this lady as to have staked her fortune at cards or staked it at a faro table. She was neither a borrower nor a speculator, and this was both clearly understood and is expressly admitted by the agent himself. He says, when asked whether he ever dealt in stocks for his principal: "No, I did not; I bought a few for investment, but not for speculation. I never made any speculation for her whatever, because she was against speculating. She would have taken away the estate from me if she had known I was speculating with her money. She was not aware of it at all." Yet we find that, while the defendant was abroad and unmarried—that is to say, as far back as October, 1871—Mr. Cuvillier commenced a series of borrowings from the bank to the extent, up to June, 1872, of $71,278.54. This fact up to that [illegible] directs bearing upon the amount of the balance sought to be rec[illegible] cause, as I have already said, in September, 1872, the defendant's account in her own name was closed, and a new one was opened by "M. Cuvillier, agent"; but it shows that the agent was even then charging his principal with loans presumably foreign to the objects of his powers, and therefore it is not without value as [illegible] it may indicate cognizance on the part of the bank of the true nature of [illegible] transactions. They went on, however, all the same: the bank continued [illegible] and to charge interest, and to credit dividends received on the stocks held in pledge, and the account soon got to very serious dimensions. In the account which the bank produces, the loans appear separately

from the ordinary or deposit account. On the latter there is a balance charged of $2,031.86, and on the former, a balance of $8,661.48, and the two are added together to make the amount that is sued for. Now, when the defendant's account in her own name was closed, as the cashier says it was in September, 1872; and when Mr. Cuvillier opened a new one in his own name as agent, the new account did not show for whom he was acting; it is in the name of "M. Cuvillier, agent," not of any one who is named, but merely "agent," generally. M. Cuvillier, as already stated, was agent for others. The fact may not have been known to the bank, but is proved to have been the fact; as agent for these others he drew out monies to a considerable amount which are charged to the defendant. He says he had only one account, therefore the balance sought to be recovered here is a balance overdrawn on an account with "M. Cuvillier, agent," the bank assuming apparently that he was acting only for the defendant, because he had deposited his power of attorney from her, and none from the others. The monthly acknowledgments show that as long as the defendant had an account in her own name, her agent signed these acknowledgments, or they were signed on his behalf in her name *per proc.* After the the opening of the new account her name was dropped altogether, and nothing appears but "M. Cuvillier, agent," signed either by himself or his clerks.

There is no proof that this new account was opened under any distinct agreement with the bank that it was to apply to Cuvillier's agency for the defendant only; but they appear by the evidence to have so understood it. What is called the "loan account" began, as I have said before, in 1871 and ended in 1876. Occasionally it would be pretty heavy. In March, 1874, it showed a balance due to the bank of $102,684.08, and on that day a cash payment was made of $60,000, for which the bank relinquished 1,200 shares of Montreal Warehousing stock. In November, 1875, the balance due the bank was $51,170.81, and Cuvillier gave another letter of hypothecation, and some notes of two of his private friends, which were subsequently paid. At last it got down to $8,661.48. This balance cannot be due to the bank by the defendant unless she has been properly charged with all these previous heavy sums of which the two, or rather the one (for they are lumped together), now sought to be recovered are the result. In the first place, I have serious doubt whether the bank could, without any distinct agreement whatever, and, as far as appears, without even any enquiry or precaution of any kind, after opening an account with Cuvillier as "agent" merely, without saying for whom, but simply on the assumption that he was acting for the defendant, under the power he had lodged with them, proceed to charge her with any and every sum got by the "agent" for any person or for any purpose whatever, however foreign to the scope of his agency for her. But however this may be, I think on other grounds, and under the peculiar facts proved, the bank completely fails to show that they have any rightful claim against the defendant for anything at all. She never in reality borrowed a shilling of all this money; and they must be held to have known it. It never was advanced to her at all; it was never intended to be advanced to her. It may have been intended that it should have that appearance; but the principal officer of the bank, at all events,

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knew perfectly well that this money was not got for the defendant. It was he who made the loans. Mr. Wainwright says so distinctly. The mere entries only were made by that witness, and he has no other knowledge of them further than that they are in the books. I cannot understand the evidence in the case otherwise than as clearly and expressly condemnatory of the pretensions of the bank. Mr. Cuvillier was called by the plaintiff and examined as a witness. He was asked by the court whether the defendant required to borrow money on stocks, whether her own or anybody else's. He answered at once: "I borrowed the money for my own speculations; it was for my own transactions." The plaintiff's counsel, and also the defendant's, continued to examine him at some length. The former asked him many questions on this head, and I will read both the questions and the answers:—

Question. When you obtained those loans from Mr. Starnes, did you tell him that you had obtained them for speculations of your own?

Answer. I don't remember that I did at the moment.

Q. At the time you got them, did you tell him that?

A. I may have told him; I did tell Mr. Starnes I was speculating on stocks, and he knew at one time I had over 300 shares of Bank of Montreal stock, because he scolded me for not selling it at a profit.

Q. When this loan was obtained in 1871, and when these two sums were advanced, ($10,000 and $15,000) had you told him you were speculating on your own account?

A. Yes; he knew it then.

Q. I speak of 1871.

A. I could not tell the date; but I am positive Mr. Starnes knew I was speculating in stocks, for we were speculating together.

Then further on he is asked about the consideration of a note for $25,000, which he had signed in his principal's name, and he answers: "It was given for a speculation of mine."

Q. Was the bank aware how you were employing that?

A. I cannot remember five years ago what I may have told Mr. Starnes; but I am perfectly sure he knew I was speculating on stocks, and everybody in the city knew it besides himself, and every clerk in the bank knew it: I am positive of that.

In his cross-examination he is still more explicit, if it be possible to be so.

Q. I would ask you, with reference to these loans enumerated in the account produced by the Metropolitan Bank, and attached to the pass-book, whether any of them were really made by you on account of the Marquise de Bassano, the defendant in this cause, or not?

A. They were not made by me on her account.

In re-examination, he is asked:

Q. You stated in your cross-examination that all loans you had obtained from the bank were for your own purposes, and not for the defendant's?

A. Yes.

Q. Will you explain how it is that credit was given to you in the pass-book opened under the head "Clara Symes per Maurice Cuvillier, agent," for these amounts?

A. There was only one pass-book kept. I kept it up to the time she was married in her name, and then kept it as agent.

Q. I ask you if this book was not kept in her name up to the change in 1872?

A. Yes.

Q. How is it, then, that credit is given in the pass-book for the account with Miss Symes for the amounts $24,266, $25,000, and $8,000, if those loans were got by you for your own purposes?

A. Because I only kept that one account, and used her name.

Such is the evidence of Mr. Cuvillier on this part of the case. It is evidence that is uncontradicted, and it is evidence that was adduced by the bank itself. Thus, then, the case of the plaintiff, as far as we have yet gone, rests on the allegation that the defendant drew out of the bank more money than she put in; and the proof shows that she did not: that she neither directly, by herself, nor indirectly, drew any of these large sums, which, on the contrary, were drawn by another person for purposes of his own, and entirely disconnected with anything he had to do as her agent, and which were known to be so drawn by the chief officer of the bank. Of course it may be said to be possible for an agent to misuse his principal's name, and to impose upon a bank officer and get funds from him without his knowledge as to what the money was got for; though I should think such a possibility hardly consistent with anything like due precaution and prudence on the part of the officer. The circumstances of the present case, however, quite preclude any such idea. Mr. Cuvillier used the name of his principal, to her possible detriment, no doubt; but the bank must be held to have been perfectly aware of what he was about, and to have helped him to do it. The agents of both parties had a perfect knowledge that the defendant's name was being pledged for purposes entirely foreign to her interests, and to the objects of the agency. That the defendant's agent got the money may be perfectly true; but it was not in virtue of any power conferred by his principal, and it would be monstrous to hold that the bank, which, through its officer, was accessory to these proceedings, had an action to get back the money or any part of it that may be still unpaid. This is the general view I take of this case; but when we come to details it is clearer still. The Bank in effect says here to this lady: "You had so much money with us; whether the proceeds of loans or otherwise is of no importance. You have drawn out some ten thousand dollars more, and you must pay it back." The defendant's plea directly meets this state of facts, for it puts in issue whether she drew the money or not; and the proof, apart from the question of authority in the agent, of knowledge on the part of the bank, or of the nature of the greater part of the loans themselves, the proof, I say, apart from all this, and restricted to one of the loans taken by itself, is certain and conclusive that as respects a sum of $10,000 of the balance claimed from the defendant, it was a specific loan made to Cuvillier in his own individual capacity, and without even pretence that he was acting for anybody but himself: and ought not to have been put among the other loans, which it is contended that he made as agent for the defendant, at all. The loan of $10,000 on the 16th of April was quite a distinct thing from the others, it is

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clearly and positively sworn to, and no contradiction or explanation is suggested; on the contrary, Mr. Cuvillier, the plaintiff's witness, swears he borrowed it on his own individual account, "to pay up margins on Western Union stock, "which I explained to Mr. Starnes at the time." "I was going to sell my "stock, and he advised me to draw $10,000 without any additional security." This would at once reduce the whole demand to some $600 or $700. Then there is a sum of $307 which was drawn to pay one Doré, and which it is admitted must be deducted. But there is a fact which hitherto I have only noticed in a cursory manner; but which is, nevertheless, a very important fact, and one of which the effect, under the express evidence in the case, would be to go much further than to extinguish any remaining balance on the account. Cuvillier, having admitted his agency for others besides the defendant, was asked by the defendant's counsel to look at a number of the cheques that had been produced and were charged, like the others, to "M. Cuvillier, agent," and to say for whom the sums were drawn. He referred to his cash book, and proved that seventeen of these cheques, of which the amounts together exceed $1,600, were drawn for the other parties for whom he was agent. The plaintiffs then, far from proving that any balance is due to them by the defendant, only succeed in showing that a person who was her agent, and also the agent of others, was suffered to open an account with the bank in an ambiguous name and treated as if he had been agent of the defendant alone, contrary to the fact, and without precaution or enquiry about it; and then they charge her with every sum he draws, whether for her, for himself, or for any of the others. This action is therefore dismissed with costs.

Action dismissed.

Judah & Wurtele, for plaintiff.
Bethune & Bethune, for defendants.
(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 27TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 495.

Larin vs. *Deslorges*, and *Séré*, guardian, mis en cause.

HELD :—That *congé défaut* on a rule will be granted without costs.

St. Pierre, for guardian, asked for *congé défaut* with costs against the plaintiff, who had taken out a rule against the guardian returnable that day but not returned.

PER CURIAM.—The *congé défaut* is granted, but without costs; C. C. P. 82 giving costs only referring to *congé défaut* in cases of actions not returned.

Longpré & Co., for plaintiff.
St. Pierre, for guardian *mis en cause*.
(J. K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 16TH SEPTEMBER, 1876.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J., BÉLANGER, J., *ad hoc*.

No. 75.

SERRE DIT ST. JEAN ET VIR,

APPELLANTS;

AND

THE METROPOLITAN BANK,

RESPONDENTS.

HELD:—1. That a notarial power of attorney to manage and administer the affairs of the constituent generally, and in so doing to hypothecate the constituent's property, is not an authority to sign promissory notes in the name of the constituent.

2. That the statements made by the agent, to the effect that he had full authority to sign notes for his principal, cannot make evidence against the principal; his power being governed by the terms of the written power of attorney.

This was an appeal from a judgment of the Superior Court, at Montreal, (TORRANCE, J.) rendered on the 30th of June, 1874, in an action by the respondents against the appellants, as follows:—

"The Court, etc., considering that it is fully proved by the evidence of the defendant Jacques Olivier Bureau and the witnesses Dumouchel and Normandeau, that the said defendant Bureau was in the habit of borrowing money for the joint expenses of himself and said Dame Léocadie Serre *dit* St. Jean, his wife, to the knowledge of said Dame St. Jean, by promissory notes signed by him, said Bureau, as agent of said defendant Dame St. Jean, to be discounted at the Banks, and that the note in question in this cause was given to plaintiffs for money which was placed to the credit of the said defendant Dame St. Jean by plaintiffs in their Bank and drawn out by said defendant Bureau as her agent; doth overrule the plea of the said Dame Léocadie Serre *dit* St. Jean with costs, and doth adjudge and condemn the defendants jointly and severally to pay and satisfy to plaintiffs the sum of $377.51 cy. of Canada, to wit, the sum of $375, amount of the promissory note dated Montreal, 12th July, 1873, made and signed by said Léocadie Serre *dit* St. Jean acting by her husband, the said Jacques Olivier Bureau, her duly authorized attorney, payable two months after date to the order of herself at the Metropolitan Bank of Canada, for value received, and by the said Léocadie Serre *dit* St. Jean acting as aforesaid, and by the said Jacques Olivier Bureau, individually, endorsed and delivered to said plaintiffs —and the sum of $2.51 for the cost of protesting the said note for non-payment: with interest, etc."

MONK, J.:—After stating facts, remarked that the Court had had no difficulty in coming to the conclusion that the judgment appealed from must be reversed, there being no authority in the written power of attorney either to make or indorse promissory notes. The declaration simply stated, that Mr. Bureau had authority to sign as he did, without any specification of the mode in which he became authorized so to act, but the respondent with the declaration filed a copy of a notarial power of attorney which did not contain any such authority. The Court were unanimously of opinion that this written power of

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attorney must serve as the guide to determine what Mr. Bureau's authority really was, and that all the verbal evidence tending to prove that Mr. Bureau really had authority to sign the note in question in this cause was illegal and irrelevant, and should have been rejected. The Court were also of opinion that there was no legal evidence of confirmation of the act of her husband by Madame Bureau.

RAMSAY, J.:—This is an action on a promissory note alleged to have been made by appellant through her authorized agent, her husband. The power of attorney under which he pretended to act is produced, and it contains no special authority to make or sign promissory notes for the appellant. It is urged for the plaintiff, respondent, that the agent told Mr. Starnes, the manager of the Bank, that he had a power of attorney from his wife. A case precisely similar to this so far was decided many years ago. I refer to Castle & Baby, 5 L. C. R., p. 411, where it was held that a power of attorney for general administration of the principal's affairs did not authorize the agent to sign promissory notes, and that what the agent said in obtaining the endorsation of an accommodation endorser was not evidence in a suit against the principal by the party who discounted the note. There was a clause in the power in that case which was of a character perhaps to take the case out of the rule, but the correctness of the general principle has not been called in question. In this case, however, there is something more. The manager tells us that he asked about the power. He knew there was one, and he trusted the agent's honor. I don't see that the appellant should be dammified by the temerity of the respondent. It has also been urged that after the note was protested for non-payment, the appellant by another agent promised to pay the note. There is no proof of such agency, and the agent examined as a witness denies the extent of the conversation out of which it is attempted to prove a subsequent promise to pay. In addition to this no subsequent promise to pay is pleaded.

I think the judgment should be reversed.

The following was the judgment of the Court:—

"The Court, etc.

"Considering that the respondent's action is brought, and is founded upon a promissory note dated 12th July, 1873, purporting to be made and indorsed by the attorney of the defendant, J. O. Bureau, her husband;

"Considering that there has been produced in this cause a power of attorney (*Procuration*) executed before Belle, Notary Public, at Montreal, the 15th April 1868;

"Considering that the said J. O. Bureau was not in and by the said power of attorney authorized and empowered to make, sign or indorse promissory notes for or on behalf of the defendant, his wife, and had not, in virtue of the said power of attorney, any express or other sufficient authority to make, sign or indorse negotiable paper of the description of that on which the present action is founded, and could not legally make and indorse the promissory note produced in this cause;

"Considering that the said J. O. Bureau exceeded the power and authority vested in him by the said power of attorney in making and indorsing said pro-

missory note, and that, therefore, the defendant is not bound or liable to pay the amount thereof. Seeing that it is not established by legal and sufficient evidence in this cause that the said defendant, personally or otherwise, undertook and promised to pay the said promissory note after the protest thereof or at any other time; and whereas the objections taken by defendant, appellant, to certain evidence adduced in this cause as illegal and irrelevant to the issue joined therein, are well founded, and should have been maintained by the Court below;

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"Considering thereupon that in the judgment of the Superior Court at Montreal the 30th June, 1874, maintaining the plaintiff's action against the defendant, there is error, doth reverse, annul, and set aside the said judgment, and the Court proceeding to render the judgment which the Court below should have rendered, doth dismiss the plaintiff's, respondent's, action with costs of this Court and of the Court below."

Judgment of S. C. reversed.

Trudel & Taillon, for appellants.
S. Bethune, Q.C. & S. Pagnuelo, counsel.
Judah & Wurtele, for respondents.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 23RD JUNE, 1877.

IN REVIEW.

Coram TORRANCE, J., DORION, J., RAINVILLE, J.

No. 329.

Wilson et al. vs. *Brunet*.

HELD:—That an insolvent cannot stay the proceedings of a plaintiff until the assignee takes up the *instance* in place of insolvent.

The defendant *Brunet* inscribed in Review. Afterwards, on the 29th March 1877, he made an assignment under the Insolvent Act, 1875. On the first day of June Review, he made a motion in the Court of Review that, seeing his insolvency and assignment, all proceedings by the plaintiff be stayed till the suit had been taken up by the assignee on behalf of defendant.

Roy, for defendant, cited Insolvent Act S. 39 and C. C. P. 437.

TORRANCE, J.—The Insolvent Act, S. 39, does not apply to this particular case. S. 39 is meant for the protection of those against whom the insolvent is proceeding, and contemplates the insolvent having a status in Court. Nor has C. C. P. 437 application to the case of the insolvent. In Quebec my brother *Dorion* says the practice has been not to allow the proceedings as a general rule to be suspended.

Motion rejected.

Archambault, for plaintiff.
Roy, for defendant.
(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH JUNE, 1877.

Coram DORION, J.

No. 1135.

Carter vs. *Molson, & Holmes*, Int. party.

HELD:—1o. That the draft of judgment in a case as paraphed by the Judge is the true record of such judgment, and cannot be contradicted by verbal evidence offered in support of a *requête civile* attacking the correctness of the entries thereon so paraphed by the Judge.

2o. That a judgment so recorded cannot be set aside, on a *requête civile* by another Judge of the same Court, on the ground of error in such record.

3o. That, according to the evidence, there was really no error in the present instance.

PER CURIAM:—Dame Eliza Ann Holmes, l'épouse du défendeur et se prétendant Intervenante dans cette cause, présente une requête au tribunal dans laquelle elle allègue en substance, que la cause entre la demanderesse et le défendeur a été inscrite à l'Enquête et Mérite pour le 17 Avril dernier; que lorsque la cause fut appelée le défendeur ne comparaissant pas, la demanderesse aurait demandé jugement; que sur cette demande le juge Mackay, présidant la Cour, aurait donné ordre au protonotaire de dresser jugement pour la demanderesse; que le juge n'a pas prononcé le jugement ce jour là ni depuis; que le même jour l'intervenante a produit son intervention. Ce que voyant, la demanderesse s'est adressé au juge *lui demandant de faire entrer* un jugement en faveur de la demanderesse portant une date *antérieure* à l'enfilure de l'intervention; qu'en conséquence le 18 Avril le juge connaissant que la dite intervention était filée, aurait fait dresser un jugement par le protonotaire, et que 19 Avril, le dit juge aurait paraphé le jugement, ainsi dressé, comme s'il eut été rendu à l'audience le 17 du même mois, avant la production de l'intervention, et a ordonné au protonotaire de l'entrer au régistre de la Cour comme tel, ce qui a été fait.

Par ses conclusions la requérante demande que le dit jugement soit déclaré nul et non avenu et à ce qu'il lui soit permis à telles conditions qui seront fixées, de prendre tels procédés qui peuvent être nécessaires pour faire rectifier le dit régistre après que la demanderesse aura déclaré si elle entend se servir du dit jugement.

Lors de l'argument l'avocat de la requérante a prétendu que si la première partie de ses conclusions ne pouvaient pas lui être accordées, la Cour pouvait lui accorder la seconde partie comme étant une demande en inscription de faux. Je dois dire de suite que cette prétention est mal fondée. Il n'y a pas dans ces conclusions de demande en inscription de faux, laquelle ne peut d'ailleurs être faite qu'en suivant les formalités prescrites par les articles 161 et suivants, du Code de Procédure Civile.

Nous n'avons donc à nous occuper que la requête demandant que la jugement soit déclaré nul et non avenu.

Les allégués de cette requête sont des plus injurieux pour l'honorable juge qui y est mentionné. S'ils étaient vrais ce ne serait ni plus ni moins qu'une

prévarication de la plus grave nature dont ce juge se serait rendu coupable, et je ne me reconnais aucune juridiction pour faire le procès d'un juge de cette Cour. Carter vs. Molson, and Holmes.

Heureusement que les faits prouvés ne justifient aucunement l'accusation extraordinaire portée contre l'honorable juge par la requérante.

La preuve qui a été faite dans cette cause est suivant moi illégale en autant qu'elle tend à contredire par témoins la minute d'un jugement de cette Cour duement paraphé par le juge qui l'a prononcé.

Mais admettant même qu'une telle preuve pût être faite par témoins, la requérante n'a pas réussi à établir la vérité des allégués de sa requête. Le juge a signé son jugement comme ayant été prononcé le 17 Avril : on ne l'a pas examiné comme témoin. Deux témoins jurent positivement que le juge a non seulement donné ordre au protonotaire de dresser le jugement, mais qu'il a prononcé le jugement en déclarant qu'il donnait jugement pour la demanderesse suivant sa demande.

Le fait que le jugement a été rédigé le lendemain et paraphé le surlendemain, est ce qui se pratique tous les jours et ce qui est conforme à notre Code de Procédure, Art. 473. Il est vrai que le protonotaire a entré dans son livre " Draw Judgment ", au lieu de jugement pour la demanderesse ; mais l'erreur du protonotaire ne fait pas loi. C'est la minute du jugement paraphée par le juge qu'il faut suivre et non l'entrée du protonotaire dans son livre ou régistre. Art. 474 C. P. C.

Mais en supposant même que la requérante eut fait la preuve de ses allégués, je ne connais aucune loi qui m'autorise à changer ou modifier le jugement d'un autre juge dans une cause contestée ou à casser ce jugement sur simple requête. Mais, dit le savant avocat de la requérante, si j'ai un grief je dois avoir un remède. Ceci est bien vrai, mais alors il faut choisir le bon remède, et ce n'est pas à la Cour à l'indiquer.

Bethune & Bethune, for plaintiff.
E. Barnard, for int. party.
(S.B.)

Requête civile dismissed.*

SUPERIOR COURT, 1876.

MONTREAL, 31st OCTOBER, 1876.

Coram JOHNSON, J.

No. 1744.

Stanton vs. *The Home Fire Insurance Company.*

HELD :—That the condition in a fire policy, that the assured shall give notice and make proof of loss before any suit can be brought on the policy, is not complied with by a third person to whom the loss is made payable furnishing such notice and proof of loss, and that in the absence of any such notice and proof of loss by the assured himself, the action by such third person will be dismissed.

PER CURIAM :—This action arises, as a great many others have already arisen, out of the burning of the coal oil sheds at Point St. Charles in 1867. In June

* A similar judgment was rendered in No. 868, Mechanics Bank vs. Molson.

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of that year, Stanton, the plaintiff, made an advance of $2,150 to Thos. Ruston on the collateral security of a warehouse receipt for 480 barrels of coal oil stored in shed No. 1, of which receipt Ruston was the bearer. About the same time, the defendants issued a premium receipt as evidence of an insurance on the oil, by which "the loss, if any," was made "payable to Stanton." The fire took place, Stanton was not repaid his advances, and accordingly presented his claim to the company, defendant, who refused to pay it, and this action was the result.

The declaration sets out that, on or about the 5th of June, 1867, Ruston was himself, or as the broker of others, owner and in possession of 480 barrels of refined coal oil of the "Atlantic brand," which were then in the warehouse of William Middleton & Company, known as store Number one, and that they (Middleton & Co.) made and delivered to Ruston a warehouse receipt for this oil; that about the 22nd of June Ruston, for value received, endorsed the receipt of the plaintiff; it then sets up the loan or advance of the money by Stanton to Ruston, and the obligation of the lender, if Ruston's note was paid, to give up the property. It then goes on to aver that a contract of insurance was made by the defendants in favor of Ruston, which, in effect, is said to have been an agreement with the plaintiff, being evidenced with an insurance receipt in favor of Ruston, of the 21st of June, 1867, subject to the usual conditions of the company's policies, and this receipt has written across it the words, "loss, if any, payable to O. W. Stanton," signed with the initials of the agents of the insurance company. The occurrence of the fire, and the destruction, and the value of the property insured, are then stated, and then it is alleged that the plaintiff gave notice of the loss to the defendants on the 20th of August, and fulfilled all the conditions and requirements of the company's policies.

The defendants pleaded: 1st, that the insurance receipt was given subject to the policies in use by the company, under which the insured was required to give notice of loss as soon as possible, and that Ruston, who was the person insured, never gave notice. 2nd, that for the 480 barrels of oil in question, Middleton issued two warehouse receipts, and that the same lot was insured in another office on the other warehouse receipt. This plea, however, is abandoned. The third plea is that the warehouse receipt produced is fraudulent and fictitious, and that there was no oil in the shed to represent it. 4th, the general denial to meet the first plea. Of course it must be proved that some one gave notice and made proof of loss. The conditions of the policy produced here do not differ materially from those that are usual on fire policies. The first material question in this case, therefore, is who, under the contract, is to be deemed the "insured," for the declaration alleges, and the facts show, that Stanton the plaintiff gave the notice, and not Ruston. I find an admission of record not referred to in argument, that the interim receipt was issued by the defendants on or about the day it bears date, *bearing the memorandum written across the face thereof "loss, if any, payable to O. W. Stanton,"* to wit, the plaintiff. Whatever, therefore, may be the effect of these words in other respects, it seems certain that they were there with the assent of the defendants when they gave this receipt. The question remains, whether notice and proof of loss made by Stanton satisfies the condition that the "insured" was to give such notice and make

proof of such loss. A very great number of authorities have been cited where none were necessary, to show that such a condition is in its nature a condition precedent of the action; there is no doubt that notice and proof of loss are in general so considered. But the point here is not whether notice was given, but whether being given by Stanton, and not by Ruston, the condition of the policy requiring notice and proof of loss by the "insured" has been complied with. In the case of Sandford *vs.* Mechanics Mutual Fire Insurance Co., 12 Cush. Rep., p. 548, it was held that "the person intended by the term 'the insured' in a mutual fire insurance policy is the person who owns the property, applies for the insurance, pays the premium and signs the deposit note, and not another person to whom the money is payable in case of loss;" and Shaw, Ch. J., in giving judgment in that case, said: "The first material question is, who under this contract, is to be deemed the insured; and the Court are of opinion that it is the owners. The property at risk was theirs; the insurable interest was in them —whereas the right and interest of the others was derivative and subordinate. The money, it is true, was payable to Sandford in case of loss; but that did not make him the insured. He was not a member of the Mechanics' Fire Insurance Company; he could not vote, could not surrender the policy, or annul the contract, &c., &c." In that case, however, the relation of the different members of a mutual association to each other was a peculiar element, though it does not seem to have affected the decision. The principle, however, in other respects, and the reason on which it rests, suffer no difficulty, though both have been the subject of discussion. The case of Grosvenor *vs.* The Atlantic Fire Insurance Company of Brooklyn is in point. It is to be found reported in 17th N. Y. Reports, p. 391, and was decided in appeal. The action was upon a policy whereby the defendant did "insure Eugene W. McCarty against loss or damage by fire to the amount of $7,000 on his brick dwelling house until November 14, 1854, loss, if any, payable to Seth Grosvenor, mortgagee." Grosvenor, the plaintiff, was the holder of a mortgage on the premises insured; McCarty had sold the premises, and of course had no insurable interest, and no action on the policy; but the Court said: "At the time the insurance was effected, the plaintiff Grosvenor held a mortgage on the property insured. He, too, had an insurable interest; the extent of that interest was the amount of his debt. To that extent he might have contracted with the defendants to have indemnified him against loss by fire. The payment of his debt would as completely have terminated the contract to insure as would the alienation of the property, when the contract is made with the owner.

"The important enquiry in this case is to which of these classes does the contract in question belong? The action is brought by the plaintiff as mortgagee. The contract was made with McCarty, the mortgagor. But the policy provides that in case of loss such loss should be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have no legal claim against the defendant for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due by the insurers by reason of any loss sustained by the mortgagor, or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against a loss, a contract to indemnify the mortgagee? * * *

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It is stated in the policy that the property insured is the property of McCarty, and that he is the party insured. McCarty paid the premium. He made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due to him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers should become liable should be deposited in a specified bank to the credit of the party insured." There is much more in the long and very able judgment of Judge Harris of the Supreme Court, N. Y., from which I have been quoting, to show the plain distinction between the contract to insure and the contract to pay the money, if any should become due, to another person than the insured. I will only further quote the concluding words of the judgment:—"The defendants contracted with McCarty, and not the plaintiff. They agreed, upon the performance of certain conditions, to pay for him to the plaintiff certain money. Some of these conditions were positive in their character; others negative; certain things were to be done by the assured, and others were not to be done. If all these conditions were performed, then, if a loss occurred, the defendants agreed to indemnify him against that loss to the extent specified, and he appointed the plaintiff his creditor to receive from the defendants the amount for which they were contingently liable. The terms of this contract have never been waived, relaxed or modified. The defendants have shown an express violation of one or more of the conditions upon which their liability was to depend." * * * * * * * * * And the judgment of the Court below was reversed in favor of the defendants. Two other of the Judges distinguished this case from the case of a policy assigned with the assent of the insurers to a mortgagee, which, of course, the Court here would do if there were any such thing proved in the present case. They were of opinion, as I should be too, that in such a case there would be a privity between the mortgagee and the insurers. In the present case, then, there can be no doubt that Stanton is in the same position as regards the defendants, that the mortgagee was in the case cited. The defendants never agreed to insure him. They agreed to insure Ruston, and to pay the money to Stanton, if any should be coming to Ruston under the conditions of his contract. It follows that Stanton has a right to recover, if Ruston would have had, and not otherwise. Among the conditions of the latter's right to recover were the notice and proof of loss to be made by him, and not by another. There is a great deal of general reasoning that may be offered no doubt as to the grounds of this necessity to comply strictly with the condition in the present case, but no authority has been cited to warrant me in dispensing with an express condition of this contract. On the other hand, there is clear and positive authority for insisting on the rule that the condition must be strictly complied with. In Fitzgerald vs. Gore Ins. Co., 30 U. C. Q. B. Rep., p. 97, it was held that under this condition the mortgagee was not the person insured, and therefore could not give the notice of loss, and in that case the policy had even been assigned to him. In Cameron vs. Monarch Ins. Co., 7 U. C. C. P. 212, it was held that where a policy contained the ordinary

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condition, and that it appeared that the plaintiffs insured as assignees in insolvency of one D., and that the business was continued under the supervision of D., who was really the only person who knew all about the loss, the plaintiffs personally taking no part in the management of the business, and that an affidavit, as required by the condition, was in fact made by D., held, nevertheless, that an affidavit should be made by plaintiffs as persons insured, and failing to make such affidavit they could not recover. The company has the right under this condition to know from the insured all that may enable them to form a judgment whether the loss was actually sustained, information which, in its nature, none other can give as well as he. They have a right to say to the plaintiff: "You, Mr. Stanton, may be acting in perfectly good faith" (and I must say there is not the slightest suspicion of the contrary in the present case) "but we want to see the man we dealt with, face to face, before "we can tell you whether we are to pay him anything, or, as a consequence, "whether we are to pay you." Though the question did not present itself in the same way, the same principle was maintained in Whyte vs. The Western Insurance Co., by the Privy Council. I am constrained therefore, to maintain the defendant's first plea, and give judgment upon it against the plaintiff.

Action dismissed.

Abbott & Co., for plaintiff.
E. Carter, Q. C., for defendants.
(S. B.)

SUPERIOR COURT, 1876.

MONTREAL, 31ST OCTOBER, 1876.

Coram JOHNSON, J.

No. 25.

Grenier vs. *The City of Montreal.*

HELD:—That in an action for damages resulting from a *quasi-délit*, instituted more than two years after the wrong complained of occurred, the Court must dismiss the action, in the absence even of a plea of prescription.

PER CURIAM:—In this case I am constrained to dismiss the plaintiff's action, without reference to the merits. The action is for damages resulting from a *quasi-délit*, and by article 2261 of the Civil Code is prescribed by two years. The wrong complained of is said to have occurred in 1871, and the action was instituted in 1875; pleas to the merits are pleaded; but article 2267 extinguishes the right of action in such cases, whether prescription be pleaded or not. The case is therefore dismissed; but the defendant who neglected to plead this will not get any costs.

Action dismissed.

A. W. Grenier, for plaintiff.
Rouër Roy, Q.C., for defendant.
(S. B.)

COURT OF REVIEW, 1876.

MONTREAL, 31st OCTOBER, 1876.

Coram JOHNSON, J., TORRANCE, J., PAPINEAU, J.

No. 1963.

Augé vs. *Mayrand.*

HELD:—That the allegation in an affidavit for *capias ad respondendum*, that deponent believes and is informed that the defendant is about to secrete "*ses biens meubles et effets mobiliers*," is defective, and that the affidavit is also bad on account of the failure to state therein the special reasons and grounds of such belief.

JOHNSON, J.:—The plaintiff inscribes a judgment of the Superior Court at Montreal of the 3rd May, 1876, which quashed a *capias* on the petition of the defendant. This judgment assigns as its only *motif* "that the plaintiff had no valid reason for causing the defendant's arrest." The defendant, however, did not examine a single witness to prove the falsity of the affidavit on which the *capias* issued, and never even appeared at the hearing to support his petition. There are three grounds known to the law upon which a petition to quash a capias may be founded: personal exemption from incarceration, the insufficient disclosure of legal grounds for arrest, and the falsity of the statements in the affidavit. In the present case the petition was founded both upon the insufficiency of the statements in point of law, and upon their not being true in point of fact. The late Mr. Justice Beaudry gave an interlocutory order for proof, which itself shows either that he thought the allegations sufficient, or that he desired proof *avant faire droit*. In the memorandum, in his own handwriting, of this order, we find the word "declaration" used instead of "affidavit;" but that, no doubt, was a mistake, as the sufficiency of the declaration was not before him, and that of the affidavit was. The issue was inscribed by the plaintiff for *enquête*, and the defendant adduced no evidence. So far, therefore, as the question of the truth or untruth of the affidavit is concerned the matter was at an end; the affidavit, if it is sufficient in its terms, must be held to be true, if nothing appears to the contrary. The reason assigned for the final judgment therefore, must mean that the plaintiff disclosed no legal ground of arrest in his affidavit; and that, at all events, is all we can look to, since, as before observed, there is nothing to show that the statements are false. Something was said as to the finality of the order for proof. It is in its nature an interlocutory order, and the sufficiency of the allegations in the affidavit (which is misnamed "declaration" in the memorandum) is only stated by Judge Beaudry as the reason for sending the petitioner to proof; but I have no doubt he held and meant to rule that the affidavit was sufficient in law, and, therefore, to say that the rest was merely matter of proof. I think, as far as the defendant was concerned, this cannot be held to have been a final judgment. It certainly could have been remedied by the final judgment. It was in the nature of a demurrer to the allegations of the affidavit, and every day demurrers even to declarations are dismissed, and the defendant never, as far as I know, thinks of going to appeal upon that. The Code says, indeed, that if his petition is dismissed the defendant may appeal, and article 821 says where the contestation concerns only

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the sufficiency of the allegations, the Judge can dispose of it at once. There there is an appeal for the simple reason that the judgment is final, and the defendant must remain in prison if it is unreversed. Here, however, the petition contended both for the insufficiency and the untruth of the allegations. The Judge, therefore, had no power to give a final judgment unless he dismissed it on both grounds and altogether. This ruling, therefore, upon the sufficiency of the allegations, is merely interlocutory, and the same question is now before us. We are all of opinion to reverse the interlocutory, and confirm the judgment which held the grounds of arrest insufficient. We do this for two reasons: first, the allegation that the concealment is of movables only, (the words are in French, and are: "*ses biens meubles et effets mobiliers.*" This must be held to be at least doubtful; if it does not really restrict the kind of property to movable property, it is at least obscure, and in a case of the arrest of the person we must give this doubtful allegation a meaning favorable to the defendant's liberation. The second ground is that the allegation is not that the defendant "doth secrete," but that the deponent believes and is informed that he is about to secrete. The distinction is perfectly well known and acted upon. In the latter case special reasons must be given; the text of the law says so; (Art. 798 C. de P.) and here in this affidavit no reasons are given. The judgment inscribed for review is therefore confirmed with costs.

Judgment of S. C. confirmed.

M. Cayley, for plaintiff.
Trudel & Taillon, for defendant.
(S. B.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH NOVEMBER, 1876.

Coram MACKAY, J.

No. 414.

Bourgouin vs. *The Montreal, Ottawa & Occidental Railway Co.*

HELD:—That a writ of *mandamus* does not lie to compel a Railway Company to deposit an amount awarded for expropriation by arbitrators.

PER CURIAM:—This was a mandamus taken by Bourgouin against the Railway Company to have them compelled to deposit in Court the money awarded by the arbitrators, as mentioned in a previous case. The proceeding was met by a variety of pleas, of which one only need be noticed, a demurrer to the declaration. There was not a shadow of right for a mandamus in a case such as this, and these mandamuses and injunctions are increasing to such an extent that the Court must see that it is not led by an inadvertency into granting them. Demurrer maintained, and *requête libellée* dismissed.

Application for *mandamus* dismissed.

Doutre & Co., for plaintiff.
DeBellefeuille & Co., for defendant.
(S. B.)

SUPERIOR COURT, 1876.

MONTREAL, 30TH NOVEMBER, 1876.

Coram JOHNSON, J.

No. 711.

Vincent et ux. vs. *Benoit* et vir.

HELD:—That a wife who with her husband makes a donation of a sum of money to one of their children, whilst *en communauté* with her husband, remains liable for one-half of the donation, notwithstanding she be subsequently separated judicially from her husband as to property and renounce to the community.

PER CURIAM:—The defendants, at that time husband and wife *communs en biens*, on the 3rd of November, 1864, made a donation to their daughter, the plaintiff's wife, of $250; since that, there has been a *séparation judiciaire* between the defendants, and the defendant being sued for one-half, for which it is contended she is personally liable, pleads that fact, and says, further, that, having renounced the community, she is completely exonerated. It is necessary to reconcile the provision of the registry ordinance which is reproduced in Article 1301 of the Civil Code with the provisions subsequently made by the same Code in Article 1308. The first Article is: "A wife cannot bind herself either with or for her husband, otherwise than as being common as to property. Any such obligation contracted by her in any other quality is void and of no effect." Nothing can be more explicit than this. We have the general rule laid down in unmistakeable language. The exception to this rule which is made by Art. 1308 is equally clear: "If the consorts have jointly benefited their common child, without mentioning the proportion in which they each intended to contribute, they are deemed to have intended to contribute equally, &c." The general provision is therefore modified in this instance, and to this extent. The same provision is found in the Code Napoleon. Indeed Art. 1308 is a verbatim copy of Art. 1438 C. N. Gilbert, in commenting on this Article in Note 2, says: "Encore bien que la dot d'un enfant ait été constituée conjointement par les père et mère pendant la communauté, et en objets qui en dépendent, elle n'est pas néanmoins dette de communauté." The defendant's renunciation, therefore, could not liberate her from the liability for one-half, and judgment is rendered for the plaintiff.

G. C. Geoffrion, for plaintiff. Judgment for plaintiff.

Archambault & David, for defendant.

(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 13TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 1494.

Chalut vs. *Valade* et al.

HELD:—That it is not necessary for a defendant who asks for *congé défaut* under C. C. P. 82 to give notice of his application to the plaintiff.*

L. L. Maillet, for defendants.

(J. K.)

* *Vide Gagnon* v. *Sépécal*, 4 Rev. Leg. 537.

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 1530.

Robert et al. vs. *Fortin*, and *La Société de Construction Jacques Cartier*, Opposants.

HELD:—That a plaintiff who seizes as belonging to the defendant, property which had been registered for years in the name of the opposants, shall pay costs of opposition.

PER CURIAM:—The plaintiff took in execution as the property of the defendant, land which the opposants by opposition claim as their property. The ownership of opposants is now admitted, and the only question is whether the opposants should have their costs of opposition from the plaintiffs who had seized *super non domino*. I find that the opposants purchased from the defendant on the 15th September, 1873, and the sale was then registered. In 1877, the plaintiffs seized the property as belonging to the defendant. I think as the opposants had been registered owners for upwards of three years, they should have their costs.

Dalbec, for plaintiff.

Loranger, for opposants.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 11TH SEPTEMBER, 1877.

IN CHAMBERS.

Coram TORRANCE, J.

No. 837.

Ex parte *Joseph Onasakeurat*, Petitioner for Writ of Habeas Corpus.

ARSON—COMMITMENT FOR TRIAL—BAIL.

HELD:—After a prisoner is committed for trial for arson, where it is not proved by the depositions produced that the prisoner is guilty, he will be admitted to bail.

PER CURIAM.—The petitioner has applied for a writ of *habeas corpus* to be liberated on bail. He is in the jail at Ste. Scholastique on three several charges of arson, and setting fire to a stable and church, and seeks to be liberated on giving bail. The facts of the case are of a most unpleasant character. A number of arrests of Indians had been made before the events in question, and the whole community of the locality had naturally been thrown into a state of great excitement. On the day of the 14th of June a number of Indians arrived in the village of Oka, carrying guns. They went to the Protestant chapel, and there deposited their arms. In this room they were addressed by the petitioner, who is their chief, but nothing inflammatory is proved to have been said. The petitioner was with the Protestant minister till 11.30 p. m. The arrests that had been made can easily account for these late vigils. But, strange to say, it is deposed in a credible way, and not denied, that he went

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about 3 a.m. to the house of one Jean Marie Lebrun, and there demanded a brass cannon which was in the custody of Lebrun, and in company with another person, he takes it away. About 4 a.m. the report of the cannon is heard, and people are aroused from their beds. About that time the Seminary buildings, consisting of barns, parsonage and church, are in flames, and the *ex parte* evidence, if uncontradicted, is undoubtedly that the fire was the work of incendiaries, who destroyed property of the value of $50,000. It is deposed that the cannon was there planted opposite one of the Seminary gates. His father, one Lazare Akwerente, is accused of having cut the hose which was on the premises as a precaution against fire, and also to have threatened to split open the head of the Rev. Father Lacan, the resident priest. The petitioner was at the fire, though it does not appear what he was doing there, and he was seen returning from it together with his father. What is my duty in the circumstances of this case? "Bail is only proper," says Hawkins, "where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial; but where that indifference is removed, it would, generally speaking, be absurd to bail him." B. II., ch. 15, sec. 40. Now it is impossible for me, upon the thirty-seven depositions which I have read, to say that the petitioner is guiltless of arson and conspiracy, but it is at the same time impossible for me to say that his guilt is proved. The petitioner will not, probably, be tried by a jury, before the month of January. I come to the conclusion to allow bail to be given by two sureties of $1,000 each, and personal recognizance for $2,000.

J. J. Maclaren, for petitioner.

Mousseau, Q. C., and *St. Pierre* for the Crown.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 30TH MAY, 1877.

Coram TORRANCE, J.

No. 173.

Gnaedinger et al. vs. *Derouin* et al.

HELD:—That where a bailiff, resident in another District, and charged with the execution there of a writ of execution issued out of the District of Montreal, fails to comply with the exigencies of the writ, he is liable to imprisonment in the District of Montreal.

The plaintiff moved for judgment on a rule for imprisonment in the District of Montreal against William H. Carter, a bailiff of this Court appointed for the District of Richelieu, for non-compliance with the exigencies of a writ of execution issued out of the District of Montreal, and asked for his imprisonment in the District of Montreal.

The *mis en cause* made default.

Hall, for plaintiffs, cited C. C. P. 788, 789, and prayed that the rule be declared absolute.

Rule declared absolute.

Macmaster & Hall, for plaintiffs.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 919.

Phaneuf vs. *Elliott*.

HELD:—*Pour parlers* for the compromise of a case are of a nature to interrupt peremption, but the proof of these *pour parlers* can only be made by writings and not by witnesses.

The defendant moved for peremption. The plaintiff moved that he be allowed to file affidavits proving *pour parlers* for reference to *expertise*, which had the effect of suspending the peremption.

Jetté, for plaintiff, cited 3 Carré & Chauveau, Qu. 1419, and Supp. on Qu. 1419; p. 381.

PER CURIAM:—I refer to a case decided at Pau, 28 January, 1861, reported in Sirey, A.D. 1861, 2. 490. It was there held that the interruption could only be proved by writings.

Peremption granted.

L. A. Jetté, for plaintiff.
L. N. Benjamin, for defendant.
(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 27TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 1048.

The Niagara District Mutual Fire Insurance Company vs. *Mullin*.

HELD:—That a demand for security for costs from an insolvent will not be granted unless the insolvent is such under the Insolvent Act of 1875.

PER CURIAM:—The plaintiffs are an Ontario company. The defendant asks for security for costs for two reasons: 1. The plaintiff has gone into liquidation in Ontario, but it is not shown to be under the Insolvent Act of 1875, which allows of a demand for security for costs, where a receiver has been appointed. 2. They do not any longer carry on business in Montreal. I do not see that the first reason is a good one. It does not appear that the demand is made under the Insolvent Act of 1875. As to the second reason, the plaintiffs should give security for costs as non-residents if the demand were duly made, and the demand should have been made within four days after the return of the action.

Motion rejected.

E. Carter, Q.C., for plaintiffs.
J. Duhamel, for defendant.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram PAPINEAU, J.

No. 1818.

Charles S Watson et al. vs. *Archibald Grant.*

HELD:—That a debtor who, having failed to meet his liabilities, gives accommodation notes, knowing his insolvency, buys goods on credit without disclosing these facts to his creditors, and having become insolvent afterward within the meaning of the Insolvency Act of 1875, is presumed to have done so with the intent to defraud his creditors, and must be held to be guilty of fraud and liable to imprisonment for such time as the court may order, not exceeding two years, unless the debt and costs be sooner paid.

PAPINEAU, J.—L'action des demandeurs est basée sur la section 136 de l'acte de faillite de 1875.

D'après cette section de la loi il y a deux causes pour lesquelles on peut demander l'incarcération d'un débiteur. Cette clause dit: 1o. Toute personne qui achète des effets à crédit se sachant ou se croyant incapable de faire honneur à ses engagements, et cachant ce fait à la personne devenant ainsi son créancier, dans l'intention de frauder cette personne, et qui n'aura pas ensuite payé ou fait payer la dette, sera reputée coupable de fraude et passible d'emprisonnement. 2o. Toute personne qui.....sous tout faux prétexte obtient crédit pour le paiement..... du prix de quelques effets ou marchandises dans l'intention de frauder la personne devenant ainsi son créancier.....et qui n'aura pas ensuite payé ou fait payer la dette ainsi encourue sera reputée coupable de fraude et passible d'emprisonnement n'excédant pas deux années.

Le défendeur est poursuivi pour s'être rendu coupable de ces deux cas de fraude.

Il y a deux créances différentes réclamées par les demandeurs, une antérieure au 7 de juillet 1875, mais pour celle-ci dont le montant excède $3,000 il n'est pas prouvé que le défendeur se sachant incapable de faire honneur à ses engagements aurait caché ce fait aux demandeurs dans l'intention de les frauder. Or, sans cette condition, il n'y a pas d'action contre le défendeur pour la somme par lui due et qui se trouvait déjà réclamée judiciairement dans l'instance en liquidation forcé prise par les demandeurs contre le défendeur. Ce n'est qu'à raison de la fraude pratiquée par le débiteur qu'il y a ouverture au droit exceptionnel d'action créé par la section 136, droit qui existe même après réclamation en justice et j'oserais dire même après que le créancier aurait reçu un dividende sur sa créance originaire en vertu d'autres procédés sous l'acte de faillite. Cette action est une action pénale exercée devant un tribunal civil pour punir la fraude et réparer la perte qui peut en résulter au créancier.

Le défendeur est aussi poursuivi pour avoir, sous de faux prétextes, obtenu terme de crédit pour le paiement du prix des effets ou marchandises qu'il avait achetés dans le temps qui s'est écoulé depuis le commencement de septembre 1874 au 15 de mai 1875; mais les demandeurs n'ont pas prouvé les faux prétextes qu'ils allèguent avoir été donnés par le défendeur pour obtenir frauduleusement les délais qu'ils lui ont accordés.

La preuve qu'il a acheté des marchandises, au montant de $851.83 dans le

cours d'octobre et novembre 1875, avec l'intention frauduleuse et les autres conditions requises pour le rendre passible d'emprisonnement, en vertu de la section 136, est parfaite contre le défendeur et je n'ai aucune hésitation à lui appliquer la peine portée contre lui par cette loi.

The following is the judgment of the Court.

Considérant que les demandeurs ont prouvé partiellement les principaux allégués de leur déclaration;

Considérant qu'il est prouvé spécialement qu'à la date du 7 de juillet 1875, et à la date du 20 d'octobre 1875, le défendeur était endetté envers les demandeurs en une somme excédant trois mille piastres; considérant qu'il est prouvé que le défendeur se croyait alors et se savait incapable de faire honneur à ses engagements; et qu'il a depuis continué d'être incapable de faire honneur à ses engagements, jusqu'au temps où il a été mis sous l'opération de la loi de faillite de 1875, en vertu d'un bref en liquidation forcée, en février mil huit cent soixante seize; considérant qu'il est prouvé que le défendeur avait à la date susdite du 20 d'octobre 1875 accepté pour le profit d'Ireland, Gay & Co, des billets de complaisance (*accommodation notes,*) qui n'étaient pas alors payés: considérant qu'il est prouvé que le dit défendeur était alors et qu'il est devenu depuis responsable en faveur des dits Ireland, Gay & Co. de billets de complaisance qui ont augmenté d'une manière notable son incapacité de faire honneur à ses engagements et qui n'étaient pas encore payés lors de l'institution de cette action: considérant qu'il est prouvé par les aveux même du défendeur qu'il a caché ces faits à ses créanciers et aux demandeurs en particulier; considérant qu'il est prouvé par les aveux du défendeur qu'il savait qu'en acceptant des billets comme susdits et des traites d'Ireland, Gay & Co. pour lesquels il n'avait reçu aucune valeur, il frandait ses créanciers légitimes et que, cependant, après avoir été mis sur ses gardes par un des demandeurs à ce sujet, le défendeur a continué d'en accepter pour un montant considérable, savoir $2.700 à $3,000: considérant qu'il est prouvé que dans le temps où le défendeur se savait ainsi incapable de rencontrer ses engagements et où il continuait d'accepter les billets ou traites de complaisance des dits Ireland, Gay and Co., et pendant qu'il cachait aux demandeurs son incapacité de faire honneur à ses engagements et ses acceptations des billets de complaisance des dits Ireland, Gay & Co., une des principales causes de telle incapacité, le dit défendeur a acheté des demandeurs, à crédit, du vingt d'octobre au vingt six de novembre de l'année mil huit cent soixante et quinze des marchandises au montant de huit cent cinquante une piastres et quatre-vingt trois centins courants, qu'il n'a pas payées depuis; considérant qu'il est prouvé aussi par les aveux du défendeur qu'il n'avait pas entré les dits billets de complaisance dans son livre de billets, mais dans un mémoire séparé; considérant que d'après le mémoire écrit ou transcrit à part, dans son dit livre de billets, relativement à un certain nombre des dits billets de complaisance dont il avait assumé la responsabilité, il est prouvé qu'ils n'y ont pas été entrés régulièrement et à leurs dates respectives, mais que plusieurs de ces billets ou traites y ont été inscrits avant d'autres qui, portant une date antérieure, auraient dû être entrés les premiers; considérant que le défendeur, en faisant un acte qui, de son propre aveu, était sciemment en fraude de ses

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créanciers légitimes, doit être légalement présumé l'avoir fait avec l'intention de frauder ses créanciers; considérant que les irrégularités dans les entrées des dates des dits billets de complaisance, irrégularités dont le défendeur n'a pu donner aucune explication, sont une autre présomption défavorable à la droiture de son intention en la faisant;

La Cour déclare que le défendeur s'est rendu coupable de fraude en achetant à crédit, des dits demandeurs, du vingt d'octobre au vingt-six de novembre mil huit cent soixante quinze les marchandises dont les prix sont contenus dans l'exhibit No. 2 des demandeurs au montant de $851.83, et pour lequel montant le défendeur a fait et signé son billet promissoire, daté à Ottawa le 29 de novembre 1875, payable à quatre mois de sa date à l'ordre des demandeurs pour valeur reçu, sachant qu'il était alors incapable de faire honneur à ses engagements et cachant ce fait aux dits demandeurs dans l'intention de les frauder, et condamne le dit défendeur à payer aux demandeurs la dite somme de $851.83, montant du prix des dites marchandises et du dit billet du vingt-neuf de novembre 1875 avec intérêt au taux de 6 pour cent par an, du 2 de mai 1876, jour d'assignation du défendeur en cette cause et les dépens, taxés à la somme de $114.60. La Cour condamne de plus le défendeur à être emprisonné dans la prison commune de ce district pendant six mois de calendrier à compter du jour où il y sera incarcéré à moins que la dite somme de $851.83 et les intérêts sur icelle à dater du deux de mai 1876, au taux de six pour cent. par an, et les dits dépens ne soient plus tôt payés, desquels dépens distraction est accordée à Messieurs Geoffrion, Rinfret & Archambault, avocats des demandeurs.

Geoffrion, Rinfret & Archambault, for plaintiff.

A. & W. Robertson, for defendant.

(W. S. W.)

SUPERIOR COURT, 1877.

MONTREAL, 10TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 1037.

The Niagara District Mutual Fire Insurance Company vs. *Macfarlane* et al.

HELD:—That an Ontario Insurance Company, though doing business in Montreal, is bound to give security for costs.

The defendants asked for security for costs from the plaintiffs, a body politic and corporate, duly incorporated under the provisions of the act of 6 William 4, Cap. 18, having its head office or chief place of business in the City of St. Catharines, in the Province of Ontario, and having an office and manager thereof in the City of Montreal, and carrying on the business of Mutual Fire Insurance in the said City of Montreal and elsewhere.

C. C. Carter, for defendants, said the plaintiffs were resident in Upper Canada, and an Upper Canada corporation, as appeared by the act of incorporation and amendments.

Edson Kemp, è contra.

The Court granted the motion.

E. Carter, Q.C., for plaintiffs.

C. C. Carter, for defendants.

(J.K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND JUNE, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 167.

REGINA vs. *James Scott.*

HELD:—That an unstamped promise to pay is a valuable security, and, even in the hands of the maker, is such property as to be the subject of larceny.

The prisoner James Scott having been convicted of stealing a valuable security the following case was reserved for the Court of Queen's Bench sitting in appeal and error, by the Hon. Mr. Justice Ramsay, who presided at the trial:—

Prisoner was indicted for stealing a note for the payment and value of $258.33, the property of Archibald McCallum and another. The evidence showed that the promissory note in question was drawn by Archibald McCallum and Charles Reay, and made payable to the prisoner's order. The said note was given by mistake to prisoner, it being supposed that the sum of $258.33 was due him by the drawers instead of a less sum of $175. The mistake being immediately discovered prisoner gave back the note to the drawers, unstamped and unindorsed, in exchange for another note of $175. An opportunity occurring, prisoner afterwards on the same day stole the note, caused it to be stamped, indorsed it, and tried to collect it. He was convicted, and I reserved the following questions for the consideration of the Court:

1. Whether an unstamped promise to pay is a promissory note or a "valuable security." 2. Whether in the hands of the drawers, it was such property as to be the subject of larceny.

DORION, C. J., *dissentiens*:—The defendant was convicted of larceny for having stolen from the makers an unstamped promissory note, before it was issued.

The questions reserved for the consideration of this Court are:

1st. Whether an unstamped promise to pay is a promissory note or a valuable security.

2nd. Whether, in the hands of the drawers, it was such property as to be the subject of larceny.

In England an unstamped note, such as the one stolen by the defendant, would be an absolute nullity, and could not be the subject of larceny as a note. *Rex* v. *Yates*, R. & M., C. C. R. 170; 2 *Russell* 272.

Here the statute allows a *bona fide* holder, in certain cases, to cure the defect by affixing double stamps. A note cannot, therefore, be considered absolutely void although it be not properly stamped, and this may have some influence when considering whether an unstamped note is a valuable security or not. In the present case this question is merged in the more important one, as to whether an ordinary promissory note, not yet issued and still in the hands of the maker, is a valuable security as contemplated by sect. 15 of the Larceny Act, 32 and 33 Vict. c. 21.

This section, leaving out the words which have no application to this case, is as follows: "Whoever steals any valuable security, other than a document of

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"title to lands, is guilty of felony, of the same nature and in the same degree "as if he stole any chattel of like value *with the money due on the security "so stolen or secured thereby and remaining unsatisfied.*"

By section one it is declared that the term valuable security includes any *bill, note or other security for the payment of money, &c., and every such valuable security, where value is material, is deemed to be of value equal to that of such unsatisfied money for the securing or payment of which such valuable security is applicable.*

Therefore, both under the terms of this section and of those of section fifteen, a note considered as a valuable security is only deemed equal in value to the unsatisfied amount of money for the securing or for the payment of which it is applicable. And if there is no amount due upon the note it ceases to have any value as a note or valuable security.

It is a general rule in cases of larceny that the property stolen must be of some value as, "if it be of no value, it is not a subject in respect of which larceny can be committed." (2 *Russell* 344.)

The value must be understood to be value to the owner, and a promissory note cannot, as such, have any value in the hands of the maker, and is not, therefore, a valuable security in contemplation of the Larceny Act. *R.* v. *Clark, Russell and Ryan* 181.

In this last case the defendant was indicted for stealing the notes of a country banker, which had been paid but were re-issuable. In other counts he was indicted for stealing the paper and stamps on which these notes were printed or written, and Grose, J., delivering the opinion of all the judges said: "Their "character and value as promissory notes were certainly extinct at the time "they were stolen; but even in that state they bore about them a capability of "being legally restored to their former character and pristine value. It was "a capability in which these owners had a special interest and property. The "act of re-issuing them would have immediately manifested their value as "papers, for it would have saved their owners the expense of reprinting other "notes, and of purchasing other stamps, to which expense it was proved they "were put, on their being deprived of these papers by the crime of the prisoner. "In what sense or meaning, therefore, can it be said, that these stamped "papers were not the valuable property of their owners? They were, indeed, "only of value to the owners; but it is enough that they were of value to them, "their value as to the rest of the world is immaterial. The judges, therefore, "are of opinion that, to the extent of the price of the paper, the printing and "the stamps, they were valuable property belonging to the prosecutors; and "that the prisoner has been legally convicted."

Legally convicted of what? not of stealing promissory notes, but of stealing the paper and stamps on which the notes were printed, and which were considered not as valuable securities, but as being of intrinsic value to the owners. R. vs. Phipoe, 2 Leach 673; R. vs. Mead, 4 C. & P. 535; R. vs. Bingley, 5 C. & P. 602; R. vs. Vyse, 1 Mood. C. C. 218; and R. vs. Perry, 1 Denison 69, are in the same sense, although the circumstances in each case are somewhat different.

The case of Ranson, decided in 1812, was an indictment under the statute 7

Geo. III. c. 50. sect. 1, against an employee in the Post Office for having secreted a letter containing thirty promissory notes of five pounds each. This act made it a felony to secrete any letter or packet containing *any* promissory *note*, but without noticing the money secured thereby. The statute 2 Geo. II. c. 25 made it felony to steal "any promissory note for the payment of money" and enacts that "it shall be deemed a felony of the same nature and in the same "degree, and with or without benefit of the clergy, in the same manner as it "would have been if the offender had stolen any other goods of like value "*with the money due on such notes, &c., or secured thereby and remaining "unsatisfied.*"

Four of the Judges were of opinion that these two statutes were *in pari materia*, and that the term "promissory note" in each Act was to be taken to mean promissory notes on which the money thereby secured still remained due and unpaid to the holder thereof as mentioned in 2 Geo. II. c. 25. The other seven Judges who heard the case were, however, of opinion that, as the notes contained in the letter properly fell within the description of promissory notes mentioned in the 7 Geo. III. c. 50, the prisoner was rightly convicted. But the majority of the Judges did not say that such notes could have sustained an indictment under 2 Geo. II. c. 25, containing similar provisions to our own statute with regard to *the money due on such notes and still remaining unsatisfied.*

The case of West, 1 *Dearsley & Bell* 109, was an indictment against Frederick West for stealing £95 in money, and against Elizabeth West, his wife, for receiving £5 in money, part of said £95, knowing them to have been stolen. The money stolen consisted in bank notes, and the only question raised was whether bank notes not in actual circulation could be the subject of larceny as money under sect. 18 of 14 & 15 Vict. c. 100, similar to sect. 25 of 32 & 33 Vict. c. 29, of the Dominion Acts, which declare it sufficient to describe bank notes in an indictment as money. The case of Ranson was cited, and the conviction was held right.

Legislation having declared that bank notes were money or were to be treated as money, the case was not susceptible of any other conclusion, but this has nothing to do with an ordinary promissory note for the payment of money which does not come under this exceptional provision relating to bank notes, but under the general provision of sect. 15 of the Larceny Act applicable to valuable securities.

If we now refer to the form of indictment given by Archbold, p. 371, we find it in the very terms of the statute.

"A certain valuable security other than a title to lands, to wit, one bill "of exchange for the payment of ten pounds, the property of J. N., the said sum "of ten pounds secured and payable by and upon the said bill of exchange "*being then due and unsatisfied to the said J. N.*, feloniously did steal and "carry away against the form of the statute."

This confirms the view taken that an ordinary note cannot be a valuable security in the hands of the owner unless it be for securing the payment of the whole or a portion of the sum mentioned on the face of it. In this respect

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no material change has taken place in the law as affecting the present case, since the 2 Geo. II. c. 25; and no precedent can be found since that statute where the note of a private individual, not being a bank note, has been held to be the subject of larceny as a note when taken away from the maker. However desirable it might be that the taking and carrying away of a note under circumstances which, as in this case, might subject the maker to some loss, should be punished, I do not think that, according to English precedents, by which I hold that this court is bound in criminal matters, the verdict can be sustained. I have, however, the misfortune to differ from the majority of the court.

SANBORN, J., also *dissentiens*:—I agree with the Honourable Chief Justice in the observations he has made, and respectfully dissent from the judgment about to be given in this case. Upon the first point, I do not find it necessary to give any opinion, as to the stamp; however, I cannot agree with the contention that our law materially differs from English law on this point. In England, any person paying an unstamped note is liable to a penalty. I believe it is the same under our law, and the rule applicable in England as to the necessity of a note being stamped to be a subject of larceny applies here. However, on the second ground, I can have no doubt, so far as English decisions are concerned. A note made and not delivered is of no value in the maker's hands. He cannot, in any way, make use of it to his advantage. It is an element in larceny that the subject of the larceny must be a thing of value in the hands of the person from whom it is stolen. The case, where this was definitely decided, was Rex *vs.* Walsh, Russell & Ryan, 215, decided in 1812. That decision has been followed ever since, and is recognized in Greaves' Russell, and in the last edition of Archbold as law, still no change of law in England has affected the point as to what is a promissory note. It is founded on principle. A promissory note is not a contract till delivered, and consequently is not a thing of value till delivered. With bank notes it is different; they are money. The bank is responsible to pay gold for those put in circulation. Stealing these deprives the bank of so much money as the bank bill evidences. Our law is not different from the English law on this point. There is an addition to the clause defining a valuable security, to the effect that the value which any note, etc., shall have is that evidenced by the note or document, as the case may be; but it does not in any particular alter the law as to what is a promissory note; and when it assumes the character of a thing of value in the hands of the holder — that we have to discover from English decisions and from general principles. These decisions are founded upon principles, and are valuable as founded in learning and reason, and establishing uniformity in decisions upon a body of law which is the same here as in England. Our Legislature has taken pains to make the great body of our criminal law identical, so far as statute law goes, with that of England, mainly that we might avail ourselves of the decisions in England under the statutes. The common law, as respects crimes, is our law. These decisions are sometimes subtle, but they are founded upon settled rules, or intended to be, and their value as guarantees of the liberty of the subject principally depends upon this fact. If we hold the verdict good, we must depart from the English decisions. I am not prepared to say that cases may not arise where I would not feel bound by

English decisions, on a point of great doubt, and the reason of the law not obtaining now and here. In this case I find no variance in the law, and I find no cause for departing from the law as laid down by these decisions, and I find reason for adhering to them, because they are founded on established rules of law. These rules sometimes produce failure of justice in permitting bad men to escape punishment due to their deserts, but adherence to them is the only security of right in the long run. I would set aside the verdict.

MONK, J., said the point reserved was a very minute one, but was one of very great importance, and the dissent of the two Judges who had just spoken demonstrated that the case had been properly reserved. It had been assumed by the two Judges that the judgment of this Court would be different from that of the English tribunals. He had no doubt that it was laudable to endeavour to follow the examples and precedents of England, and it might be desirable to have as much harmony as possible, but two obstacles presented themselves, he would not say to servile, but to absolute and implicit adherence. There were slight differences between the laws of England and Canada respectively, hence this Court must swerve from English precedent. He had the most profound respect for the precedents of England, and would be among the very first to say if they were precedents precisely in point and not questioned, they should be adhered to. As every one would know there were great discrepancies between the opinions of judges, and sometimes they were so startling as to induce courts even in the colonies to say that they could not be governed by them. At one time twelve judges would decide in one way and at another twelve judges would decide just the contrary, making some of the strangest judicial aberrations on record. These things were calculated to startle a tribunal of inferior minds. His Honour recapitulated the facts of the case, and went on to say that if the note was made it was assumed to have some value. It might possibly have no value in the hands of the maker, but the moment it was stolen and placed in circulation it had a value, and besides the circumstances showed that the *animus furandi* had throughout been present. Putting the stamps on placed this beyond all possibility of doubt. Men could not be allowed to go and steal promissory notes in the belief that they could not be convicted of stealing unstamped notes, which they might subsequently stamp and place in circulation. The majority of the Court were of opinion that the verdict must be maintained.

RAMSAY, J.:—What the prisoner had to make out in this case was that, under our statutes,

1. An unstamped promissory note was not the subject of larceny.

2. A note in the hands of the drawer had no value, and consequently could not be the subject of larceny.

There was a great display of cases said to be applicable to our law as it stands under our statutes. With great confidence we were told that the English law was the same as ours, and that the English cases bind us. It is not perhaps of much importance at the present moment, but I think it may be well to notice an important distinction to be made with regard to the citation of English decisions. In the most unqualified manner I accept as decisive as to the law of England the settled jurisprudence as to the law of England before its introduction into

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this country. From that time the decisions of the courts in England have no authority beyond their reason. That is, they have the same authority with regard to our courts that our courts have to them, and they may be cited here and considered here just as an American decision, by its reason, may be cited in England. In a late volume of Cox, there is an American case reported.

Under this view, which will prevail sooner or later, I may say that the cases cited do not bind us, even if given on laws identical to ours. But they cease to have any authority at all when it is known that the law of England was not the same as ours is now, when these decisions were rendered. To decide otherwise would be to strike our legislation with sterility. I shall shortly advert more particularly to these differences; but, for the moment, let us look at our law as it stands by the light of reason, and subject to the ordinary rules of interpretation.

At common law there can be no doubt that a *chose in action* was not the subject of larceny. This was altered, and now, by our Larceny Act, whosoever steals any "valuable security" is guilty of felony (32 and 33 Vic. c. 21, sect. 15.) Now, a valuable security is defined so as to include a note. Now the simple question appears to me to be, whether a writing promising to pay a sum of money to order is or is not a promissory note, unstamped and before it is due? I maintain that the words of a statute ought primarily to be taken in their common acceptation if it be possible. If so, the definition of a promissory note suffers no sort of difficulty. It is "a written promise for the payment of money absolutely and at all events." (Bayley, p. 1.) Now if we go back to the Statute of Anne, which put promissory notes on a footing with bills of exchange, we find the constituents of a promissory note given. They are "in writing, signed by the party who makes the same, whereby such person promises to pay unto any other person or his order any sum of money therein mentioned." (3 and 4 Anne, Cap. 9). What Scott stole possessed all these qualities. The endorsation is not of the essence of the note, neither is the stamp.

Now, let us turn to the English jurisprudence, and see how far it applies. The first case is R. *v.* Phipoe (2 East), which has been quoted to show that in the hands of the drawer a note is of no value, and cannot be the subject of larceny. In the first place, the Judges decided the case on a different point, and the Judges were not agreed on this point. In the second place, Phipoe's case was decided in 1791. What authority can it have? Our statute, 32 and 33 Vic., was modelled on the 24 and 25 Vic., which in its turn was drawn from 7 and 8 Geo. IV., and the 9 Geo. IV.

The next case is Rex vs. Walsh (R. & R. 215), in which it was decided that a check was of no value in the hands of the drawer, as it formed no part of his goods and chattels. In other words, it was a chose in action. But this was in 1812, fifteen years before the 7 and 8 Geo. IV.

The next case was R. vs. Yates (1 Moody, 170), in which it was held that under the 7 and 8 Geo. IV., a note was not a valuable security, because it should be stamped. This, so far as it is authority, makes for the prisoner. But the same question was raised in 1845 in the case of Reg. vs. Perry (1 Denn., p. 69), but the judges declined to repeat a decision so flagrantly in violation of

terms of the law, and affirmed the conviction on the ground that the prisoner had stolen a piece of paper, which, if not good as a note, was of no value but as a dirty piece of paper.

The last case cited was Reg. vs. Watts, decided in 1854, (6 Cox, 304). It was there held that an unstamped promissory note "was evidence of a chose in action," and not a title, and therefore not the subject of larceny. Parke, B. dissented. This is an ingenious justification of R. vs. Yates; but Mr. Baron Parke dissented from the ruling, and held that it was a valuable security. But if we are to have our decisions on our own statutes hampered by somewhat analogous decisions in England, how are we to deal with the more recent case of Reg. vs. West decided in 1856? (7 Cox, 185.) There it was held that bank notes in the hands of the bank, and not in circulation, could be the subject of larceny. This is exactly the test case suggested by the Chief Justice at the argument. It is perfectly parallel, and the enormity of any other conclusion than that arrived at by the court prevented the judges from reaffirming the principle of the previous decisions. The truth is, the pretention that a promissory note in a man's own hands has no value, and that the paper it is written on has, is about as rational as the older but long exploded doctrine, that an unset diamond was of no intrinsic value to the owner. But we need not pay much respect to these decisions, for our own statute is materially different, and shuts out all question as to whether it includes an unstamped note, which is only evidence of title. It enacts, "And every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery, or transfer, or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security." What we hold is that a promissory note in its totality is a statutory thing, subject to the Larceny Act, and which may be stolen. I am, therefore, of opinion that the verdict should stand.

TESSIER, J., concurred.

The judgment is recorded as follows:—

"After hearing counsel, etc., it is considered and adjudged, etc., that the proceedings had and taken in the said Court are regular, that the ruling of the Judge presiding the said Court of Queen's Bench is correct, and that no reason hath been assigned by and on behalf of the said James Scott sufficient to set aside the conviction on the indictment in this cause. It is therefore ordered and adjudged that the said conviction be and the same is hereby affirmed, and that it do stand in full force and effect."

Conviction affirmed.

T. W. Ritchie, Q.C., for the Crown.
F. J. Keller, for the prisoner.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 11TH JUNE, 1877.

Coram TORRANCE, J.

No. 204.

Joseph vs. *The City of Montreal.*

HELD:—Where the Corporation changes the level of a street as it has actually existed for several years although no grade for such street had been formally determined previously, it is bound to proceed under 37 Vict. cap. 51, sections 176 and 183, to the appointment of commissioners to fix the amount of indemnity to be paid to owners of property aggrieved by the change, the same as in an ordinary case where a level is changed.

This was an application for a writ of mandamus. The petitioner alleged that he had been since 1857 proprietor in possession of a lot of land in the St. Antoine Ward of the City of Montreal, on St. Margaret street; that in the summer of 1874, the City Council caused the level of said street bounding the property of the petitioner in front to be altered and lowered, to the damage of petitioner; that St. Margaret street had been for more than ten years before opened for public use, and been a thoroughfare, and entered in the books of the City and on the plans of the city surveyor as a public highway; that the alteration in the level was ordered by the City Council by a by-law made on the 1st June, 1874; that said alteration of level had damaged petitioner to the extent of $2500; that by 37 Vic. c. 51, s. 123, ss. 37, 41, the City Council had power to alter and change the level of any street, but that the Corporation was bound by s. 183 to indemnify owners aggrieved by such change of level; that when the parties could not agree as to the amount of indemnity, s. 183 provided that the amount of compensation should be fixed by three commissioners to be appointed by the Superior Court, or a judge thereof, according to s. 176 of said Act, upon the petition of the Corporation; that the Corporation had refused to take any steps for the appointment of such commissioners. Whence the prayer for a mandamus addressed to the Corporation, requiring them to take the necessary steps for the appointment of commissioners. The Corporation pleaded that they were not liable for the damages which the petitioner might have experienced, as they merely exercised the powers given them by 37 Vic. c. 51; that before the by-law in question no level or grade had been fixed or determined legally in St. Margaret street, the grade in the said street being until then natural, so that the purport of the said by-law was not to change or alter the level or grade of the street, in which case the petitioners might perhaps have had a claim for indemnity, but the by-law was passed to fix and determine for the first time the level or grade of the street.

PER CURIAM:—37 Vic. c. 51, s. 123, ss. 37, gives the City Council power to make by-laws "to control, regulate, repair, or alter the streets, parks, squares, "bridges, or drains, in the said city, and to protect the same from any encroach- "ment or injury, and to close and discontinue any street in the said city, if "deemed advisable in the interest of the public; to change the level of side- "walks in any street of the said city when the said council shall deem it neces- "sary; saving, however, to any proprietor who may feel aggrieved by such change

"of level in front of his property any remedy he may have therefor against the "said corporation." SS. 41: "To regulate the width of streets in the said "city, and to establish or alter the level of the roadway of any street or high- "way in the said city, when deemed advisable in the interest of the city." S. 176 provides the mode of procedure in expropriation cases, and s. 183 enacts that all the provisions contained in s. 176 with regard to the appointment of commissioners, etc., "shall be and are hereby extended to all cases in which it "shall become necessary to ascertain the amount of compensation to be paid by "the said corporation to any proprietor of real estate or his representatives, for "any damage he may have sustained by reason of any alteration, made by order "of the said council, in the level of any street or sidewalk," etc. The by-law invoked enacts: "That the level of St. Margaret street, between Lagauchetière "and Dorchester streets, shall be and the same is hereby fixed and determined "as follows, viz:" &c., &c. The evidence of George D. Ansley, city surveyor, shows that there are in the office of the Road Department records of the existence of St. Margaret street for the past twelve years, and that previous to 1874 there had been no fixation or determination of the grade or level of the street by the city; but the witness in cross-examination adds, that he has no recollection of the portion of the street in question previous to the time of grading in 1874. We have then the fact of the existence of the street for twelve years, and of the alteration of its level in 1874, and I do not adopt the view of the counsel for the City that until the formal fixation or determination of the level by the city the petitioner has no claim for indemnity. The order for the mandamus will go.

J. S. C. Wurtele, Q. C., for petitioner.

Rouer Roy, Q.C., for defendant.

(J. K.)

CIRCUIT COURT, 1877.

MONTREAL, 3RD OCTOBER, 1877.

Coram TORRANCE, J.

No. 508.

Laframboise et al. vs. *Lajoie*, and *Lauzon* et vir, Opposants.

HELD:—That a wife's property will not be made liable for necessaries supplied to the family without proof of the insolvency of the husband.

Semble:—That such liability should not be declared on an opposition by the wife to a seizure of her movables in execution of a judgment against her husband.

PER CURIAM:—The plaintiff obtained judgment against the defendant for $6, amount of an account for bread supplied to his household. Execution was taken out, and the movables of the household seized. The wife claimed them as her property and produces a marriage contract by which she is separated as to property, and the husband undertakes to pay the expenses of the household. There is no proof of the insolvency of the husband, and at any rate I doubt much whether, supposing his insolvency proved, the wife's property should be made liable, except by a direct action against her.

Mireault, for plaintiff.

T. C. Delorimier, for opposant.

Opposition maintained.

(J. K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND SEPTEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 196.

BÉRARD DIT LEPINE, APPELLANT;

AND

MATHIEU, RESPONDENT.

HELD:—That an obligation taken by a Sheriff from an *adjudicataire*, by which the latter promised to pay the Sheriff the amount of his purchase money with interest, was against public order, and the laws regulating the office of Sheriff, and was, therefore, null.

RAMSAY, J.—This was an action by the respondent, late Sheriff of the District of Richelieu, on a bond or obligation with hypothec for $1,958.33, money lent and interest from 1st July, 1869, to 23rd August, 1869, date of bond, at 6 per cent, from that last date at 8 per cent. It appears $431.22 are claimed for interest and $13:20 for the cost of the deed, enregistration and the addition of an hypothec in another case. The defendant pleaded that he was *adjudicataire* at a sale, and that as a creditor he had a right to retain the price on giving security until the judgment of distribution. There is no question either as to the evidence or as to the right of the appellant to retain the price, if he chose so to do on giving security; but respondent contends that appellant did not do so, but that he desired to pay the price of adjudication, and not having the money to do so, that the sheriff lent him the money and took a personal obligation for it. But the loan so made to appellant was a fiction; appellant said he had paid and the sheriff acknowledged to have received the price of the adjudication without any money passing at all, so that the money the sheriff lent to the appellant was appellant's own money, which had remained in his pocket, if it had an existence at all. The Court below maintained the action, and condemned appellant to pay the interest stipulated in the bond. The reasoning by which the Court below arrived at this conclusion seems to have been that the sheriff might have taken the money from the appellant, and having done so, might immediately have given him back the same money as a loan at interest; that since he could do that he might by a fiction, *brevis manus*, dispense with the payment and lend it him without appellant dispossessing himself of the money, or his even having had it to pay.

It appears to me that this reasoning is radically false. Even if the sheriff had the legal right to lend back to the debtor the money which he, the sheriff, had received, in order to make a profit out of it for himself, substituting his personal responsibility as an equivalent for the substantial deposit in his hands, it is perfectly clear that he had no right to give the debtor a receipt for money which he had not received. In the case of Beaudry and the Mayor, &c., of Montreal, it was held in this Court, reversing a judgment of the Superior Court, that the certificate of the Prothonotary to the effect that the Corporation of Montreal had deposited the necessary funds in a case of expropriation, the fact being that the Corporation had deposited a promissory note instead of the money,

might be attacked by an inscription *en faux*, (17 L. C. R., p. 428). There is then no room for the fiction *brevis manus*. We have an example of that fiction in the rule *datis in solutum est vendere*. There you have all the constituents of sale, save the counting of the money, and there the law says it is a sale. But here we have nothing but a false return for a promised consideration. The consideration appellant was to receive for the interest he was to pay was the right to retain his own money, a right he already possessed under the law. Is such a consideration lawful? If not no action can be maintained upon it. The most obvious kind of illegal exaction consists in a public officer taking a reward for that which he is obliged by his office to do, and this is properly called extortion. Coke says: "Extortion, in its proper sense, is a great misprision, by wresting or unlawfully taking, by any officer, by color of his office, any money or valuable thing from any man, either that is not due or more than is due, or before it be due." (2 Inst. 701.) In this case, it is true, appellant did not ostensibly give his word or obligation to induce the sheriff to perform his duty, but that was the effect of the transaction. In other words, it was a contract passed in order to give a color of legality to that which would have been manifestly illegal, if done directly; as, for instance, if it had been an undertaking to pay interest for the permission to hold the money until the judgment of distribution, and a return, that the money was not paid, but that *adjudicataire* had put in a security bond. If the one be illegal, I don't see how the other can be legal, for I do not see how a false return could mend the matter. The statute of W. 1., cap. [illegible] deals with this very question. (3 Inst. 149.) The commentary of Coke is on the statute, but it is a statute which only adds penalties to the common law. (2 Inst. 210.) On referring to that case we find that the Court would not allow a suit on a special undertaking where there was an unlawful consideration. Of course this case turns on a technicality of the common law which would not be binding upon us if this case came up precisely in the same way, which it does not; but it is cited to show how absolutely the law prohibits the taking of any fee or reward by an officer for the performance of his duty. And this is not questioned in England. Comyn's Dig. Vbo. Officer (H), "So exaction by an officer will be a great misprision; if it be for taking a fee not due, or before it be due, or more than is due; *if it be for any other exaction.*" It appears to me to be idle to say that the Sheriff became his security, and so a consideration was given. The Sheriff has a right to decide what shall be security, if the law be interpreted to mean that the *adjudicataire* creditor must give anything more than his own bond, which is questionable; but he certainly can have no discretion to decide as to his own responsibility. It is incompatible with his office that he should become otherwise responsible than he is by the law which governs his office. I have dealt with the case as though it came under the operation of the public law of England, and this position is possibly correct; but, if it were otherwise, the case would be even more easily disposed of, for where there is no severance between equity and law it is evident that a suit with an unlawful consideration could not be maintained, and it is not less clear that under the public law of France the wrongful taking of fees was unlawful. In fact, the mode in which the law is expressed

Bérard dit Lépine, and Mathieu.

is strikingly identical in Coke and in Bouchel. The latter says: "Concession doncques est sous le prétexte, couleur et titre d'office ou dignité composer avec quelqu'un de faire justice, ou ne la faire, ou la mal faire, et avec lui faire quelque appointment pécuniaire touchant icelle cause." N. Den. V. Epices, p. 729: "Les épices sont dues aux juges ecclésiastiques comme aux juges laïcs, pourvu qu'ils se contentent de les exiger dans les cas autorisés par les lois." The Edict of 1673, Touchant les Epices and Vacations, Art. 1, forbids taking any *droits* beyond those taxed "sous prétexte d'extraits." And art. 29 says that anything given beyond the tax, even though given voluntarily, were liable to the penalty of exaction. In the Parliament of Toulouse there was an arrêt of reglement forbidding even the servants of the officers of justice to take anything voluntarily offered, and subjecting those who contravened the law to humiliating punishments. The Edict of 1673, it will be remembered, was passed to correct an abuse which had sprung up, and which other ordinances had ineffectually endeavoured to check. Jousse deplores the want of success of the Edict of 1673, nevertheless it sets forth the common law not only as to officers of justice but as to all other public officers.

The authority of Bouchel, already cited, covers precisely the case in point, for it includes any money transaction respecting the officer's duty. It is not a question of simulation, it is a question of nullity, and it includes no question of evidence, for the whole transaction, however illegal, is above board, and free from any imputation of unfair dealing. It is an illegal exaction, and not *concussion* in the strict and offensive sense of the word. I think the judgment should be reversed.

The following was the judgment of the Court:—

"La Cour * * * considérant qu'il appert par la preuve faite en cette cause que l'acte d'obligation du 28 août 1869 devant St. Louis, notaire, par lequel l'appelant s'engagea de payer à l'intimé une somme de $1858.33 courant avec intérêt du 27 juillet 1869, n'a été ainsi consentie, que pour dispenser l'appelant, qui s'était rendu adjudicataire à une vente d'immeuble faite par l'intimé, en sa qualité de Shérif du District de Richelieu, le 27 juillet 1869, sur exécution émanée dans une cause de la Banque de Québec contre Alexis Barrette, de payer son prix d'acquisition ou de fournir un cautionnement tel que la loi le requiert en pareil cas, et pour assurer au dit intimé le remboursement des sommes qu'il pourrait être appelé à payer en sa qualité de Shérif par suite de cette transaction, et sans qu'il ait donné alors aucune valeur à l'appelant pour la dite obligation. Et considérant qu'une semblable convention, entre un officier public et un débiteur de deniers ou de sûretés dont la loi exige la remise entre les mains de tel officier, à titre de dépôt, est contraire à l'ordre public et aux lois qui règlent les devoirs de tels officiers, et qu'elle ne peut être considérée comme la cause valable d'une obligation comme celle consentie par l'appelant en faveur de l'intimé;

Mais considérant que l'appelant n'a pas par ses défenses demandé à être déchargé de la dite obligation comme étant entachée de nullité, mais qu'il a seulement demandé le renvoi de l'action en alléguant que l'intimé n'avait payé pour lui que la somme de $676.53, dont il l'avait remboursé;

Et considérant que l'intimé a prouvé qu'outre cette somme de $676.53, il a payé en déposant à son acquit le 24 octobre 1874, entre les mains du trésorier de la Province de Québec la somme de $1181.80, conformément aux dispositions du chapitre 5 de l'acte passé dans la 35e année du règne de Sa Majesté ; Bérard dit Lépine and Mathieu.

Et considérant que d'après la contestation en cette cause, l'intimé a droit de recouvrer de l'appelant ces deux sommes de $676.53, et de $1181.80, avec de plus celle de $10.20, pour coût d'actes et enregistrement d'iceux, ces différentes sommes formant ensemble celle de $1868.53, de laquelle somme il faut déduire celle de huit cents piastres payée par l'appelant, étant le montant de deux transports faits par l'intimé dont l'un à André Chapdeleine, le 18 décembre 1869, pour la somme de $200, et l'autre fait le 21 décembre 1869, à Pierre Rémi Chevallier pour la somme de $350, et à Delle. Elmire Lacroix pour celle de $250, ce qui laisse une balance de $1068.53 ;

Et considérant que l'intimé n'a droit aux intérêts sur cette somme qu'à compter du 24 octobre 1874, date du dépôt qu'il a fait pour l'appelant de la somme de $1181.80, entre les mains du Trésorier de la Province de Québec, et qu'il y a erreur dans le jugement rendu par la Cour Inférieure le 3 mai 1875 ;

Cette Cour casse et infirme le dit Jugement du 3 mai 1875, et procédant à rendre le jugement qu'aurait dû rendre la dite Cour Supérieure, condamne l'appelant à payer à l'intimé la dite somme de $1068.53, avec intérêt à compter du 24 octobre 1874 et les dépens encourus dans la Cour Inférieure, et condamne le dit intimé à payer à l'appelant les frais encourus sur le présent appel.

Judgment of S. C. reversed.

Pagnuelo, Major & Brousseau, for appellant.
Mathieu & Gagnon, for respondent.
(S.B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND SEPTEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 175.

LANGEVIN, APPELLANT;

AND

GROTHÉ ET AL., RESPONDENTS.

HELD:—That the provisions of Sect. 14 of "The Insolvent Act of 1875" do not apply to a creditor who desires to attack the validity of an attachment under the Act, on the ground that his debtor (the insolvent) is not really a trader within the meaning of the Act, and that he is moreover not really insolvent, and, therefore, that such creditor may intervene at any time and contest the proceedings, and that in so doing he does not require to allege that he is an unsecured creditor for an amount exceeding $100.

This was an appeal from a judgment rendered by a judge of the Superior Court at Montreal (RAINVILLE, J.) in a case in insolvency under the Insolvent Act, in which Grothé was plaintiff, Lebeau (one of respondents) was defendant, and the appellant was petitioner, dismissing the appellant's petition.

Langevin and Grothé et al.

This petition was worded as follows:—

"La Requête de Jean-Bte. Langevin, cultivateur de St. Laurent, dans le District de Montréal, expose respectueusement:

Que sur affidavit produit un bref de saisie-arrêt compulsoire a émané en cette cause à la demande du demandeur contre le défendeur sous les dispositions de l'acte de faillite 1875, lequel bref est adressé à C. Beausoleil, écuier, syndic officiel, de la cité de Montréal, lequel sous l'autorité du dit bref a saisi en sa qualité de syndic tous les biens-meubles et effets du dit défendeur, suivant les dispositions du dit acte de faillite;

Qu'avis de l'émanation du dit bref a été publié dans la *Gazette Officielle* de Québec de vendredi dernier 24 Mars courant;

Qu'il est allégué dans le dit affidavit que le défendeur est un commerçant dans le sens du dit acte de faillite;

Qu'il est faux que le dit défendeur soit ou ait été commerçant aux termes du dit acte et qu'il puisse en conséquence bénéficier en aucune manière du dit acte de faillite;

Qu'il est faux que le dit Pierre J. Grothé soit créancier du dit défendeur suivant qu'allégué dans le dit affidavit;

Qu'il est faux que le dit défendeur soit insolvable suivant qu'allégué dans le dit affidavit;

Que le dit Pierre J. Grothé, le demandeur, en faisant le dit affidavit et en prenant les dit procédés, a agi collusoirement avec le dit défendeur et dans le but de frauder le dit requérant et les créanciers du défendeur;

Que les faits allégués dans le dit affidavit sont faux et mal fondés et insuffisants en loi, et que le dit bref de saisie-arrêt compulsoire est illégal, nul et de nul effet et a été émané d'une manière illégale;

Que le requérant est créancier du dit défendeur pour un montant excédant $100, savoir un montant de $140 et les frais d'une action de cette classe.

Pourquoi le requérant conclut à ce que le dit bref soit déclaré avoir été émané illégalement et qu'il soit déclaré illégal, nul et de nul effet ainsi que tous les procédés adoptés en vertu du dit bref, et qu'ordre soit donné au gardien et syndic des biens-meubles et effets du défendeur, savoir à C. Beausolcil, écuier, syndic officiel, d'abandonner et de livrer la possession d'iceux. Le tout avec dépens distraits aux soussignés."

The plaintiff and defendant each filed a *défense en droit* to this petition, to the effect, that it did not appear by the petition that the appellant was a creditor to an amount of not less than $100 beyond the amount of any security which he holds, nor that there existed in the affidavit for the writ any substantial insufficiency.

The following was the judgment so rendered by Mr. Justice Rainville:

"Je, soussigné, un des Honorables Juges de la dite Cour, ayant entendu les parties sur la réponse en droit du défendeur à la Requête du dit pétitionnaire, et sur le tout mûrement délibéré;

Considérant que le pétitionnaire n'a pas le droit de contester la vérité des allégations de l'affidavit produit par le demandeur;

Considérant que le dit pétitionnaire ne fait pas voir par sa Requête qu'il est

créancier du dit défendeur pour un montant de pas moins de $100 en sus de toutes garanties;

Maintient la défense en droit du défendeur à la Requête du dit pétitionnaire Largevin et déboute ce dernier de sa Requête avec dépens."

DORION, CH. J., after reciting the facts, pronounced the following judgment in the name of the Court:

"La Cour.....considérant qu'en vertu de la loi tout créancier dont les droits sont menacés par des poursuites faites contre son débiteur peut intervenir dans ces poursuites pour protéger ses intérêts;

"Et considérant que par sa Requête l'appelant a allégué qu'il était le créancier de Jean Baptiste LeBeau, l'un des intimés, pour une somme excédant $100, et qu'il a de plus allégué que le dit LeBeau, n'était pas commerçant aux termes de l'acte des faillites de 1875, ni insolvable dans le sens du dit acte;

"Et considérant que par ces allégués l'appelant attaquait les procédés du dit Pierre Grothé en faisant émaner le bref de saisie-arrêt compulsoire contre le dit LeBeau, comme étant entachés d'un vice radical en ce que la Cour d'où émanait le dit bref n'avait aucune juridiction pour le faire émaner contre un débiteur qui n'est pas commerçant aux termes du dit acte;

"Et considérant que l'appelant n'était pas tenu d'alléguer qu'il n'avait pas de garanties pour sa créance, mais qu'il pouvait invoquer les moyens dans sa Requête comme son débiteur aurait pu le faire lui-même, et que partant il aurait du être admis à prouver les allégués de sa Requête;

"Et considérant qu'il y a erreur dans les jugements rendus par son Honneur M. le Juge Rainville le 12 Avril, 1876, qui ont maintenu les défenses en droit des dits intimés et renvoyé la Requête de l'appelant;

"Cette Cour casse et annule les dits deux jugements du 12 Avril 1876, et procédant à rendre le jugement qu'aurait dû rendre le dit juge en chambre, renvoie la défense en droit du dit intimé Pierre Grothé avec dépens, tant ceux encourus en cour inférieure que sur le présent appel, et renvoie également la défense en droit du dit intimé Jean Baptiste LeBeau, aussi avec dépens, tant ceux encourus en cour inférieure, que sur le présent appel, et ordonne que le dossier soit transmis à la cour inférieure pour être procédé ainsi que de droit sur la dite Requête et la contestation d'icelle par les dits intimés."

Judgment of Superior Court reversed.

Dugas & Longpré, for appellant.

T. P. Foran, for respondent.

(S.B.)

SUPERIOR COURT, 1877.

MONTREAL, 5TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 1.

In re *James Somerville* et al., PETITIONERS;

AND

The Hon. R. Laflamme, RESPONDENT;

AND

Désiré Girouard, *Mis en cause.*

HELD:—Where the respondent, in answer to a petition contesting his election as member of the House of Commons, makes counter charges against the unsuccessful candidate, who is not a party to the cause, and in whose behalf the seat is not claimed, and prays that he be disqualified, that such petition is an election petition, and must be accompanied by security and all other formalities prescribed by the Dominion Controverted Elections Act, 1874, 37th Vict. chap. 10, sections 8, 9, and 40.

PER CURIAM:—The petitioners, ten in number, presented an election petition against the respondent, praying that his election as member for the county of Jacques Cartier be set aside. The respondent has answered generally to the allegations of the petition, and in the same pleading has made charges of personal corruption against the *mis en cause*, Désiré Girouard, who was not a petitioner, and in this pleading he concludes that the petition should be dismissed, and also that Désiré Girouard be declared disqualified to be a candidate or to hold any office during seven years. This pleading was served only on the attorney of the petitioners and not on Désiré Girouard personally or at his domicile.

The petitioners have made a motion to reject 17 paragraphs of this answer, and also so much of the conclusion as refers to Désiré Girouard: 1st. Because the said Désiré Girouard not being a party to the said election petition, and the seat not being claimed on his behalf, the conduct of the said Désiré Girouard at the said election cannot be inquired into, except by an election petition presented in the manner and form prescribed by the Dominion Controverted Elections Act, 1874, and more particularly as provided for by sections 7, 8, 9 and 40 of the said Act.

Désiré Girouard has also fyled a number of preliminary objections to the answer of respondent so far as it concerns him. Among these objections he says that he cannot be summoned except by the observance of the formalities required by the Act, sections 7 and 8, which have not been observed. *Inter alia*, it was not alleged that Mr. Laflamme was an elector or candidate. Further, the petition was not served as required by s. 40 of the Act. No security was given to Mr. Girouard. The petition was not signed by the petitioner. A copy was not sent to the returning officer, and notice given of the presentation of the petition as required by section 9.

This pleading of the respondent Laflamme, styled "Answer to Petition and Counter Petition," was fyled on the 22nd January.

The respondent Laflamme afterwards, on the 27th January, served another petition upon Désiré Girouard. The service this time was personal, and the petition resembled the first counter petition so far as it concerned Girouard, with the additional allegation that the petitioner Laflamme had been a candidate.

Désiré Girouard has fyled another series of preliminary objections to this second counter petition, alleging, with a few unimportant variations *mutatis mutandis*, the same objections already referred to.

With respect to the first pleading of the respondent Laflamme, the Court will simply remark that the blending of the accusation against Girouard, who was not a petitioner, with the answer to the petitioners is a fatal irregularity. I hold that the petition against Girouard was to all intents an election petition, attended with the most serious consequences to the respondent Girouard if its allegations were proved. It required all the formalities to be observed in a petition against the return of the sitting member. I need only specify as defects the omission to serve upon Désiré Girouard, and the omission of the allegation that the counter petitioner had been a candidate.

These defects do not appear in the second counter petition. But if I am right in holding the petition against D. Girouard to be an election petition, there is here the omission to give the necessary security, the omission to sign the counter petition by the petitioner himself, and the omission to give the necessary notices and publications.

The counsel for the counter petitioner has suggested to me that I should still allow the security to be entered, and give time for that purpose. To this my answer is, that I hold the giving of security to be a condition precedent or contemporaneous with the fyling of the petition.

In the case of Pease v. Norwood, L. R. 4 Com. Pleas, 236, the question of the sufficiency of the security was discussed, and there the petitioners were allowed to give a security in place of that which the Court held to be insufficient.

But a distinction was there made between insufficient security and the total absence of security. In the latter case, which was not before the Court, several judges strongly doubted whether it would be in the power of the Court to help the petitioners. I would further remark that the present proceeding against Désiré Girouard is of the most serious character, involving his civil rights during seven years. It vitally affects his status as a citizen and a British subject. It is not at all defensive on the part of the respondent Laflamme. It does not help his defence in the least degree. It is entirely aggressive. *Certat de lucro captando non de damno vitando.* It is by no means a case in which considerations of equity should weigh with the judge.

On the whole case, I have no hesitation in granting the motion of the petitioners so far as regards all the paragraphs specified in their motion excepting the first. I maintain also the preliminary objections of Désiré Girouard.

The text of the judgment is as follows:—"I, the undersigned judge, having heard the parties as well on the motion of the petitioners as on the preliminary objections of the *mis en cause*, Désiré Girouard, to the first and second counter

James Somerville et al., and The Hon. R. Laflamme, and D. Girouard.

petitions of the respondent, Rodolphe Laflamme, having examined the procedure of record and deliberated;

"Seeing that Désiré Girouard is not a party to the petition of Somerville and others, and hath not been duly summoned to answer the allegations of the respondent in his first counter petition contained;

"Seeing also that the respondent hath not alleged by said first petition that he was a candidate or elector; seeing that neither of the two counter petitions hath been accompanied by the necessary security or been signed by the counter petitioner as required by the statute, do grant said motion as regards the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th paragraphs of the answer of said Rodolphe Laflamme to the said petition of petitioners, and do grant the conclusions of the preliminary objections fyled by said Désiré Girouard, and reject the two several counter petitions of said Honorable Rodolphe Laflamme, and do grant *congé défaut* to the said Désiré Girouard, the whole with costs against the said Rodolphe Laflamme."

Girouard, for self and petitioners.

E. C. Monk, for respondent Laflamme.

(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram JOHNSON, J.

No. 1892.

Elliott vs. *The National Insurance Company.*

By the terms of a policy of insurance the company insured one "L. A. Auger, official assignee," against loss upon goods, etc., contained in a certain store occupied by C. H. Côté as a residence and tailor's store, "loss, if any, payable to the estate of C. H. Côté." Auger was at the time assignee to Côté's estate.

HELD:—1. The above contract of insurance was with Auger personally and not with the estate Côté.

2. Another assignee of Côté's estate being afterwards appointed by the creditors, the above policy did not vest by law in the new assignee, there being no consent of the company endorsed upon the policy, which contained the following condition: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer, or conveyance, or if the policy shall be assigned before a loss without the consent of the company endorsed thereon, &c., then, and in every such case, the policy shall be void."

3. The said policy having been taken by Auger personally to protect himself, his interest expired as soon as the estate was taken out of his hands.

4. That an assignee in such a case ought to disclose what was his interest.

JOHNSON, J. The plaintiff brings the present action in his quality of assignee to the insolvent estate of C. H. Côté, against the defendants, to recover $3,000, being the amount of a policy of insurance effected on the 6th May, 1876, by one Louis A. Auger, and which the declaration alleges to have been so effected by Auger "acting in his quality of official assignee to Côté's estate, and for the benefit and on behalf of the creditors of the said C. H. Côté." The declaration goes on to allege that, by the terms of the policy, "the defendants insured L. A. Auger, official assignee," against loss to that amount upon a stock of tweeds, ready-

made clothing and trimmings, such as are contained in a tailor's store and gentlemen's furnishing store, in a wood building encased with brick, and covered with metal and gravel, situate on the east side of Richelieu street, No. 113, St. Johns, Province of Quebec, occupied by C. H. Côté as a residence and tailor's store, for three months only, (loss, if any, payable to the estate of C. H. Côté.) The assignment made to Auger was on the 1st of May. The policy was effected on the 6th of May. The plaintiff was made assignee by the creditors on the 5th of June; and the fire took place on the 18th of June. The defendants have filed eight pleas, of which the first has been in part, and the third has been wholly, rejected on demurrer. The defendants' pretensions, which have been to that extent overruled, were 1st, that the assignee was incapable of acting, by reason of his not having given security, and not having been authorized to sue; and, secondly, that under the policy, an award of arbitrators was a pre-requisite to the action. The second plea sets up that the policy never formed part of the estate of Côté; and that, even if any interest in the contract was ever vested in Auger, it has never been transferred to the plaintiff, nor been vested in him as assignee; and that, by the conditions of the policy, it was expressly stipulated that if it was assigned before a loss, without the consent of the defendants endorsed on it, it should be void; and that no such consent has been given. I think we must be careful to distinguish here between the insured and the person appointed to receive the money in case of loss. It would be incorrect to say that the policy formed part of the estate; but the contract of the insurer to pay the money to another, in case of loss, might still subsist, and that other, or his representative, might have an action if the insured himself had conformed to the conditions of the contract, and to that extent therefore the assignee might have an interest for the estate. The agreement here was to pay the money, in case of loss, to the creditors of Côté. That would give them the right to get the money if there is a valid insurance with Auger, and he has conformed to the conditions of it; but not otherwise. I do not think we are concerned with the question of the duties and powers of the interim assignee, as to whether it fell within the scope of those duties for the interim assignee to insure without an order of the Court; for the contract of insurance was, in my opinion, with Auger personally. Though he describes himself as an official assignee (which he was,) there is nothing in the terms of the policy to show that he acted as interim assignee to Côté's estate more than to any other. The meaning of his contract was that he insured to secure himself towards the creditors in case of a loss; and the creditors were to get the money if a loss occurred while the contract was in force. Any other construction would appear incorrect in the face of the fact that a payee is named other than the insured, for if the estate itself had been the insured, it would also have been the payee as a matter of course, and without stipulation. Therefore, as regards that part of the 2nd plea, which sets up that the policy formed no part of the estate, I hold it to be immaterial, and I think the plaintiff can exercise the rights of the creditors whatever they may be under this policy, for section 39 of the Insolvent Act is that "the assignee, in his own name as such, shall have the exclusive right to sue for the recovery of all debts due to or claimed by the insolvent, &c., &c.," and if under Auger's contract with

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the insurance company there is anything due to him, it must go to these creditors, and the plaintiff is the person and the only person that can urge their rights. On the other question, however, raised by this plea, I am against the plaintiff; nothing can be more comprehensive for the purposes of this case than the language used in the policy to prevent the risk from being altered without the knowledge of the company, and their acquiescence in writing. Thus: "If the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, or if the policy shall be assigned before a loss, without the consent of the company endorsed thereon, &c., then, and in every such case, the policy shall be void." The pretension of the plaintiff himself is that a change has taken place by a legal process, both in the title and in the possession of the goods insured; but he shows no compliance with the condition without which the policy is void by express stipulation between the parties. The fourth, fifth and sixth pleas set up contraventions of other express stipulations, such as that it was falsely represented at the time of the contract that the place was then in Côté's occupation as his residence, that the contract was with Auger on, or at all events very near the place, and could exercise some sort of supervision over the property insured, and that Auger's interest had ceased at the time of the fire. The seventh plea challenges the preliminary proof. The eighth sets up a condition that there was no organized fire department. Only three-fourths of the amount insured should be exigible under any circumstances. Under the view I have taken of the nature of Auger's interest, it had of course entirely ceased on the 18th of June, the time of the fire, for, being liable only to the creditors, and having insured in his own person to protect himself, and the creditors having never insured at all, his interest expired with his liability, that is when the plaintiff took the estate out of his hands. So that, besides the breach of the condition alleged under the second plea, this ground of want of interest, which is urged under the 6th plea, is also maintained. Auger clearly had the insurable interest at the time of the contract; but that interest being other than the entire and sole ownership, it ought to have been disclosed. There is nothing in the policy that gives the right information that the property insured was an insolvent estate; and the principle is well known, and is indeed specifically enounced in art. 2570 C. C., that representations not contained in the policy nor made a part of it, are not admitted to control its construction or effect. Therefore, Auger did not, in fact, properly disclose what was his interest. Again, there can be no doubt that there was a very material change as far the mere increase of the risk was concerned. Auger lived on the other side of the bridge, and, as the insurer, may have been fairly considered to have lived on the spot; while Elliott, who is supposed to stand in Auger's shoes, was a clerk in Montreal. But I do not enter at length on these other points, because it will be sufficient to base the judgment of the Court on the grounds urged by the second and the sixth pleas.

The action is therefore dismissed with costs.

Davidson & Cushing, for plaintiff.

Lunn & Davidson, for defendant.

(J. L. M.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 15TH JUNE, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

NOS. 165, 166, AND 167.

REGINA vs. *Glass*; REGINA vs. *Bain*; and REGINA vs. *Scott*.

HELD:—That it is not necessary that the prisoner should be present at the hearing of a reserved case.*

At the hearing of the reserved cases enumerated above, it was suggested by counsel that the prisoners should be present. The Court, having taken time to consider the question, the following judgment was rendered:

RAMSAY, J., *dissentiens*:—The prisoners in these cases were not bailed, pending the adjudication of the cases reserved, but it has become a question whether they should be present during the argument. Our statute, after stating what criminal cases should be reserved and [illegible] be reserved, goes on to give jurisdiction to this Court sitting in [illegible] error in these words: "The said Court of Queen's Bench shall have [illegible] power and authority at any sitting thereof on the Appeal side, after the receipt of such case, *to hear and finally determine every question therein*, etc." (C.S.L.C., cap. 77, s. 58, 2.) The duty to *hear* is enjoined by the very words of the Act under which we sit, and this appears to me to be conclusive if there was any doubt as to the obligation at common law, nothing being said in the statute. It will probably be said that this is a mere extension of the old reservation for the consideration of the judges before the passing of the 11 & 12 Vict., cap. 78, and that the prisoner never was present at these hearings. But the reason for that is plain, the opinion of the judges then had no legal effect. It was merely a consultation among themselves as to whether they would recommend a pardon. The decision of the Court now is a final determination as to what shall be done in the case. The prisoner's life or liberty depends on the judgment. You might just as well think of trying an accused man in his absence, and this cannot be done in felonies even where the prisoner is at large, and his absence [illegible] to his own fault. In misdemeanors where another rule prevails, and [illegible] the accused may be tried in his absence, did any one ever hear of a misdemeanant being tried while locked up in jail? It has been said that the prisoner is not brought up in England. This is a statement I am unable to contradict; but, as no English authority has been quoted on the point, I may be permitted to question the correctness of the statement. So far as I know, the right of the imprisoned defendant to be present has never been raised in England. If it had been decided there that his presence was not necessary, I should not consider the decision conclusive, for the Act 11 & 12 Victoria has words which are not to be found in our Act. Section 3 of the English Act is in these words: "the judgment or judgments of the said justices and barons shall be delivered in open Court, after hearing counsel or the parties, *in case the prosecutor or the person convicted*

*Scott and Glass had been convicted of felony and were in gaol. The conviction against Bain was for a misdemeanor, and he was out on bail. (J. K.)

Regina vs. Glass; vs. Bain; and vs. Scott.

shall think it fit that the case shall be argued, in like manner as the judgments of the Superior Courts of common law at Westminster are now delivered." There is, therefore, room for a distinction under the English Act which our Act does not sanction.

There remain only the questions of convenience and our own practice. I am told that we have decided cases in the absence of a prisoner. If I have joined in any such illegality it is unintentionally, and because it was not brought to my knowledge that the accused was not at large. In Deery's case where I knew the person convicted was not bailed I immediately made the objection, and he was brought up in custody. As to the inconvenience, it is the feeblest of all arguments if it be used to dispense with the law.*

MONK, J., also *dissentiens*, had always understood that in cases of treason and felony, where any point was discussed before the Court, involving the life or liberty of the accused, it was necessary that he should be present. His Honor found nothing in the law or in the practice which had modified that rule, and it might be a dangerous innovation to allow a contrary rule to be adopted. Not only had that been the prevailing opinion, but there had been cases in which it was held that the parties should be present, particularly in felonies. He remembered that it had been so held by Mr. Justice Day, and by the late Mr. Justice Aylwin, who was very learned in these matters, and who held, with the greatest strictness, that the prisoner must be present. There might be exceptions to the rule, but His Honor saw no reason to make an exception in this case.

DORION, C. J.—These cases are Crown cases which were reserved by the presiding judge at the last criminal term of this Court. A preliminary question has been raised, as to whether it is necessary that the prisoners, who are confined in the common gaol, should be brought into court to be present at the argument of the reserved case.

Before the Imperial Statute 11 and 12 Vict., c. 78, a case reserved was a mere question submitted by the Judge presiding at the trial to the other Judges for their advice, and, although a judgment was entered on such case, it was considered more in the nature of a consultation between the judges than a regular proceeding in the cause, and the decision of the judges was considered to be the decision of the judge before whom the trial took place. *Archbold Crim. Plead.* 181 to 185. This statute does not seem to have made any change in the practice, but merely to have extended it to cases tried before Quarter Sessions to which it did not apply before. The provisions of the English Act have been adopted here by the 20 Vict., c. 44 embodied in chap. 77 of the Consolidated Statutes of Lower Canada. By sect. 60 it is provided that the prosecutor or the party convicted may be heard by counsel, if they think

* Section 60, cap. 77, C. S. L. C., using the words of the English Act: "In case the prosecutor or the party convicted thinks it fit that the case be argued," adds: "but no notice, appearance, or other form of procedure, except such only, if any, as the court in such case sees fit to direct, shall be requisite." It seems unquestionable that the prisoner has a right to be heard, and if he is to have no notice, it is because he is presumed to be present. It cannot seriously be argued that the "appearance" refers to the appearance of a prisoner in custody. It evidently refers to the appearance of the crown, and to avoid the discharge of the prisoner in default of an appearance by the crown, as on a writ of error.

fit, but that no notice, appearance or other form of procedure shall be requisite.

Regina vs. Glass; vs. Bain; and vs. Scott.

On this point of practice Judge Taschereau, in his valuable work on the Criminal Statutes of Canada, vol. 2, p. 380, says: it has never been the practice in England, Ontario and Quebec to require the presence of a prisoner on the hearing of a reserved case. This observation is made with reference to the case of Reg. vs. Deery, wherein the prisoner had been brought into Court. Deery had been tried for a capital offence, and the order went to bring him into Court, without looking into precedents. Many reserved cases have since been argued before this Court in the absence of the prisoner, and when he was not represented by counsel. The majority of the Court, being of opinion that this is in accordance with the practice in England and that followed by this Court, declares that it is not necessary that the prisoner should be present at the argument.

SANBORN, J., remarked that there could be no question the prisoner had a right to be present during the period of trial, but the reserved case was argued after conviction, and the presumption which existed before the trial as to the prisoner's innocence was reversed. The questions are reserved by the Judge, and the prisoner has no right to suggest what points shall be reserved. He could not gain or lose anything by coming before this Court, and his status was very different from what he occupied at the trial. The question had not been specially raised in our courts, and the Deery case could not be considered a precedent, as the order in that case had been given without deliberation.

TESSIER, J., concurred with the majority.

The judgment is recorded as follows: "After mature deliberation had on the question whether counsel can be heard in this case, it is hereby considered and adjudged that in this case the presence of the prisoner is not required."

T. W. Ritchie, Q.C., for the Crown, in Scott and Glass cases.
Macmaster, for Crown, in Bain case.
Terrill, for Glass.
E. Carter, Q.C., for Bain.
F. J. Keller, for Scott.

(J.K.)

COUR SUPÉRIEURE, 1877.

MONTREAL, 4 OCTOBRE, 1877.

Coram DORION, J.

No. 682.

Julie Delbar vs. *Alphonse Landa.*

JUGE:— Que nonobstant les dispositions de l'art. 189, du Code de Procédure, il est permis au défendeur d'attaquer les réponses spéciales de la demanderesse, au moyen d'une motion signifiée après l'expiration des huit jours requis par cet article pour la production des répliques ou de *toute autre pièce de plaidoirie* nécessaire pour lier la contestation.

L'action en cette cause est fondée sur un billet promissoire.

Le défendeur répond à cette action, par l'exception suivante, accompagnée de son affidavit:—

Delbar vs. Landa.

Que le dit billet lors de sa confection, n'a pas été revêtu par le faiseur des timbres requis par la loi et que le jour où le dit défendeur a signé le dit billet, il n'a pas été par lui estampillé, et qu'il ne l'a pas non plus été en sa présence, par la demanderesse, à qui le dit billet a été remis.

A cette exception, la demanderesse répond spécialement :—

1o. Que si le timbre en question n'a pas été apposé au dit billet par le défendeur lui-même, il l'a été avec le même effet, par la demanderesse, à qui la loi ne défendait pas de l'apposer pour le dit défendeur et en son lieu et place ; que le Trésor au profit de qui le droit a été ainsi payé, n'en a souffert aucun préjudice, et que le but de la loi a été atteint de la même manière que si le dit timbre eût été apposé par le défendeur lui-même.

2o. Que la créance sur laquelle est fondée l'action en cette cause, savoir, le prêt de la somme de cent piastres, fait comptant, en espèces, par la demanderesse au défendeur, existe indépendamment du dit billet, qui n'a été consenti que dans le but de faciliter la preuve de ce prêt.

3o. Que le défendeur doit bien et légitimement à la demanderesse, la dite somme de cent piastres, et intérêt sur icelle tel qu'allégué dans la dite action.

4o. Qu'en supposant que le dit billet manquât de quelque formalité, ce que nie expressément la demanderesse, cette informalité supposée ne pourrait avoir l'effet d'éteindre la dite créance et d'acquitter le défendeur.

Cette réponse spéciale fut produite le 11 septembre et le 20, c'est-à-dire neuf jours plus tard, le dit défendeur y répliqua au moyen d'une motion par laquelle il demande, pour les raisons y énoncées, que les trois dernières allégations de la dite réponse spéciale soient retranchées de cette réponse et rejetées du dossier.

La demanderesse résista à cette motion, et lors de l'argument, fit valoir, comme raisons péremptoires, à l'encontre de la dite motion, que sa réponse spéciale avait été produite le 11 septembre ; que la motion du défendeur aurait dû être signifiée dans les huit jours de la production de cette réponse spéciale, attendu qu'elle tenait lieu de réplique à icelle ; que le défendeur n'avait que jusqu'au 19 septembre inclusivement, c'est-à-dire huit jours francs, pour y répliquer ou autrement l'attaquer ; qu'après le 19, la contestation était liée de plein droit sur cette réponse et le défendeur forclos de l'attaquer, à moins d'une permission spéciale du tribunal, chose qui n'existait pas, et elle demandait, pour ces raisons, le renvoi de la motion.

Au soutien de ses prétentions, elle cita les articles 139 et 140 du Code de Procédure qui se lisent comme suit :

Art. 139 :—" Semblable délai de huit jours, est accordé pour la production de *toute autre pièce de plaidoirie* nécessaire pour lier la contestation."

Art. 140 :—" Après l'expiration de ces délais, la partie en défaut de produire *est de plein droit forclose* de le faire sans le consentement de la partie adverse, ou la permission du tribunal."

Le 4 octobre, la motion du défendeur fut accordé avec dépens.

Motion accordée.

J. G. D'Amour, procureur de la demanderesse.

Prévost & Préfontaine, procureurs du défendeur.

(J. G. D.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 16TH MARCH, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 82.

THOMAS CRAMP, (*Plaintiff below,*) APPELLANT;

AND

THE MAYOR ET AL., OF MONTREAL, (*Defendants below,*) RESPONDENTS.

HELD:—That the City of Montreal will not be compelled to dispossess itself of documents forming part of the archives of the city in order that the same may be filed as evidence in a cause.

SANBORN, J.:—This is a motion for leave to appeal from a judgment rendered by the Superior Court at Montreal on the 2nd day of November, 1876, reversing a ruling at *enquête*.*

It seems that in cause pending in the Superior Court, a *subpœna duces tecum* was served upon Charles Glackmeyer, clerk of the city of Montreal, ordering him to produce certain records and documents of the City Council relating to matters in issue in the cause.

A copy of the subpœna has not been produced with the present motion, but it appears that the document sought for formed part of the archives of the Council. Mr. Glackmeyer, when before the Court, was requested to produce the documents, and objected to do so on the ground that he could not dissezize himself of these documents which formed part of the archives and records of the city. The objection was also more formally made by the counsel for the defendants on the ground that the *subpœna duces tecum* did not definitely point out the documents required, and that the law did not require or permit the production of such documents, except for the purpose of proving a *faux*, and that the public interest requires them to be kept at the office of the City Council.

This objection was rejected. The Court revising reversed this ruling. The present motion asks leave to appeal from this judgment in order to its reversal, and that the clerk may be ordered to produce the documents.

Under the City Charter 14 and 15 Vict. c. 128, section 50, it is provided that copies of any documents of the records or archives of the city may be authenticated by the signature of the proper officers, and become *primâ facie* evidence in all Courts of Justice.

By the same section it is provided that any elector may have access to all the records on payment of one shilling. This presumes them at all times at the office, ready for inspection there.

In this case, the plaintiff directs his enquiry to no particular thing. He cannot be permitted the production of all the documents of record, or all of a class of documents, to see what he can find. He cannot by this means *fish* for evidence. He

* Vide 20 L. C. Jurist, 217. (Reporter's note.)

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must avail himself of the power given by the law to inspect the records at the office, and to demand such of them as he requires, and it seems contemplated as a rule that he should provide himself with copies. Doubtless there may be cases when, for certain specific purposes, documents may be ordered to be produced to verify peculiarities about them not disclosed by a mere copy, or to prove their falsity or the order and relation which they bear to their proceedings; but it is not by an order of general character on the clerk to produce a large portion of the city archives, with the hope of finding something, but with no definite object in view.

On another ground the judgment would necessarily be confirmed if appealed. The clerk has no power over these records and documents, except as the servant of the Council to keep them in the office of the Council. Any order that could be given must be given against the Council or the Corporation. Cases similar on this point have been frequently decided in the New York Courts.

Bank of Utica vs. Hilliard, 5 Cow. 153; Lafarge vs. Lafarge M. Co., 14 Harwood 126; Opdyke vs. Marble, 44 Barbour 64.

The appeal could not be maintained, and the Court does not grant an appeal when it has no doubt as to the correctness of the judgment.

E. Barnard, for Cramp.

Motion rejected.

R. Roy, Q. C., for the City of Montreal.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 13TH MARCH, 1877.

Coram TORRANCE, J.

No. 1824.

Delisle vs. *Valade.*

HELD:—Where a person to whom a judicial adviser had been appointed carried on business as a grocer, and signed a promissory note, without the assistance of his adviser, for goods sold and delivered to him, and such act was not beyond the limits of the appointment of the adviser, that the note was valid.

The action was to recover the amount of a promissory note signed by the defendant. The defendant pleaded that he had a *conseil judiciaire* whose appointment had been duly published, and that his signature to the note was *ultra vires*. At the trial the plaintiff proved that the consideration of the note was goods sold and delivered to the defendant, who, like the plaintiff, carried on the business of a grocer.

Dugas, for the plaintiff, cited C. C. 351; 2 Toull. p. 483; 1 Pig. p. 83, §. 2; Bioche vo. Conseil Judiciaire, § 23, p. 526.

Augé, for the defendant, relied upon the nomination of the conseil judiciaire.

PER CURIAM:—Looking at the circumstances of this indebtedness, and considering that the act of the defendant in signing this note has not gone beyond the limits laid down by the appointment of the judicial adviser, the conclusion of the Court is to overrule the plea of the defendant, and give plaintiff judgment for the amount of his demand.

Dugas, for plaintiff.

Augé, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 2ND FEBRUARY, 1877.

Coram TORRANCE, J.

No. 879.

Symons vs. *Kelly* et al.

HELD:—Where a donation was made by marriage contract from the husband to the wife of a sum of money to be applied to the purchase of household furniture for their joint use, the death of the husband before the donation was so applied did not exempt the husband's estate from liability for the amount thereof.

The plaintiff was the widow of the late John Patrick Kelly, advocate, of Montreal. She claimed from the defendants, John Kelly, usufructuary legatee under the will of her late husband, and Antoine Lamontagne, tutor *ad hoc* to the minor children of John Kelly, the sum of $9,000, namely $5,000 under her marriage contract with her late husband, and $4,000 under the will.

The declaration referred to an agreement made between plaintiff and defendants, by which she agreed to take from the defendants an annual sum of $900 in lieu of the said sum of $9000, payable quarterly, with the proviso that on the default of the defendants to make two quarterly payments, the claim of the plaintiff should revive for the payment of $9,000.

The plea of the defendants set forth the words of the donation in the marriage contract in the following words: "Said John Patrick Kelly hereby makes "donation *entre vifs* to said Miss Annie Ashe Symons, accepting thereof of "the sum of $5,000, which shall be payable on demand, and which shall be "applied by said Miss Annie Ashe Symons to buy and purchase household "furniture and moveable property, which shall be used by the said parties "during their intended marriage; but should the said Annie Ashe Symons "depart this life before said John Patrick Kelly, the present donation of "household furniture and moveable property shall become null, and all said "household furniture and moveable property shall in such case remain the "sole property of the said John Patrick Kelly." The plea goes on to say that plaintiff never having demanded said sum of $5,000, and said sum never having been invested in conformity with the terms of the contract, plaintiff had lost all right to the same.

As to the bequest of $4000, defendants made no difficulty about it, but they said that plaintiff had appropriated to herself effects belonging to the estate of her husband amounting to $1500. The defendants accordingly offering to confess judgment for $4000, prayed that the action be dismissed for any other sum, and in any case that $1500 be deducted from said sum of $5000 in the of the Court allowing the claim for $5000 under the marriage contract.

PER CURIAM:—The Court has no difficulty about this case. The donation to Mrs. Kelly was absolute in its terms with two qualifications and no more. The money was to be applied to the purchase of furniture of which John P. Kelly was to have the enjoyment during the marriage, and further, at the termination of the marriage by plaintiff's death, if so terminated, then the donation became

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null. [illegible] other events it was absolute to the plaintiff. John P. Kelly has pre-de[illegible], and the plaintiff is entitled to the donation. It is further to be remarked that by the *compromis* referred to in the declaration and plea, the validity of the claim of the plaintiff for the $5000 is admitted in unqualified terms. With regard to the offset pleaded by the defendant to the amount of $150, the only evidence is that of the plaintiff herself, who has frankly admitted the appropriation of a few small articles amounting in all to the value of $32. With this deduction, the plaintiff will have judgment.

I. Wotherspoon, for plaintiff.

J. J. Curran, Q. C., for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 15TH FEBRUARY, 1877.

Coram TORRANCE, J.

No. 986.

Osborne et al. vs. *Nitsch*; and *Nitsch*, petitioner.

HELD:—That the omission to allege in an affidavit for *saisie-arrêt* before judgment under Art. C. C. P., that the defendant "is secreting" his property, or (in the case of a trader alleged to be insolvent) "that he still carries on his business," is fatal.

The plaintiffs issued a *saisie-arrêt* before judgment against the defendant, to secure the payment of a claim for $401.63. The defendant petitioned to be discharged from the seizure on the ground of insufficiency of the affidavit among other reasons. The affidavit contained these allegations: "That said defendant "has opened business in the city of Montreal under the name and style of "William Nitsch and Company, &c.

"That the said defendant has made away with and secreted his estate, goods "and effects with the intention of defrauding his creditors in general.

"That, moreover, defendant is notoriously insolvent, and has refused to "arrange with his creditors, and deponent saith that without the benefit of a writ "of seizure, *saisie-arrêt*, &c."

The defendant contended that the affidavit was defective, inasmuch as it did not allege that defendant "*is secreting*," or "that he still carries on his business," in the words of the Code.

The Court granted the petition.

F. Keller, for plaintiff.

Archibald, for defendant.

(J. K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 18TH SEPTEMBER, 1877.

Coram DORION, C.J., MONK, J., RAMSAY, J., and TESSIER, J.

No. 67.

ORLEN PARKER,

(*Defendant in the Court below,*)

APPELLANT;

AND

WILLIAM L. FELTON,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—1. That the production of a registrar's certificate, showing that mortgages are registered against the property purchased, which mortgages do not appear to have been discharged, is sufficient to support a plea of fear of *trouble*, under Art. 1525 C.C.

2. That in such case the balance of purchase money which the buyer has yet to pay on the property is the only amount for which he can claim security.

The appellant Parker purchased from the respondent Felton about fifty acres of land, being a portion of a larger property which belonged to the latter. Parker took possession, and made several payments on account of the purchase money. Subsequently, he ascertained that the piece of land which he had bought was subject to a mortgage in favor of the Trust and Loan Company, which had been established on the whole property prior to the sale, and when the next instalment became payable under the deed, he declined to pay, on the ground that he had just cause to fear that he would be disturbed by reason of the mortgage.

The respondent did nothing towards removing the encumbrance, but instituted the present action.

The appellant, setting up the facts, and assuming that he could not be compelled to pay until the respondent caused the trouble to cease or gave security, asked that the respondent's action be dismissed.

The Court below rendered judgment in favor of respondent, because it found no legal proof of the existence of the mortgage.

The proof adduced by the appellant to establish the encumbrance or *trouble*, and to show the grounds of his fear of trouble, was the registrar's certificate.

Mr. Justice Doherty, in rendering judgment, said that, though the Court was bound to take the registrar's certificate as establishing that there were such and such entries in his books, it could not accept it as any further proof, and that the registrar was not competent to declare whether a certain instrument was a mortgage or not.

It was on this question that the case came before the Court of Appeals.

Ives & Brown for appellant:—

The registrar's certificate in this cause produced by appellant is formal, duly executed and sealed, and on the face of it shows that the land in question

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was, at the time of the sale to the appellant, and is still, encumbered and mortgaged to an extent of over $4,000.

Does or does not this certificate make sufficient proof that there is *trouble* and encumbrance on said land?

Appellant submits it is the best proof, and he submits further that the production of an ordinary notarial copy of the deed of mortgage (and in many cases no copy at all could be produced by third parties, as in cases of deeds *sous seing privé*), would make no legal proof of the *present* existence of any *trouble* or encumbrance. The question of the authenticity of a registrar's certificate is plainly determined by a reference to the following authorities.

Article 1207 of the Civil Code declares what writings are authentic, among others mentions "official copies and extracts of and from the books and writings above mentioned, *certificates* and all other writings executed or attested in Lower Canada, &c." Now does this certificate come within the scope of this article, and is or is not the granting of such certificates especially a part of the official duty of a registrar?

Art. 2177 settles this point, and shows that it is one of the principal parts of his duty, and so important is it considered that the registrar is liable in damages for false entries or omissions in such certificates. See Montizambert and Talbot dit Gervais, Q.B., 10 L. C. R., p. 269; and Dorion *vs.* Robertson, S.C., 15 L.C. R., p. 459. See on this point also C. S. L. C. cap. 37, secs. 44 and 82.

Moreover the registrar's certificate is that on which the sheriffs and prothonotaries base their returns and reports in matters connected with the sale of real estate, and what is more worthy of notice in this particular case is, that article 1535 of the Civil Code upon which the plea is based is taken from cap. 36, sec. 31, C. S. L. C., entitled, "an Act respecting confirmation of titles, the "discharge of incumbrances on real estate by sheriff's sales or licitation, and "*the rights of purchasers fearing trouble.*"

Section 19, sub-sec. 2, of this chapter specially declares that the registrar's certificate *shall* be *prima facie* evidence of the facts therein mentioned, and would infer that in cases of this nature the registrar's certificate is *the* proof required.

DORION, C. J.—This action is for $240, balance of $600, being the price of a lot of land which the respondent sold to the appellant. By his plea the appellant alleges that the property sold is mortgaged to the Trust and Loan Co. of Upper Canada for $4,100, as appears by the registrar's certificate which he produces; that he has notified this mortgage to the respondent before the demand, and he prays that the action be dismissed. The Court below, holding that the certificate of registration was not a sufficient proof of *trouble*, and that appellant should have produced the deeds of obligation to establish the existence of the hypothecs complained of, dismissed his plea, and condemned him to pay the amount claimed.

Under Art. 1535, a buyer who has just cause to fear that he will be disturbed in his possession by an hypothecary action may delay the payment of the price until the seller causes the disturbance to cease or gives him security. This

Court has already decided in the case of Shuter & Jobin, 21 L. C. J. 67, that the buyer was not obliged to establish a clear right of action against the property purchased, nor to assume the risk of a law suit. It was sufficient if there appeared a reasonable cause of *trouble*. Now it has been repeatedly held in France that the existence of *inscriptions hypothécaires* was a sufficient cause of *trouble* to entitle the purchaser to retain the price of sale. Sirey, 1826, 2, 17; Dalloz, 1827, 1, 252; Idem, 1827, 1, 322; Dalloz, 1829, 2, 189; Sirey, 1833, 2, 41; 1 Duvergier, Vente, No. 425; 9 Dalloz, Rec. Alp. 449, and this jurisprudence has always been followed here. The cases of Nye & Colville and Dessein & Ross, cited by the respondent, are not applicable. In those cases the plaintiffs produced copies certified by the registrars to prove sales of real estate, and the Court decided that these copies did not prove the sale. In the present case we do not say that the registrar's certificates establish the existence of mortgages, but simply that they show entries in the registry office, affecting the appellant's property, which it is the duty of the respondent to have removed.

It is contended by the respondent that the appellant is not exposed to be troubled because a sufficient portion of the property affected by the mortgages is still in the hands of the respondent. This is no answer. For the creditor can claim the whole of his *hypothèque* on that portion of the land sold to the appellant without following that which remains in the hands of the vendor. It was contended on the authority of Hyde & Dorion that inasmuch as the respondent had not offered to give him security his action should be dismissed. It is a well established rule that although a court cannot grant more than is asked by the parties, yet it can grant less or grant the demand in a modified form. Here the appellant was not entitled to a dismissal of the action pure and simple, but we think he was entitled to an order that the action be dismissed unless the respondent should give him security within a certain delay, and this Court considers that the Superior Court, in accordance with the uniform practice before the Code, should have ordered the respondent to give security within a reasonable delay, and that in default of such security being given within such delay the action should be dismissed.

A question has arisen as to the amount of security the appellant is entitled to. The hypothecs affecting the property amount to $4000. The price of sale was $600, and the balance claimed by the action is $240. Is the respondent bound to give security for the amount of the mortgages, or for the amount of the price of the property, or only for the sum which the appellant is called upon to pay and which the respondent is to receive? The right of a purchaser who is exposed to be disturbed in his possession is to retain in his hands the unpaid portion of his purchase money to the extent of the claims affecting the property. If he has paid any portion of the price he cannot recover it back unless the sale be rescinded. The only security he has against the apprehended *trouble* is the amount of money he still has in his hands. The law enables the vendor to give to the purchaser a security in lieu of the one he holds. This security must be to replace him in the same position in which he would be if he was not called upon to pay, and this is effected by the vendor giving security to refund the amount of money which the purchaser holds as security.

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The majority of the Court following these views, enunciated by 2 Troplong, Vente, No. 618; 1 Duvergier, Vente, No. 427; 2 Dalloz, Rec. Alp. 379, s. 5, and sanctioned by the Court of Cassation, Sirly, 1827, 1, 230, holds that in this case the security should be for [illegible] the amount claimed, and for no more.

It is manifest that the [illegible] deed has no legal effect whatever. The subsections 3 and 4 of the [illegible] section, chapter 37, C. S. L. C., page 347-8, establish that a certificate by the registrar written upon any document requiring registration is a proof of the registration of such document, but taken alone it forms no proof even of such registration, and manifestly can have no effect in proving the existence or execution of mortgage, or any other deed affecting real property. If there was any [illegible] which the best legal evidence of the existence of a mortgage would be imperatively required it is precisely the case now presented, where the defendant seeks not security against any possible trouble, but demands the absolute dismissal of plaintiff's action.

The existence of any hypothec, whether legal, judicial or conventional, clearly cannot be proved by so lean and meagre a document, when a formal and complete copy of the pretended hypothec, certified by the registrar to be a true copy of a document registered in his books, would be insufficient to prove anything beyond the mere fact of registration—see Nye, appellant, and Colville, respondent, reported in 3 L. C. Reports, p. 97, as decided by Justices Stuart, Rolland, Panet and Aylwin; see also Dessein vs. Ross, 9 Rev. de Lég. 58.—It is manifest that this certificate, if it deserves that name, does not come within the provisions of the following Articles of the Civil Code: Nos. 1[illegible] 1216, 1218, 2042.

The judgment is recorded as follows:—

"The Court, etc.,

"Considering that under Article 1535 of the Civil Code of Lower Canada a buyer disturbed in his possession or having just cause to fear that he will be disturbed, by an action hypothecary or in revendication, may delay the payment of the price until the seller causes such disturbance to cease or gives security, unless there is a stipulation to the contrary;

"And considering that by the certificate of the registrar for the Registration Division of Sherbrooke, wherein the property mentioned in the pleadings in this cause is situated, it appears that a mortgage for $3,500 dated the 21st day of December, 1871, has been registered in the said registry office on the 29th day of December, 1871, against the said property, and also another mortgage for $600, dated 9th day of July, 18[illegible] and registered in the said registry office on the 10th day of July, 18[illegible]2, the said mortgages being from William L. Felton to the Trust and Loan Company of Upper Canada;

"And considering that such registration doth constitute for the appellant a just cause for fearing that he the appellant will be disturbed in the possession of the property he has acquired from the respondent, and there being no stipulation to the contrary in the deed of sale, doth justify the said Appellant in his refusal to pay the balance of the purchase money claimed by this action until the respondent shall have caused the said trouble to cease by obtaining a

discharge or radiation of the entries made in the said registry office of the said two mortgages or shall have given good and sufficient security;

"And considering that the security required by law in such a case is only to the extent of the portion of the price claimed, and which the purchaser is bound to pay;

"And considering that there is error in the judgment rendered by the Superior Court at Sherbrooke on the 6th day of December, 1876;

"This Court doth reverse the said judgment of the 6th day of December, 1876, and, proceeding to render the judgment which the said Superior Court should have rendered, doth order that the respondent shall within three months from the date of this judgment, or within such other delay as upon cause shown the Court below may direct, produce and file in the said cause a regular and proper certificate of the discharge (radiation) of the registration of the said mortgages of the 21st day of December, 1871, and of the 9th day of July, 1872, in favor of the Trust and Loan Company, or give good and sufficient security to the extent of $240, amount in principal due by the appellant to the respondent, that the said appellant shall not be troubled in the possession of the real estate so purchased by the appellant from the respondent, and that, in default of filing such certificate of discharge, or of giving security within the said delay, the cause be adjudicated upon by the Superior Court in due course of law; and this Court doth condemn the respondent to pay to the appellant the costs incurred on the present appeal, reserving to the Superior Court to adjudicate, on rendering the final judgment, on the costs in the Court below."

Ives & Brown, for the appellant.

Felton & Felton, for the respondent.

(J. K.) Judgment reversed.

SUPERIOR COURT, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram JOHNSON, J.

No. 1519.

Perry vs. The Niagara District Mutual Fire Insurance Company.

HELD:—That where it is impossible for the assured to give a detailed statement under oath of his loss, supported by books and vouchers, owing to their being burnt, the condition of the policy requiring such statement will be satisfied by his giving affidavits as to the value of the property lost.

The facts of the case fully appear from the remarks of the learned Judge.

JOHNSON, J:—The plaintiff had insured at the defendants' office his stock, which was a general country stock in trade, at Coteau Landing, for $2,000 for three years from the 31st March, 1876. On the 28th August, 1876, the store containing his stock was totally destroyed by fire; and he brings his action against the insurers for the full amount of the policy. The defendants plead, first, a condition of the policy that persons sustaining loss should forthwith

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give notice; and within thirty days after such loss deliver a particular and detailed account of it, signed by their own hand and verified by their oath and by their books of account and other proper vouchers, which, as the defendants allege, has never been complied with.

2nd. That by the form of application for insurance made by the plaintiff he agreed to all the laws and by-laws regulating the Company, amongst which, the by-law No. 46 and the Ontario Statutes regulating mutual insurance companies specially require notice in writing and verification under oath and by accounts and vouchers within 30 days; and the amount found to be due is then only payable in three months; that the plaintiff has entirely failed to comply with these conditions, but on the 23rd September he sent in his affidavit of the occurrence of the fire, but without any detailed account, although it was often asked for, and that the action which was brought on the 19th December is, therefore, premature.

3rd. The defendants plead that they only insured two-thirds of the actual cash value at the time of the application, and that the plaintiff misrepresented the cash value at double its true amount. By their fourth plea the defendants invoke the Ontario statutes as having the effect of annulling the contract under these circumstances, and, lastly, they plead the general issue. The plaintiff answers these pleas in effect, by saying he conformed to all the conditions and obligations of his contract. That all his books, accounts and papers were destroyed by the fire and that, in fact, he did all that was possible for him to do, and the defendants waived the rest and adjusted the loss, and promised to pay it. The facts, as I understand the effect of the evidence, are very simple. This man's property was totally destroyed, including all the means of verifying precisely by inventories and books of account, the value of the stock; and of course, as a matter of fact, the mode of proof stipulated was not forthcoming. As to the time, though the notice of loss (such as it was) was only seen by the agent on the 23rd of September, that was from no fault or neglect of the plaintiff, who had sent it in time. The nature and sufficiency of the plaintiff's compliance with the conditions of his contract, and the subsequent conduct of the defendants, as tending to admit their liability, raise questions of some importance, no doubt; but upon the whole of the evidence I am with the plaintiff. I must confess, however, that I have always been struck, in the case of mutual insurance companies, by the force of the reasoning of Chief Justice Robinson and Chief Justice Draper, in two well-known cases that were cited here for the defendants. The first was the case of Merritt against the company now defendants (18 U. C. Q. B. Rep., p. 532); and Chief Justice Robinson thus laid down the law:—"No authority has been cited for holding that, where a public statute says an insurance shall be deemed and become void on failure of some stipulation inserted in the statute, such provision can be waived by the consent of the parties, notice, consent, or verbal or tacit acquiescence. On principle, we take it, such a waiver cannot be relied on any more in a court of equity than of law, for courts of equity cannot dispense with what a public Act of Parliament specially requires. The king cannot do it, nor his courts, we take it. These mutual insurances affect great numbers. If this condition can

be waived, why not others? They are for the protection of all who insure, and all who insure their property become members of the company, and liable in respect of all losses upon other insurances. They have, therefore, an interest in the protection provided by the Legislature; and, though the directors represent the members, and can bind them in whatever they do under the authority of the Act, they cannot bind them by anything done without or contrary to such authority. All who are made members by insuring have an interest in the statute being enforced, and there is no implied authority in the directors to waive all or any of the safeguards provided in the Act." The language of Chief Justice Draper in the other case is equally strong and explicit. In the first case, the condition, the violation of which had been pleaded, was the notification and non-endorsement on the policy of another insurance. In the second it was precisely the point here to a certain extent—that is to say, it was the non-furnishing of accounts and vouchers; but, (which is most important to be observed) *in either of those cases*, had the element peculiar to the present one any existence; it was not a question in either of those cases of *force majeure*, as it is in this; it was not a question there as it is here, of the *impossibility* of furnishing more information; but merely of the voluntary neglect to do what was in the power of the assured. Therefore, what we have to do with here is not so much waiver as sufficiency. It surely never could be held under the law of Lower Canada that an insured is to lose the benefit of his policy, if through *force majeure* an exact compliance with its conditions becomes totally impossible. Perry swears in his claim, which was made within the time required, that he cannot give a detailed statement, his books and vouchers being burnt; and he furnishes five affidavits of other parties. I am constrained to say that the proof of loss before me was a reasonable and sufficient proof under the circumstances. Then as to the conduct of the defendants admitting their liability, Chapman was authorized on the 11th of December, 1876, by notarial power of attorney (Plaintiff's Ex. K), "to proceed to settle, and to settle, and finally adjust all claims for all loss or damage by fire in which the said company is now or may hereafter be interested in the Province of Quebec; and finally, for and in the name of the said Niagara D. M. Fire Ass. Co., to execute, sign and perform all and every act, deed or thing needful and expedient." On the 13th of January, Chapman wrote to Perry: "if you will recall the claim, I will adjust and settle claim within 10 days." On the 11th of January, Chapman writes to Duckett: "I also desire to see Mr. Perry of your town, who, I understand, has become disgusted and commenced suit: but I hope he will yet conclude to wait until I can meet him, and see if I cannot pay him his loss to a much better advantage than to collect it by law." Leger, the clerk, swears positively there were no books, vouchers or invoices saved which rendered it possible to make a detailed statement. Giles, the Secretary, is asked:—Did you not give plaintiff to understand more than once that his loss would be settled? and he answers: "Of course." He admits that all the letters received by Perry, in several of which there are important admissions, were laid before the Board, and Delaet, the general agent for the Province, several times offered Perry $1,500. The authorities do not require of course what is im-

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possible in any case; on the contrary, the tenor of authority is to exact good faith of course; but where there is no fraud (and assuredly none has been attempted to be proved here), to be satisfied with a reasonable performance of the conditions. The 16th Wend. R., p. 385, note B., citing the authority of several cases, says:—"The requisitions of the by-laws in regard to conditions to be performed by the insured need not be literally adhered to in cases free from fraud." Phillips, Vol. 2, No. 1812, says:—"The right of the underwriters to require a compliance with these stipulations for preliminary proof may be impliedly waived, temporarily or absolutely, by their silence, their words, or their acts." Sansum's digest, p. 1127, citing Norton *vs.* Renselaer Insurance Company: "All the books and papers of the insured were destroyed by fire. He made a statement in gross of the amount of the loss. Held: it was as particular an account as the nature of the cause would admit." Sansum, p. 1127, citing Hinds *vs.* Schenectady County Mutual Insurance Company (11 N. Y. R. 534) "stipulated: insured shall within 30 days deliver to insurer a particular account of loss verified by oath, and, if required, by his books, papers, &c. Held: the condition was satisfied by as full and accurate an account as the insured, without fraud on his part, was able to furnish, and where his books, papers, and inventories were consumed, his statement, verified on oath, showing the fact, and that the property lost was at least of the value insured, was sufficient." Rust *vs.* The Citizens Insurance Co., 3 Allen 602, it was held that this requirement does not relate to the substance of the contract, but only to the mode or form by which the amount of the liability is to be ascertained. May, p. 579, No. 475, citing a number of cases says:—A general statement of the aggregate value of the property lost has been held to be sufficient excuse for an insufficient particulars account, where, from the loss of the books and the accounts, or for other causes, no better or more detailed statement could be made. Applying these authorities to the circumstances of this case, I give judgment for plaintiff for the amount claimed.

The following is the judgment.

"The Court, etc.,—Considering that plaintiff has proved to the satisfaction of the Court the allegations of his declaration, and that his books, accounts, and vouchers were destroyed by fire along with the property insured, and that, therefore, it was impossible to comply with the by-law No. 46 more fully than he did;

"Considering that no fraud is proved against the plaintiff in this cause, and that in the absence of fraud the requirements of the said by-law need not be literally fulfilled in such case;

"Considering, therefore, that the plaintiff furnished as particular an account of his loss as the nature of the case would admit, and that the defendants by and through their constituted agents, Chapman and Delaet, virtually agreed to adjust and settle the plaintiff's loss, and admitted their liability;

"Considering that the requirement of the said by-law does not relate to the substance of the contract between the parties; but only to the mode or form of showing the loss sustained, doth dismiss the defendants' pleas, firstly, secondly, thirdly, and fourthly pleaded, and doth adjudge and condemn the said defendants

to pay and satisfy to said plaintiff the sum of $2000 currency, amount of the policy of insurance, with interest from the 19th December, 1876, day of service of process, until paid, and costs of suit *distraits* to Messrs. Cross, Lunn & Davidson, attorneys for plaintiff.

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Cross, Lunn & Davidson, for plaintiff.
Devlin & Devlin, for defendant.
(J. L. M.)

Judgment for plaintiff.

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 22ND SEPTEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., ESSIER, J.

No. 136.

BUREAU, APPELLANT;

AND

THE BANK OF B. N. AMERICA, RESPONDENT.

HELD:—That the description of the respondent in the writ of summons, as carrying on "the trade and business of banking in the city of Montreal, in the district of Montreal, and elsewhere," was a sufficient compliance with the requirements of Art. 49 of the Code of C. P.

DORION, CH. J.:—This was an appeal from a judgment of the Superior Court, at St. Johns, in the District of Iberville, rendered on the 17th of March, 1876, dismissing an exception *à la forme*, fyled by appellant, and condemning him to pay respondent the sum of $920.35, besides interest and costs.

The action was brought to recover the amount of a draft on defendant, duly accepted by him and held by plaintiff, under due endorsement.

The defendant fyled an exception *à la forme*, assigning as the only reason in support thereof, that the writ of summons failed to state the place where the plaintiff had its *principal* place of business.

The plaintiff, before answering this exception, demanded a plea to the merits, and the defendant having failed so to plead he was foreclosed, and the case was subsequently inscribed for hearing on the exception, and for judgment on the merits at the same time.

The Honorable Judge who heard the case (Chagnon, J.) considered the exception unfounded and dismissed it, and condemned the defendant on the merits to pay the amount of his acceptance and interest and costs of protest.

The description of the plaintiff in the writ is to the effect that the plaintiff, a body politic and corporate, carried on "the trade and business of banking in "the city of Montreal, in the district of Montreal, and elsewhere."

This Court is unanimously of opinion that this description is sufficient and all that is required by the law and practice of our courts. The appeal will, therefore, be dismissed.

Judgment of S. C. confirmed.

J. S. Messier, for appellant.
Bethune & Bethune, for respondent.
(S. B.)

COURT OF REVIEW, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram JOHNSON, J., TORRANCE, J., DORION, J.

No. 9.

Rolland vs. *The Citizens' Insurance Company.*

HELD:—1. That an insurance of goods described as being in No. 319 St. Paul street will be held to cover the same goods although removed into the premises No. 315 adjoining, if the agent of the Insurance Company at the end of the first year of the Insurance examined the premises and consented to a renewal of the policy.

2. That such a variation does not constitute a new contract, but only a slight change in the old contract approved of by the parties.

3. That the question as to the consent of the Company to such change of the placing of the goods was a matter of fact properly left to the jury.

4. That the jury in giving their opinion, without being expressly asked the question, that the Company had continued the risk after the agent's visit to the premises, and by his not only not making any objection at the time but actually renewing the risk without any increase, did not decide what was matter of law, but only gave this as their reason for finding that the stock that had been insured was lost or damaged, and the jury had a right to give their reason for their finding.

JOHNSON, J.—The verdict of the jury in this case sustains the plaintiff's demand, and the only question is whether it has been rendered contrary to the evidence; for, though the defendants make three separate motions, there is nothing whatever to sustain the motion for judgment *non obstante* nor that for arrest of judgment.

The action is to recover the amount of a policy of insurance of the 16th February, 1867, for one year, and then renewed for another year, "on stock in trade belonging to assured, consisting of boots, shoes, leather, &c., manufactured and not manufactured, and contained in a three-storey house built of stone, and covered with patent roofing, situate and being No. 319 St. Paul street, Montreal, owned and occupied by assured as a manufactory, bounded on both sides by similar buildings."

The plea fyled by the defendants to this action was, first, that there were other insurances on the same goods, and that they were only liable for their share, which they offered; and, secondly, that the goods destroyed were in great part not covered by the policy, because at the time of the fire they were in the next house to that which they had been insured in, viz., in No. 315 instead of No. 319 as stated in the policy. Under this plea, it has been contended for the defendants that the risk had been altered after insurance without their consent, which would appear to be a very different thing from saying the goods had not been originally covered by the policy, because, if the things were originally insured as being in No. 319, they might continue to be insured in the next house if there was notice and consent. It appears that the plaintiff's business when he first insured was carried on in a store having two doors on the street, numbered 319 and 317, and adjoining a similar store with the number 315. During the first year the plaintiff rented the upper part of No. 315, and made a door between it and numbers 319 and 317, moving the greater part of his goods to the other side of the wall. He

closed the communication with the lower storey of 315, so that the door of No. 319 was the only way that access to the goods could be had. If the plaintiff had notified his insurers of the change he had made, they, no doubt, would have had the right of urging, if they had chosen to do so, the augmentation of the risk. He did not do so, however, and if during the first year the fire had taken place, the loss would have been his own, but when the first year was up, he went to renew his insurance, which the agent would not do at the same rate without seeing the place. He accordingly did visit it personally. He examined the stock in the new store room. He satisfied himself that it was a good risk at the same rate, and took it for another year. The entrance to the building was still distinguished by the number 319; only the area of an upper storey had been extended by piercing the wall. Now what could the agent be concerned to have gone down for, but for the purpose of refusing or accepting the risk after inspection? It is not a question of whether there was a new contract that ought to have been declared upon, as the defendants contended, but whether one of the parties was willing to continue the contract already subsisting, but with a slight change which he had the opportunity of verifying, and which he concluded had not been vitiated or substantially altered. He saw this change, whatever it was: there can be no doubt of that; and it was a matter of fact properly left to the jury to say, if under all the circumstances, and after all his explanations, the stock in trade insured included, with his consent, the things afterwards damaged. The jury found (and I cannot say it is against evidence) that it did include these things. It was argued that the jury had found by their third answer what was matter of law. They gave their opinion without being expressly asked the question, that the company had continued the risk after Mr. Muir's visit, and by his not only not making any objection at the time, but actually renewing the risk without any increase, if in his judgment there was any; but this is given as their reason for finding, as they had already done, that the stock that had been insured was lost or damaged; and I do not think it was unfair or improper; nor should I say it was unusual or undesirable for a jury of merchants so to express themselves, upon a matter that must be one of almost every-day practical experience with them. The case of Rolland *vs.* The North British and Mercantile Insurance Company was cited by the defendants, but it had no application. In that case it was held that an insurance of goods described as being in numbers 317 and 319 does not of itself cover goods in 315 adjoining. There, however, there was no notice or consent, no evidence, as there is here, of the extent and meaning put upon the contract by the defendants themselves through their agent. In that case it was an improper finding to say that the goods in 315 had been insured under the policy of itself, without any renewal, or any of the circumstances that distinguish the present case; and a new trial was properly granted. It was also said, for the defendants, that the jury had found a verdict for a loss in a place which, whether insured or not, was not declared upon. The answer is there was no access to this place, but through 319 as declared on; and that taking the plaintiff's money for a renewal of the risk under the circumstances, and after the agent's visit and inspection, which amounted to consent and admission that the risk was not substantially varied,

Rolland vs. The Citizens' Ins. Co.

gives the plaintiff the right to recover under his present declaration. Of course it could never be contended that an insurance company, or any one else, were to be held to a bargain that was never made; but that is plainly different from making a bargain restricted at first to a certain area, and afterwards consenting that it should stand as it was made, though the area was subsequently extended. Then, even apart from the consent to renew,—for call it renewal or consent, or what you please, the agent agreed to take again at the old rate the risk that he went there to ascertain,—it ought to be observed that it was not an insurance on the building but upon the goods; and the number over the door could only be material as showing where these goods were; and it is certain, as has been already mentioned, that the number 315 had been disused and shut off as a way of access to the place where the goods were at the time of the fire. So, upon the case as it stands, the defendant's three motions are dismissed with costs, and the plaintiff has judgment on the verdict in accordance with his motion.

The judgment is as follows:—

The Court here having heard the parties by their counsel respectively, Firstly,—Upon the motion of plaintiff made and fyled on the 22nd of May last past, that the verdict of the jury rendered in this cause on the 25th April, 1877, granting to him, said plaintiff, the amount claimed by the present action, be confirmed by this Court, and that, in consequence, the defendant be condemned to pay the same to said plaintiff, with interest and costs according to the conclusions of his declaration; and, secondly,—upon the three several motions made and fyled by defendants on the said 22nd day of May, 1877, the one, that judgment upon the said verdict of the jury be arrested; the second, that, notwithstanding the said verdict, judgment be entered up and recorded in favor of the company defendants and that the plaintiff's action be dismissed with costs, and the third that a new trial be granted to said defendants in this cause, the whole for the causes and reasons stated in said defendants' three motions: having examined the record and proceedings had in this instance and deliberated; doth reject the said motions of defendants and each of said motions, and doth grant said plaintiff's motion, in consequence doth adjudge and condemn the said defendants to pay and satisfy to said plaintiff the sum of $600 currency of Canada, with interest thereon from the 31st October, 1868, day of service of process, until paid, and with costs of both Courts to said plaintiff, *distraits* to Messrs. Archambault and David, his attorneys.

Judgment for plaintiff.

Archambault & David, for plaintiff.
J. J. C. Abbott, Q.C., for defendants.
(J. L. M.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 15TH MARCH, 1876.

Coram—DORION, C. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 110.

FREDERICK GERIKEN,

(*Defendant in Court below,*)

APPELLANT;

AND

GEORGE H. GRANNIS,

(*Plaintiff in Court below,*)

RESPONDENT.

HELD:—1. An innkeeper is responsible for the effects stolen from a traveller while lodging in his house, where it is not proved that the theft was committed by a stranger and was due to the negligence of the traveller. (C. C. 1814, 1815.)

2. The oath of the traveller is sufficient to prove the loss, as well as the value of the things stolen. (C. C. 1677.)

The judgment appealed from was rendered by the Superior Court, Montreal, (Mackay, J.) 31st March, 1873, condemning the appellant to pay $104.50, being the value of effects stolen from the respondent while lodging at the hotel kept by appellant. The judgment was in these terms:—

"The Court, etc.

"Considering that plaintiff has proved his allegations of declaration sufficiently, and his loss alleged, to the extent to warrant a judgment against defendant, to wit, to the extent of the present judgment, and that though plaintiff has given sixty-five as the number of the room he had in defendant's hotel whereas it really was the number 163, he is not to suffer, the defendant not having been misled:

"Considering the loss suffered by plaintiff to be attributable to want of care by defendant, and not to any neglect or carelessness on the part of the plaintiff, and that defendant has not proved enough to show that he is not responsible for the loss; Considering the evidence of defendant not exact and complete, and not justly representing all the facts essential to the cause; that there are omissions in defendant's proofs, for instance, omission to put before the Court the key that really was in the lock of door 163 on the night of the burglary and larceny in question in this cause, also omission to prove that the bolt alleged to have been upon the door of No. 163 was in working order on the night of the larceny; Considering that upon the pleadings and proofs of record, defendant is liable to pay plaintiff $91 Canada currency for money lost by plaintiff, stolen from him as alleged, and $13.50 said Canada currency, value of two shirt studs stolen from plaintiff, and thereby lost, as alleged, making $104.50 said Canada currency due to plaintiff. Doth condemn said defendant to pay and satisfy to said plaintiff the said sum of $104.50, with interest, &c.

Fred. Geriken and G. H. Grannis.

MONK, J., *dissentiens*.—On the 10th August, 1872, Grannis arrived at the St. Lawrence Hall, Montreal, with his wife, and was assigned to room 163. Between the night of the 11th and the morning of the 12th a pocket book and pocket diary, containing money, some studs and other valuables, were stolen from his room, and he brought the present action against the hotelkeeper to be indemnified. The defendant Geriken demurred, but the demurrer was dismissed. The parties then went to proof upon the exception pleaded by Geriken, alleging that the appellant never agreed to indemnify the respondent against the loss of any money, or other property, while occupying said room; that in that and every other room set apart for travellers and guests, there was, at the time of said alleged loss, a printed placard affixed to the doors, notifying guests that the proprietor (the appellant) would not be responsible for any valuables, such as money, jewels, etc., unless deposited in the safe at the office of the hotel, and requesting them and the other occupants of such rooms to lock and bolt the doors on retiring at night or going out at any other time, and to leave the key at the said office in the last case; that each of the doors of said room had at that time a good lock and key on it, and a bolt on the inside; that the respondent was guilty of contributory negligence as regards said loss; that the appellant was not guilty of any negligence in the premises, but in every way acted circumspectly in order to protect his guests against losses of the species complained of; that the respondent was not the guest of the appellant for reward on the said occasion; and generally that said loss, if it occurred, does not entitle the respondent, under the circumstances of this case, to recover from the appellant the amount claimed, or any sum of money whatever.

The evidence establishes that there was a printed notice on the door of the respondent's room, notifying travellers that the proprietor would not be responsible for valuables unless deposited in the safe at the office, and requesting guests to lock and bolt their doors. It was also proved that the lock and bolt on the door of the respondent's room were in good order. The respondent contends that this being money and jewellery which he had on his person, it was not necessary to give it into the charge of the hotelkeeper. The question is: 1st. Has the loss been proved? 2nd. Has it been shown by Geriken that he took such precautions as the law requires? I admit that Geriken is bound to establish that he took every precaution that a reasonable man could take to protect the property of his guests. But I think the evidence shows that he did take every precaution in his power, unless he is expected to keep a man stationed at the door of every room to prevent persons from entering. Moreover, I have very grave doubts whether the loss has been proved at all. Grannis' testimony is sufficient as to the value of the things stolen, but as to the loss itself his testimony stands alone. I don't know whether by our law a man can prove by his own testimony the loss itself. His evidence should be corroborated. But, assuming the loss to have been proved, I think Geriken has established that he used the utmost care, and that the theft could not have been committed if Grannis had properly secured the door of his room. I have to differ, therefore, from the judgment of the majority.

RAMSAY, J.:—This is an action by a traveller against an innkeeper for the

payment of a sum of money stolen from the traveller's bedroom while he was asleep.

By our law innkeepers are liable as depositaries for the things brought in by travellers who lodge in their houses. (C. C. 1814). Such a deposit is deemed to be a necessary deposit. (*Ib.*) A necessary deposit is subject to the same rules as a voluntary deposit, except as to the modes of proof. (C. C. 1813). And the depositary is bound to use the care of a prudent administrator. (C. C. 1802).

This seems all fair enough, but a difficulty arises from article 1815, which enacts specially that the innkeeper is not relieved of his responsibility by any amount of care he may take, but he must prove that the loss is due to the negligence of the traveller, and further that the thief was a stranger in the house and not a servant.

This is a very harsh rule, and it appears particularly so in the present instance, for it appears not only that very considerable precautions were taken by appellant for the protection of his guests, but that the respondent had negligently omitted a precautionary measure which he was warned to take. It is proved that four or five servants are constantly up and on duty in the passages during the night, coming and going with boots and shoes, and answering-bells, and the services of a detective are retained to keep an eye on suspicious persons. Besides this, each door is provided with a lock and bolt, and a notice is posted up in each room warning the occupant to lock and bolt his door on retiring. It is proved that respondent said he took both these precautions, but it is clear from the evidence that this is incorrect, and that the theft could not have been perpetrated without injury to the door if the bolt had been shot.

But as has been said, this does not suffice, and the innkeeper is held to proof which he could not make in the present case, namely that the uncaught thief was not one of his own household.

Extraordinary as this rule of law may appear, the law of England was the same until the 27 & 28 Victoria altered it. Although its rigor induced Erle, C. J., in Fillipowski & Merryweather (F. & F. 288), to say that if the innkeeper did all that a reasonable man might be reasonably expected to do under the circumstances he would not be liable. This is not in accordance with what the same judge said in Cashill & Wright, 6 E. & B. 891, and what was held in Morgan & Racey, 6 H. & N. 265. In these cases the liability of the innkeeper was held to arise out of a duty to protect his property. And even in the case of Fillipowski & Merryweather it was held that failure to lock a door is not such carelessness as would of itself throw the responsibility on the traveller.

We are, therefore, reluctantly obliged to confirm the judgment of the Court below with costs. At the same time it is right to state that we do not think the appellant open to any blame in the matter.

DORION, C. J.—According to the French law there is no doubt that the party who lost his goods under such circumstances could prove the loss himself. It was merely a question for the Court whether the man was to be believed or not. In some cases the fact of the loss was admitted to be proved and in others rejected, according to the character of the man. The amount here was not large

Fred. Geriken and G. H. Graunt.

for a traveller to have with him, and there is every appearance of good faith on his part. The presumption is that the theft was committed by one of the servants of the house, in which case the hotelkeeper is always responsible.

SANBORN, J., concurred.

Judgment confirmed.

B. Devlin, for the appellant.

L. H. Davidson, for the respondent.

(J.K.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 18TH SEPTEMBER, 1877.

Coram DORION, C. J., MONK, J., RAMSAY, J., and TESSIER, J.

No. 37.

THOMAS WORKMAN,

(*Defendant in the Court below,*)

APPELLANT;

AND

THE MONTREAL HERALD PRINTING AND PUBLISHING COMPANY,

(*Plaintiffs in the Court below,*)

RESPONDENTS.

HELD:—That section 100 of the Dominion Controverted Elections Act of 1874 does not preclude the recovery of accounts for lawful expenses connected with an election, unless the expenses were incurred with a corrupt or illegal motive.

The appeal was from a judgment of the Superior Court, Montreal, RAINVILLE, J., maintaining an action for printing and other work done in connection with an election for the House of Commons.

The judgment was as follows:—

"Considérant que les demandeurs ont prouvé les allégations de leur demande;

"Considérant que la loi reconnait un droit d'action aux demandeurs, pour recouvrer la somme réclamée pour dépenses, ou déboursés légaux, encourus pendant une élection, à condition que le compte soit transmis à l'agent du candidat dans le délai fixé par la loi;

"Considérant que le montant du compte réclamé par les demandeurs a été transmis à l'agent du défendeur dans le dit délai;

"Considérant que les impressions faites, ouvrages faits, et matériaux fournis par les demandeurs, et dont ils réclament la valeur, l'ont été à la connaissance de l'agent du défendeur, et de son consentement tacite, et que les dites impressions, ouvrages, &c., étaient nécessaires et utiles à l'élection du défendeur, et jugés tels par ses amis et partisans, et nommément par le comité dont l'agent du défendeur a reconnu l'existence; déboute le dit défendeur de ses exceptions, et le condamne à payer aux demandeurs la somme de $ 974.48 avec intérêt," &c.

The defendant appealed, contending that, under section 100 of the Dominion Election Act of 1874, no action will lie against a candidate upon an alleged undertaking to pay expenses incurred in the conduct of an election.

RAMSAY, J., *dissentiens*.—This is an action for an account for printing and advertising, done for the purposes of an election for a member to serve in Parliament. The defendant, who was the successful candidate, pleads that the expenses were unauthorized by him or by his agent, Mr. Holton; that they were extravagant and unnecessary, and that, under the Dominion Election Act, no action lies for their recovery.

This contestation gives rise to a question of law and to a question of fact. It is beyond controversy that the respondents performed the work for which they charged, and that the prices they demand by their action are fair. It seems, also, to be pretty clear that the means adopted, whether "scandalous," as respondent tells us appellant calls one of them, or not, were not unnecessary. The question of fact therefore reduces itself to this: were they authorized? On this point the real difficulty seems to turn on the meaning to be attached to Mr. Workman's letter to the Chairman of the Committee, Mr. Brown, dated September, 1875, appointing Mr. Ed. Holton, appellant's sole agent, and declaring that he will not recognize or be responsible for the actions of any other party whatever; and which letter was published in the columns of the *Herald*. The pretention that Mr. Workman was not responsible because he was brought out against his will, that he was the candidate of the Reform party—the Government candidate, and particularly that he was not liable for work done at the *Herald* office, because he was solicited by the *Herald* people, will not stand a moment's examination. Whatever were the motives, patriotic or personal, which induced him to stand, he became a candidate, and the election was his election. If it be of any consequence, we have, besides, his own avowal, expressed in the most public manner, that he came forward at the solicitation of "a large and influential number of his fellow merchants and manufacturers, and citizens generally." Again, there was no fund prepared to defray the expenses of the election, nor does it seem to have been contemplated at any time that the expenses of the election should be defrayed by any one but the candidate. It seems to be assumed by the appellant that section 121 of the Act 37 Vic. affects the question now before us. But that section only applies to payments, loans or allowances made on behalf of a candidate. It does not pretend to say that the candidate shall be cleared of all responsibility because he has appointed an agent. Mr. Workman's letter to Mr. Brown has, in the matter under consideration, just the effect it would have had if section 121 had never been passed. The terms of that letter are, however, sufficiently explicit, and if it appeared that neither Mr. Holton nor Mr. Workman had in any way authorized these expenses, it is quite evident that the appellant would not be liable. But such is not the case. Both Mr. Workman and Mr. Holton were cognizant of the whole expense that was going on, and even it is proved that Mr. Workman hurried the clerk in copying part of the work for the printer. Even the so-called "scandalous bills" were, at all events to some extent, sanctioned by Mr. Workman. [illegible] disapproved of them, still he allowed them to be circulated in the interest of his own election.

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It is insinuated in respondent's factum that the letter was written with another object than that now avowed. It certainly says that "above all things," and consequently, above the things just mentioned in the letter, he desired to keep within the limits of the law. I think, therefore, the evidence establishes that he is under the natural obligation to pay the amount of the bill claimed of him.

But is it a debt which can be recovered in a court of law? Section 100 of the 37 Vic. declares that "every executory contract, promise or undertaking, in *any* way referring to, arising out of, or depending upon, any election under this Act, even for the payment of lawful expenses, or the doing of some lawful act shall be void in law, &c. It will scarcely be seriously contended that the words "executory contract," "promise," "undertaking" do not cover all the contractual causes of obligations, and, if so, the right to recover is expressly taken away by statute, if the contract refers to an election. Nor can it be contended, it appears to me, that this contract does not refer to an election. The whole evidence shows that it does, and the question being formally put to Mr. Brown he answered in the affirmative. In the case of Guevremont and Tunstall on a statute very similar to that in question, the majority of this court held that the cost of a dinner given by a candidate to celebrate an electoral triumph could not be recovered. In that case it was not contended that the dinner was a corrupt practice. Mr. Justice Loranger, in the Court below, expressly declares that even lawful expenses cannot be recovered, and the majority of this Court confirmed his judgment. Mr. Justice Tessier and I dissented from that decision because the action did not arise or refer directly to an election. In the case of Couture et al. *vs.* Delery we held unanimously that the sale of a barrel of whiskey, in the absence of, and without the knowledge of appellants, was not within the statute, and that appellants' right [illegible] could not be affected by the use respondent made of the whiskey. In this case there is no doubt the expense referred to an election. It is said, however, that section 122 over-rides or explains section 100. I cannot see that section 122 confers any new right. It doubles the bar, if I may so speak, where the bills are not sent in till after a month. It will also, I understand, be contended that the contract to be null must be made with a corrupt intention in the view of influencing the election; but, if so, by section 92, it is unlawful as a corrupt bargain, whereas clause 100 deals with bargains lawful in themselves. I do not think the question really offers any very great difficulty; at least it appears to me that the rule of interpretation is clear, and that, if possible, the two sections should stand. They do so by the interpretation I would put on them, while the effect of section 100 is entirely destroyed by the interpretation which is put upon it by the majority of the Court. I may add that I have come to this conclusion although I entirely sympathize with the majority of the Court in their desire to limit, as far as possible, the operations of a law so extraordinary as section 100. The responsibility of that legislation, however, rests with the Legislature, and not with me. The duty of Courts is to give effect to the law as they find it. And in this case I think the words of the law, and the intention of the Legislature to leave the payment of even lawful expenses to the honour of the candidate, are clear.

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DORION, C. J.—This case depends upon the interpretation to be given to sections 100 and 122 of the Dominion Election Act of 1874.

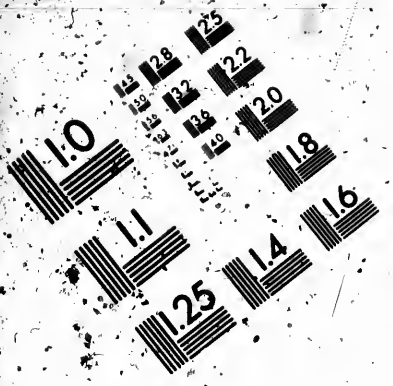
By the first of these sections "every executory contract, or promise, or undertaking, in any way referring to, arising out of, or depending upon any election under this Act, even for the payment of lawful expenses, or the doing of some lawful act, shall be void in law; but this provision shall not enable any person to recover back any money paid for lawful expenses incurred with such election."

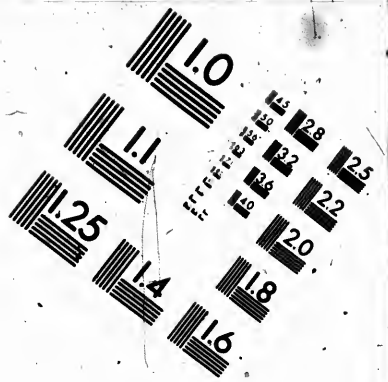
The second clause provides that all persons who have any claims or claims upon any candidate for or in respect of any election in such bills, charges or claims within one month after the day of the election to the agent appointed by such candidate as the Act, otherwise such persons *shall be barred of their right to recover such claims* and every or any part thereof."

These two clauses seem to be repugnant, for while by the first all executory contracts in reference to any election, even for lawful expenses, are null, in the second it is said that the right to recover a claim against a candidate for or in respect of an election shall be barred unless sent to the agent within one month after the day of the declaration of the election. The right to recover such claims cannot be barred, after the expiration of one month, unless it existed during that month, and therefore this section 122 expressly recognizes the right to sue for and recover the claims which are presented to the agent of the candidate within one month after the election. This section is taken from the English Acts, under which the right to sue for and recover all legitimate expenses incurred for or in relation to an election, is recognised, and has never been doubted.

But it is said that the English Statutes having reference to elections do not contain a clause similar to section 100 of our own statute declaring void all contracts made with reference to an election even for lawful expenses—and that therefore the English rule is not applicable to this case.

A rule of universal application is that in the construction of one part of a statute, every other part ought to be taken into consideration, and that one part of a statute must be so construed by another, that the whole may if possible stand; *ut res magis valeat quam pereat.* Dwarris, p. 699. Again the intent of the legislature is not to be collected from any particular expression, but from a general view of the whole of an Act of Parliament and from a consideration of the mischief. Ibidem, p. 703. Sect. 100 is placed under the heading of Prevention of "corrupt practices at elections," and is the last of a series of sections, from 92 to 100 inclusive, declaring who should be guilty of bribery and punishable as such. Subsection 5 of section 92 holds the fair cost of printing and advertising to be lawful expenses, and the payment thereof not to be a contravention of the Act. It could not, therefore, be the intention of the legislature to deprive a party of his action to recover a claim declared lawful by the statute and not in contravention of any of its dispositions. The mischief sought to be remedied was the prevention of acts of corruption provided against by the statute, by means of contracts for either lawful expenses or





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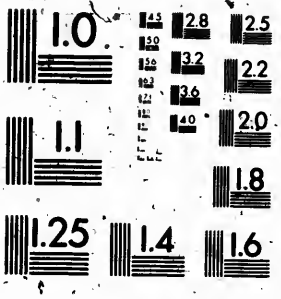

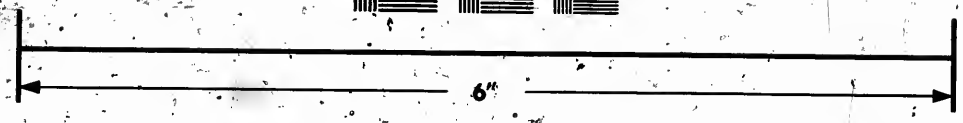

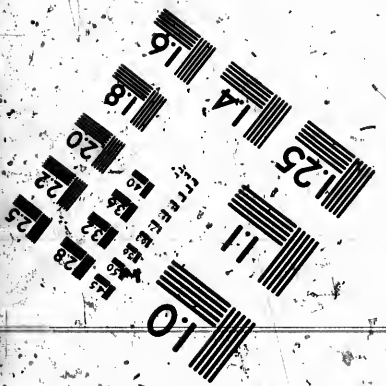

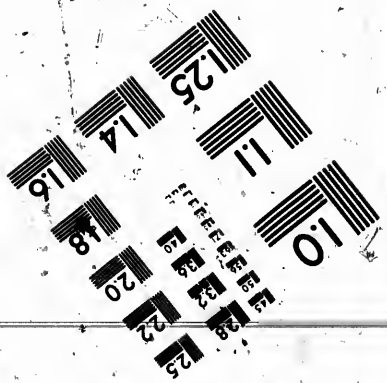

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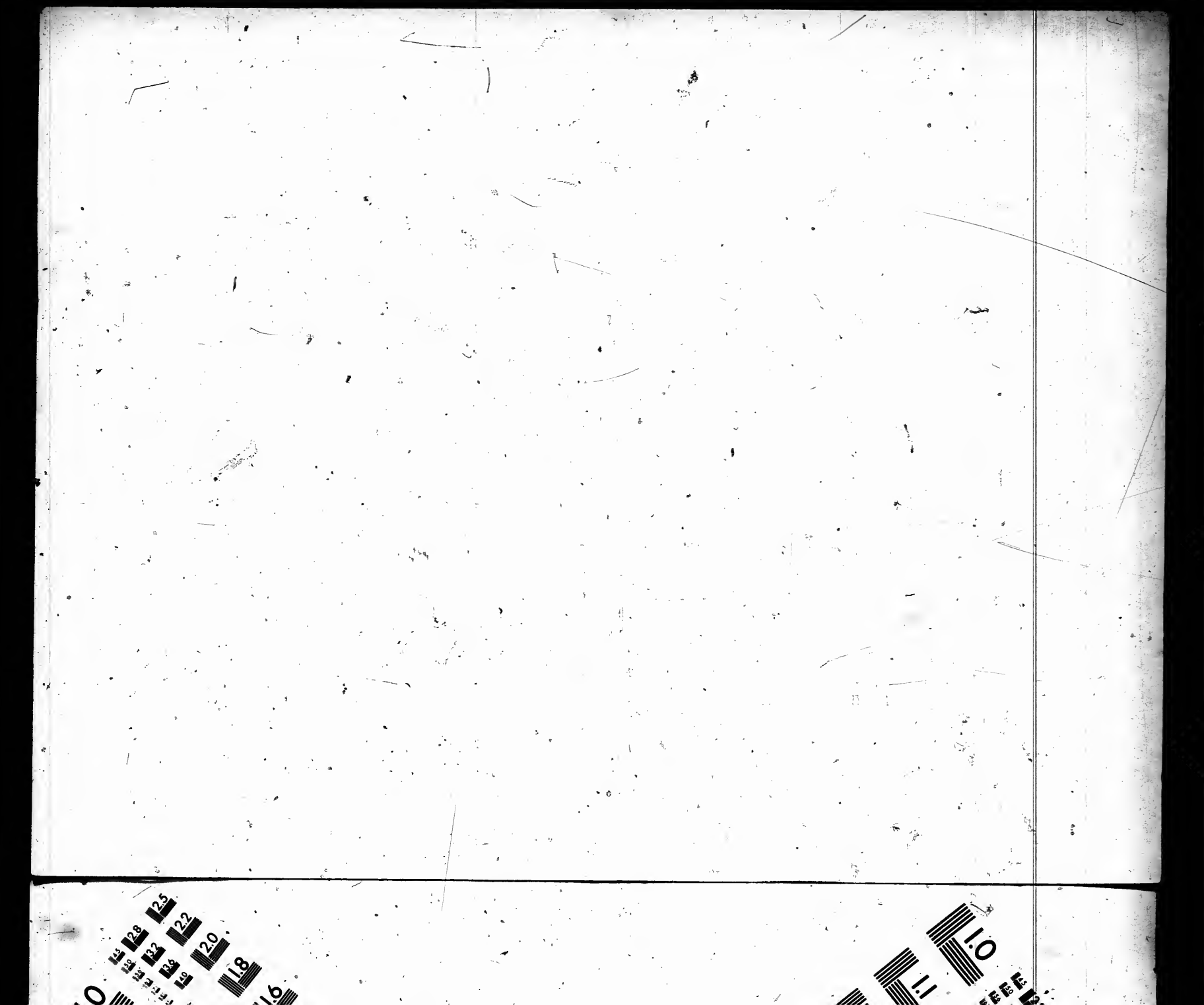

The Workman, and Herald Printing and Publishing Company.

unlawful expenses. For instance, a candidate agrees with a publisher to give him all the printing and advertisements required during his election on condition that he shall vote for him. This is a corrupt bargain, repudiated by law, and which sect. 100 declares null and void, although the printing and advertising are lawful expenses. But this nullity cannot apply to a contract made for legitimate purposes in relation to an election and without any intention of influencing the election. "A" contracted for printing given to a party outside of the electoral division and having no vote and no influence in the county. This last contract could by no possibility come within the mischief sought to be remedied, and could not, therefore, be within the intent of the legislator.

By saying that all executory contracts for lawful expenses, even those that are made *bonâ fide* and without any corrupt intent, are void, we have to say that section 122, which recognizes the action of the creditor who, within one month, sends his claim to the agent, becomes nugatory and of no possible application unless it be contended that although any agreement for legitimate expenses is declared null by section 100, yet an action on a *quantum meruit* would lie under section 122. I do not consider this a proper view to take of the question. Effect can, however, be given to both sections, by saying that section 100 avoids all contracts, even for legitimate expenses, when such contracts are for the purpose of illegally influencing the election, and constitute an act of corruption prohibited by the statute, and that an action will lie under section 122, to recover the lawful expenses made for a candidate at an election, when these expenses were not incurred in consequence of a corrupt bargain prohibited by the Act, and this I think is a fair interpretation to be given to the Act.

In this case the action is for printing and advertising ordered by a committee having, with the sanction of both Mr. Workman and his agent, the management of the election. Mr. Workman went frequently to the committee rooms, and his agent was constantly there, and the works were ordered with his sanction, or at least without any remonstrance on his part, and the prices seem to be fair. It is not pretended that there was any corrupt bargain or corrupt influence exercised in giving out this work. The difference between this case and that of Guevremont and Tunstall et al., decided by this Court, is that in the present case the claim is for expenses declared lawful by the election law; while in the other, the demand was for expenditure connected with an election, but forming no part of what are recognized by the law as legitimate expenses. The majority of the Court, therefore, see no reason to disturb the judgment rendered by the Court below.

MONK, J., entirely concurred in the judgment of the majority of the Court, and in the reasons assigned by the Chief Justice. He also concurred in the grounds of the judgment in Coutu and Delery, and in Guevremont and Tunstall, as stated by the Chief Justice. Referring to the evidence, he expressed the opinion that the account sued on was for legitimate expenses, and it was impossible to sustain the defence. The Committee were justified in incurring these expenses for the purpose of promoting Mr. Workman's election. The work was legitimate, and the *quantum meruit* was proved beyond all doubt.

There was, therefore, the fact that the expenditure was legitimate, authority to do the work, and value. His Honor then referred to the legal question, with respect to which his view coincided with that of the Chief Justice.

Judgment confirmed.

Abbott, Tait, Wotherspoon & Abbott, for the appellant,
Devlin & Devlin, for the respondent.
(J.K.)

SUPERIOR COURT, 1877.

MONTREAL, 13TH MARCH, 1877.

Coram TORRANCE, J.

No. 1277.

Rochon vs. *Côté*.

HELD:—That where a person brings an action *en bornage* without previous demand, and joins with it a claim for damages of which no proof is made, he will be condemned to pay the costs of the suit.

The action of the plaintiff was *en bornage* coupled with a demand for $100 damages, alleged to have been suffered by the encroachments of the defendant upon the plaintiff's property.

The defendant pleaded that he had never been asked to put metes and bounds (*borner*), and prayed *acte* of his willingness to do so, and he denied the claim for damages.

The plaintiff joined issue in the usual form. At the trial no evidence was given by the plaintiff of damages, and he failed to prove any default on the part of the defendant to *borner*. The only question submitted to the Court was a question of costs.

PER CURIAM:—A demand has been made upon the defendant for damages, and no evidence has been given in support of it. This part of the demand should therefore fail. How should costs go? Undoubtedly against the plaintiff as regards the damages. Does the demand for *bornage* acquiesced in by the defendant make any difference? In Slack v. Short, 2 L. C. Jur. 81, the costs went against the plaintiff simply because he had instituted the action without any previous demand. In Weymess & Cook, 2 L. C. R. 492, Chief Justice Stuart, speaking for the Court, said: "In cases of this kind, costs ought generally "to be divided between the parties;" and "it is an error to think that the "plaintiff was bound, before bringing his action, to summon his neighbour to "draw lines." In the present case, seeing the entire failure of the plaintiff to establish the allegations on which he was at issue with the defendant, he should pay costs.

Dugas, for plaintiff.
Augé, for defendant.
(J. K.)

COURT OF REVIEW, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram TORRANCE, J., DORION, J., RAINVILLE, J.

No. 1068.

Baillie vs. *The Provincial Insurance Company of Canada.*

HELD:—1. That an agent of an insurance company, whose powers were limited to receiving applications for insurance for transmission to the head office and to the collecting of premiums, has no power to waive any of the conditions of the policies.

2. In addressing the jury the Judge has a right to give his opinion upon the whole case, although the jury are the exclusive judges of the facts.

TORRANCE, J.:—This case was before the Court on a motion by plaintiff for a new trial, and on a motion by defendant for judgment on the verdict. The defendants gave one Murphy a policy of insurance against loss by fire for $1,000 in 1872. The policy was transferred to the firm of Murphy & Whitaker, and the claim on the policy is now held by the plaintiff. A fire occurred, and the claim was made for payment. The defendant pleaded a variety of pleas to the action, but it is sufficient to refer to the second plea, which pleaded that the insured had subsequently insured in the Western Assurance Company, and failed to give defendants notice, or to obtain the indorsement and acknowledgment thereof on defendants' policy, contrary to its sixth condition. The plaintiff by a first answer to this plea said that Murphy & Whitaker had applied to the defendants' agent at Sherbrooke, D. Thomas, for additional insurance from defendant, and by advice of said Thomas a policy was issued from the said Western Insurance Company, of which said Thomas was also then the agent, and, through him, the defendants had full knowledge and notice, and made no objection; and if said 6th condition was not fully complied with it was through the neglect of the said agent of defendants, and of defendants. The plaintiff, by a second answer, said that the defendants waived said sixth condition by not notifying the insured before the fire that they intended to enforce said condition, and by not objecting to the claim immediately after said fire; in which claim the subsequent insurance was stated. The sixth condition contains these words: "And in case of subsequent insurance on property insured by this Company, notice thereof must also, with all reasonable diligence, be given to them, to the end that such subsequent insurance may be indorsed on the policy subscribed by this Company, or otherwise acknowledged in writing; in default whereof such policy shall thenceforth cease and be of no effect." Arthur Harvey, manager of the defendants at Toronto, explained before the jury what the powers of D. Thomas as their agent were. He received applications for insurance. "His duties were to fix rates of insurance, and transmit them to us, also to transmit to us the cash he collected. He has no right to waive any of the conditions of the policies." Mr. Harvey did not know that D. Thomas was also acting for the Western Insurance Company. The jury, by their answers to the 8th and 9th questions put to them, in effect held that the defendants' second plea was proved and the plaintiff's answers to the plea disproved; that Murphy and Whitaker obtaining a subsequent insu-

rance with the Western Insurance Company, did not give defendants notice, and did not obtain an indorsement and acknowledgment thereof by defendants, and that defendants had no knowledge of this subsequent insurance and did not consent to it or waive their objections. After answering all the questions categorically they add, "We consider that the plaintiff has acted in good faith and entitled to his insurance." The plaintiff makes a motion for a new trial on a variety of grounds. Among others he complains that the questions to the jury do not comprise all the facts necessary to be proved, and certain suggestions made by him, namely, the 8th, 10th, 11th, 12th, 13th and 15th suggestions have not been included in the questions to the jury; also, that the Judge at the trial, in his charge, encroached upon the province of the jury, giving his view of the evidence, and also misdirected them as to the law. With respect to the suggestions omitted, if they had all been answered in the affirmative, I do not see that they would have helped the plaintiff, so long as the jury answered as they did the 8th and 9th questions put to them as to want of notice and waiver; the 15th suggestion in the hypothetical form is most objectionable. One of these suggestions made by the plaintiff is that D. Thomas was agent as well of the Western Insurance Company as of the defendants. Supposing this had been put as a question to the jury the affirmative would have served little without a further question as to his powers to bind the defendants. The fact of his being an agent for the two companies was distinctly before the jury, and also the very limited nature of his powers. As I understand the assignment of facts to be proved before the jury, it is undoubtedly the duty of the Judge to assign the facts to be inquired into by the jury. The second plea raised the question whether the 6th condition of the policy had been complied with, and the answer to it whether there had been a waiver. Suppose the 15th suggestion of the plaintiff had been put to the jury, whether the non-indorsement of [redacted]cond insurance on the policy of defendants or its non-acknowledgment in writing was caused by the neglect of the defendants or their agent, the answer should have been in the negative, for D. Thomas had very limited powers, and in procuring the Western Insurance policy, he was not the agent of the defendants, and could not here serve two masters. Look at the facts: In January, 1873, the local agent procured a policy from the defendant, and the insured got possession of it. In May, the same person is agent of the Western Assurance Company, and procured for the insured another insurance from them. Surely it was the duty of the insured in possession of the defendants' policy to have taken it to them and got their consent to the indorsement if he could, for it was a matter of agreement. In charging neglect, he should have shown in what way there was neglect on the part of defendants. While the facts to be put to the jury in the shape of questions should fairly cover the issues, it is impossible to suppose that it was intended that every fact to be proved by the evidence given to the jury is to be put to the jury in a written or printed question which they are to answer. If it were so, the questions to be answered by the jury might be numbered by hundreds. As to the Judge having usurped the province of the jury in giving his opinion of the purport of the evidence, it has always been held right and proper in the Judge to give his opinion of the

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case, although the jury are the exclusive judges of the facts. Then it is said that the Judge misdirected the jury as to the law in saying that notice to the defendants of the Western Assurance Company before the fire was *à peine de nullité*. I do not see that the Judge erred in this charge. On the whole I am of opinion that the assignment of facts submitted to the jury covered the material issues of the case, that the defendants are entitled to judgment on the answers to the 8th and 9th questions, and that the findings of the jury are entirely supported by the evidence.

The judgment was *motivé* as follows:—

The Court here having heard the parties by their counsel respectively, firstly, upon the plaintiff's motion of the 22nd of May last past, that, for the causes and reasons therein stated, the verdict of the jury in this cause rendered on the 27th of March last (1877) be set aside and annulled and be held for naught, that all proceedings in this cause from and after the motion for trial of said cause by jury, and including said motion, be set aside and annulled, and a new trial be ordered in due course of law; and, secondly, upon the motion of defendants made and fyled on the said 22nd of May last, that the judgment be rendered by this Court on the findings of the said jury in answer to the eighth and ninth articulations, or questions submitted to said jury, in favor of said defendants, and that the present action be dismissed with costs; having examined the record and the proceedings had in the said instance and deliberated; doth reject said plaintiff's motion, and doth grant said defendants' motion, in consequence, doth dismiss said plaintiff's action, with costs of both Courts *distraits* to Edward Carter, Esquire, attorney for defendants.

L. H. Davidson, for plaintiff.

Edward Carter, Q. C., for defendants.

(J. L. M.)

COURT OF REVIEW, 1877.

MONTREAL, 29TH SEPTEMBER, 1877.

Coram JOHNSON, J., DORION, J., RAINVILLE, J.

No. 192.

Converse vs. *The Provincial Insurance Company of Canada.*

HELD:—That the condition in a policy of insurance, to the effect that all persons insured shall, as soon after the loss by fire as possible, deliver in a particular account of such loss or damage, signed with their own hand and verified by oath or affirmation, is waived by the fact of the agent of the Company and the person insured each choosing valuators who made a valuation of the loss, and by the fact of the Company offering the insured a less amount than the valuation in settlement, showing that they only disputed as to the amount to be paid.

The plaintiff set up a loss by fire on 24th August, 1876, under policy No. (60173). The amount of insurance was $3000,00 "on the building only of a brick encased gravel roofed building owned by the assured and occupied by him as a plaster mill," and $2000.00 "on machinery, belting and shafting contained therein."

The plaintiff alleged and proved that immediately after the fire he notified the company's agent at Montreal, in writing, of the loss, and requested him to take such action as he might deem necessary as early as possible.

That in answer to said letter the agent met him, and the result was that they each appointed valuators to act together and value the loss.

The loss to the building was valued at $2918.

The valuators of the machinery being requested by the company to give details made two columns in their list of articles valued. One they headed "Machinery" and the other they headed "Millwright work, etc.," but they say the latter was part of the machinery, one part being iron and the other part wood, fittings, &c. It was this last only that the company disputed, contending that it was not machinery, and, therefore, not insured.

George H. McHenry, defendants' inspector, in letter of 31st August, 1876, to A. Harvey, defendants' manager, wrote, "Herewith find proofs of loss."

"You will note appraisement of damages to machinery is estimated at $1705.32
"With a salvage valued at..... 350.00

1355.32
"Hoist..... 100.00

"making our loss thereunder, adding the hoist outside of building and not covered $1255.32
"by the policy, $1255.32.

"This is an item of machinery only. An appraisement is also made for mill-"wright work, which Converse wishes to apply to machinery account so as to "make this item total. This is incorrect. It is chargeable to the building, "making that item total, and we are only entitled to pay $1255.32 for whole "loss."

On 11th September, 1876, Arthur Harvey, defendants' manager, wrote T. A. Evans, their agent in Montreal, in terms following: "Enclosed please find copy of "Mr. McHenry's adjustment of Mr. Converse's claim. You can give Mr. "Converse a draft at sixty days sight for $1255.32 in accordance therewith. "Have Policy receipted accompanying draft."

Plaintiff refused this offer, and sued the company for the whole loss. All the witnesses proved that the millwright work, etc., was part of the machinery, and the defendants adduced no evidence upon that point.

The defendants in their plea relied on the fact that plaintiff had given in no sworn statement of his loss.

JOHNSON, J.—The plaintiff sued the defendants upon a policy of insurance against fire, and got judgment against them for $4,918.16 and costs, and they now inscribe for review. They pleaded that the action was premature, there being a stipulation in the policy that payment was only due in sixty days after proof of loss, and that in case of difference, arbitrators should be appointed by the parties; and, further, that the company had the option of either paying or replacing the things destroyed; but it is quite evident that the claim was adjusted between the parties without the defendants insisting on any of these

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things, and that the only point on which they wanted information was the amount of the loss; and with the object of ascertaining that amount, valuators were agreed upon and reported, and an offer of payment was made of somewhat less than the amount now asked; but at all events the liability of the company was distinctly admitted. We are all for confirming the judgment.

John L. Morris, for plaintiff.

Edward Carter, Q. C., for defendants.

(J. L. M.)

SUPERIOR COURT, 1877.

MONTREAL, 3RD FEBRUARY, 1877.

Coram TORRANCE, J.

No. 2039.

The Exchange Bank of Canada vs. *Napper* et al.

HELD:—That an appearance and plea by a person who was not served in the cause, though the writ purported to be addressed to him, will be rejected with costs, where the evidence showed that he was aware of the error in the writ. In such a case if the party fears that judgment may be erroneously rendered against him, his proper course is to come in by intervention.

PER CURIAM:—This case was before the Court on the merits of an exception *à la forme* by John Napper of Havelock, who denied that he had ever been served with the writ of summons. The writ was originally addressed to John Napper of Hemmingford, but was changed to John Napper of Havelock. There were two persons of this name, one of Havelock and the other of Hemmingford. The bailiff after the change made in the writ, which was done on his information, found out that the person intended was of Hemmingford, and accordingly served it upon him and so made his return of proceedings. The person served being a nephew of John Napper of Havelock, took the writ and declaration to his uncle, who conferred with his brother, the father of the person served, and concluded to put the matter into the hands of a lawyer in Montreal. I have no doubt but that this course was taken to delay and embarrass the plaintiffs. John Napper of Havelock accordingly appeared in the cause by his attorney and filed the exception *à la forme*, complaining of want of service.

The Court finds that John Napper of Havelock, who appeared, had never been served, and John Napper of Hemmingford, for whom the writ was intended and who received it, made default. Napper of Havelock is irregularly in the record, and should be put out of it, but he should not have appeared as defendant. The evidence shows clearly that both he and his nephew of Hemmingford knew for whom the writ was intended—namely, for Napper of Hemmingford, who had signed the note sued upon in the case and upon whom the writ was served. If Napper of Havelock was afraid of a judgment being erroneously rendered against him, he could have intervened. He will, therefore, be put out of court, but he shall pay the costs which have been occasioned by his own litigious spirit.

Gilman, for plaintiff.

Maclaren, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 11TH JUNE, 1877.

Coram TORRANCE, J.

No. 447.

In re *Gear*, insolvent, *Sinclair*, assignee, and *Furniss*, petitioner.

HELD:—1. "The Court," in section 136 of the Insolvent Act of 1875, in the Province of Quebec means the Superior Court, and not the judge sitting in insolvency.

2. The demand for the imprisonment of the debtor for fraud, under section 136, is made in an ordinary suit, and not by a petition in insolvency.

The petitioner presented a petition to the judge sitting in insolvency on the 25th April, 1877, of which he had given notice to the insolvent on the 23rd April. By this petition it was alleged that the insolvent on the 6th February, 1877, purchased from the petitioner goods to the amount of $230.30 with intent to defraud petitioner, well knowing and believing himself to be unable to meet his engagements, and concealing the fact from the petitioner. The petitioner accordingly prayed, in the terms of the Insolvent Act of 1875, s. 136, that the Court would condemn the insolvent to pay to petitioner the said sum of $230.30 with interest and costs, and "that the insolvent be declared to have been and "to be guilty of fraud in so purchasing, &c., and that he be adjudged and con- "demned to be imprisoned in the common goal," &c., following the words of the Act.

The insolvent answered the petition by alleging that the petition had been presented out of term to a judge who had no jurisdiction to grant its conclusions, and the allegations of the petition and the conclusions thereof were the subject matter of an action, and such action should have been regularly instituted in the Superior Court.

PER CURIAM:—There is no doubt that the petition in question though addressed to the Court at a time when the Court was not sitting, namely in vacation, between the 20th and 30th April, has been presented to a judge sitting in vacation. This is an objection which made *in limine* to the petition is fatal to it. The other objection, that the petitioner can only seek to charge the insolvent under s. 136 by an action at law, is a much more serious question. It is manifest that the machinery of the liquidation of the estates of insolvents was not intended as a means of recovery of debts from the insolvent himself, for the insolvent is divested of his estate. We have to look distinctly at the clause in question, s. 136, under which the petitioner makes his demand. There jurisdiction is given to the Court, which in the Province of Quebec means the Superior Court, which has power to order the imprisonment of the debtor for a period not exceeding two years unless the debt and costs be sooner paid. It cannot mean the insolvency court, for it has not said so, and the insolvent court is not the court for the recovery of debts. It uses the word "suit," which refers to proceedings for the recovery of debts among other things. The word "proceeding" following "suit" must mean something *ejusdem materiæ* connected with suits and arising in the same court. The answer of the insolvent is maintained.

F. Keller, for petitioner.

W. H. Kerr, Q. C., for insolvent.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 3RD FEBRUARY, 1877.

Coram TORRANCE, J.

No. 300.

The Molsons Bank vs. *Campbell.*

HELD :—The pretensions of a defendant who, after being arrested under a *capias*, leaves the country and refuses to appear for examination, will not be favorably regarded by the Court.

PER CURIAM :—This case was before the Court on the merits of a *capias ad respondendum* against the defendant to recover $14,600, the amount of two bills of exchange drawn by the defendant on parties in England, and unpaid and protested for non-payment. The defendant was charged with being immediately about to leave the province of Quebec, with having secreted and being about immediately to secrete his estate with intent to defraud, &c. The defendant had made an assignment under the Insolvent Act, and denied the charges, and the contest was in reality only as to the truth of the charges in question. The accusation against the defendant chiefly arose from his possession of some $40,000, which he had drawn out of the bank and had possession of against the will of his creditors. They appeared to believe that the sum in question was an asset of his estate unlawfully withheld by the defendant. He, on the other hand, avers that it is the property of his wife, though he has declared that it would have been available for the purchase of his estate if the creditors would have sold it to him. On the evening of his arrest under the *capias*, he fled to the States, where he has since remained, avoiding in this way his creditors, and a fugitive from justice. It is impossible for the Court to take any other view of this case than that entertained by the plaintiffs. The refusal of the defendant to allow any investigation of the truth of his story, that the $40,000 belonged to his wife, is by no means justified by his fear that the creditors would put him in gaol until he disgorged the money. If his wife had a right to the money, that right would be protected by the Court, and the absence of explanations by him and his flight from the country are circumstances which render it impossible for the Court to exonerate him from blame, or to hold that he has in any way rebutted the charges made against him. Is the money withheld by him in reality an asset of the estate, or is it the property of the wife of the defendant? Is it a sum of money withdrawn from the estate in order to pay his wife in preference to other creditors, assuming that she is a creditor? All these are matters in respect to which the creditors are entitled to the fullest explanations and the most searching investigations. The actions of the defendant would go to prove that he is averse to submit to inquiry, and prefers to lay himself open to the most injurious imputations upon his character. The allegations of the plaintiff's declaration are held to be proved, and the plea of the defendant overruled.

Wotherspoon, for plaintiff.

Gilman, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 31st OCTOBER, 1877.

IN REVIEW.

Coram TORRANCE, J., DORION, J., PAPINEAU, J.

No. 2495.

Gault et al. vs. *Robertson*, and *Robertson*, Petitioner.

HELD:—That the provision of our Code of Procedure, allowing of a *capias* in the case of secretion, can have effect against a debtor resident in Ontario, but who is found in Quebec.

DORION, J., *dissentiens*. The judgment appealed from quashed a writ of *capias ad respondendum* issued against the defendant upon the ground of alleged secretion of his property and effects. The reason given by the Judge was that the facts of secretion proved had taken place in the Province of Ontario where the defendant had his domicile and place of business, and where this Court has no jurisdiction. I fully concur in this proposition. The *capias* is a remedy given for the protection of the creditor in two specific cases only. The first is when the debtor is about to leave the Province, that is, when he flies from the jurisdiction of our courts, because, as long as he remains within such jurisdiction, he cannot be arrested and, if arrested, he can be freed by giving security that he will surrender himself to the Court whenever required to do so.

The second is when the debtor secretes his property and effects, that is, when he does what will have the effect of depriving the creditor of the remedy he has through our courts to seize and cause to be sold in payment of his debt the property and effects of his debtor. Then, if it is so, and it appears to me to be manifest that the *capias* has no other, and can have no other, object than to keep the debtor's property within the control and power of the Court, how can the secretion of property which is not under the control and jurisdiction of the Courts of this Province affect or injure the creditor? He is deprived of nothing that this Court can give him. This Court has no more power over the the property and effects situated in Ontario than if they were in China or any other foreign country. They would be subject to the laws of such countries and could be disposed of according to such laws. What is called here secretion may be a perfectly honest transaction abroad, and if the plaintiff's pretensions were maintained, a man might be punished here for that which would be no offence in his own country.

I give no opinion upon the merits of the case, as I think this Court has no right to enquire into the conduct of the defendant in the Province of Ontario.

TORRANCE, J. The plaintiffs arrested the defendant by a writ of *capias ad respondendum* issued out of the Superior Court for the District of Montreal to secure the payment of $1,437.49. The defendant presented a petition for his liberation from gaol, on the ground that the allegation of secretion of his property in the affidavit upon which the *capias* was issued was untrue. The petition has been maintained, and liberation ordered on the ground that the defendant, being a resident of the Province of Ontario, the provision of our Code of

Gault et al. vs. Robertson.

Procedure allowing of the *capias* in the case of secretion could not apply. I am of opinion that the *capias* would lie in a case like the present. The *capias* is given the creditor as a remedy and means of securing his debt, and not as a punishment of the debtor. Of course the remedy cannot operate out of our jurisdiction, but I hold that the defendant may be detained if he come within the jurisdiction. Story, Conflict of Laws, § 571, says: "The better opinion now established, both in England and America, is that it is of no consequence whether the contract authorizes an arrest or imprisonment of the party in the country where it is made, if there is no exemption of the party from personal liability on the contract. He is still liable to arrest or imprisonment in a suit upon it in a foreign country, whose laws authorise such a mode of proceeding as a part of the local remedy." The question next presents itself, whether the secretion charged has been disproved by the defendant. He is a resident of Ontario, and shortly before his arrest sold his entire stock in trade to one C. D. Fuller, a fellow-townsman of Belleville, where the defendant's domicile was. The consideration of the sale was seven promissory notes which were handed over to the defendant, and Fuller went into possession. The defendant then came to Montreal to see his creditors, with six of the notes in his pocket, the seventh having been discounted before he left home. He kept from his creditors the fact of the sale and the delivery of the notes, and, being asked about the sale, represented that it was subject to the approval of his creditors. I see neither fairness nor candor in these representations, and the facts as put before the Court satisfy me that the charge of secretion and purpose to secrete with intention to defraud is made out. The majority of the Court is of this opinion.

PAPINEAU, J. Le défendeur et requérant est arrêté en vertu d'un *capias ad respondendum*, pour avoir recelé ses biens.

Le défendeur est de Belleville, province d'Ontario. L'affidavit des demandeurs met à sa charge divers faits entachés de fraude, antérieurs à ceux qui font l'objet principal de l'accusation de recel, afin de mieux faire ressortir le but qu'avait le défendeur en commettant les actes qui lui sont reprochés.

Le défendeur conteste, par requête, et nie la vérité des allégués de l'affidavit. Il prétend, de plus, n'être pas sujet à l'arrestation;

1o. Vû qu'il ne réside pas dans la province de Québec, où il ne possède pas et n'a jamais possédé de biens.

2o. Parcequ'il n'a rien fait, dans les limites de la jurisdiction de cette Cour, qui puisse l'assujettir à l'arrestation.

Le jugement soumis à notre révision, n'a prononcé que sur la question de droit et se lit comme suit :

"Considérant que par la loi un *capias* ne peut émaner contre une personne "et celle-ci ne peut être arrêtée que pour des faits qui ont eu lieu sous la jurisdic- "tion de la loi de la province de Québec;

"Considérant que le défendeur arrêté par le présent *capias* n'aurait pas "le privilège de faire une cession de biens, en autant qu'il n'est pas domicilié "dans la dite province de Québec, et que ses biens meubles n'y sont pas situés; "considérant qu'il est établi que les biens que le défendeur-requérant est accu-

" gé d'avoir recelés et cachés, dans le but de frauder ses créanciers, sont situés " dans la province d'Ontario, où le défendeur a son domicile;

"La Cour," etc.

Je suis porté à croire que le 1er considérant de ce jugement est formulé en termes trops généraux. Si l'Hon. Juge qui a prononcé ce jugemont a voulu énoncer, par ces termes, que la cause de l'action ou la créance doit avoir pris naissance dans les limites de la province de Québec, pour donner droit à l'arrestation opérée dans les limites de cette province, je crois que c'est exact, en principe; si, au contraire, il a eu l'intention de poser comme principe de droit que non-seulement la dette doit avoir été contractée dans notre pays, mais que tous les faits, donnant ouverture au droit d'action et à la voie exceptionnelle établie pour l'exercer contre le corps même du débiteur, doivent aussi avoir eu lieu sous la jurisdiction de notre loi, je crois devoir émettre un avis contraire.

En effet, sous notre Code de Procédure, pour nous donner jurisdiction sur le débiteur, il suffit que le droit d'action ait originé dans notre district, ou que le débiteur y soit assigné personnellement. Or ces deux conditions se réalisent dans cette cause; cette Cour a donc jurisdiction sur la matière du litige, c'est-à-dire la dette, et sur la personne du débiteur trouvée, au moment de l'assignation, sous la main de notre autorité.

D'ailleurs, le défendeur en cette cause ne prétend pas disputer aux demandeurs leur droit d'action. Il résiste au mode de l'exercer, voilà tout. Le *capias ad respondendum*, tel que nous l'avons, n'est au fond, qu'un mode ou moyen de contraindre le débiteur à s'acquitter de sa dette; il est purement un accessoire de l'action (*Vide* C. P. C. Art: 796 et 802) et même de l'exécution, dans les cas où la loi permet de le mettre en œuvre, et le débiteur peut l'éviter ou y mettre fin en payant la dette. Il n'est pas actionné pour d'autre but, l'arrestation n'a pas d'autre objet que le paiement de la dette.

Dans les circonstances ordinaires, le débiteur n'a à redouter qu'un mode d'être contraint: c'est le simple ajournement pour s'entendre condamner à payer et, par suite, voir ses biens saisis et vendus.

Le débiteur veut-il par la fuite où le recel frauduleux se soustraire lui-même ou soustraire ses biens à l'obligation de payer son créancier, immédiatement la loi ouvre à celui-ci deux voies extraordinaires: la saisie, même avant jugement, du bien et la saisie du corps de ce débiteur. Elle met l'un et l'autre sous la main de la justice pour contraindre ce débiteur frauduleux à faire précisément ce qu'il se proposait d'éviter, par son acte frauduleux.

Maintenant cet acte illicite et réprouvé de soustraction frauduleuse de son bien, à ses créanciers, que l'on a qualifié par le mot recel, la loi dit-elle quelque part qu'il doit avoir eu lieu dans les limites de ce pays? Pas du tout.

Le législateur le sait, la dette s'attache à la personne du débiteur comme la lèpre à la peau du lépreux, elle le suit en quelque partie du monde qu'il aille porter ses pénates; non seulement elle le suit, mais elle s'identifie à lui, au point de se continuer, comme lui, dans la personne de ses héritiers. Le créancier peut donc suivre son débiteur dans tous les pays du monde, et lui demander paiement de sa créance, et jamais ce débiteur ne pourra se dire: ce que j'ai est mon bien tant qu'il n'aura pas acquitté cette dette: *non intelliguntur bona nisi*

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deducto aere alieno. Le législateur, sachant tout cela, n'a pas spécifié que l'acte de recel devait être commis ici ou là pour donner ouverture au *capias*. Partout où le débiteur fait un acte pour soustraire son bien à son créancier, ou plutôt pour soustraire le bien du créancier qu'il a dans les mains, il commet un acte contraire au droit des gens, au droit naturel, et il donne à son créancier, en quelque lieu qu'il se trouve, l'occasion d'employer les moyens d'actions, qu'offre la loi du pays où il le rencontre, pour le contraindre à faire, contre son gré, ce qu'il ne veut pas faire volontairement, satisfaire son créancier. Or un des moyens que donne la loi de notre pays, de forcer à l'observation de cette règle du droit naturel, c'est la contrainte par corps. Elle ne distingue pas où le débiteur a recelé son bien, ici ou à l'étranger, pourvu qu'il l'ait recelé, c-à-d., soustrait à l'action de son créancier ; elle soumet le corps même du débiteur à la contrainte, au lieu de son bien.

Il ne peut pas se plaindre ; cette rigueur présuppose chez lui une intention frauduleuse, il faut même une preuve *prima facie* de faute de sa part ou de disposition prochaine à la commettre, avant qu'il puisse être arrêté.

On objecte en disant : Comment cette cour peut-elle connaître d'un fait de recel de biens qui, se trouvant hors de sa jurisdiction, n'aurait jamais pu être saisis et vendus par son autorité ?

Cette cour, il est vrai, ne peut agir directement par voie de saisie sur des biens situés en Ontario ; aussi ces biens ne sont pas directement l'objet du présent litige, ils n'en sont que la cause occasionnelle, en ce sens que leur soustraction a donné ouverture à la voie extraordinaire adoptée contre le corps du défendeur, et l'objet très indirecte, en ce sens qu'ils peuvent servir à payer la dette, s'il est encore possible au défendeur d'en recouvrer le contrôle et, sous la pression de la contrainte exercée, de les employer contre son gré, à l'extinction de la créance réclâmée. Ils auraient pu être l'objet d'une poursuite et d'une exécution, dans la Province d'Ontario, sans le fait de recel reproché au défendeur.

Les demandeurs ne se plaignent pas de ce que le défendeur a soustrait à notre jurisdiction des biens qui s'y trouvaient antérieurement soumis, mais bien de ce qu'il a soustrait ses biens à toute action et jurisdiction quelconque, dans n'importe quel pays ; en les faisant devenir la propriété, si non réelle au moins apparente, d'un tiers et de ce que, en ce faisant, il ne leur a pas laissé d'autre recours que celui qui peut exister contre sa personne même, à laquelle la dette reste toujours attachée.

Et alors les demandeurs s'adressent à cette Cour et la prient d'appliquer le seul remède que la ruse et la fraude du défendeur n'a pas encore pu leur faire perdre, la contrainte par corps, reconnue par la loi du pays où ils rejoignent leur débiteur.

Ici se présente tout naturellement cette question : avons-nous jurisdiction sur la personne du défendeur ?

Nous trouvons la réponse dans cette disposition de l'article 6 de notre code : "Les lois du Bas-Canada relatives aux personnes sont applicables à tous ceux "qui s'y trouvent, même à ceux qui n'y sont pas domiciliés." Il n'y a qu'une exception en faveur de ceux qui n'y sont pas domiciliés : ils restent soumis à la

loi de leur pays, *quant à leur état et à leur capacité.* Personne ne prétendra qu'il s'agit, dans cette cause, de l'état ni de la capacité du défendeur.

Le défendeur a contracté sa dette envers les demandeurs, à Montréal; Or Boullenois (1er Vol: de la personalité et de la réalité des lois, p. 146) exprime l'avis suivant: celui qui contracte dans une autre jurisdiction que la sienne, ne peut réclamer la loi de sa jurisdiction, il "*est présumé ne faire attention qu'aux "lois de l'endroit où il contracte, et le juge de cet endroit n'est pas obligé de "suivre les lois du domicile de ceux qui viennent contracter chez lui, ni souffrir "que dans sa jurisdiction on prenne droit par des lois étrangères.*"

Le défendeur est venu contracter ici, il est actuellement trouvé dans notre jurisdiction; c'est donc en vertu de notre loi qu'il doit être poursuivi et jugé. Nous n'agissons aucunement sur son bien qui est en dehors de notre jurisdiction, mais sur sa personne, parce qu'il a, lui, commis un acte de fraude pour éviter l'exécution de son contrat fait ici.

Si l'on admet en principe, qu'un débiteur ne peut être arrêté que pour des faits qui ont eu lieu sous la jurisdiction de la loi de notre pays, il faudra dono dire que le débiteur regnicole, qui soustrairait son bien frauduleusement, en faisant passer en pays étranger, à des tiers, ne pourrait pas être arrêté, à son retour ici, parce que l'acte qui l'aurait finalement dénanti de son bien, se serait passé hors de l'atteinte de notre loi! Tel ne me parait pas être l'esprit de celle-ci.

Elle a pour but de protéger la pleine et entière liberté de la personne du débiteur aussi longtemps que celui-ci conserve honnêtement le bien qu'il tient, pour ainsi dire, de son créancier, à qui il le doit. Veut-il, par fraude, faire passer en d'autres mains ce gage du créancier, aussitôt la loi cesse de lui conserver cette liberté dont il s'est rendu indigne.

Maintenant devons nous, dans l'intérêt du commerce, comme on l'a prétendu, appliquer cette loi avec rigueur contre nos propres concitoyens et la considérer comme une lettre morte, quand il s'agit d'un étranger qui vient ici, chercher leurs marchandises, et une fois qu'il les a transportées hors de notre jurisdiction, soustrait ces marchandises non pas seulement à notre jurisdiction, mais à l'action universelle de ses créanciers, et revient ensuite, sous la jurisdiction de notre loi, braver celle-ci en disant: vous ne pouvez rien sur moi; j'ai eu le soin de commettre la fraude hors de chez vous, et à raison de cela vous ne pouvez m'atteindre. Ce serait, il me semble, une manière étrange de favoriser le commerce extérieur et oublier que c'est précisément pour les cas où le débiteur met ses biens hors de l'atteinte de notre loi que celle-ci assujettit son corps à la perte de sa liberté dont elle est si jalouse en tout autre cas.

Le second considérant du jugement va plus loin et me semble ériger en principe, que le débiteur ne peut pas être incarcéré, parce que son bien et son domicile étant hors de cette province, il n'aurait pas le privilège de faire une cession de son bien à ses créanciers, pour se libérer.

C'est un adoucissement considérable, à la rigueur de la loi de la contrainte par corps, que la faculté donnée, au débiteur, de recouvrer sa liberté, en faisant une cession de son bien. C'est une clef que la loi met dans la main même de celui qui s'est rendu coupable de fraude, pour sortir de prison, en réparant

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autant qu'il est encore en son pouvoir de le faire, l'acte qui l'y a fait entrer et en a refermé les portes sur lui.

Mais de ce que le débiteur s'est volontairement privé de cette clef, que la loi lui avait ménagée pour sortir; de ce qu'il a si bien pris ses mesures, pour éluder la loi qu'il ne serait plus en son pouvoir de s'y soumettre, même s'il en avait la volonté, peut-on rigoureusement déduire la raison même qui devra le faire exempter de l'application de cette loi? Je ne puis m'expliquer la justesse de cette déduction. Je ne puis apercevoir comment tirer de l'excès même de la faute du débiteur la raison ou le motif de lui en faire éluder les conséquences immédiates. Ne serait-ce pas là dire au débiteur: quand vous aurez intention de frauder vos créanciers, ayez la précaution de le faire bien complètement et vous échapperez à l'action de la loi; si, au contraire, vous ne le faites qu'à demi, vous serez passible de toute sa rigueur.

Je dois ajouter qu'il ne s'agit pas, dans cette cause, de décider si le défendeur incarcéré aura ou n'aura pas tel ou tel moyen de se libérer. La question est de savoir s'il a donné lieu à son incarcération.

Si les faits mis à sa charge sont vrais, il s'est assujetti à l'incarcération, et les motifs exprimés dans le jugement revisé ne me paraissent pas suffisants pour l'en faire déclarer exempt indépendamment de l'examen des faits de la cause. Le capias doit être maintenu.

The judgment is recorded as follows:

"Considering that the defendant, petitioner, being within the jurisdiction of this Court, and the cause of action having arisen therein, was liable to be arrested in the terms of the Civil Code of Procedure;

"Considering that petitioner hath failed to prove that the allegations of the affidavit of plaintiffs, upon which the *capias* in this cause issued, were untrue, and that the petitioner was not guilty of secretion, as charged against him; doth, revising said judgment, reverse the same," &c.

Judgment reversed and *capias* maintained.

L. H. Davidson, for plaintiffs.

L. N. Benjamin, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH NOVEMBER, 1877.

Coram TORRANCE, J.

No. 2024.

O'Brien vs. *Molson*.

No. 2026.

O'Brien vs. *Thomas*.

JUDICIAL ADMISSION—INDIVISIBILITY.

HELD:—1. That judicial admissions cannot be divided against the party making them.
2. That a contract is not the less valid though the consideration be incorrectly expressed in the contract.

The action of the plaintiff was to recover the price of certain lots of land alleged to have been sold to the defendants, but not paid for. The declaration set out the deed of sale by plaintiff to defendant. In the deed it was declared that the price had been paid. The plaintiff averred that the payment had not been made, and prayed for a condemnation against the defendants.

The only evidence in the case was that of the plaintiff and defendant in each case, and the evidence of Molson as witness in the case against Thomas, and the evidence of Thomas in the case against Molson. It was admitted that the price had not been paid, but the defendants also declared under oath that it was never intended that they should pay a price. The transfer was a gift or gratuity to compensate them for a breach of contract on the part of the plaintiff towards them. The deed of sale was made in 1873, and nearly four years had elapsed without the plaintiff making any demand upon the defendant for payment.

PER CURIAM:—There is here admitted a consideration different from that in the deeds of sale. The plaintiff has proved non-payment, but he wishes to divide the admission. He asks for the price of the land, but he refuses to the defendants the advantage of their declaration that the transfers to them were in the nature of a gift or gratuity. C. C. 989 says that a contract is not the less valid though the consideration be incorrectly expressed in the writing. C. C. 1243 says, admissions cannot be divided against the party making them. C. C. P. 231 says, the answer of any party to a question put to him may be divided according to circumstances, and in the discretion of the Court in certain cases which are put. I do not consider that this article 231 applies to the present case.

The books, nevertheless, abound in statements which bear upon the present case. Merlin, Questions, vo. Causes des Obligations, § 1, No. III. p. 215, says, we should regard as valid the obligation of which the expressed cause is false, but which has, in reality, a real cause.

Toullier, Vol. 6, n. 176, adopts this principle. So also LaRombière, Vol. 1, p. 296, No. 8; Comm. on Cod. Nap. Art. 1132. The French authors are so positive in saying that the admission cannot be divided: Troplong, Donations,

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n. 1044. Marcadé says, Vol. 5, p. 213, Cod. Nap. Art. 1356: when the holder of a bill, admitting that the consideration expressed is not real, affirms that the bill has such another cause, his declaration cannot be divided. So LaRombière, Vol. 5, p. 407, where a person acknowledged having received a certain sum, but said it was by way of gift. *Vide* also Bonnier, Des Preuves, Vol. 1, n. 356, p. 450 and seq. I would also refer to the following decisions of the French Courts: Metz, 31 Jan. 1821, (Tay) Cass.; 19 Avril 1858, (Benoit) Cass.; 11 Mars 1862, (Boucault). But we need not go abroad for illustrations of the principle that the admission of the parties cannot be divided. It was so held in re Callahan et al., insolvents, and Fulton, assignee, and McNamee et al., petitioners. This was a case decided by Mr. Justice Rainville on the 2nd May, 1876, and confirmed in appeal Q. B. on the 15th June, 1877, by a majority of the Court. C. J. Dorion says: "There is hardly "a rule of French law less susceptible of controversy than the one stated in "Article 1243 of the Civil Code, which says: 'Admissions are extrajudicial "or judicial. They cannot be divided against the party making them.' "The effect of this rule is that if you take one part of the admissions of the "respondents, whether as contained in their petition or in their depositions, the "other must be taken also, for they cannot be divided, &c. &c. There is a "singular unanimity among the authors on this question of the indivisibility of "admissions made by the parties, especially as regards the true cause or considera-"tion of obligations." I come to the conclusion, therefore, that the plaintiff has not made out that the defendants owe him any money, and the actions are therefore dismissed.

Actions dismissed.

J. L. Morris, for plaintiff.
M. M. Tait, for defendants.
(J. L. M.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND DECEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 53.

FRANCŒUR, APPELLANT;

AND

MATHIEU, RESPONDENT.

HELD.—1st. That a tripartite community of property is dissolved by the death of the second wife who dies without leaving any minor children, and, therefore, the third share of the second wife in an immoveable purchased during the existence of such tripartite community is a *propre* of the issue of such second marriage.

2nd.—That the surviving husband has no power to alienate such immoveable after the death of the second wife.

3rd.—That the purchaser of the rights of said issue, of age at the death of the mother, has a right to claim a *partage* of said immoveable.

The material facts of the case, as well as the legal questions at issue, appear in the written judgment of the Court which was rendered as follows:—

"La Cour * * * considérant qu'au décès de Julie Millette dite Beauchemin,

épouse de François Godin, l'Intimé, arrivé le 26 mars 1841, la communauté de biens qui existait entre elle et le dit François Godin s'est continuée avec les trois enfants alors mineurs issus de leur mariage; Considérant que par le convol en secondes noces du dit François Godin avec Josephte Mainville le 10 juin 1843, les parties ayant stipulé une communauté de tous biens, une communauté tripartite a été formée par la loi entre le dit François Godin, les enfants de son premier mariage et la dite Josephte Mainville sa seconde femme; *

"Considérant que le 9 octobre 1873 la dite Josephte Mainville est décedée, ne laissant qu'une fille baptisée sous le nom de Cécile et connue sous les noms de Priscille ou de Sophie, à qui elle a légué tous ses biens, et qui était majeure lors du décès de sa mère, et que par le décès de la dite Josephte Mainville sans enfants mineurs, la communauté de biens tripartite qui existait entre elle et le dit François Godin et les enfants du premier mariage de ce dernier a été dissoute, sans toutefois dissoudre la communauté entre le dit François Godin et les enfants de son premier mariage, qui a continué entre eux comme elle existait avant le second mariage; †

"Et considérant que l'immeuble mentionné dans la déclaration et les défenses en cette cause a été acquis par le dit François Godin et la dite Josephte Mainville le 27 octobre 1857, pendant l'existence de la dite communauté tripartite, et que partant la dite Priscille Godin est devenu par le décès de sa mère et le legs qu'elle lui a fait de tous ses biens, propriétaire d'un tiers indivis du dit immeuble qu'elle a vendu à l'appelant par acte du 4 septembre, 1874; ‡

"Et considérant que lors même que la dite communauté tripartite n'aurait pas été dissoute par le décès de la dite Josephte Mainville, mais qu'elle aurait été continuée avec la dite Priscille Godin, sa part indivise du dit immeuble qui lui serait devenue propre par le décès de sa mère, ne serait pas entrée dans la dite continuation de communauté si ce n'est quant aux fruits et revenus qui en seraient prevenus suivant l'art. 1329 du code civil, et que partant le dit François Godin n'aurait pas eu le droit de l'aliéner;

"Et considérant que l'action en partage du dit appelant est bien fondée, en autant qu'il est propriétaire d'un tiers indivis du dit immeuble que lui a vendu la dite Priscille Godin, et qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Sorel, le 16me jour de septembre 1875, qui a renvoyé l'action de l'appelant; Cette Cour casse et annulle le dit jugement du 16 Septembre 1875, et procédant à rendre le jugement qu'aurait du rendre la dite Cour Supérieure, renvoie la défense en droit produite par le dit François Godin, arrière-garant et intimé en cette cause, et condamne le dit François Godin à payer à l'appelant les frais encourus en Cour Inférieure sur la dite défense en droit et ceux du présent appel.

"*Dissentiente*, L'Hon. M. le Juge Monk."

Judgment of S. C. reversed.

A. Germain, for appellant.

Mathieu & Gagnon, for respondent.

(S. B.)

* Pothier, Nos. 813, 854, 907, 930,—Arts. 1323, 1327, 1329, 1331, C. C.

† Pothier, No. 930.

‡ Art. 1335, C. C.

SUPERIOR COURT, 1876.

MONTREAL, 18TH APRIL, 1876.

Coram JOHNSON, J.

No. 849.

McDonald vs. *Senez.*

HELD :—That a note given to a creditor to induce him to sign a deed of composition, or the note given in renewal of such note, is null, and the nullity may be pleaded by the maker to an action by the creditor.

PER CURIAM :—The action is brought on a promissory note by the payee against the maker. The plea is, no consideration, and no right of action under the circumstances. The facts are that in 1867 the defendant wanted to get a composition from his creditors, of whom the plaintiff was one, and the latter consented to sign on getting the defendant's note for his debt. When the note was overdue and approaching extinction by limitation, the defendant gave the present note in renewal of it. There are cases of old date in this country in which it was invariably held that a man making a composition with his creditors implies by the nature of his act that they are all being dealt with on equal terms, and that such a contract as this is virtually a robbery *pro tanto* of the other creditors. In more recent times conflicting decisions have been rendered by the Court of Appeals, which in their turn have caused variance in other courts. In 1859, Mr. Justice Badgley decided in the case of Greenshields vs. Plamondon that such a note was null and void; it is reported in 3rd Jurist, p. 240, and was remarkably well argued on both sides. It was taken to appeal, however, and the judgment was reversed (see 8th Jurist, 192), Judge Aylwin dissenting. The next case was that of Perreault vs. Larin (8th Jurist, 195), in which Judge Loranger, against his own individual opinion, held himself bound by the decision of the Queen's Bench in Greenshields vs. Plamondon, and adjudged the note to be valid. This was in December, 1863. Three years later, in Sinclair et al. vs. Henderson et al., a contrary opinion was held, Chief Justice Duval, who had succeeded Chief Justice Lafontaine, observing "that by all laws, the transaction in question was considered a fraud upon the creditors. It was considered a fraudulent act, giving rise to no action whatever. The English authorities put it upon the broad ground of being a fraudulent act. It had been stated that previous to the Code Napoleon, this was not the law in France, but such a statement was incorrect." Since that decision, the Courts have gone further, and have held that even the note of a third person given for such an object is a nullity (see Pickle vs. Prévost, 14th Jurist, p. 220) where the judgment was rendered by Mr. Justice Mackay. This judgment was confirmed in the Queen's Bench in March, 1872, (18 Jurist, p. 314), and that decision was followed in another case in appeal in September of the same year—the case of Doyle and Prévost (18 Jurist, 307), and I hope the point may now be considered settled.

If the case came before me for the first time, I should not fail to be struck by the objection that the debtor was not here pleading his own right, but his own

wrong; certainly it would come better from the creditors; but the answer to this is to be found in the judgment of Mr. Justice Badgley, to which they have all come back at last. Judge Badgley says:—"The only serious difficulty which existed for some time in France in the application of the principle involved in this case was with reference to the nullity of such a contract, *quoad* the debtor himself; but it is now universally settled that the debtor must be admitted to claim his release from an obligation of this kind. It is a matter of public policy that a contract founded upon fraud should receive no sanction from a Court of Justice." To use the language of Lord Mansfield in Holman vs. Johnson, Cowper, 343, "the objection that a contract is immoral or illegal, as between the plaintiff and the defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice between him and the plaintiff, by accident if I may so say. The principle is *ex dolo malo non oritur actio.*" The fact of the note sued on being a renewal of the first one, makes no difference. As between the same parties, there is no novation, and the natural obligation is over-ridden by positive law. I should have been individually inclined to dismiss this action without costs, under the circumstances, but I follow the precedents in dismissing it with costs.

Action dismissed.

Duhamel & Co., for plaintiff.
Delorimier & Co., for defendant.
(J. K.)

COURT OF REVIEW, 1877.

MONTREAL, 30TH NOVEMBER, 1877.

Coram JOHNSON, J., MACKAY, J., RAINVILLE, J.

No. 192.

Decelles vs. *Bertrand.*

HELD:—That a note given either by an insolvent or by a creditor to induce the payee to consent to the insolvent's discharge is null.

The plaintiff inscribed in review from a judgment rendered by the Superior Court, District of Iberville, CHAGNON, J.

JOHNSON, J.—The plaintiff is holder of a promissory note endorsed to him after maturity by Langelier & Decelles, in whose favor it was made by the defendant; and the action is brought to recover the amount of this note from the maker. The plea is that it was given to get the consent of the indorsers to the discharge of the defendant's brother,—that is to say, the original note was (for this is a renewal, which, however, makes no difference.) It was answered that there was another and a different consideration; viz., that the first note, which was retired by this one, had been given by the defendant to pay the balance of a *hypothec* created by Théophile Bertrand on the defendant's property. Arcade Decelles, the indorser, examined as a witness, is asked what consideration was given for

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the note, and he does not prove what is alleged in the plaintiff's special answer at all; but quite another thing—that is, he says that the consideration was another note given (not to pay a balance as alleged in the answer), but to settle a criminal prosecution for having mortgaged the property of another. If the answer had set up this instead of a payment of the balance of the *hypothec*, the question might have arisen whether the Code not having reproduced the penalty imposed by the Registration law for this offence, there was any misdemeanor to be compounded. That question was decided in the negative by the Queen's Bench about a year ago in the case of Montizambert vs. Dumontier, and therefore the consideration mentioned in Decelles' evidence might have been held good; for the defendant who pleads want of consideration calls the payee as his witness, and if he proves by him a consideration, or rather fails to prove a want of it, his note for 'value received' on the face of it would be held to have been given for good consideration. But the fact is that Decelles does not say in his evidence what he says in his special answer;—I say *his* special answer, for he admits that the plaintiff got the note after maturity, and is a mere *prête-nom*. The Court must, therefore, look at the one question, whether a note made, not by an insolvent but by a third party, to procure the insolvent's discharge, is a valid contract. As to the fact that this note was so given, the written receipt settles that. The case of Prévost vs. Pickel is in point. That was a note given by a third party, but it is not so strong a case as this, for here the maker evidently knew all about the matter. I have given myself the trouble to look over very numerous authorities; but in a case of McDonald vs. Senez,* which I decided in May, 1876, I reviewed them all. On recurring to my notes in that case, which were reported, I find that I improvidently expressed the hope that the doctrine might be considered finally settled that such a contract, whether by the insolvent, or a third party on his behalf, is void. I will merely say now that when I turn to the terms of the 66th Section of the Act of 1875, even if it stood alone, without the string of previous decisions both in England and in this country, I cannot conceive how it could be held not to reach payments or promises of payment made by third persons. The argument of Mr. Pagnuelo—ingenious no doubt, and on the surface plausible—that the third person might have bought the debt right out, is an assumption, a fallacy. The words of the 66th Section, and the very spirit and essence of the system of insolvent law, reach not only to the outward form, whether it be that of a sale or a promise to pay, but to every shape that such a thing may be ingeniously devised to take. The principle at bottom of all the cases seems to be that every creditor assumes of right that every other creditor has given an entirely free assent, as free as he himself is giving; and they are deceived if some of them allow themselves to be bribed into consenting. The very heart of the system would be struck at by allowing any mere form or disguise to affect the character of the transaction. I will only cursorily refer to one case as showing how the matter is regarded in the English courts: the case of Howden vs. Haigh et al., 11 Ad. & Ell. p. 1038. Lord Denman there, on precisely the same point, said: "It was argued that the stipulation did not alter the condi-

* Ante, p. 290.

"tion of the insolvent, or give the creditor more than he was entitled to; but "the principle is that every creditor is entitled to be on the same footing, and "none shall privately exact better terms for himself. So in Knight vs. Hunt, "where it was argued that neither the debtor nor his funds were prejudiced by "the agreement, the Court disregarded that argument, holding the question to "be whether the judgment of the creditors has been influenced by the supposi- "tion that all are to suffer in the same proportion."

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Judgment confirmed.

Duhamel & Co., for plaintiff.
Lacoste & Co., for defendant.
(J.K.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 22ND SEPTEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 32.

GUEVREMONT, APPELLANT;

AND

TUNSTALL ET AL., RESPONDENTS.

HELD:—(By Dorion, Ch. J., Monk, J., and Sanborn, J.) that the costs of an election feast, *after* an election (in 1867) had been closed, are not recoverable, and (by all the Court) that the appellant's account was not proved.

The judgment appealed from was rendered by Loranger, J., as follows:

"La Cour &c., &c.

"Considérant que par l'article 6 de l'acte 23 Victoria, chapitre 7, applicable "au présent litige, il est pourvu que tout contrat ou toute promesse, et toute "entreprise exécutoire se rapportant en aucune manière ou provenant ou dé- "pendant d'aucune élection parlementaire même pour le paiement de dépenses "légales ou l'éxécution de tout acte légal sont nuls en loi;

"Considérant qu'il appert par le compte même du demandeur et par l'en- "quête, qu'il réclame la somme de $345.96 pour préparation d'un festin d'élec- "tion, valeur de liqueurs et victuailles, ayant servi à ce festin, et pour loyer "des lieux du festin qu'il prétend avoir été donné par feu Thomas McCarthy, "représenté par les défendeurs Daniel & John McCarthy comme ses exécuteurs "testamentaires, avec lequel Thomas McCarthy, la défenderesse Dame Mary "Emma Tunstall était en communauté de biens, à la suite de l'élection du dit "Thomas McCarthy en 1867, comme membre de la Chambre des Communes du "Canada, pour le Comté de Richelieu, et que par la loi qui vient d'être citée "le dit demandeur n'a aucune action en justice pour soutenir la dite reclamation "qui, fût elle prouvée, tomberait sous le coup du dit article 6 de la loi préc- "a débouté et déboute le demandeur de son action avec dépens."

Guevremont and Tunstall et al.

DORION, C. J. An election was held in the County of Richelieu in 1867 to elect a member of the House of Commons and a member for the Local Legislature. Mr. Thomas McCarthy was the candidate for the House of Commons, and was elected. Mr. Guevremont, a brother of the appellant, was candidate for the Local Legislature, and was defeated. Shortly after the election the electors who had been favorable to Messrs. McCarthy and Guevremont were invited to a banquet, to celebrate the triumph of McCarthy, and this demonstration, to which electors from every part of the county congregated, took place on the appellant's property.

The action, which is to recover from the representatives of Mr. McCarthy the expenses of this feast or banquet, was brought several years after the expenses were incurred and after the death of Mr. McCarthy, and was dismissed by the Court below, on the ground that, under the 23rd Vict. c. 17, such expenses could not be recovered.

The Court is unanimous that there is no evidence that this banquet was given at the request of McCarthy, nor of any agreement or of any promise on his part or on that of his representatives to pay for it. On [illegible] ground the action must fail, and the judgment must be confirmed. The other question is so important that it is thought it ought not to be passed over unnoticed, to prevent any misconstruction of the views of the Court. Unfortunately, we have been unable to agree on this point. The majority hold with Mr. Justice Loranger that the expenses of a banquet to the electors, given in connection with an election, do not constitute any part of the legitimate expenses which can be recovered against a candidate, and that no action will lie for such expenses. On this last ground, also, the majority of the Court would be disposed to confirm the judgment of the Court below.

RAMSAY, J. The first question is as to the admissibility of verbal evidence. If admissible, it must be from the admissions of Mrs. McCarthy and of the two executors, and especially the admission that McCarthy ordered and paid for two casks of beer sent down for the use of the guests. Although the naked facts give rise to some difficulty we are not prepared on a demand of this sort, brought forward so long after the transaction and even after the death of the defendant, to admit parole evidence to establish the claim. On this ground, and on this alone, Mr. Justice Tessier and I would maintain the judgment of the Court below.

The next question is as to whether the action is barred by the Statute of 1860. I think not. The contract did not refer to the election, though the the election was the remote cause of it. As well might it be said that Mr. McCarthy should not pay his wine merchant because some of his electors had dined with him the week after the election.

TESSIER, J., concurred in the views expressed by Ramsay, J.

Judgment of S. C. confirmed.

A. Germain, for appellant.

Pagnuelo, Major & Brousseau, and D. Z. Gauthier, for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 16TH SEPTEMBER, 1876.

Coram RAMSAY, J., SANBORN, J., TESSIER, J., BELANGER, J., *ad hoc.*

No. 13.

GIRARD,

APPELLANT;

AND

TRUDEL ET AL.,

RESPONDENTS.

HELD:—That an association of persons, formed for the purpose of trafficking in real estate, is not a commercial partnership.

RAMSAY, J. L'appelant a posé la véritable question ainsi: "Si l'affirmative est accueillie, l'appelant doit réussir; au contraire, si la négative prévaut, il doit succomber." L'affirmative est que l'association des personnes pour faire le trafic des terres est une société commerciale. L'appelant admet que le droit français est opposé à sa prétention; mais il maintient que le droit anglais est en sa faveur, et que l'article 1863 C. C. donne un caractère commercial à tout trafic quelconque, et que l'article 1834 reconnait le trafic des terres et donne à ce trafic un caractère commercial.

La seule autorité citée pour appuyer la prétention que le droit Anglais considère le trafic des terres comme une matière commerciale est la cause de McKay & Rutherford, mais il ne s'agissait pas dans cette cause du trafic des terres, mais de la construction d'un canal. Je ne vois donc d'analogie entre cette cause et celle-ci. L'article 1834 ne donne aucun caractère commercial au trafic des terres, mais il ordonne à toutes les sociétés formées pour des fins de commerce ou pour la colonisation, le défrichement, ou le trafic des terres, d'enregistrer leurs actes de société. Ensuite l'article 1863 ne dit pas que toutes les sociétés contractées pour quelque trafic que ce soit seront commerciales, mais au contraire, qu'une société contractée pour un trafic d'une nature commerciale sera commerciale, "soit qu'elle soit générale, ou limitée à une branche ou aventure spéciale." Ainsi ces deux articles sont contraires à la prétention de l'appelant. Mais il y a plus, même dans le cas que la preuve testimoniale fut admissible, je doute fort qu'il y ait une preuve suffisante au dossier pour établir une promesse de la part des défendeurs d'admettre l'appelant et Brazeau comme leurs associés. Le jugement dont est appel est en conséquence confirmé.

Judgment of S. C. confirmed.

Doutre & Co., for appellant.

C. A. Geoffrion, and Longpré & Dugas, for respondents.

(S. B.)

COURT OF QUEEN'S BENCH, 1876.

MONTREAL, 15TH SEPTEMBER, 1876.

Coram DORION, CH. J., MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 124.

GRENIER,

APPELLANT;

AND

THE MAYOR ET AL. OF MONTREAL,

RESPONDENTS.

HELD:—That the corporation of Montreal is liable for damages caused by the bad state of one of the public footpaths in the city.

DORION, C. J. This was an action brought by the appellant, who had slipped on the sidewalk in St. James street and broken her arm. It appears that the level of the street had been lowered, and the sidewalk on one side was left higher than the road bed. This made the sidewalk more dangerous than it otherwise would have been. The question is, whether the Corporation is responsible for the unsafe condition of the sidewalk. The judgment of the Court below dismissed the action, but it was not pretended that the Corporation would in no case be liable—only that, under the circumstances of the case, the Corporation was not responsible. The Court here is of a contrary opinion, and holds that there was negligence of such a gross character that the Corporation must be held responsible. The judgment is reversed, and the sum of $200 damages awarded to the appellant.

SANBORN, J., remarked that the law upon this subject is in a somewhat unsatisfactory condition, but it would be a great hardship, seeing that the power of controlling the streets and sidewalks is vested in the Corporation, not to hold it liable for negligence in the direct way in which it was held by the present judgment. He therefore concurred in the judgment.

RAMSAY, J. I would not consider it necessary to say anything if it were not for the case of O'Neil vs. The Mayor of Quebec. * But the Court thinks that case is a precedent not to be followed. It turned upon the fact that the old Statute of Geo. III. was still in force. The question is whether that statute has not been impliedly repealed. I consider that it has, and that the rule recognized by the common law must now be applied, namely, that, if a person bound to perform a duty neglects it, he becomes liable. It comes to be a question between the Corporation and the proprietor. The Corporation is primarily liable to the public. The proprietors are liable to the Corporation, but the Corporation is primarily liable to the individual injured. There is evidence showing that this portion of sidewalk was in a bad state for months; the Corporation was clearly in fault for not having it made safe for foot passengers, and judgment must go for damages.

* A case cited at the argument, not reported.

The following was the judgment of the Court:—

"The Court * * * considering that the appellant hath proved by legal evidence the material allegations of her declaration, and, namely, that, during the months of December, 1871, and January, 1872, the snow and ice had been allowed to accumulate on the footpath on the south side of St. James street in the City of Montreal and that, on the eighth day of January, 1872, and for a long time previous, the said footpath was in a dangerous state for persons having occasion to use the same;

"And considering that the bad and dangerous state of said St. James Street was mainly, if not altogether, due to the fact that the roadway had, by the respondents, been graded several feet below the level of the footpath which had been left sloping towards the street;

"And considering that the appellant has proved that, on the said eighth day of January, 1872, owing to the bad state of the said footpath, of which the corporation was aware, or could not be ignorant, she met with the accident complained of in the declaration in this cause, by which her left arm was fractured;

"And considering that said accident occurred through the negligence of the respondents in not keeping the said footpath in a proper state of repair as they are bound to do;

"Considering that the respondents are by law responsible for the damages resulting to the appellant from said accident, and considering that there is error in the judgment rendered by the Superior Court at Montreal on the 29th day of November, 1873. This Court doth reverse and annul the said judgment of the 29th day of November, 1873;

"And, proceeding to render the judgment which the said Superior Court should have rendered, doth condemn the said respondents to pay to the appellant the sum of $200, with interest from this date and costs, as well those incurred in the Court below as on the present appeal."

Judgment of S. C. reversed.

E. Barnard, for appellant.
R. Roy, Q. C., for respondents.
(S. B.)

COUR DU BANC DE LA REINE, 1877.

MONTREAL, 18 SEPTEMBRE, 1877.

(En Appel).

Coram Dorion, Juge en chef, Monk, J., Ramsay, J., Tessier, J.

No. 121.

HERMAN HEYNEMAN,

Appelant;

et

JOHN SMITH,

Intimé.

Juge :—Qu'un défendeur arrêté sur capias doit soulever *in limine litis*, tous moyens résultant de l'insuffisance de l'affidavit, et qu'il est trop tard de le faire en appel."

Le 16 février dernier, (1877) les intimés ont fait arrêter l'appelant sur un bref de *capias ad respondendum*, émané sur l'affidavit reproduit à la suite de ce factum. L'appelant a été arrêté et conséquemment a reçu signification personnelle du dit bref. Il a donné le cautionnement ordinaire pour garantir qu'il comparaîtrait le jour du retour et là dessus il a été mis en liberté. Le 1er mars, jour du rapport du retour en cour du dit bref, le dit appelant n'a pas comparu, ni ce jour-là, ni après; et après enquête par défaut, jugement a été rendu contre le dit appelant, qui avait laissé la province, ainsi qu'il appert par l'enquête. Il n'a pas reparu depuis.

Trois mois après, l'appelant instituait le présent appel qu'il appuie sur les moyens suivants:

1o. Parce qu'il n'appert pas dans quel district la cause a été instituée.

2o. Parce que l'affidavit semble avoir été fait par un nommé George Flanagan, teneur de livres de la cité et du district de Montréal, mais n'indique pas, tel que requis par l'article 798 du Code de Procédure, que ce monsieur était le teneur de livres des demandeurs, ou leur commis ou leur représentant légal, ou qu'il était réellement autorisé, en aucune façon, à faire tel affidavit.

3o. Parce que l'affidavit n'indique pas d'où procède la créance de l'intimé contre l'appelant.

4o. Parce que l'affidavit ne dit pas *comment, quand, où, ou de quelle manière* les deux cents piastres étaient dues par l'appelant à l'intimé, mais déclare seulement "que Herman Heyneman de la cité et du district de Montréal est personnellement endetté envers les demandeurs en une somme excédant quarante "piastres, savoir en la somme de deux cents piastres."

5o. Parce que l'affidavit ne donne aucune désignation de l'appelant.

6o. Parce que l'affidavit, en autant que l'allégué de soustraction et de dissipation des biens et effets de l'appelant est concerné, n'est pas conforme à l'article 798 du Code de Procédure, lequel veut que le déposant jure positivement comme un *fait actuel*, que la partie soustrait et dissipe ses effets, et non pas seulement qu'il a tout lieu de croire.

7o. Parce que l'affidavit est sous plusieurs autres rapports, absolument irrégulier et illégal, et insuffisant pour permettre aux intimés d'avoir et de soutenir leur *capias*. Heyneman et Smith.

A l'encontre de ces allégués les Intimés prétendirent que l'Appelant ne pouvait pas maintenant soulever ces moyens, n'attaquer en aucune manière la suffisance de l'affidavit. Il aurait pû le faire à l'origine de la cause, par une *petition to quash*; mais il est trop tard de le faire en appel, après que jugement a été rendu par défaut contre l'appelant.

Les Intimés citèrent les autorités suivantes :

Hogan & Gordon, 2 L. C. J. p. 162; Chapman & Blennerhasset, 2 L. C. J. p. 71; C.P.C. art. 819; M & W. Reports Vol. 5, p. 30; U. C. Q. C. Rep. t 2 p. 385.

Les prétentions des Intimés ont été maintenues par le tribunal, et l'appel a été rejeté.

F. J. Keller, pour l'appelant. Jugement confirmé.

DeBellefeuille & Cie., pour les intimés.

(E. Lef. De B.)

SUPERIOR COURT, 1877.

MONTREAL, 31st OCTOBER, 1877.

In Review.

Coram Torrance, J., Dorion, J., Rainville, J.

No. 656.

Beard vs. *Thomson*, and *Thomson, Petitioner.*

Held:—That a demand for assignment under the Insolvent Act, 1875, will be set aside unless it be distinctly proved that the defendant had failed to meet his liabilities generally as they became due.

Torrance, J. This is an appeal from a judgment in insolvency, given in the District of Montreal, on the 1st September last. On the 8th of June last the plaintiff made a demand for assignment upon the defendant under the Insolvent Act. The defendant within the delay presented a petition to have the domand rejected. Among other reasons, he urged that the debt upon which the plaintiff based his claim was not due; that the plaintiff had no reasonable grounds for making the demand; that defendant was solvent, and had not ceased to meet his liabilities generally as they became due. The petition was rejected as not proved; hence the appeal. We find that the debt upon which the plaintiff founds his claim was not due. It was given to him at a short date for his convenience as representing a debt assumed by the defendant and payable at a much longer date under a written agreement and undertaking by the plaintiff, that the note now in question should be renewed, and the debt so assumed by the defendant was really not exigible until a later date. It was, therefore, not correct for the plaintiff to swear in the affidavit which necessarily preceded the demand for assignment, that the note he based his demand upon was *past due*.

His counsel endeavors to get over the difficulty by citing C.C. 1092, by which an insolvent cannot claim the benefit of a term of payment. It is further

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necessary to consider the charge against the defendant, that he had failed to meet his liabilities generally, as they became due. We do not find this charge made out. On the contrary, we find no proof of a default on the part of the defendant such as would meet the requirements of the insolvent law. He had two or three small accounts unpaid, but the creditors were not pressing him. This we find, notwithstanding the proof of considerable pains taken by the plaintiff to discover evidence against the defendant that he failed to meet his liabilities generally as they became due. I hold that the creditor who seeks to avail himself of this provision of the Insolvent Act must bring himself strictly within the letter and spirit of the law, if he wishes by its means to compel an assignment by a debtor. For my own part, I do not consider it necessary, under the circumstances, rigidly to investigate whether the defendant was then insolvent. I have examined the testimony with this view, and I am not yet satisfied that he was; but I am satisfied that the charge against the defendant, that he failed to meet his liabilities generally as they fell due, has not been made out. This is the unanimous opinion of the Court, and the petition of the defendant is therefore granted, setting aside the demand for assignment.

Judgment reversed.

Geoffrion, for plaintiff.
T. C. Butler, for defendant.
(J.K.)

COUR SUPERIEURE, 1877.

MONTREAL, 9 OCTOBRE, 1877.

Coram BELANGER, J.

No. 1108.

Guy vs. *Normandeau*.

JUGE:—Que les taxes municipales de la cité de Montréal ne sont prescriptibles que par trente ans.

La demanderesse comme subrogée aux droits de la Corporation de Montréal, poursuivait la défenderesse pour les arrérages des taxes municipales remontant au delà de vingt années.

A l'encontre, la défenderesse plaide que les taxes municipales de la cité de Montréal étaient prescriptibles par cinq ans, et cite l'art. 2242 du C. C. qui se rapporte aux arrérages de fruits naturels et civils.

Contre ces prétentions la demanderesse cita l'art. 2242 C. C. et dit que la prescription est une stipulation de droit étroit dont les dispositions doivent être appliquées rigoureusement et qu'elles ne sauraient être étendues d'un cas à un autre.

La Cour adopte l'interprétation de la demanderesse et lui accorde jugement, en disant que la prétention de la défenderesse n'était supportée par aucun texte de loi.*

DeBellefeuille & Turgeon, avocats de la demanderesse.
Bonin & Archambault, avocats de la défenderesse.
(E. LEF. DE B.)

*C'est la première décision rendue dans la jurisprudence canadienne sur ce sujet.

COUR SUPERIEURE, 1877.

MONTREAL, 13 NOVEMBRE, 1877.

Coram TASCHEREAU, J.

No. 2147.

Brennan vs. *McAnnally.*

JUGE:—Que, dans une action en séparation de corps, la réciprocité des torts ne peut être opposée par l'époux défendeur pour demander le renvoi de l'action.

PER CURIAM.—Le demandeur poursuit son épouse en séparation de corps pour cause d'adultère. La défenderesse plaide par exception que le demandeur son mari, s'est lui-même rendu coupable d'adultère, qu'il a maltraité, etc., etc. la défenderesse en plusieurs occasions, pourquoi elle demande le renvoi de l'action. Le demandeur répond en droit à cette exception.

Je ferai remarquer de suite que la défenderesse n'allègue pas que son mari tient sa concubine dans la maison commune, seul cas où la femme peut demander la séparation de corps pour adultère du mari. Art. 188, C. C. Mais serait-ce le cas, je ne crois pas que ceci autoriserait la défenderesse, poursuivie en séparation de corps pour cause d'adultère, à demander le renvoi de l'action. Il y a des autorités graves au contraire. Elles sont citées dans 2 Boileux, page 25, et Demolombe, 2 du mariage, No. 415 et seq. Mais la raison me semble faire voir, dans le plaidoyer de la défenderesse, deux causes pour la prononcer séparée de corps d'avec son mari au lieu d'une seule qui apparaissait par la déclaration. Je cite Demolombe, loc. cit.;

" Le mari et la femme sont, chacun de son côté, adultères; ou bien, ils se prodiguent réciproquement toutes sortes d'injures, d'excès et de sévices. Voilà notre fait. Eh bien! je dis que, non seulement les textes, comme je crois l'avoir établi, commandent de prononcer la séparation, mais qu'ainsi le veulent encore les principes et les plus hautes considérations de morale et d'intérêt public. Qu'est-ce donc que la séparation de corps? C'est en méconnaitre, selon moi, le caractère, que de n'y voir qu'une réparation, ou un refuge au conjoint opprimé qui mérite la protection de la justice. La séparation de corps, sans doute, se propose l'intérêt des époux, l'intérêt principalement de l'époux opprimé, j'en conviens; mais c'est aussi, ne l'oublions pas, une institution d'ordre public, qui se propose le bon ordre des familles, le bon ordre de la société. Et les deux époux, fussent-ils également coupables, également odieux, il n'en faudra pas moins prononcer la séparation, si vous reconnaissez que la vie commune n'est pour eux qu'un enfer, et pour la société qu'un scandale. Oui, certes, il y a là un grand intérêt public! car nous devons tout craindre de ces situations, lorsqu'elles nous révèlent d'irréconciliables haines; 'Contingit enim ut ex his nonnulli ad mutuas insidias procederent, venenisque et aliis quibusdam, quæ lethalia essent, uterentur.' La Novelle 140 est bien vieille, mais les passions humaines n'ont pas changé. Comment! parce que ces deux époux sont animés au plus haut point l'un contre l'autre; parce que des torts respectifs ont élevé entre eux une double barrière; parce qu'il y a enfin, dans ce

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procès, deux causes de séparation au lieu d'une, vous en concluez qu'il ne faut pas du tout prononcer la séparation ! J'en conclus, moi, au contraire, qu'il faut doublement la prononcer."

Je n'hésite pas à adopter cette opinion de Demolombe, que la jurisprudence française a entièrement supportée, (Voir Sirey, Table générale, page 181 et Table décennale de 1851 à 1860, page 539, et les décisions citées par Demolombe, loc. cit. No. 416), et je décide que la défenderesse ne peut en loi, pour les faits par elle allégués, demander purement et simplement le débouté de l'action. Réponse en droit maintenue et exception rejetée.

J. P. Sexton, procureur du demandeur.

Chs. de Salaberry, procureur de la défenderesse.

(J.K.)

COUR SUPERIEURE, 1877.

MONTREAL, 16 NOVEMBRE, 1877.

Coram TASCHEREAU, J.

No. 1949.

Dansereau vs. *Archambault et al.*

JUGE:— Que quand le mari et la femme separée de biens sont tous deux poursuivis et qu'une condamnation conjointe et solidaire est demandée contre chacun d'eux, une copie du bref et de la déclaration doit être laissée à chacun d'eux.

PER CURIAM:—Dans cette cause, le demandeur poursuit: "François Xavier Archambault, de Montréal, Ecuier, avocat et Octavie St. Louis, épouse séparée de biens par contrat de mariage du dit F. X. Archambault, et le dit F. X. Archambault pour autoriser sa dite épouse à l'effet des présentes et conclut à ce que ces défendeurs soient conjointement et solidairement condamnés.

Une seule copie du bref et de la déclaration a été servie aux défendeurs à leur domicile, en parlant à une personne raisonnable de leur famille.

Exception à la forme, des défendeurs, basée sur l'insuffisance de l'assignation, en ce qu'une copie devait être servie à chacun d'eux.

Cette exception à la forme est bien fondée. Le demandeur s'est appuyé sur l'article 67 C. P. C., mais je ne vois pas que cet article vienne à son secours. De droit commun (art. 59 C.P.C.) une copie doit être laissée à chacun des défendeurs, et l'article 67 permet de laisser au mari la copie pour sa femme et voilà tout. La cause du Trust and Loan Co. *vs.* McKay, 9 L. C. R. 465, ne s'applique point. Là, le défendeur n'était mis en cause que pour assister son épouse. Quelques auteurs, copiant Jousse, donnent à entendre qu'une seule copie suffit, mais la jurisprudence, en France, tant sous l'ordonnance que sous le code, est au contraire. La question est on ne peut mieux discutée par Merlin Répert. v. Surenchères, p. 545, v. Séparation de biens, p. 431. Je cite aussi, Dalloz Répert. v. exploit, Nos. 375, 378; do., do., v. Frais et dépens, No. 778, et v. Cassation, No. 1151; aussi 2 Boncenne, procéd. 221; 1 Boitard, procéd. 135, et Rogron, tel que cité par les codificateurs: Bioche, procéd. v. femme mariée, No. 42 et seq.—Sur un jugement obtenu contre la femme, et ses biens

mobiliers, et ses biens immobiliers ne peuvent-ils pas être vendus? Est-ce qu'elle n'a pas le droit de comparaître à la demande séparément d'avec son mari, et par un autre procureur que celui de son mari? Ne lui faut-il pas une copie de la demande pour ainsi se défendre? Même quand le mari est seulement mis en cause pour autoriser sa femme, on trouve des autorités qui disent qu'il faut une copie séparée et pour le mari et pour la femme. Bioche, v. exploit, No. 313; Dalloz loc. cit. Exception à la forme maintenue.

Dansereau vs. Archambault et al.

C. H. Stephens, proc. du demandeur.

Archambault & David, procureurs du défendeur.

(J.K.)

COUR DE CIRCUIT, 1877.

MONTREAL, 12 NOVEMBRE, 1877.

Coram DORION, J.

No. 4876.

Major vs. *Chartrand.*

JUGE:—1o. Que si un huissier omet de parapher un renvoi essentiel au rapport de la signification d'une action et ne fait pas mention dans ce rapport de la distance depuis le lieu des séances du tribunal, au domicile du défendeur, et que ces omissions donnent lieu à une *exception à la forme*, tel huissier sera passible d'une poursuite en recouvrement de ce qu'il en aura coûté au demandeur, pour faire amender ce rapport. (*)

2o. Que l'huissier n'est pas un *officier public*, dans le sens de l'Art. 22 du Code de Procédure.

L'action en cette cause est dirigée contre un huissier, en recouvrement de ce qu'il en avait coûté au demandeur, pour réparer les erreurs et omissions de cet huissier, dans un rapport de signification d'action, dont il s'était chargé; lesquelles erreurs et omissions consistaient dans le fait qu'un renvoi essentiel au dit rapport de signification, n'avait pas été paraphé et qu'aucune mention n'avait été faite dans ce rapport, de la distance du lieu des séances du tribunal, à celui de la résidence du défendeur.

Pour *fin de non recevoir* à l'encontre de cette action, le défendeur proposa l'exception suivante:

"Qu'il est *un officier public*, savoir: Un huissier de la Cour Supérieure et, comme tel, a droit à la protection de la loi.

"Qu'en vertu de l'article 22 du Code de procédure, il ne pouvait être poursuivi à raison des actes par lui faits dans l'exercice de sa charge, à moins qu'avis de telle poursuite ne lui eut été donné au moins un mois d'avance."

Cet avis ne lui avait pas été donné, et il concluait en conséquence au renvoi de l'action. Il produisit en outre une *défense au fond en fait.*

La cause fut inscrite pour preuve et audition, et le demandeur ayant prouvé les allégations de sa demande, la Cour condamna le défendeur à lui payer le montant réclamé, et déclara que l'huissier n'est pas *officier public*, dans le sens

(*) Voir C.P.C., art. 78, no. 5, et art. 295.

Major vs. Chartrand.

de l'article 22 du Code de procédure ; qu'il est uniquement officier de la Cour et sujet, comme tel, à ses ordres et injonctions, et n'a aucun droit à l'avis requis par cet article.

Maillet, pour le demandeur.

Ouimet & associés, pour le défendeur.

(J. G. D.)

CIRCUIT COURT, 1877.

MONTREAL, 2ND NOVEMBER, 1877.

Coram TORRANCE, J.

No. 5406.

Major vs. *Boucher*.

BAILIFF—NOTICE OF ACTION—PUBLIC OFFICER.

HELD :—That a bailiff is not a public officer entitled to a month's notice of action under C. C. P. 22.

The plaintiff claimed from the defendant, who was a bailiff of the Superior Court, $36 for damages suffered by the fault of the defendant, who had failed to make an effective service of a writ of summons and declaration. By his failure the plaintiff had to pay the costs of an *exception à la forme* and to withdraw his action.

Augé, at the argument, said he was entitled to a month's notice of the action under C. C. P. 22.

The Court held that the bailiff was not entitled to such notice.*

Judgment for plaintiff.

McMahon, for plaintiff.

Augé, for defendant.

(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 31ST OCTOBER, 1877.

IN REVIEW.

Coram TORRANCE, J., DORION, J., PAPINEAU, J.

No. 761.

In re *Beaulieu*, Insolvent, and *Dupuy*, Assignee, and *Beaulieu* et al., Petitioners, Contestants.

JOURNEYMEN—WAGES—PRIVILEGE.

HELD :—That journeymen have no privilege under the Insolvent Act, 1875, on the proceeds of the sale of book debts for the payment of their wages.

TORRANCE, J. This is an appeal by the assignee from a judgment in insolvency, of date 27th July, which maintained the contestation of a dividend

* See *Major* v. *Chartrand*, *ante*, p. 303.

In re Beaulieu and Dupuis.

sheet prepared by the assignee. The contestants were employees of the insolvent, and claimed three months' arrears of wages. The claims of hypothecary creditors had absorbed the proceeds of immoveables, and the landlord had taken the proceeds of the sale of moveables and merchandise. There only remained the proceeds of the sale of book debts and the collections of debts due the insolvent. The assignee collocated them as ordinary and not privileged creditors. Hence the contestation. The contestants held that, under the Insolvent Act of 1875, s. 91, they had a special privilege for any arrears of salary or wages, and the judgment now complained of maintained their contestation and ordered the preparation of a new dividend sheet. The appellants call attention to s. 82, which enacts that the rank and privilege of each creditor shall not be disturbed by the provisions of this Act, and if we turn to the article of the Civil Code, 2006, it says that clerks, apprentices and journeymen are entitled to a preference, "but only upon the merchandise and effects contained in the store, shop or workshop in which their services were required." We hold the view that the dividend sheet already prepared is the right one, and that the petition of contestants should be dismissed. The judgment is therefore reversed.

Judgment reversed.

J. Alphonse Ouimet, for petitioners.
T. & C. C. Delorimier, for assignee.
(J. K.).

CIRCUIT COURT, 1877.

MONTREAL, 2ND NOVEMBER, 1877.

Coram TORRANCE, J.

No. 384.

Choquet vs. *Hart*.

HELD:—That the Circuit Court in Montreal has jurisdiction to rescind a lease of a house rented for $195 per annum where the amount of damages asked for is within the jurisdiction of the Court.

The action was to recover the sum of $25 damages claimed by the tenant against the landlord for the bad condition of the house, and the conclusion was to recover $25, and that the lease be rescinded. The defendant pleaded an exception *déclinatoire*, on the ground that the Circuit Court has no jurisdiction to rescind a lease of premises of the annual value of $192.

TORRANCE, J. The remarks of the Chief Justice in the case of *Beaudry & Denis*, 20 L. C. J. 254, would appear to support the jurisdiction, and Mr. Justice Rainville, in an elaborate judgment in the Superior Court No. 105, (8 June) A. D. 1876, in *Monarque* v. *Goulet*, refused such jurisdiction to the Superior Court. The same Judge, I understand, in this court similarly held that this court had jurisdiction. I shall so hold in this case, for the reason that I believe such a ruling to be in accordance with the later rulings in this court, and, if I hold the contrary, the party may be driven to a suit in the Superior Court

Choquet vs. Hart.

where the last decision would not give him a hearing. I am aware that these decisions are inconsistent with *McGinnis* v. *Horseman*, 14 L. C. J. 224.

Exception dismissed.

Jetté, Béique & Choquet, for plaintiff.

Doutre, Doutre, Robidoux, Hutchinson & Walker, for defendant.

(J. K.)

COUR DE CIRCUIT, 1877.

MONTREAL, 18 DECEMBRE, 1877.

Coram RAINVILLE, J.

Dame Joséphine E. Wood, vs. *Léon Ste. Marie*, et *Léon Ste. Marie*, opposant.

JUGE :—1o. Que la déposition accompagnant les oppositions, au désir de l'article 583 du Code de Procédure Civile, peut être assermentée devant un commissaire de la Cour Supérieure:

2o. Que cette déposition peut être assermentée et reçue devant un commissaire résidant dans un district voisin de celui où l'opposition a été enrégistrée ;

3o. Que les mots "Commissaire C. S." sont une indication suffisante de la qualité du commissaire ;

Semble qu'il n'est pas nécessaire d'ajouter le nom du district où tel commissaire exerce ses pouvoirs.

L'opposant en cette cause oppose la saisie de ses biens mobiliers, et demande la nullité de cette procédure. Le montant réclamé par le bref d'exécution était plus élevé que le montant accordé par le jugement, lequel a été rendu à Montréal. L'opposant demeure dans le District de St. Hyacinthe. Les faits de l'opposition sont supportés par un affidavit reçu devant un commissaire résidant dans le district de St. Hyacinthe. La Demanderesse fait motion pour faire renvoyer l'opposition pour les raisons suivantes :

1o. Parceque l'opposition n'est pas accompagnée de l'affidavit exigé par la loi ;

2o. Parceque la dite opposition n'appert pas avoir été assermentée par aucune personne ayant droit d'assermenter dans le district de Montréal ;

3o. Parceque les mots "Joseph A. Archambault, commissaire C. S.," n'indiquent pas que le dit Archambault eut le droit d'assermenter la déposition de l'opposant ;

4o. Parceque le dit Joseph A. Archambault n'est pas un commissaire de la cour supérieure ayant juridiction dans le district de Montréal, et que l'assermentation qu'il a faite de l'opposant est nulle pour les fins de cette cause ;

5o. Parceque l'affidavit au soutien de cette opposition a été fait et assermenté à Marie-Ville, dans le district de St. Hyacinthe.

PER CURIAM.—La déposition peut être reçue devant un commissaire de la cour supérieure. La loi n'oblige pas que l'affidavit soit donné dans le district où l'opposition est enregistrée. Ce serait obliger les justiciables à se déplacer sans raison. Je considére que la qualité du commissaire est suffisamment désignée.

Motion renvoyée.

Longpré & Dugas, procureurs de la demanderesse.

Lareau & Lebeuf, procureurs de l'opposant.

(E. L.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH NOVEMBER, 1877.

Coram H. E. TASCHEREAU, J.

No. 1397.

Booth vs. *Lacroix* et al., and *Rolland, T. S.*, and *Dupuy*, petitioner.

HELD:—That the service of a petition by a party not in the cause, on the attorneys of the plaintiff who obtained the judgment condemning the *tiers saisi* to pay plaintiff a certain sum of money, asking for a special order to prevent said *tiers saisi* paying over the amount, is bad.

PER CURIAM:—This is a petition by an assignee appointed to the defendants under the Insolvent Act, asking for an order to prevent the *tiers saisi* paying over to the plaintiff the amount which he has been condemned to pay under a judgment duly served on the *tiers saisi*. The service of this petition has been made on the attorneys of record who obtained the judgment against the *tiers saisi*, and they have raised the preliminary objection that their powers ended with the rendering of the judgment, and that their client, the plaintiff, is not bound by such a service. On this point I am against the petitioner, and I hold that such a service is bad. The petition is, therefore, dismissed.

Petition rejected.

Bethune & Bethune, for plaintiff.
Loranger & Co., for petitioner.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH NOVEMBER, 1877.

Coram H. E. TASCHEREAU, J.

No. 1082.

Westcott et vir vs. *Archambault* et al.

HELD:—That costs will be awarded on an *exception dilatoire*, if the power of attorney asked for thereby has not been filed before the exception.

PER CURIAM:—The defendants filed a dilatory exception, asking for the suspension of the case until the production of a power of attorney. The power of attorney has been since produced, and the question now is, are the defendants entitled to costs. I think they clearly are, and I therefore maintain the exception with costs.

Exception maintained with costs.

J. A. A. Belle, for plaintiffs.
Loranger & Co., for defendants.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH NOVEMBER, 1877.

Coram H. E. TASCHEREAU, J.

No. 1569.

Chevalier vs. *Cuvillier* et al.

HELD:—That an account unsustained by vouchers will not be rejected on motion, when it is established by affidavit that the vouchers are in the possession of third parties.

PER CURIAM:—This is a motion to reject an account filed by La Marquise de Bassano, one of the defendants, with her plea to the action, which is one asking for an account, on the ground that it is wholly unsupported by vouchers. An affidavit, however, has been filed, establishing that all the vouchers are in the possession of third parties. Under the circumstances, I must reject the motion, but without costs.

Motion rejected.

Doutre & Co., for plaintiff.
Bethune & Bethune, for defendant, La Marquise de Bassano.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 9TH NOVEMBER, 1877.

Coram H. E. TASCHEREAU, J.

No. 686.

Duhamel et al. vs. *Duclos*, and *Duclos, T. S.*, and *Perrault* et vir, opposants.

HELD:—That an opposition *afin de distraire* to a seizure of moveables, seized in the possession of the party condemned, will be dismissed on motion, if the allegations fail to set out any specific title and do not set up a possession in the opposants.

PER CURIAM:—This is a motion to dismiss an opposition *afin de distraire* in the case of a seizure of moveables, on the ground that the allegations are vague and uncertain. The things have been seized in the possession of the *tiers saisi*, the party condemned, and there is no allegation of adverse possession in the opposants, and no allegation of any specific title to the property, there being nothing but the general allegation that the opposants are proprietors. I cannot hesitate, therefore, to grant this motion, and the opposition is consequently dismissed.*

Opposition dismissed.

Duhamel & Co., for plaintiffs.
A. A. Augé, for oppesants.
(S. B.)

* A similar motion was granted (following this judgment) by Papineau, J., on the 29th of December, 1877, in No. 2464—Currie et al. vs. Delorme, & Delorme, opposant. (Reporter's note).

CIRCUIT COURT, 1877.

MONTREAL, 9TH NOVEMBER, 1877.

Coram TORRANCE, J.

No. 3483

La Société de Construction du Coteau St. Louis vs. *Villeneuve.*

A building society distributed its lots of land by a *tirage au sort*, which was a secondary or subordinate element in its constitution.

HELD:—That it did not constitute a lottery prohibited by C. S. Canada, cap. 95, and that it did not come under the operation of C. C. 1927.

The plaintiffs demanded from the defendant $90.10 for instalments and fines due by him as member of the Society. The defendant had signed the original agreement of promoters of the Society, and subscribed for two shares in the undertaking, each share being $336, payable in monthly payments of $4 each

The plea of the defendant alleged that under the by-laws of the Society he was not liable as member.

Vilbon, for defendant, referred to by-laws Nos. 2, 7, 17, 20, as supporting the plea. He also cited C. S. Canada, cap. 95, and argued that the "*tirage au sort*," by which lots of land were distributed among the members, was illegal.

PER CURIAM:—The Court is not prepared to support the pretension of the defendant as to the *tirage au sort*. The chance of an aleatory gain is a secondary and subordinate element in the constitution of the Society. *Vide* Journal du Palais, A. D. 1870, foot-note to page 1168. On the other grounds the Court is also against the defendant.

Judgment for plaintiff.

Bourgouin, for plaintiff.
Villeneuve, for defendant.
(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 30TH NOVEMBER, 1877.

Coram TORRANCE, J.

No. 330.

Larue vs. *Fraser.*

HELD:—That an auctioneer is not liable in his own name on a sale made by him as such auctioneer for a disclosed principal.

The action was to recover $120, damages claimed by plaintiff by reason of the non-delivery to him of a hogshead of tobacco which he had bought at an auction sale had by the defendant on the 6th July, 1876. The tobacco was adjudged to the plaintiff for the price of $80, on which he paid at the time of the sale a deposit of $20. It was alleged on the part of the defendant that when the tobacco was put up for bids, the question was put whether the duty was paid, and the answer given by the defendant that he did not know, and that the article was sold as it

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was. This was denied by plaintiff, and at any rate he denied that he heard such question or answer. The defendant sold at the sale a quantity of unclaimed goods by direction of the Grand Trunk Railway Company after due advertisements in conformity with the statute. The tobacco was worth in the market, if duty was paid, over $80, and if unpaid much less than the amount bid by the plaintiff.

PER CURIAM:—The defendant has pleaded among other things that he sold the tobacco in question for a disclosed principal, namely, the Grand Trunk Railway of Canada. This is clearly proved. He says, therefore, that he is not liable himself as he was only an agent known as such. Fisher's Digest *vo.* Sale.

The rule is found in Bateman on Auctions, and is of an elementary character. I think it should be applied here, and the first plea of the defendant, which specifically raises the point, will be maintained.

Action dismissed.

J. Loranger, for plaintiff.
T. Butler, for defendant.
(J. K.)

SUPERIOR COURT, 1877.

MONTREAL, 12TH SEPTEMBER, 1877.

Coram TORRANCE, J.

No. 661.

Cartier vs. *Germain.*

HELD:—1. The demand for security for costs under section 39 of the Insolvent Act of 1875 must be made within the ordinary delay of four days after the return, and if the vacation intervene, the motion for security must be made within four days exclusive of vacation.
2. The rule laid down in section 39, requiring the insolvent to give security for costs, is without qualification.

The plaintiff instituted an action of damages for slander against the defendant, returned into Court on the 3rd July, 1877. The plaintiff had made an assignment under the Insolvent Act, of date the 13th October, 1876.

Lareau, for the defendant, made a motion for security for costs under the Insolvent Act 1875, s. 39.

L. O. Loranger, for plaintiff:—The motion comes too late, and should have been made within four days. Moreover, this is an action for personal wrongs which does not fall into the estate of the insolvent, s. 63 of Insolvent Act, and therefore the rule in s. 39 does not apply.

PER CURIAM:—The motion comes too late, and should have been made within four days after vacation. I need not, therefore, say anything as to the other reason of the plaintiff, but it may be said that the rule in s. 39 is without qualification, and may have been made simply because the insolvent had been divested of his entire estate.

Loranger, for plaintiff.
Lareau, for defendant.
(J. K.)

CIRCUIT COURT, 1877.

MONTREAL, 10TH OCTOBER, 1877.

Coram TORRANCE, J.

No. 6620.

McGibbon et al. vs. *Monge* et vir.

WIFE—HOUSEHOLD EXPENSES—LIABILITY.

HELD:—That if the husband is without means, the creditors may claim from the wife payment of household debts for necessaries supplied after the husband's insolvency.

PER CURIAM:—The husband of the female defendant made an assignment under the Insolvent Act in 1875. His wife is separated as to property from him. The plaintiffs claim from her the payment of an account for groceries supplied to the household in 1876. It is admitted that the husband was at this time an insolvent, and the counsel for plaintiffs have cited C. C. 173 & 1317 as establishing her liability. In the case of the husband's insolvency, I am satisfied that the creditors may address themselves directly to the wife for the payment of necessary debts arising subsequent to the husband's insolvency. I refer to the following authorities: 4 Demolombe, pp. 4, 5, n. 4, 5. Troplong, Mariage, 2nd vol. n. 1440, p. 722. Sirey, A. D. 1830, 2. 430, 1. Sirey, A.D. 1835, 1, 415-7. Demolombe says that the wife might be declared directly bound to the creditor, not as a consequence of a solidarity or of an indivisibility of obligation, which would be contrary to the principles not less than to the articles of the Code, but by different motives of which it would belong to the Judge to make the application according to circumstances; see also Code Civil annoté of Gilbert on C. C. 1448. I would add that the question of the liability of the wife is often a delicate one, but here I find no difficulty. In the words of our Code C. C. 1317: The wife "must bear these expenses alone if nothing remain to the husband."

Judgment for plaintiffs.

L. N. Benjamin, for plaintiffs.
Greenshields, for defendants.
(J. K.)

COURT OF REVIEW, 1877.

MONTREAL, 24TH OCTOBER, 1877.

Coram JOHNSON, J., BELANGER, J., RAINVILLE, J.

No. 1799.

Abbott vs. *Macdonald*.

HELD:—That an appeal lies directly to the Supreme Court from the judgment of the Superior Court sitting in Review, in cases, not under $2000 in amount, where, the judgment having been confirmed in Review against the party inscribing, no appeal lies to the Court of Queen's Bench.

In this case the judgment of the Superior Court had been confirmed in review against the defendant, the party inscribing. The latter was therefore precluded from appealing to the Court of Queen's Bench, and he now desired to appeal directly to the Supreme Court, and asked to have a day fixed for entering security.

Abbott vs. MacDonald.

JOHNSON, J., who rendered the judgment of the Court, said that, notwithstanding the prohibition of the Provincial Act 37 Victoria, c. 6, enacting that the party inscribing for review shall have no appeal to the Queen's Bench if the judgment inscribed against is confirmed, the subsequent legislation of the Federal Parliament (38 Victoria, c. 11) constituting a Supreme Court, and defining its jurisdiction under powers specially conferred by the British North America Act, 1867, gave by its 17th Section an appeal to the Supreme Court from all final judgments of the highest court of final resort, whether such court be a court of appeal or of original jurisdiction. The Court, therefore, unanimously held that such an appeal would lie, and granted the motion to have a day fixed for entering security. The Court further held that the right, as far as the Province of Quebec is concerned, was limited only by the exclusion of cases under $2000 in amount.

Motion granted.

Abbott, Tait, Wotherspoon & Abbott, for plaintiff.
Loranger, Loranger & Pelletier, for defendant.
(J. K.)

SUPERIOR COURT, 1874.

MONTREAL, 31st MARCH, 1874.

Coram BEAUDRY, J.

Noad vs. *Noad*.

HELD :—1. Under the Imperial Statute 22 & 23 Vic. c. 63, in any case depending in any Court within her Majesty's Dominions, if the law applicable to the facts of the case is the law administered in any other part of Her Majesty's Dominions, and is different from the law in which the Court is situate, it is competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts, and to pronounce an order, remitting the same for reference to the Superior Court administering the law applicable to the facts of the case, and desiring said Court to pronounce its opinion upon the questions submitted to it.

2. Such case is brought before the Court whose opinion upon the law applicable to the facts of the case is desired by petition of any of the parties to the action, praying the Court to hear the parties or their counsel and to pronounce its opinion on the questions submitted.

3. Legal questions arising out of the construction of the terms of a will are regulated by the law of the domicile of the testator where he makes his will.

4. Under the following clause of a will the legatee is simply a fiduciary legatee or trustee, such as specified in art. 869 C.C. : "I hereby give and bequeath unto my brother, William S. Noad, $3000, which said sum I hereby direct to be invested by my executors in United States Government bonds, bearing interest, and the said bonds to be issued in his name and to be forwarded to him, to be used for the support of his family," and the family is in effect the real legatee and proprietor of the bonds.

5. That in such case the family of Noad could demand a *séquestre* if the trustee misused his trust.

6. That such a trustee had the right to deposit the bonds, or their proceeds, in the hands of a depositary who was bound to return the same on the order of the trustee, and could not be held liable for his breach of trust, even though he knew of the nature of the trust and the terms of the will, unless fraud and collusion were proved.

The facts of the case and proceedings will appear by the following documents remitted from the Court of Chancery in Ontario :

IN CHANCERY.

NOAD *vs.* NOAD.

This cause came on for hearing at the last sittings of this Court, at Kingston. The bill is filed by the infant children of William Street Noad, suing by

their grandfather and next friend against William Street Noad and his sister, Mrs. Kirkwood, and it seeks to make the latter defendant liable as for a breach of trust under the following circumstances:

In July, 1870, Henry John Noad, a brother of William Street Noad, made his will, which contained a bequest as follows:— "I hereby give and bequeath unto my brother, William Street Noad, the sum of $3000 currency, which sum I hereby direct to be invested by my executors in United States Government bonds, bearing interest, and the said bonds to be issued in his name, and to be forwarded to him to be used for the support and maintenance of his family."

The testator at the time he made his will was domiciled in the Province of Quebec, and he died so domiciled in the month of August following the making of his will.

The executors, in a reasonable time after the testator's death, invested $3000 in United States bonds, as directed by the will, and, by the direction of William S. Noad, forwarded these bonds to Messrs. Campbell & Cassels, bankers, at Toronto. At this time W. S. Noad was insolvent and a private soldier in the U. S. Army, stationed at some American Fort in the Western Country, and was living apart from his wife and children, who were residing in Ontario with the wife's father, on whom they are wholly dependent for support.

Soon after receiving the bonds, Messrs. Campbell & Cassels, by direction of W. S. Noad, sold them in New York, and the cash proceeds being remitted to them they held the money at the credit of W. S. Noad, who drew upon it for some sums which he applied to his own purposes. Subsequently W. S. Noad ordered the bankers to transfer the residue of the funds into the name of his sister, Mrs. Kirkwood, who thereupon assumed the control of it, and, having applied a portion of the amount in payment of debts due by W. S. Noad at Toronto, handed over the remainder to W. S. Noad himself, who used it for his own purposes. It was distinctly proved that Mrs. Kirkwood was aware of the terms of the legacy, having heard the will read soon after the testator's death.

Upon this state of facts it was insisted that W. S. Noad was a trustee of the $3000 for his children, and Mrs. Kirkwood having the notice she had was to be considered as liable to make good so much of the money as had passed through her hands, as a participant in a breach of trust; and it was contended on the part of the plaintiffs that the question was to be adjudged by the ordinary principles of English law administered by this Court.

It appeared to me, however, at the time of the argument, that I was not called upon to enter into the nice and difficult question as to whether a trust was or was not constituted, inasmuch as that was a question of construction dependent on the law of the domicile of the testator, which was to be regarded as a question of fact, so far as this Court is concerned, and which was to be ascertained from some authentic statement of the foreign law applicable to the case.

A subsequent reference to authorities has confirmed this opinion. See Wharton's Conflict of Laws, sec. 592; Phillimore's International Law, vol. 4, p. 631; Westlake's International Law, p. 310; Yates vs. Thompson, 3 Clarke & Finley 585; Guthrie's Savigny, p. 233.

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All that I can, therefore, do at present is to make such an order as will lead to the ascertainment of the law of the Province of Quebec. The mode of doing this which was suggested at the Bar was by stating a case for the opinion of members of the Bar of the Province of Quebec, and were this a case in which infants were not concerned I should have been willing to accede to this proposal. But the plaintiffs being infants and, as such, peculiarly under the protection of the Court, I conceive that I am bound to do all I can to secure an authoritative exposition of the law upon which their rights in this suit must be determined, and I think, therefore, I must direct a case to be sent under the provisions of the Imperial Statute 22 & 23 Vic. chap. 63 for the opinion of the Superior Court of the Province of Quebec.

This enactment expressly provides that any Court in Her Majesty's Dominions may send a case for the opinion of a Court sitting in any other part of Her Majesty's Dominions, and this Court would be bound under its provisions to answer a case sent for its opinion by the Superior Court of Lower Canada.

I apprehend, therefore, there will be no difficulty in obtaining under it a decisive determination of the question of Foreign Law upon which the judgment of the Court must depend.

An order has been drawn up and a case settled accordingly. The practice under the Imperial Act of Parliament referred to is stated in Daniel, Chancery Practice, p. 10 and 12, and an instance of its application is shewn by the case of Logan vs. Princess of Cooey, 30 Beav. 633.

ORDER.

This cause coming on for examination of witnesses and hearing at Kingston on the twenty-eighth day of March, one thousand eight hundred and seventy-three, upon hearing what was alleged by counsel for both parties, and upon hearing the evidence of both witnesses then examined :—

This Court doth order that a case be prepared, setting forth the facts appearing in the evidence so taken, as aforesaid, and that such case and the questions as to the law of the Province of Quebec, arising out of the same, be settled by a judge of this Court, for the purpose of ascertaining whether the defendant, Louisa Mary Kirkwood, is liable to the relief prayed against her by the Bill in this cause; and it is further ordered that such case and questions, when so approved and settled, be remitted to Her Majesty's Superior Court of the Province of Quebec, sitting at the City of Montreal; and Her Majesty's said Superior Court is hereby respectfully requested to give its opinion on such questions upon the Law of the Province of Quebec administered by the said Superior Court as are applicable to the facts to be set forth in the said case, the said case being so remitted pursuant to the Statute of the Imperial Parliament 22 and 23 Victoria, chapter 63; and this Court doth reserve the consideration of further directions until after Her Majesty's said Superior Court for the Province of Quebec shall have given its opinion on the said questions of Law.

23rd December, 1873.

(Signed,) A. GRANT.

Case for Opinion of Superior Court.

Case under the Statute of the Imperial Parliament 22 and 23 Victoria, chapter sixty-three, for the opinion of Her Majesty's Superior Court for the Province of Quebec, sitting at the City of Montreal:—

1. Henry John Noad, deceased, whilst domiciled in the Province of Quebec, and on the twenty-third day of July, one thousand eight hundred and seventy, made his last will and testament, which is admitted by all parties to have been duly and sufficiently made and executed according to the law of the said Province of Quebec.

2. The said testator afterwards, in the month of August, one thousand eight hundred and seventy, died, still domiciled in the Province of Quebec.

3. The said will contains a bequest in the words following:

"Sixthly, I hereby give and bequeath unto my brother, William Street Noad, "the sum of three thousand dollars currency, which said sum I hereby direct to "be invested by my executors in United States Government bonds, bearing in- "terest, and the said bonds to be issued in his name and to be forwarded to him, "to be used for the support and maintenance of his family."

4. The testator left surviving him his brother, the defendant, William Street Noad, who was then and also at the date of the will a private soldier in the United States Army, living apart from his wife and family, who were then living in Ontario and were dependent for their support on the wife's father, the said William Street Noad making no provision for them.

5. The executors of the said will were domiciled in the Province of Quebec.

6. The said executors invested the sum of three thousand dollars, as directed, in United States Government bonds, and transmitted the bonds to a banker, who was the duly authorized agent of William Street Noad at Toronto, in the Province of Ontario.

7. The said agent afterwards, by the direction of William Street Noad, caused the said bonds to be sold and converted into cash, and hold the money so produced as the agent and for the behoof of the said William Street Noad.

8. Subsequently the said fund in the hands of the said banker and agent was, by the direction of the said William Street Noad, transferred into the name of Louisa Mary Kirkwood, a sister of the said William Street Noad, who paid thereout certain debts of the said William Street Noad, and who afterwards handed over the remainder of the money to William Street Noad himself, with the exception of a small sum still remaining in her hands.

9. William Street Noad applied the whole of the said legacy to his own purposes, and no part of it was applied to the support and maintenance of his family, except two small sums of money which he gave to his eldest daughter, one of the plaintiffs.

10. The said Louisa Mary Kirkwood derived no benefit whatever from the said money, and she acted as she did at the request of William Street Noad and from a feeling of regard and kindness for him.

11. The said Louisa Mary Kirkwood at the time she received the said

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money had heard read the said will, and knew the terms of the said bequest of the said legacy to the said William Street Noad.

12. The said William Street Noad is insolvent.

The opinion of the Honorable Her Majesty's Superior Court for the Province of Quebec sitting at the city of Montreal is requested with reference to the law of the said Province of Quebec as administered by that Court, and so far as the same is applicable to the facts set forth in the above case, in terms of the Statute of the Imperial Parliament 22 and 23 Victoria, chapter sixty-three, upon the following:

QUESTIONS.

1. Is the said Louisa Mary Kirkwood liable according to the law of the Province of Quebec to make good to the family of William Street Noad so much of the money produce of the said legacy as so came to her hands as aforesaid?

2. Was there, according to the law of the Province of Quebec, any trust created which would entitle the wife and children of William Street Noad to follow the money into Mrs. Kirkwood's hands, and to make her liable directly to them for having disposed of the money by Noad's direction in the manner stated?

3. Did the said bequest, according to the law of the Province of Quebec, give to the family of William Street Noad any right to control the application by him of the particular bonds handed over to him by the executors, or the produce of these bonds, or is the direction contained in the said will as to the support and maintenance of the family of the legatee to be considered as prescribing a mode of dealing with the legacy when received by the legatee, giving rise to a mere personal right of action against the legatee in favor of his family?

4. What were, according to the law of the Province of Quebec, the rights of the family of William Street Noad in respect of this legacy as against any person dealing with the fund as William Street Noad himself, and as against any person dealing with the fund as William Street Noad's agent and by his direction and for his behoof with a knowledge of the terms of the said bequest?

IN CHANCERY.

NOAD vs. NOAD.

This cause and the questions of law arising out of the same above stated have been settled and approved by a judge of the Court of Chancery of the Province of Ontario as the case and questions to be remitted for the opinion of the Honorable the Superior Court of Lower Canada at the City of Montreal pursuant to the order of this Court in this cause made, dated the 25th day of June, in the year of our Lord 1873.

(Signed,) A. GRANT,

Registrar Court of Chancery.

PETITION.

To the Honorable Her Majesty's Superior Court of the Province of Quebec, District of Montreal.

The humble petition of Louisa Mary Kirkwood, of the City of Toronto, in the County of York and Province of Ontario, widow,

Respectfully Sheweth:

That by an order of the Court of Chancery for Ontario pronounced on or about the twenty-third day of June, 1873, in a cause depending in the said Court, wherein Florence Noad, Grace Noad, Ella Noad, and Edith Noad, infants under the age of 21 years, by Christian Julius Brown, their grandfather and next friend, are plaintiffs, and William Street Noad and your petitioner are defendants, it was ordered that a case should be prepared setting forth the facts appearing in the evidence written in the said cause at the examination of witnesses and hearing therein, and that such case, and the questions as to the law of the Province of Quebec arising out of the same when approved and settled as directed by the said order, should be remitted to your Honorable Court under the provisions of the Imperial Parliament of Great Britain and Ireland 22 and 23 Victoria, chapter sixty-three, for opinion upon such questions as aforesaid.

2. That such case and questions have been approved and settled as directed by the said order, and have been remitted to your Honorable Court.

Your petitioner, therefore, prays:

That your Honorable Court will be pleased to appoint an early day for the hearing of the aforementioned case, and to hear your petitioner by her counsel and the other parties to the said suit in person or by their counsel, and to pronounce your opinion in terms of the said Act of Parliament upon the questions of law as admitted in your Honorable Court which have been submitted by the said Court of Chancery in the said case, and upon such opinion being pronounced will cause a copy thereof, duly certified by an officer of your Honorable Court, to be transmitted to your petitioner's solicitor in the City of Toronto in terms of the said Act of Parliament.

And your petitioner will ever pray, &c.

L. M. KIRKWOOD.

NOTICE.

Take notice that, by the direction of the Registrar of this Honorable Court, we have this day transmitted to the Prothonotaries of the Superior Court of the Province of Quebec, at the City of Montreal, the order made herein, bearing date the twenty-fifth day of June last, the Judgment of his Lordship Mr. Vice Chancellor Strong upon which the said order was made, and the case under the Statute of the Imperial Parliament 22 and 23 Vict. chap. 63, settled by his Lordship for the opinion of the Superior Court of Quebec as provided in the said order.

And take notice that on behalf of the defendant, Louisa Mary Kirkwood, we have this day transmitted to Montreal a petition to the said Superior Court in the manner provided by the said Act, praying the said Court to hear the parties

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to this suit in person or by counsel, and to pronounce their opinion upon the questions of law which have been submitted by the Court of Chancery in the said case.

Dated this twenty-third day of January, A. D. 1874.

Yours, &c.,
(Signed,) SMITH & WOOD,
Solicitors for defendant, L. M. Kirkwood.

To Messrs. Campbell & Macdonnell, plaintiffs' solicitors, and to Messrs. Mowat, Maclennan & Downey, their agents.

PER CURIAM:—Pour mieux éclaircir les questions soumises je crois devoir en intervertir l'ordre, et considérer d'abord la disposition citée du testament de Henry J. Noad, et quels droits en résulteraient en faveur de la famille du dit William Street Noad.

Cette disposition ne contient évidemment pas un fidéi-commis proprement dit, car dans le fidéi-commis il y a avantage pour le légataire premier nommé avec réversion en faveur d'un tiers, pendant qu'ici W. S. Noad n'est pas indiqué comme devant profiter du legs en question. Il aurait pu l'être indirectement, puisque le testateur lui donnait le contrôle des bonds en question et qu'il aurait pu en employer le montant en logeant et nourrissant chez lui tous les membres de sa famille. La disposition en question rentre dans la définition du *Mode*, expression qui se prend en droit "pour une clause qui modifie un acte d'après "un événement incertain; l'on appelle ainsi," dit Merlin, Rep. vo. Mode, "toute disposition par laquelle un donateur ou testateur, charge son donataire ou "légataire, de faire ou de donner quelque chose en considération de la libéra- "lité dont il le gratifie." Ici il n'y a aucune libéralité dont W. S. Noad soit gratifié, il n'y a qu'une charge à lui imposé, c'est d'employer le montant des bonds ou obligations pour le soutien de sa famille, sans même lui en attribuer aucune part pour son administration, et de fait il n'y a là rien de plus qu'une disposition de la nature de celle mentionnée en l'art. 869 du Code Civil, qui se lit comme suit: "Un testateur peut établir des légataires seulement judiciaires "ou simples ministres, pour des fins de bienfaisance ou autres fins permises, et "dans les limites voulues par la loi; il peut aussi remettre les biens pour les mêmes "fins, à ses exécuteurs testamentaires, ou y donner effet comme *charge imposée* "*à ses légataires et héritiers.*"

Dans ce cas, ce légataire fiduciaire ou simple ministre est sujet aux dispositions de l'art. 917, et s'il dissipe ou dilapide les biens qui lui sont confiés, il peut être destitué par le tribunal, et une des suites de cette destitution, c'est l'obligation de rendre compte et de restituer les biens, comme tout mandataire. (C. C. 1713.) Les légataires en faveur de qui la charge a été imposée peuvent revendiquer les biens qui subsistent en nature, ou procéder par voie de saisie (*attachment*), s'il s'agit de deniers, entre les mains de ceux qui les détiennent. Telle est donc la réponse qu'on peut faire à la question soumise en 4e. lieu.

Ceci posé j'en viens à la question. D'après les règles ci-dessus énoncées, W. S. Noad n'étant qu'un légataire fiduciaire ou simple ministre, il est impossible de considérer cette disposition testamentaire comme un simple conseil

donné à W. S. Noad, mais c'est une obligation directe qui lui est imposée d'employer le montant au produit de ces *bonds* pour le soutien et le maintien de sa famille qui a droit d'empêcher que ces deniers ne soient employés à d'autres objets, qui en est de fait légataire et conséquemment propriétaire, (C. C. 964) W. S. Noad n'y ayant d'autre droit que celui d'en régler la distribution et à cette fin pouvant vendre les *bonds* et en réaliser le montant. Si W. S. Noad mésusait du produit de ces biens, la famille pouvait demander un séquestre, et faire régler par la Cour l'emploi des deniers, C. C. 955. Il suit de là que W. S. Noad avait droit de réaliser les *bonds* en question et de les déposer où il jugerait à propos, soit dans une banque ou ailleurs, ou même entre les mains de Madame Kirkwood. Le dépositaire, quelqu'il fût n'avait aucun contrôle sur l'emploi de ces deniers, et devait comme tout mandataire, les payer sur l'ordre de celui qui lui avait confiés, sans être responsable envers la famille de W. S. Noad de l'emploi que ce dernier pouvait en avoir fait abusivement, à moins qu'il n'y eût fraude ou collusion, ce qui n'apparait pas dans l'état de faits soumis. Et c'est la réponse aux questions première et deuxième.

Je dois observer que dans le cas actuel le terme famille employé dans le testament de Noad ne doit pas s'entendre dans le sens de l'art. 979 C. C., mais doit s'entendre de ce qui compose la maison de W. S. Noad, savoir, sa femme et ses enfants.

S. Bethuné, Q. C., for Petitioners Wm. S. Noad, and Mary Kirkwood.

John L. Morris, for family of Wm. S. Noad.

(J. L. M.)

SUPERIOR COURT, 1877.

MONTREAL, 7TH DECEMBER, 1877.

Coram TASCHEREAU, H. E., J.

No. 1590.

Hon. L. R. Church, Attorney General *pro Regina* vs. *Middlemiss;* and *Middlemiss*, plaintiff *en garantie*, vs. *Hon. L. Archambault et al.*, defendants *en garantie.*

HELD :—That the members of the Executive Council who concur in an order of Council sanctioning the sale by the Crown of certain real property, and the execution of a deed of sale in accordance with such order, cannot be sued *en garantie* by the purchaser, to guarantee and indemnify him against an action brought by the Attorney General for and on behalf of Her Majesty to set aside the deed of sale, on the grounds (*inter alia*) that the sale itself was *ultra vires* and that the deed was executed without lawful authority.

TASCHEREAU, H. E., J.:—This case comes before me on a demurrer by the defendant Ouimet to the action *en garantie*, as against him.

Middlemiss, the plaintiff *en garantie*, complains of the Honorable Louis Archambault, Gédéon Ouimet, George Irvine, Pierre Fortin, Joseph Adolphe Chapleau, and of His Excellency the Honorable René Edouard Caron, Lieutenant Governor of the Province of Quebec. The declaration avers that, by deed of exchange, dated the 1st day of July, 1874, the Hon. Louis Archambault, *acting for and in the name of Her Majesty the Queen*, and declaring himself to be duly authorized to that effect by virtue of an order in Council, to wit an

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order of the *Lieutenant-Governor of the Province of Quebec in Council*, bearing date the 27th of June, 1874, did cede and transfer by way of exchange to him, the said Middlemiss, present and accepting thereof, with promise of warranty (*garantie*) against all troubles, mortgages or hypothecs, the piece of land known as the Tanneries property, in counter-exchange of which he, the said Middlemiss, did cede and transfer to Her Majesty, by the said deed, the piece of land known as the Leduc farm.

Then follows an averment that the said Honorables Archambault, Ouimet, Irvine, Fortin, Ross and Chapleau were, together with the Hon. Jos. G. Robertson, at the time of the passing of the said deed of exchange, members of the Executive Council of the said Province of Quebec, and were present at *a meeting of the said Executive Council*, held in the City of Quebec, on the said 27th day of June, 1874, at which meeting the said Hon. Louis Archambault as Commissioner of Public Works and Agriculture, made a report in writing representing that it was expedient to make the above-mentioned exchange, which report was unanimously passed and approved of *by an order in Council* at the said meeting of the said Executive Council, and the said Hon. Louis Archambault was authorized to carry the said exchange into effect and to execute and sign *in the name of Her Majesty* all necessary deeds and documents. Then comes an allegation that the said order in Council was subsequently duly ratified, signed and approved of by the said Honorable Gédéon Ouimet in *his capacity of President of the said Executive Council, and by His Excellency the Honorable Réné Edouard Caron, then Lieutenant Governor of the said Province of Quebec;* that the said deed of exchange was duly ratified by the said Honorable Louis Archambault in his capacity of Commissioner of Agriculture and Public Works, and *in the name of Her said Majesty*, by deed passed on the 15th day of August, 1874, the said ratification so made in order to avoid any misapprehension which might have arisen as to the validity of the said exchange, from the fact that the *said order in Council* was not sanctioned by the Lieutenant-Governor until the 10th of July, 1874, when the said deed of exchange had been completed on the first day of the said month of July.

The plaintiff *en garantie* then alleges that, upon two (amongst other) grounds, he is troubled in his possession of the said Tanneries property by an action by Her Majesty against him, whereby the cancelling of the said exchange is asked: 1st. Because the said Tanneries property was acquired with moneys appropriated therefor by His Excellency the Governor and Special Council (in 1839) for the purpose of erecting a lunatic asylum, to become and be the property of Her Majesty; and the said land could not by law be alienated without the authority and consent of the Legislature of this Province first had and obtained, and no such authority or consent was in fact ever obtained. 2dly. Because the said Honorable Louis Archambault had no authority to sign and execute the said deed of exchange for or on behalf of Her Majesty; that the said deed of exchange and the ratification thereof were signed and executed without any order of His Excellency the Lieutenant-Governor in Council having been made authorizing the same.

Then comes an averment that the said defendants having all concurred in the

passing of the said order in Council, and in the execution of the said deed of exchange and the ratification thereof, are, *under the clause of warranty therein stipulated*, bound to guarantee and indemnify the said plaintiff *en garantie* against the said action of Her Majesty, and all damages to him resulting therefrom. The plaintiff's conclusions are that the aforesaid defendants *en garantie* be ordered to take up his *fait et cause* in *Her Majesty's* said action against him, and to guarantee and indemnify him against all condemnations that may be pronounced against him therein, and that, in default of their so doing, and in the case of the rescision of the said deed of exchange, that the said defendants *en garantie* be jointly and severally condemned to pay to him, the said Middlemiss, the sum of $207,598 currency, as per a previous statement in the declaration, with interest and costs.

Does Middlemiss, by this declaration, show a right of action against the defendant Ouimet, is the only question upon which I have to decide on the said defendant's demurrer. I unhesitatingly answer no to this question.

The plaintiff's action is *en garantie formelle*. He distinctly bases it on the clause of warranty stipulated in his favor in his title to the Tanneries property, and this title, he himself alleges, is from Her Majesty. It is in Her Majesty's name, by Her Majesty, that this property was ceded to him. It is Her Majesty who has stipulated in his favor this clause of warranty, upon which he declares, and yet he prays a judgment against the defendant Ouimet on this very same clause of his title deed. He says in his action: Her Majesty has sold me a piece of land. She has stipulated in my favor a warranty of the peaceful possession thereof. I am troubled in the possession of the said piece of land, therefore I wish that the defendant Ouimet, under this stipulation of warranty by Her Majesty, be held responsible for the trouble I am now exposed to in my possession. Ouimet, it seems to me, is quite right in saying, as he does in fact say in his demurrer, *les conclusions du demandeur ne découlent pas de ses prémisses*. This alone puts an end to the plaintiff's action. He has sued Ouimet as his *garant formel*; he himself shows by his declaration that Ouimet is not his *garant formel*. He claims his right of action against Ouimet on the clause of warranty contained in his title deed; he himself avers that not Ouimet, but Her Majesty, stipulated that clause.

Leaving aside this objection to the plaintiff's demand, which, though perhaps technical, is not the less fatal to him, and passing now to the consideration of the other averments of the declaration, I fail to see in any one of them how the plaintiff can obtain his conclusions against the defendant Ouimet. He says, in one count of his declaration: "The rescision of my title deed to the Tanneries property is asked for upon the ground that the transfer of this property has to me illegally been made without an act of the Legislature of Province." But he alleges also in distinct terms that this transfer was made in Her Majesty's name by and in virtue of the authority of the *Lieutenant Governor in Council*. Is it, forsooth, because Ouimet was then one of Her Majesty's Executive Council, because he was present when this order in Council was passed, and he concurred therein, that he is responsible to the plaintiff in the manner prayed for? The plaintiff appears to think so. But this is ignoring the most elementary principles

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of the constitution. It is trite to say that the acts of the Executive Power are the acts of the Sovereign, done upon the advice of the Sovereign's ministers. In this case, the plaintiff virtually sues the defendant Ouimet upon the ground that he, Ouimet, being one of the Crown's advisers, erroneously advised Her Majesty!

Middlemiss alleges himself that he holds his title from the Crown; he himself alleges that his title is impugned, because the Crown had not the power to give it to him. His recourse is then against the Crown and against the Crown alone. He has not the right to go into Her Majesty's Council to question the advice upon which Her Majesty has been guided, in this exchange with him. The members of the government are not individually and personally responsible, at least when not charged with malicious or corrupt motives, in the advice they gave to the Crown on this occasion, or which they may give on any occasion, to any other than to Her Majesty herself, or her Lieutenant Governor, and to the nation by its representatives in the Legislative Assembly. These principles seem to me plain and undeniable. There is no more personal responsibility in the members of the Executive power than there is in the members of the Legislative power. Now, suppose that the Quebec Legislature passes an act to prohibit the sale of liquors, and that no liquor is sold for one year in the Province. Suppose that later this act is declared unconstitutional and *ultra vires* by the judicial power, would each and every liquor dealer in the Province have a right of action in damages against each and every one of the members of the Legislature, because they, the liquor dealers, would have lost the earnings of their trade during a whole year, in consequence of an act illegal, *ultra vires*, passed without jurisdiction, by these members? Or against the Licutenant-Governor, because he sanctioned a bill without having the jurisdiction to do so? Or against the members of the Cabinet because they advised this sanction, and are responsible for it?

Middlemiss' action is as extraordinary. He forgets that the acts of the Lieutenant-Governor in Council are Her Majesty's acts; that, if he suffers grievances in consequence of these acts, he can, by petition of right, complain and ask redress of Her Majesty and of her alone. The members of the Executive Council can be dismissed by Her Majesty or her Lieutenant-Governor in her lieu and stead. The House of Representatives can express its disapproval of their stewardship and oust them from power. But they are not in law individually and personally responsible towards any one of Her Majesty's subjects in the Province for any of their acts as advisers of the Crown; they cannot be called to account before a Court of Justice for the advice given by them, and each of them to the Sovereign in her Councils. Their acts are not their personal acts. The Crown acts by them, and their acts are those of the Crown. *See Dickson* vs. *Viscount of Combermere*, 3 *Fost. & Fin.* 533, 585.

Of course, as the head of one of the Public Departments, a minister may, in certain cases, be held liable in a Court of Justice toward his fellow-subjects, but I have considered the question only as it appears raised between the parties in this case, that is to say, whether a member of the Executive Council, as such, is

responsible before a Court of Justice for the advice given to the Sovereign in Council. Would the plaintiff have his action or any action if he had alleged that the defendant Ouimet had in this matter of exchange acted maliciously, dishonestly, or with corrupt motives, is a question which I have not to decide here. There is no allegation of this nature in the plaintiff's declaration.

The cases of Gidley vs. Lord Palmerston, 3 Brod. & B. 275; Macbeath vs. Haldimand, Governor of Quebec, 1 T. R. 172; Sutton vs. Johnstone, 1 T. R. 493, and in fact all the cases on the questions submited here, or having any analogy with them, will be found collected and annotated in Broom's Constitutional Law. I also refer counsel to the case of Luby vs. Lord Wodehouse, decided in 1865, 17 C. L. R. 618, C. P. This case arose out of the Fenian conspiracy, and was an action against the Lord Lieutenant of Ireland for an illegal seizure of the plaintiff's property. The Court of Common Pleas in Ireland held that, as the act complained of was done by the defendant as Lord Lieutenant of Ireland, the action could not stand, whether the defendant had acted rightly or wrongly, "We entertain no doubt, (said Chief Justice Monahan,) that it would be contrary to all law, and contrary to reason, that, while a governor is discharging the high duty he is entrusted with, redress can be obtained through such an action as this."

In the case of Sullivan vs. Spencer, Earl, in 1872, 6 Irish R. C. L. 173, Q. B., the same point was raised and decided in the same way. See also O'Grady vs. Cardwell, 21 W. R. 340.

A book which, as a Canadian, I cite with a sense of pride, (I allude to Todd, Parliamentary Government in England, resumes in the following words the true principles on this point, (Vol. 1st, page 295): "If a minister of the Crown be guilty of any abuse of authority, or dereliction of duty, he is personally liable, under the law and constitution for his conduct. But in determining the liability of a public functionary for damage caused by his act to a fellow-subject, a seeming conflict between principles is noticeable, and an anxiety in the breast of the law on the one hand to assist the suitor, who, perchance, complains of wrong, and, on the other, to protect the officer who, inflicting an apparent injury, has, perchance but done his duty. Any direct infringement of the law of the land by a minister or officer of the executive government would render the offender liable, in a Court of Justice, to precisely the same consequences as if he were a private person. Nor would it be, in an English Court of Law, any justification to plead the command of the Sovereign as the warrant for an unlawful act. It may be stated, as a general principle, that, in assuming on behalf of the Crown a personal responsibility for all acts of government, ministers are privileged to share, with the Crown, in a personal immunity from vexatious proceedings, by ordinary process of law, for alleged acts of oppression or illegality in the discharge of their official duties, and are responsible to Parliament alone for acts of misconduct in their official capacity. Nevertheless, the Courts of Law have established certain rules, which, so far as they go, afford protection to the subject against the abuse of executive authority. Thus it has been determined that general warrants, issued by a Secretary of State, to search for and seize the author, or the papers of an author (not named) of a seditious libel are illegal. Also that a

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warrant, issued by a Secretary of State, to seize the papers of the author (named) of a seditious libel, is illegal. Apart from the security afforded to the subject by these decisions, the law accords to persons who are clothed with an official character a peculiar protection. On grounds of political expediency all such persons are preserved from liability to actions at law. Whether the alleged liability arises out of contract or out of tort, or from any matter of private and individual complaint against a minister of the Crown, for acts done or directed to be performed by him in his official capacity, the ordinary tribunals of justice will afford him special immunity and protection. But if ministers of the Crown think fit, for reasons of public policy, to take upon themselves the responsibility of directly infringing an existing law, they are bound to apply to Parliament for an Act of Indemnity, to relieve themselves, and those who have followed their directions in the particular matter, from the legal consequences of their conduct. The constitutional remedy against a minister of State who may be guilty of injustice or oppression in the exercise of his administrative functions is by an appeal to Parliament, and more especially to the House of Commons. Attempts to obtain redress under such circumstances by resort to the courts of law are unavailing, inasmuch as such complaints are not properly cognisable by these tribunals, which have no jurisdiction to coerce or otherwise control high public functionaries. Whereas the House of Commons, as the grand inquest of the nation, is fully competent to investigate every case of ministerial abuse or misconduct, and to visit upon the offender the consequence of his misdeeds. In theory of law, the judgment and decision upon every matter of state is that of the Sovereign, who acts, according to his discretion, upon advice given him by a responsible minister, who is sworn to keep the king's counsel secret, and who may not disclose elsewhere the nature of the advice given, without his Sovereign's express permission. Nor is this secrecy enjoined merely as a personal privilege or protection to the Sovereign or the minister, to be waived as they may think fit; it is founded upon constitutional principle and public policy, which unite in recognising the importance of entire and unfettered freedom in any advice to be given to the Sovereign, and the necessity for preserving the king's counsellors from being harassed by actions on false pretences of malice or corruption. Every minister is directly responsible to Parliament for his conduct in office, and for the advice he tenders to his Sovereign; but he is responsible to no other tribunal. If he be put upon his trial by Parliament, it is right that he should be at liberty to disclose the secrets of the Council chamber, so far as they may affect his personal responsibility for the acts under review; and permission to that effect is invariably accorded by the Sovereign. But it is not right for a minister to disclose before a jury or before an ordinary Court of Law, the counsels of the Crown, because these tribunals have no power to follow up the matter, and to sit in judgment upon the advice given to the Sovereign by her ministers, or upon the acts of the Sovereign consequent upon such advice."

See also 3 Fost. & Fin. 533. *Note.*

There is a count of the plaintiff's declaration in which he avers that his title to this Tanneries farm is sought to be annulled because the Hon Mr. Archam-

bault, who consented it to him in Her Majesty's name, had not the authority to do so, and because the said exchange and the ratification thereof had never been authorized by an order in Council. It is obvious this, at most, would show a right of action against Archambault alone, though perhaps not *en garantie formelle*. As against Ouimet, far from showing a right of action, it destroys the plaintiff's first and only allegation. He says here : " there was no order in Council ;" how can he then say : " Ouimet is responsible towards me as having concurred in the *said* order in Council." The declaration is here most contradictory.

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Demurrer maintained, and action dismissed with costs quoad Ouimet.

The case is also before me on the issue between Middlemiss and the defendant Fortin, on a plea of the same nature as Ouimet's. Judgment will also go dismissing the action quoad Fortin.

Demurrer maintained, and action dismissed.

Geoffrion & Co., for plaintiff *en garantie*.
H. C. St. Pierre, for Ouimet & Fortin, defendants *en garantie*.
(S. B.)

PRIVY COUNCIL, 1877.

12TH DECEMBER, 1877.

PRESENT: THE QUEEN'S MOST EXCELLENT MAJESTY, LORD PRESIDENT, LORD PRIVY SEAL, EARL OF DERBY, MR. SECRETARY CROSS, MR. THESIGER.

PHILO LAMBKIN,

(*Plaintiff in Court below,*)
APPELLANT ;

AND

THE SOUTH EASTERN RAILWAY COMPANY,

(*Defendant in Court below,*)
RESPONDENT.

HELD :—That a judgment setting aside the verdict of a special jury and ordering a new trial does not belong to that class of interlocutory judgments from which no appeal is allowed from the Queen's Bench to the Privy Council ; and Her Majesty will grant an appeal from such judgments, if the Queen's Bench refuse to allow it.

In February, 1875, P. Lambkin instituted an action before the Superior Court, Montreal, against the S. E. Railway Company, for the recovery of $50,000 damages suffered from the injuries sustained by him on or about the 13th August, 1874, through the negligence of the defendants whilst travelling on their line of railway. On the 13th Sept., 1875, the cause came up before a Special Jury, which unanimously awarded the plaintiff a verdict assessing his damages at $7,000. On the 23rd Sept., 1875, the plaintiff made a motion before the Court of Review for a judgment in conformity with the verdict. The Court of Review unanimously granted this motion, entered judgment on the verdict, and rejected the defendants' motion asking for a new trial. The

Lambkin and The South Eastern Railway Company.

defendants appealed to the Court of Queen's Bench from that judgment, and on the 16th March, 1877, the Court of Appeal reversed the judgment of the Court of Review and ordered a new trial. On the 11th June, 1877, the plaintiff moved the Court of Queen's Bench for leave to appeal to Her Majesty in Council. This motion was rejected on the 15th June, the Court giving, as the reason of its refusal, that the judgment of the Queen's Bench was an interlocutory judgment, from which there could be no appeal to the Privy Council.

The appellant then applied directly to the Privy Council for special leave to appeal.

The Lords of the Committee having reported to Her Majesty as their opinion that leave ought to be granted to appellant to enter and prosecute his appeal from the judgment rendered on the motion of the defendants for a new trial,

Her Majesty was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order that the said Philo Lambkin be allowed to enter and prosecute his said appeal, upon depositing in the registry of the Privy Council the sum of £300, sterling, as security for the costs of the respondents, in case the said appeal should be dismissed, and the registrar of the Court of Queen's Bench at Montreal is hereby directed to transmit to the registrar of the Privy Council, without delay, authenticated copies of the record, etc., etc.

Appeal allowed.

Simpson, Hammond & Co., solicitors in London for petitioner.

Doutre, Doutre, Robidoux, Hutchinson & Walker, solicitors in Montreal for petitioner.

(J. D.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH FEBRUARY, 1877.

Coram JOHNSON, J.

No. 710.

Veroneau vs. *Poupart.*

HELD:—That it is not competent for a party sued on a note given as boot on an exchange of horses to plead non-liability on the ground of a redhibitory vice in the horse received by him, and without bringing any action to set aside the exchange; especially when such plea is filed several months after the defendant knew of the vice and had tendered back the animal.

PER CURIAM:—To the plaintiff's action to recover the amount of the defendant's bon in his favour it is pleaded that the consideration was $100, which the defendant agreed to give to boot in an exchange of horses, and that the horse he got from the plaintiff was unsound and useless to the knowledge of the latter, and was immediately offered back and refused. The plaintiff makes answer that the defendant ought to have followed up his offer to return the horse either by an action *redhibitoire*, or *quanto minoris*. I do not enter into the proof; my judgment upon this issue is that by law the defendant's remedy, if what he says be true, ought to have been exercised within a reasonable delay. Here the sale was on the 23rd of June, the bon given on the same day was payable on the

6th of July. The plaintiff's action was taken on the 17th of August, and the plea was fyled on the 20th of September. The defendant can be in no better position by giving his note than if he had paid the money down; and under the practice followed in these cases in my time, it has never been held that two months could have been allowed to keep the horse and use him without bringing an action redhibitory. Therefore, the defendant's plea will be dismissed, and judgment will go for the plaintiff. No cases were cited; but there was one decided in February, 1876, by Mr. Justice Rainville, in which precisely the same thing was held—Lemoine vs. Béique, S. C., Montreal.*

Plea dismissed.

Geoffrion & Co., for plaintiff.
Ouimet & Co., for defendant.
(S. B.)

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 16TH MARCH, 1877.

Coram MONK, J., RAMSAY, J., SANBORN, J., TESSIER, J.

No. 155.

LACROIX,

APPELLANT;

AND

BULMER,

RESPONDENT.

HELD:—That an order to "give bearer what he wants" does not contain a continuing guarantee.

TESSIER, J.—The action was brought by Bulmer on a writing dated 5th November, 1874, in these terms: "Give bearer what he wants." Signed by P. Lacroix. On this the respondent furnished some lumber to the bearer, Joseph Lacroix, son of P. Lacroix, to the value of $124.12. The defendant, when sued upon the order, desired to limit his liability to the lumber given on the first presentation of the order. The Court below condemned him to pay the whole amount of the account, and the defendant appealed. We consider that this judgment was erroneous, and that the guarantee did not continue beyond the first day.

SANBORN, J., differed only on one point from the judgment. He agreed with his colleagues in considering that this was not a continuing guarantee. But upon the evidence, and considering the relationship of the parties, and their business being much mixed together, he would be inclined to hold the defendant responsible.

MONK, J., said the question was, did Lacroix render himself liable, notwithstanding the fact that he was not bound by the letter of guarantee. This was a question of evidence, and His Honor did not consider the proof sufficient.

* This judgment was confirmed by the Court of Q. B. on the 29th January, 1878—the judges being unanimous.

Lacroix and Bulmer.

The following was the written judgment of the court:—

"La cour * * * considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure à Montréal le 18 Avril, 1876;

"Considérant que le document produit de la part du demandeur comme suit:

"Montréal, November 5, 1874.

"Donnez au porteur ce qu'il aura besoin.

P. LACROIX."

N'a engagé le défendeur Pierre Lacroix père, appelant, que pour ce qui a été livré sur la foi et sur la remise de ce bon au demandeur, intimé en cette cause, c'est-à-dire pour ce qui a été fourni et avancé par le demandeur à Joseph Lacroix, porteur du dit bon, le 6 Novembre 1874, mais ne doit pas s'étendre à garantir la vente de choses faite à une époque différente, savoir, plusieurs mois après cela, au dit Joseph Lacroix;

"Considérant que le dit Pierre Lacroix a offert une confession de jugement en bonne forme pour la balance due sur les avances faites sur la garantie du dit bon, savoir, pour la somme de $39.86, avec intérêt, et les dépens d'une action de cette classe, jusqu'à la dite confession.

"La présente cour rendant le jugement qui eut dû être rendu condamne le défendeur Pierre Lacroix, appelant, à payer au demandeur, Henry Bulmer, junior, intimé, la dite somme de $39.86 suivant la dite confession, avec intérêt du 6 Octobre 1875, jour de l'assignation, et les dépens d'une action de cette classe jusqu'à la dite confession, et renvoie la demande quant à l'excedant avec dépens subséquents à la confession, et les dépens de cet appel en faveur de l'appelant Lacroix, contre l'intimé Bulmer."

Judgment of S. C. reversed.

Doutre & Co., for appellants.
H. W. Austin, for respondent.
(S. B.)

SUPERIOR COURT, 1877.

MONTREAL, 28TH FEBRUARY, 1877.

Coram JOHNSON, J.

No. 1134.

Dempsey vs. *MacDougall et al.*

HELD:—That the *actio pignoratitia directa* does not lie, when the pledgee is allowed to sell or dispose of the thing pledged by the very terms of the written instrument of pledge.

PER CURIAM:—The plaintiff in this action charges that on the 3rd of September, 1873, he borrowed from the defendants $800, and pledged for its repayment fifty shares of the stock of the N. Y. Central and Hudson River Railroad. That on the 25th of February, 1874, he offered back the money he had borrowed with interest, and demanded back the pledge he had given, but the defendant refused to comply with his request, and, therefore, he brings his action, and prays that the defendants should be condemned to restore him the thing pledged, or its market value, or the sum advanced. The defendants

plead that the plaintiff had dealt with them as stock brokers from the 26th of June to the 15th of October, and that the particular advance made on the 3rd of September was only one of a series of transactions in which the plaintiff employed them as such brokers to buy and sell stocks on the margin in New York; and they had express authority from the plaintiff to sell the stock in question as well as all other stocks that they carried for the plaintiff, as they might see fit; and they enumerate a number of these transactions, and charge the plaintiff with other advances and with commission on call loans made by their agents there to carry these stocks for the plaintiff, and they say that the 50 shares in question, which had been pledged on call in New York to raise "margin," were sold at the plaintiff's request, and that when the accounts were closed there was a balance of $276.75 due to the plaintiff, for which they sent him a cheque that he refused to take, and they now renew their offer, with the costs of the action.

It will be seen at once from this summary statement of the issue that the plaintiff gives his action the character of the *actio pignoratitia directa*, the simple and direct demand for the restoration of the pledge on payment of the money lent upon it. It will also be seen that, in stating the terms of the advance, no time is mentioned for the repayment of the money [illegible] which is not unimportant as bearing upon the character of the transac[illegible] On the other hand the defendants insist that the contract was distinctly and essentially modified by an agreement between the parties; and if this is true, the action, of course, cannot be maintained, for the principle that lies at the very root of it is: "*pignus manente proprietate debitoris solam possessionem transfert ad creditorem;*" and it cannot possibly be maintained, if, besides the mere possession of the creditor as a pledge, there have been additional elements introduced into the contract essentially changing its nature, such as the creditor's exclusive right of control for all purposes over the property pledged. Therefore we must see precisely what the nature and extent of this contract was. The receipt which the defendants gave to the plaintiffs is as follows:

"3rd September, 1873.

"Received of M. A. Dempsey, Esquire, certificate No. 6544, for 50 shares of N. York Central and Hudson River R. R. Co., shares to be sold as collateral security for an advance of $800 made to him.

"September 3rd, payment, $500.
" 11th, " $300.

"(Signed,)
"McDOUGALL BROS.
"Per J. H. Cox."

So far the thing is plain enough; but on the defendants' side there is a writing produced also—a receipt note running as follows:—

"Montreal, 3rd September, 1873.

"Messrs. McDougall Bros.—Gentlemen:—In consideration of your having advanced to me $500, payable on call with interest at seven per cent., I have assigned to you, as collateral security for the due payment of said advance, fifty

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shares of stock in the New York Central and Hudson River Railroad; should the above amount not be duly paid by me, you are hereby authorized to sell or dispose of the stock or any part thereof in such manner as you may deem advisable without notice, protest, or any other proceeding of any kind, and to appropriate the proceeds as far as may be necessary towards the payment of the said advance, the whole without prejudice to the ordinary legal remedies thereon; and the acceptance of the foregoing conditions is established by the fact of said advance.

"Your obedient servant,

"M. A. DEMPSEY."

It is clear, therefore, that the plaintiff here has no right to exercise the *actio pignoratitia directa*—that is, the naked right of restoration of the thing pledged purely and simply, and his action must be dismissed. There is a general answer in law and in fact to the defendants' plea; and at the hearing of this case it was argued at great length that the transactions pleaded were prohibited by law; but it is unnecessary to go into that. I may say, however, that if it were so, the plaintiff's participation would destroy his action just as much as the defendants', participation would destroy their plea; for on the supposition that the plea is true, which must be assumed on the law issue, these margins were simply stakes in the game. The judgment will dismiss the plaintiff's action on the ground that, under the receipt note proved in the case, the naked right of restoration, or the direct action *pignoratitia*, cannot be exercised, for the principle on which it rests, consecrated by the text of the old Roman law, may be familiarly put in this way: The plaintiff says to the defendant: "I only gave you possession of my property until I should repay you." The defendants' answer to this is conclusive. They say: "It is not true that you only gave us possession; you also gave us an absolute and exclusive right of control and disposition, without any formality whatever, which is quite inconsistent with the right you claim now, and you are acting in the very teeth of our contract."

The law indeed, though it was not invoked at the hearing, goes much further than this, and the very text of the Roman Code has been almost copied in art. 1975 of our own: "If another debt be contracted after the pledging of the thing, and has become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." That is a part of the case, however, into which I do not enter. The action is dismissed on the sole ground that the contract of pawn or *nantissement*, purely and simply, does not exist here, but has been expressly changed by the parties.

Action dismissed.

H. W. Austin, for plaintiff.
Dunlop & Lyman, for defendants.
(S. B.)

CIRCUIT COURT, 1877.

WATERLOO, 12TH DECEMBER, 1877.

Coram DUNKIN, J.

No. 717.

Ex Parte *James D. Long*, Petitioner for *Certiorari*, and *Flavien R. Blanchard*, Respondent; and *The Magistrates Court of the County of Shefford et al.*, Court below.

HELD:—That the Circuit Court has no jurisdiction by means of *Certiorari* over Judgments other than those rendered by Commissioners Courts or by Justices of the Peace.

Suit was instituted in the District Magistrate's Court, County of Shefford, by respondent against petitioner, on the 19th November, 1875, for a sum exceeding $50; judgment was pronounced against petitioner for a portion of *demande*, and overruling his *exception déclinatoire*.

Petitioner applied for writ of *certiorari* to the Circuit Court for the County of Shefford to quash the judgment of the District Magistrate against him, and on the 14th June, 1876, the writ was granted by CARON, J. At the argument to quash the judgment of the Court below, on the return of the Record, respondent's attorney urged the want of jurisdiction of Circuit Court, citing No. 1056 of C. C. P., while applicant relied upon No. 1225 of C. C. P.

PER CURIAM.—Considering that by law this Court hath no jurisdiction by means of *certiorari* over judgments other than such as may be rendered by a Commissioner's Court for the summary trial of small causes or by Justices of the Peace, and that therefore the writ which in this matter hath been issued was improvidently issued, doth quash the said writ, &c., but without costs. *

Huntington & Noyes, for petitioner.
A. D. Girard, for respondent.
(J.P.N.)

* A similar judgment was rendered the same day in another case by Judge Dunkin. The reason given by the Court for not granting costs, which might at first appear singular, was that the Court of Appeals having decided adversely to the jurisdiction of District Magistrate's Court on the matter in dispute, it would be a hardship to grant costs in favour of a party who had sued for a sum manifestly in excess of the jurisdiction of that Court. Reporter's note.

COURT OF QUEEN'S BENCH, 1877.

MONTREAL, 21st DECEMBER, 1877.

Coram Sir A. A. DORION, C. J., MONK, J., RAMSAY J., TESSIER, J., and CROSS, J.

No. 183.

CHARLES LAPIERRE,

(*Plaintiff in the Court below*),
APPELLANT;

AND

L'UNION ST. JOSEPH DE MONTRÉAL,

(*Defendants in the Court below*),
RESPONDENTS.

HELD:—That a member of an incorporated Benevolent Association must have due notice given him before he can be expelled for non-payment of dues.

2. That a writ of mandamus will be ordered to issue to restore the expelled member subject to payment being made by him of arrears due to the Society.

CROSS, J., delivering the judgment of the Court, said:—The appellant obtained from one of the Hon. Judges of the Superior Court a writ of mandamus addressed to the respondents, a Benefit Society, incorporated under the name of L'Union St. Joseph de Montréal. The petition which accompanied the writ complained that on the 28th January, 1857, he had been admitted a member, and became entitled to all the benefits and advantages of membership. That he paid his entrance fees and all contributions that could be exacted from him, pursuant to the constitution and by-laws of the Association, up to the 1st of March, 1875. That by a letter from the secretary, dated the 13th, but only received the 25th January, 1877, the appellant was informed that he had been struck from the list of the members of the Society. That on the 13th January, 1877, he had been in default to pay six months' contributions, and it was in the power of the society to strike him from the list and to deprive him of his membership, but for this purpose he should have been put *en demeure* to pay his arrears, and that at a regular meeting the collectors and treasurer should have made known the names of those in arrears, and that a motion should have been made to strike off from the list of members those so reported in arrear. That no demand had ever been made upon him for said arrears; he had not been informed of the amount thereof, had always been ready and willing to pay them, and was so still. That on the 13th January, 1877, there were a great many other members, in like manner in arrear for more than six months, who had not been expelled. That the practice had been to receive arrears of more than six months. That the respondent had no right to strike off appellant's name, and, at the same time, leave on the list and retain as members others in like manner in arrear for more than six months' contributions. That he had done nothing to warrant expulsion. That he had attended a regular meeting of the Society on the 23rd April, 1877, and offered them $20 in payment of any arrears which he might owe, which offer had been refused, and from that

date he had been refused the privileges of membership, to which he prayed to be restored.

To this petition the Society pleaded that the appellant had been duly expelled according to the constitution and by-laws of the Society, by a unanimous resolution passed on the 8th January, 1877. That the Society was not bound to collect the contributions which were payable by the members at the Society's place of business. Their right to expel was optional, extending to all or any of those in arrear, as it might please the Society. The Society produced with their plea an account for $7 of arrears, with a form of notice under it, the date in blank, containing a warning that if not paid within a month legal measures would be taken to compel payment, but it was not proved that this notice had been sent to the appellant.

The facts as alleged on both sides were admitted in the articulation of facts, and answers, including the fact that others in arrears for over six months' contributions at the time appellant's name was struck from the list of members had been allowed to remain. The respondents did not pretend that any notice was given to the appellant of the motion of expulsion, the necessity for which is the only point that is in question in the case. The rule relied on by respondents was to the effect: "That when a member neglects for six months to pay his "contributions, or the entire amount of his entrance, the Society may strike "his name from the list of members, thereupon he no longer forms part of the "association. To that end at each regular general meeting the collectors-treasurers "are bound to make known the names of those thus indebted for six months' "contributions, or for a balance of their entrance; and thereupon any member "may make a motion that such members be struck from the list of the Society's "members." The resolution adopted at the meeting of the 8th of January was as follows:—"Mr. P. Leclerc moves, seconded by Mr. Jean Bte. Masse, that "the gentlemen hereafter named be struck from the list of members of this "Society (here are inserted 13 names, including that of the appellant). The "motion was passed unanimously."

The question that arises on this state of the record is whether the appellant Lapierre could be expelled without notice, and, if illegally expelled, has he shown a right to be restored to membership by mandamus. Persons who become members of such associations are bound, by reasonable by-laws made for their government and the management of their business. They are presumed by their membership to have been parties to the making of the by-laws or to have contracted with the society to submit to the operation thereof, but their rights cannot be forfeited under such by-laws without a clear legal provision which, by its terms, will operate such forfeiture. It will be observed that the by-law in question does not, as is the case in some instances, provide that the neglect of a member to pay shall of itself operate an expulsion. It will be further observed that the by-law contains no express waiver of the right to notice of the intention to expel, so that if this be a legal right it still remained to Lapierre, notwithstanding his being in arrear, and the reason given has force, because on such notice a member might give a sufficient excuse, or on hearing him the Society might be inclined not to exercise rigour in enforcing the penalty of default. The

Lapierre and L'Union St. Joseph de Montréal.

precedents in the English books show that prior notice is matter of right; not only is this required, but it is necessary in the notice to state the cause for which it is proposed to expel the party charged. See Rex *vs.* Richardson, 1 Burrows Rep. p. 517, and Rex *vs.* the Mayor of Liverpool, 2 Burrows R., p. 734. It is true these cases involved a culpable neglect of duty, and not merely a default in the payment of money, but it appears by the appellant's citation from Angell and Ames 204, the same rule has been applied in the United States to a case very like the present. Commonwealth *vs.* Pennsylvania Beneficial Society, 2 Serg. and Rawles R. p. 141. The articles of incorporation provided that, should any member neglect to pay his monthly contribution of 50c. per month for three months he was to be expelled. A committee reported the party in question three months in arrears, and with others in like condition he was struck off the roll as having forfeited his right of membership; there was no vote of expulsion, the officers of the Society acted on the supposition that by force of the rule his default *pro facto* operated his cessation of membership. On a mandamus to restore, the Court were clear that there must be some act of the Society declaring the expulsion, and that this could not be done without a vote of expulsion after notice to the members supposed to be in default. The case differed from the present, where there has been a vote of expulsion; at the same time, the want of notice was treated by the Court as a fatal defect in the proceedings. A number of other cases holding that notice is necessary are given in Abbott's Digest of the Law of Corporations, under the word "Expulsion," p. 336, Nos. 12 and 13, but the reporters cited are not in our library. We do not find that Card vs. Curr, 38 English L. E. R., p. 134, is an authority to the contrary. In that case the question of notice was not raised, nor does it seem to have been necessary, because the rule was so framed that default of payment for a specified time of itself operated a forfeiture of the rights of membership. Had the rule now in question been in like terms, we would not, likely, have held notice to be necessary; but, in the present case we think the safest rule, and the one that is justified by precedents, is to hold that notice was necessary. The judgment of the Court below is consequently to be reversed, and a peremptory mandamus ordered to issue to restore Lapierre, subject to payment being made by him of the arrears due to the Society.

Judgment reversed.

Doutre, Doutre, Robidoux, Hutchinson & Walker, for the appellant.
Mousseau, Champleau & Archambault, for respondent.
(W.S.W.)

COURT OF REVIEW, 1877.

MONTREAL, 30TH NOVEMBER, 1877.

Coram TORRANCE, J., DORION, J., PAPINEAU, J.

No. 2641.

Thompson vs. *Mackinnon*.

HELD:—Where a biscuit maker sold his stock-in-trade, "with the good will and all advantages pertaining to the name and business" of the vendor, that the exclusive right to use the trade-mark of the vendor passed to the purchaser without express mention thereof in the contract.

DORION, J. The circumstances which gave rise to the action are as follows:

For some years previous to July, 1876, the defendant had carried on the trade of a biscuit-maker in the Town of St. Henri, near Montreal, and for the the purpose of distinguishing the articles manufactured by him, used a certain label or trade mark, consisting of the word *Mackinnon's* under which was engraved a *boar's head* grasping a *bone in his jaws*. This label or *trade mark* was used upon every box of biscuits manufactured by defendant. The biscuits themselves were branded with the word *Mackinnon's*.

In July, 1876, the defendant sold to the plaintiff his estate and effects, real and personal, stock in trade, *with the good will and all advantages pertaining to the name and business of the said John Mackinnon* and including specially the property occupied as the biscuit factory, in which were some thousands of the labels, and the brands, cutters, and other accessories, which were all delivered to the plaintiff, who continued the business and used the labels, brands, &c., as they were used before, to the knowledge of the defendant with his assent. Moreover the plaintiff got the label in question registered as a trade mark in the proper office at Ottawa, where it had not been registered before. Shortly after this the defendant recommenced business as a biscuit manufacturer in his own name, and adopted for use in his new business the label above-mentioned.

The present action is brought by plaintiff to have the defendant restrained from using the said label or trade mark which he alleges has passed to him as an accessory of the business and good-will sold to him by defendant.

The defendant in his plea admits that this label was his trade mark, but says that it was not included in the sale he made to plaintiff of his stock, business and good-will.

The facts are not disputed. It is a mere question of law.

That it was a trade mark cannot be disputed. Both parties agree upon this point. That it did pass to plaintiff by the sale made to him by defendant appears to me to admit of no doubt. All the authorities, French, English or American, cited by the counsel on both sides, are unanimous upon this point: "Where a business is sold the entire good-will and the right to use the "trade mark pass to the purchaser, without any express mention being made of "them in the deed of assignment, and the Court will restrain any subsequent "attempt on the part of the vendor to retain either for his own use." Adams on Trade Marks, p. 102. The same doctrine is to be found in the French and American books. Now if the defendant's trade mark has passed to the plaintiff

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with the business and good-will of the factory, no stranger can use the same, nor the defendant himself. He has divested himself of all rights he had in the said trade mark, whether it contained his name or not. He may start a similar business in his own name, but he cannot represent himself as carrying on that business which he has sold nor use its trade marks. The case of *Compere vs. Bajou*, decided by the Tribunal of Commerce, Paris, 6th February, 1854, and subsequently by the Court of Appeals, is perfectly analogous to the present case, and is even stronger in favour of plaintiff's pretensions. There it was an assignment by Bajou of a business as glovemaker, including the *good-will* thereto attached. The stamp employed by Bajou, as the manufacturer's mark for his gloves, being the *fac simile* of his signature. It was agreed that Bajou should not have the right to establish any manufacture of this nature either at Paris or any other town in France, with the exception of Grenoble. Some time afterwards Bajou manufactured a certain quantity of gloves at Grenoble, and stamped them with his signature, his former manufacturer's mark. The Court enjoined him to desist from using the said mark, which was his own name and signature, and condemned him to ten thousand francs for damages. This case seems to be a leading one and is cited and approved of by all the authors.

Under the circumstances, I think the plaintiff's action was well-founded, and judgment should go in his favour as well upon the demand for injunction as for damages, which are assessed at $400.

The judgment is as follows: "The Court, etc., Considering that, in July, 1876, the defendant assigned to the plaintiff for a price agreed upon his business as a biscuit maker, and comprised in that assignment including all accessories used in carrying on the said business with the *good-will* and all advantages pertaining to the name and business so assigned;

"That for that purpose the plaintiff was thereby authorized to *use* exclusively of every other person, as the mark for his biscuits, the label employed by defendant as the manufacturer's mark. That after the said assignment the plaintiff has continued the said business, and has also continued to use the said label as his trade mark, and has duly registered the same in his own name;

"That since that time, and before the institution of this action, the said defendant has started a new business as biscuit manufacturer in the vicinity of plaintiff's factory, and has been for several months illegally using as a manufacturer's mark for his biscuits a label similar to the one used by plaintiff and acquired by him under said assignment;

"Considering that in the said judgment which dismissed plaintiff's action there was error, doth reverse the same, and, proceeding to render the judgment which ought to have been rendered, doth prohibit and restrain the said defendant from using in future the said trade mark, or any part thereof to biscuits, or boxes or packages of biscuits not made by plaintiff, and from selling or causing to be sold or exposing for sale within this province, boxes or packages of biscuits marked with said trade mark and with said label, or with any counterfeit or imitation of the same; and doth adjudge and condemn the said defendant to pay and satisfy to the said plaintiff the sum of $400, for damages with interest, &c.

Butler, for plaintiff.

Abbott & Co., for defendant.

Judgment reversed.

(J. K.)

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" :—Where it is impossible for the assured to give a detailed statement under oath of his loss, supported by books and vouchers, owing to their being burnt, the condition of the policy requiring such statement will be satisfied by his giving affidavits as to the value of the property lost. (Perry vs. The Niagara District Mutual Fire Ins. Co., S. C.)..... 257

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" " :—A, separated as to property, is not liable for groceries consumed in the house in which she and her husband live, when they have not been purchased by her or on her order, and have been charged in the merchant's books to the husband. (Larose vs. Michaud et vir, C. C.) 167

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" " :—An, to a seizure of moveables, seized in the possession of the party condemned, will be dismissed on motion, if the allegations fail to set out any specific title and do not set up a possession in the opposants. (Duhamel et al. vs. Duclos, & Duclos, T. S., & Perreault et vir, opposants, S. C.).. 308

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" :—Where a pledged watch has been stolen from the party to whom it was pledged, without any fault or negligence on his part, he is not liable to make good the loss. (Soulier vs. Lazarus, C. S.)..... 104

" :—The *actio pignoratitia directa* does not lie, when the pledgee is allowed to sell or dispose of the thing pledged, by the very terms of the written instrument of pledge. (Dempsey vs. MacDonald et al., S. C.)..... 328

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" :— " ENQUÊTE.

" :— " PARTNERSHIP.

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" :—Where a bailiff, resident in another district, and charged with the execution there of a writ of execution issued out of the District of Montreal, fails to comply with the exigencies of the writ, he is liable to imprisonment in the District of Montreal. (Gunedinger et al., vs. Derouin et al., S. C.)..... 220

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" :—The remedy of a purchaser of real estate in case of deficiency of quantity in the land sold is not in damages, but to claim either a diminution of the price or the revocation of the sale. (Doutney vs. Bruyère et al., S. C.)..... 59

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TEMPERANCE ACT OF 1864 :—*Vide* MUNICIPAL CODE.

" " :—The provisions of the, have not been repealed or amended by the Municipal Code or subsequent legislation, so as to prevent the enactment of a by-law thereunder for the prohibition of the sale of spirituous liquors. (Ex parte Covey, Jr., petitioner, & The Municipality of the County of Brome, respondent, C. C.) 182

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WILL:—The registration of a will creating substitution, after the six months following the death of the testator, is good as against all persons acquiring right since. (Dufresne vs. Bulmer, S. C.)..... 98

" :—Legal questions arising out of the construction of the terms of a will are regulated by the laws of the domicile of the testator where he makes his will. (Noad vs. Noad, S. C.)..... 312

" :—Under a clause in a will worded as follows, the legatee is simply a fiduciary legatee or trustee such as specified in Art. 869 of the C. C.:—"I hereby give and bequeath unto my brother, William S. Noad, $3000, which said sum I hereby direct to be invested by my executors in U. S. Government bonds, bearing interest, and the said bonds to be issued in his name and to be forwarded to him, to be used for the support of his family." But in the absence of fraud or collusion, the depositary of such bonds or their proceeds (even though he knew the nature of the trust and the terms of the will) would be free of all responsibility or liability on returning the same on the order of the trustee. (Do.)..... 312

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n the 29th January, 1878—the