The Legal News.

Vol. III. OCTOBER 2, 1880. No. 40.

DISTRIBUTION OF JUDICIAL WORK.

It sometimes happens when a city is laid out, in advance of actual requirements, with commodious avenues and highways, that commerce declines to take the channels provided for it, and magnificent streets are left in solitude, while narrow ways are inconveniently crowded. Something of the same kind has occurred in the ample provision of judicial officers for the districts of this province. Judges have been sent to reside in places before there were any causes to be judged, and where the inhabitants are apparently slow to create occupation for them. In the district of Montreal, on the other hand, the resident judges have to deal with a far greater number of cases and with far more business than all the other judges in all the other nineteen districts, put together. The statistics collected by Mr. Pagnuelo in his *Lettres* serve to illustrate this important fact. Thus in Montreal, in 1877, there were 952 Superior Court judgments in contested cases, and in all the other districts 785 judgments. In Montreal in the same year, there were 1434 judgments in default cases (S.C.), and in all the other districts 619 judgments. In the Montreal district there were last year 124 jury trials in the Criminal Court, and in all the other districts only 90 trials. In the Circuit Court, in 1877, there were 2507 judgments in contested cases in Montreal, and in all the other districts 2865 judgments. If Quebec and Sherbrooke be excluded from the other districts, the disproportion between the work in Montreal and the total work of 17 rural districts is still more remarkable. The reason for this is evident on examination of the returns for the rural districts. Thus Gaspé had but 1 contested S. C. case in 1877, 1 in 1878, and 5 in 1879. Chicoutimi had none in 1877, 1 in 1878, and 15 in 1879. Saguenay had 3 in 1877, none in 1878, and 5 in 1879. It is evident that however well intended, the decentralization of the Superior Court in this Province has not worked evenly. It is true that the opening up of the country by railways will tend to create more business in the outside districts, but on the other hand the facilities for rapid travel make it less necessary than ever to have a Superior Court judge residing all the year round in a district where there are only half a dozen or half a score of cases to occupy him.

GUARANTEE INSURANCE.

By the decision of the Court of Queen's Bench in the case of *Citizens' Insurance Co. & Grand Trunk Railway Co.*, reported in our last issue, the judgment rendered in the Superior Court by Mr. Justice Rainville (1 Legal News, 485) was confirmed unanimously, and without any hesitation or difference of opinion on the part of the Court of Queen's Bench. The Insurance Company guaranteed the employee's diligent and faithful discharge of his duty, and he carelessly left a very large sum of money (over $22,000) lying on the floor in an open bag in his office while he went to lunch, so that very little cleverness was necessary on the part of the thief in getting away with the cash unseen and unpursued. It is difficult to see how there could be seriously two opinions of such a case. As Mr. Justice Rainville very clearly put it: « Il suffit d'énoncer le fait d'un homme, ayant à sa disposition un pupitre fermant à clef, une boîte en métal à son usage exclusif, barrant aussi à clef, et en outre, une voute de sureté dans la bâtisse, et qui laisse dans son appartement, sur le plancher, dans un simple sac non fermé, une somme de $22,000, et laisse cet appartement pendant 30 ou 40 minutes, pour établir en même temps son imprudence, sa négligence." It is almost impossible to imagine a stronger case for the employer where the employee is himself exonerated from complicity in the theft (as he was here), and guarantee bonds would evidently be of very little value, if the Courts had arrived at a different conclusion.

AN IMPORTANT QUESTION.

Several of our contemporaries, both in England and the United States, are discussing a question of professional ethics of a somewhat delicate nature, yet one which cannot well be entirely overlooked. The *Law Times* (England)

says: "An incident in the Bristol County Court raises a question which we think is of the utmost moment to the bench and the bar. A son of the judge appeared as counsel before him, and the counsel on the other side declined to go on with the case, as we gather, on that ground alone. We think the judge was wrong in suggesting that this step could in any sense be an insult to him." And the same journal adds: "To say that a barrister should never appear in a court presided over by his father may be unreasonable. But we most emphatically condemn the practice of barristers adopting a court in which to practice over which their fathers do preside or may preside alone." The *Law Journal* (also English) is not quite so outspoken, but its conclusion is not materially different. "In the United States," it says, "the impression has taken so deep a hold that an attempt has actually been made to pronounce a father disqualified, on the ground of interest, to try a case in which his son is engaged. * Such views of the situation are, it is needless to say, altogether without foundation. Judges' sons cannot be ostracised from the bar because their fathers were eminent lawyers before them. We do not for a moment believe that a single case on record has been decided in favor of a particular party because that party happened to be represented by the judge's son." But the *Law Journal* nevertheless admits, "if a son attach himself constantly to the court of his father, as a Queen's counsel in equity attaches himself to a vice-chancellor, it must be admitted that an impropriety is committed." The *Albany Law Journal*, we think, sums up the matter very fairly as follows:—"The difficulty in the case is four-fold: first, that a judge will always be presumed by the populace to lean in favor of his son; second, that the son will get business from the force of this presumption; third, that the judge will unconsciously be biased in his favor; or fourth, that the judge will do his son's client injustice from the fear of such bias. However pure, the judge and the son will always stand in danger. We think it would be better for everybody that a judge should read Chief Justice Ryan's remarks on nepotism, and should decline to hear a cause in which his son is counsel or attorney. If we were a judge, and had a son who insisted on appearing before us as counsel, we should insist on disappearing."

* See 3 Legal News, p. 232.

NOTES OF CASES.

CIRCUIT COURT.

[In Chambers.]

MONTREAL, Aug. 26, 1880.

THE JACQUES CARTIER PERMANENT BUILDING SOCIETY v. ROY, and Plffs., petitioners.

Coercive Imprisonment—C. C. P. 782—*Defendant "conveying away" and "secreting" effects.*

A defendant is liable to coercive imprisonment (under C. C. P. 782) *for conveying away and secreting his effects under seizure, where said effects have been transferred to his father-in-law by a sale manifestly fraudulent and simulated, and defendant party thereto.*

The plaintiffs recovered judgment against the defendant on the 17th December, 1879, for $49, and costs, and now prayed that the defendant be condemned to imprisonment until satisfaction of the judgment, *nisi causa*, on the ground that he had conveyed away and secreted his goods, and thereby prevented the execution of the judgment.

The evidence showed that the moveables in question were advertised for sale under the judgment, on the 3rd January, 1880, but the sale was stopped by an opposition by the defendant alleging informalities in the proceedings. This opposition was contested by the plaintiffs and dismissed by the Court on the 12th March. The goods were again advertised for sale to take place on the 25th March, and the sale was suspended by an opposition by Théophile Girouard in his quality of assignee appointed under the insolvency of the defendant. This opposition was contested by the plaintiffs and dismissed by judgment of the Court on the 15th May, 1880. The goods were again advertised for sale to take place on the 28th May, and the sale was a third time stopped by an opposition by Joseph Dauphinais, who alleged that he had bought the goods from the assignee Girouard at a judicial sale by the assignee on the 19th May, 1880. This opposition was also dismissed

by the Court on the 16th June, 1880. The sale was again fixed for the 26th June, and the sale did not take place, because the defendant, as alleged by the plaintiffs, had secreted and made away with the goods seized, and this was the question to be determined.

TORRANCE, J. The bailiff, Gustave Darveau, says that the defendant promised to have the goods for the sale on the 26th June, and then told him to take a rule and give him time, and he would pay in September. Roy was a bailiff and not a trader capable of assigning as he had done to the assignee Girouard, and the assignment had been held to be inoperative, as also the sale by the assignee to Dauphinais. Dauphinais is the father-in-law of Roy, and they live in the same house. The father-in-law and the wife of Roy contribute to the expense of the household, sharing the burden of the rent in common, and part of the money comes from the defendant.

The demand of the plaintiffs is answered by Roy setting up the assignment to Girouard, and the sale by him to his father-in-law Dauphinais.

We can judge of the value of these transfers, the latter of which, namely the sale to Dauphinais, was made by the assignee on the 19th May, four days after the judgment of the Court, which on the 15th May rejected the claim of the assignee. Do the circumstances justify the demand for imprisonment? C. C. P. 782 says that in all cases in which the defendant conveys away or secretes his effects, he may be imprisoned until he satisfies the judgment. We see him here party to the sham transfers to the assignee and Dauphinais his father-in-law. The goods remain really under his control, for he had promised to produce them for the sale, and then to pay the debt, only asking time till September. He occupies the same house with the purchaser, his father-in-law, whose claim had been rejected by the Court. I see here the conveying away and secreting which are contemplated by the law, and I have no hesitation in overruling defendant's answer to the rule, and in ordering the imprisonment asked for, *nisi causa* on the first September next.

Longpré for plaintiffs.

J. E. Robidoux for defendant.

SUPERIOR COURT.

MONTREAL, September 17, 1880.

TORRANCE, J.

DUCHESNAY v. LAROCQUE.

Procedure—Preliminary plea—C.C. P. 131, 132.

Where the defendant after filing a declinatory exception, is required under (C. C. P. 131*) to plead to the merits, and then pleads a demurrer, the Court may order that the declinatory exception be disposed of, before proceeding on the demurrer.*

This case was in a peculiar position. It was on the roll for hearing on law on the inscription of plaintiff. The defendant had met the demand by a declinatory exception. The plaintiff, as was his right, asked for a plea to the merits, and the defendant filed a *défense en droit* to the action, and other pleas.

Alderic Ouimet, for defendant, submitted that the law hearing should not take place until it had been decided whether the Court had jurisdiction.

Laviolette, for plaintiff, cited C. C. P. 131, 132, which provided that the proof should take place at the same time on all the issues, and he could not inscribe for proof until he had disposed of the law issue.

TORRANCE, J. This is a case in which the intervention of the Court is necessary. What Mr. Laviolette says is very reasonable, and on the other hand it would be an anomaly to require the defendant to try the merits of the action on a demurrer when he has already excepted to the jurisdiction.

The Court orders that the law hearing be suspended until the disposal of the declinatory exception.

Laviolette for plaintiff.

Alderic Ouimet for defendant.

GUILLAUME v. CITY OF MONTREAL.

Action in forma pauperis—Revocation of privilege —C. C. P. 32.

A defendant who seeks to have the plaintiff's leave to plead in forma pauperis revoked, is not entitled to ask for the dismissal of the action.

The defendant moved that the permission given to plaintiff to prosecute *in forma pauperis* be rescinded and the action dismissed.

TORRANCE, J. The leave given by the court

or judge may be revoked on proof that the plaintiff was able to make disbursements, but I know no law which would justify the dismissal of his action on a motion like the present. Motion rejected.

D'Amour for plaintiff.

Ethier for defendant.

BARTHE v. DAGG.

Procedure—Imprisonment in civil cases—2272 C.C.

The imprisonment of the defendant may be asked for by motion after judgment awarding damages for personal wrongs, though imprisonment was not asked for by the action.

The plaintiff had obtained judgment against defendant in damages for $200, for having caused his arrest without probable cause, (see p. 230.) The merits of a rule were now before the Court, under which it was sought to imprison the defendant for non-payment of the judgment.

The defendant resisted the demand for imprisonment on the ground that the plaintiff had not asked for imprisonment by his action, and the judgment condemning him to pay the money had not ordered imprisonment.

Lebourveau, for defendant, cited: C.C.P. (Foran), p. 22, No. 3; p. 248, 3, 4; Dictionnaire de Leg. & Jurisp. (Dalloz), Vol. 1, p. 663, Nos. 22 & 25; Dictionnaire de droit Civil (M. Rolland de Villargues), Vol. 3, p. 142, Nos. 10 & 11; Code Civil (Boileux), Vol. 7, p. 76 last part, p. 77 last part, p. 38 first part; Code Civil (Marcadé), Vol. 9, Nos. 871 & 872.

TORRANCE, J. The Civil Code, art. 2272, enumerates among the persons liable to imprisonment "any person indebted in damages awarded by the judgment of a court for personal wrongs, for which imprisonment may by law be awarded. In the present case the defendant is indebted in $200 for damages for personal wrongs. Here is an application for imprisonment following the judgment of indebtedness. I see nothing in the demand which is not in conformity with our code. The old law in the Ordinance of 1667, Tit. 34, art. 10 & 11, would appear to contemplate two judgments. The authorities from the modern French law would appear to support the pretension of the defendant, but they are misleading when our own law has its own rule on the subject. It is true that the plaintiff did not ask for imprisonment by his declaration, but I do not consider that the omission was an abandonment of his rights under C.C. 2272. Rule made absolute.

F. Keller for plaintiff.

Lebourveau for defendant.

FAUCHER v. PAINCHAUD et al.

Action to change order of hypothecs.

An action by which the plaintiff alleges that defendants collusively made and registered a mortgage before the mortgage given to plaintiff, and seeks to change the order of registration, is not a matter purely personal.

The action was of a peculiar character. The plaintiff complained of the *dol* of the defendants Painchaud and James P. Brown, by which he was induced to accept of a mortgage from Painchaud on their joint representations that it was a first mortgage, whereas a second mortgage, given by Painchaud to Brown, was purposely registered through their artifices before his, and he asked that the mortgage to Brown be postponed after his in the books of the Registry office, for which purpose the registrar Alexis M. Gagnier was made party to the action; and in default of this being done, plaintiff prayed that the defendant Painchaud be condemned at once to pay his indebtedness. The *dol* was alleged to have been committed at Montreal, and there it was alleged that the whole right of action arose. The defendants were served and all resident in the District of Beauharnois, where the land was.

The defendant Brown met the action by a declinatory exception, declining the jurisdiction of the Court at Montreal.

Lareau, for plaintiff, contended that the whole cause of action arose at Montreal, and that the claim was a personal one, and therefore the defendants should answer here.

J. J. Maclaren, for Brown, *è contra*, contended that the demand was real (or, at all events, mixed), involving a *hypothèque* and a change in the books of the Registry office at Beauharnois, and that the defendants should have been impleaded there;—C.C.P. 34, 37.

Exception maintained.

Lareau for plaintiff.

J. J. Maclaren for defendant Brown.

BEAUDRY v. ARCHAMBAULT.

Interrogatories upon articulated facts—C.C.P. 221.

A party cannot be examined upon articulated facts before the case is fixed for trial.

The demand was in damages for breach of contract. The defendant pleaded to the action and the plaintiff filed answers. At this point the plaintiff sued out a rule against the defendant to have him answer interrogatories on articulated facts. The rule was returned into Court, and the defendant, on being called, making default, the plaintiff asked that default be entered against him. The counsel for the defendant opposed this on the ground that the rule was premature before issue joined, and before the case was fixed for trial.

TORRANCE, J. The plaintiff contends that he can in all stages of the case examine on articulated facts. The defendant cites C.C.P. 220, 221, and contends that the interrogatories are only allowable "during the trial." The Court so holds and refuses to enter the default.

Dalbec for plaintiff.

Archambault & Co. for defendant.

COURT OF QUEEN'S BENCH.

MONTREAL, Sept. 17, 1880.

Sir A. A. DORION, C. J., MONK, J., RAMSAY, J., CHAGNON, J. *ad hoc.*

THE MONTREAL COTTON CO. (oppts. below), Appellants, and THE CORPORATION OF THE TOWN SALABERRY OF VALLEYFIELD (seizing party below), Respondents.

Municipal Code, Art. 970—"*Rate-payer.*"

A person who claims a total exemption from taxes may, if proceeded against as a rate payer, avail himself of the remedy allowed to rate payers under Art. 970, *Municipal Code.*

The Company appellants agreed to construct their work, within the limits of the municipal corporation of the Parish of St. Cécile, now represented by the Corporation of the Town of Valleyfield, on condition of the corporation discharging the Company appellants from all municipal taxes for twenty years. A resolution to this effect was passed. Subsequently the Company respondents seized for the sum of $1240, for the taxes of 1878. The Company appellants then filed an opposition in the Circuit Court under article 970 of the Municipal Code. The Respondents met this opposition by a declinatory plea. By the judgment of the Circuit Court for the district of Beauharnois, Bélanger, J., May 26, 1879, this plea was maintained, and the opposition dismissed. No reason was given for the judgment, except this: "Considérant que l'article 970 du Code Municipal ne donne aucune jurisdiction à cette Cour pour adjuger sur les moyens invoqués par l'opposante"; but it was argued that as the Company denied all indebtedness it was not a rate-payer. Art. 970 is as follows: "Every rate-payer who is required to pay, either as municipal or school taxes, an amount greater than that which he owes, may plead such fact by exception to any action or claim, or by opposition to any seizure of his moveable property and effects made under article 962."

RAMSAY, J. Rate-payer is a technical word, and in its application under this article is not to be restricted to the person who has actually a rate to pay. It includes those who are treated as rate-payers. Were it otherwise we should be obliged to allow the opposition to a person who was charged a fraction too much, and refuse it to him who owes nothing. We should hold appellant to pay as a rate-payer, and refuse him the remedy the law accords to a rate-payer. This Court cannot adopt that conclusion.

It was said the Code gave the appellant another remedy—to attack the roll. Unless that is a concurrent remedy article 970 M. C. would have no effect. Besides it does not appear there was anything wrong in the valuation roll. The appellant relies on an exception. It was also said there was no appeal to this Court; but the point was not pressed, and we do not find anything that takes this case out of the ordinary rule governing appeals from the Circuit Court.

We think, therefore, that the declinatory plea to the appellants' opposition ought to have been dismissed and the parties been sent to the merits, and the appeal must be maintained with costs.

The judgment is as follows:—

"Considering that the Circuit Court held in the district of Beauharnois, had jurisdiction under article 970 of the Municipal Code to hear

and determine the contestation raised by the opposition filed in this cause by the Company appellants;

"And considering that the *exception déclinatoire* filed by the respondents is not well founded;

"And considering that there is error in the judgment rendered by the said Circuit Court on the 26th of May, 1879, by which the said *exception déclinatoire* was maintained and the opposition of the appellants dismissed;

"This Court doth reverse, &c., and doth dismiss the said *exception déclinatoire* of the said respondents," &c.

Judgment reversed.

Davidson, Monk & Cross for appellants.

J. K. Elliot for respondents.

MONTREAL, Sept. 17, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, JJ.

MARCHAND et al. (defts. below), Appellants, and WILKES (plff. below), Respondent.

Composition—Surety.

The endorsers of composition notes for an insolvent remain liable thereon, though the discharge of the insolvent may have been annulled by the Court, and though the insolvent may have given other notes by way of preference to some of his creditors.

L. H. Marchand became insolvent in July, 1875. His creditors agreed to take a composition of 20 cents on the dollar, and to discharge him, on condition that the appellant should endorse notes for the amount, payable at different times. The notes were given as promised, but when the insolvent applied for his discharge, the application was resisted by some of his creditors on the ground of fraud, by preferences to other creditors, and the discharge was refused. The appellants paid the first notes falling due, but declined to pay the second notes, for two reasons: first, because the condition for their endorsement had failed, the promissor not having been discharged; second, that the plaintiff was one of those who had participated in the fraud and obtained notes for 50 cents.

The following judgment was rendered by Chagnon, J., in the Superior Court, Iberville, Feb. 19, 1878:—

"La Cour, etc....

"Considérant que l'action repose sur des billets représentant les installements de la composition du nommé L. H. Marchand, failli;

"Considérant que l'acte de composition et décharge, conformément à et en vertu duquel les dits billets ont été donnés, a été mis de côté et déclaré nul et de nulle valeur, sur la demande de confirmation qui en a été faite devant la cour;

"Considérant que d'après les dispositions de l'acte de faillite, ce jugement ne peut être considéré comme *res inter alios acta*, quant à ses effets, mais doit affecter et atteindre tous les créanciers;

"Considérant que le failli ne peut être obligé vis-à-vis certains créanciers, de payer la composition, et vis-à-vis d'autres, de rentrer sous l'opération et rouage général de l'acte de faillite, et perdre ainsi l'usage et propriété des biens dont la conservation pour son propre bénéfice lui était assurée par l'acte de composition;

"Considérant que si le demandeur voulait maintenir et voir à la confirmation du dit acte de composition et décharge, il devait se présenter devant la cour, conformément à l'avis qui lui en avait été donné en vertu de la loi, au jour où telle demande de confirmation devait être faite, et dans le cas de contestation de telle demande, intervenir s'il était nécessaire pour rétablir les faits sous leur vrai jour, et démontrer qu'il n'y avait eu de sa part aucunes menées frauduleuses exercées entre le failli et lui-même;

"Considérant que le demandeur ne peut guère se plaindre de ce que les biens du failli ont disparu par incendie ou autrement depuis l'acte de composition, en autant que c'est la majorité en nombre des créanciers représentant les trois quarts en valeur, qui gouverne la minorité en matière de faillite, et que sur cette majorité gouvernante doit retomber la faute d'avoir acquitté le failli et ordonné la rétrocession immédiate de ses biens, sans conditions;

"Considérant que le demandeur ne peut se plaindre que le failli ait depuis obtenu sa décharge pure et simple, en autant que le demandeur en a eu avis, et qu'il ne s'est pas présenté pour l'opposer;

"Considérant sous ces circonstances, que d'après les dispositions de l'acte de faillite, le

dit acte de composition et décharge devait être confirmé ou annulé, et qu'ayant été annulé, la réclamation faite par le demandeur d'installements sur cette composition doit tomber, sans avoir besoin d'entrer dans le mérite de la preuve relative aux préférences et menées frauduleuses pratiquées ou non entre le failli et certains de ses créanciers ;

" Considérant qu'il est constaté par la preuve que le billet de $72.20 réclamé par le demandeur a été transporté par la Howe Machine Co. au demandeur qu'après échéance et pour collection seulement, et a été consenti par le failli à la dite compagnie aussi pour un installement sur la dite composition ;

" Considérant que l'annulation du dit acte de composition doit profiter aux cautions exigées par le dit acte et conséquemment doit profiter aux défendeurs comme telles cautions ;

" Maintient les défenses et exceptions des trois défendeurs poursuivis, et déboute l'action," &c.

The above judgment was reversed in Review, Montreal, May 31, 1878, (Mackay, Dorion, Rainville, JJ.), as follows :—

" The Court, etc.,

" Considering upon the proofs that plaintiff ought to have had judgment against defendants, as prayed ; and that he has proved his allegations material, and defendants have failed to prove theirs ;

" Considering particularly that the notes sued upon were made for lawful consideration ; that the defendants have not proved illegal preferences received by the plaintiff, or the Howe Machine Company, that the judgment of the 19th of December, 1876, cannot, (as regards plaintiff,) be held to prove it, though the said judgment seems warranted against the bankrupt L. H. Marchand, considering what he deposed to before the judge (as stated in his deposition in this cause) ;

" Doth, revising said judgment, cass and reverse the same, and proceeding to render the judgment that ought to have been rendered in the premises, doth condemn the defendants jointly and severally, &c."

Ramsay, J. (*diss.*) I think the appellants right on both points. It is perfectly evident that the position of the endorsers was changed by the fact that the promissor was not discharged. He remained an insolvent, and consequently he had not the opportunity to pay which was contemplated by the endorsers. It perhaps does not affect the question materially as the issue is between the original parties to the note, still it may be observed that the note, on the face of it, expresses the consideration to be : " *pour valeur reçue conformément à l'acte de composition et décharge exécuté devant Maitre D. Carreau notaire le 23 Septembre dernier*," &c. Of course I can understand that in the particular case it may be a hardship to the creditors to lose their endorser ; but it was their own doing. They let the estate slip out of their fingers, without the fault of the endorsers, and they should suffer. As to the second point, it appears to me to be fully proved that the respondent Wilkes represents the Howe Machine Co., and that they both had obtained preferences ; that, in fact, they got notes for 50 cents instead of for 20 cents. I do not see how under these circumstances, we can maintain the decision of the Court below without over-ruling our decision in *Arpin & Poulin*.* It seems to me impossible to distinguish the two cases by saying that in *Arpin & Poulin* there had been other payments. So far as I remember that case, there was no statement to show that the creditor had been paid more than the composition. Besides that was not the principle on which the case turned. The real principle is this, as between an endorser and the creditor, that behind the endorser's back a fraudulent bargain has been made injurious to the position of the debtor. The endorser backs a debtor free of all his debts for 20 cents, and not one who has undertaken to pay 50 cents, and this principle is as applicable, it seems to me, where the creditor holds notes for the preference as where he has been paid the 20 cents. I don't think the creditor who has committed a fraud in this respect should be allowed to recover against the endorser at all, but at any rate he should not be allowed to recover while holding the notes beyond the open rate of composition.

Sir A. A. Dorion, C.J. There is no doubt that when a debtor, to induce his creditor to sign a composition, gives him something beyond what he gives to the other creditors, the notes that he subscribes to induce his creditor to sign are null and void, and cannot be recovered—at

* 1 Legal News, 290 ; 22 L. C. J. 331.

all events, as against the sureties. Here the action is on the composition notes, and these notes were given for good and valuable consideration. Marchand got back the whole of his estate; therefore there was consideration. Marchand never offered to return the estate to the assignee. The case of *Arpin & Poulin* was different, because there the debtor had taken money out of what was coming to the endorser, to pay the other creditor an additional amount. The question is, does the taking of additional notes by the creditor annul the deed of composition? The majority of the Court think not. In the present case the notes were given for the composition, and the Court holds that they were given for lawful consideration. It is said that the deed of composition has been set aside. The discharge may have been set aside, but we do not think the deed of composition has been set aside. The judgment of the Court of Review is, therefore, confirmed.

Judgment confirmed.

Lacoste & Globensky, for Appellants.
Doutre & Doutre, for Respondent.

MONTREAL, Sept. 17, 1880.

Sir A. A. DORION, C.J., MONK, RAMSAY, CROSS, JJ.

RIOPEL (plff. below), Appellant, and THE CITY OF MONTREAL (deft. below), Respondent.

Corporation—Damages.

A city corporation is not liable for damages caused in the construction of necessary works, where no negligence appears, or for damages resulting from the omission to make a drain in a street where no drain previously existed.

The appeal was from a judgment of the Superior Court, Montreal, Caron, J., March 26, 1877, dismissing the appellant's action.

The judgment was as follows:—

"Considérant que la demanderesse réclame $2,500 pour dommages qu'elle prétend avoir soufferts, dommages causés à son terrain qui a été baigné et inondé, par l'eau qui descend de la rue Sherbrooke et de la rue Ontario, ce terrain se trouvant plus bas que ceux des dites rues Sherbrooke et Ontario;

"Considérant que la défenderesse allègue dans sa défense que si ces dommages ont eu lieu, ils n'ont pas été causés par sa faute et sa négligence, et qu'elle a le droit de faire des canaux et des rues lorsqu'elle le juge à propos et selon sa discrétion;

"Considérant que la demanderesse n'a pas prouvé les allégations essentielles de sa déclaration, et qu'elle n'a pas fait voir que les dommages qu'elle dit avoir soufferts, aient été causés par la faute et la négligence de la défenderesse, et qu'elle allègue dans sa déclaration que son dit terrain est plus bas que celui de ses voisins:

"Considérant que la défenderesse ne saurait être tenue aux dommages en question, en supposant qu'ils seraient prouvés, vu qu'elle n'est obligée de faire des travaux de la nature de ceux que la demanderesse exige pour égouter son terrain qui est plus bas que celui de la défenderesse, que selon sa discrétion et ses moyens;

"Considérant que la demanderesse n'a pas prouvé les allégations de sa déclaration;

"Considérant que la défenderesse a prouvé les moyens qu'elle invoque dans sa défense, laquelle est bien fondée; maintient la dite défense de la défenderesse et déboute l'action de la demanderesse avec dépens, distraits," etc.

RAMSAY, J. This is an action brought against the City Corporation for damages, alleged to been occasioned by a flood of water lodging round the appellant's house, and undermining the foundations and doing a considerable amount of injury. This, appellant says, was due to the fault of the Corporation, by whom a drain had been made which cut through a wooden drain established by appellant for her own use, on respondents' street. Without carrying to any fanciful extent the doctrine that a corporation should be the sole judge of the works it shall make, and of the mode of making them, it will scarcely be denied that they cannot be under any greater necessity to drain their land than any other proprietor, and unless they created some new obstruction they were not obliged to keep appellant's house clear of water. People who build, intending to take advantage of the conveniences afforded by streets, must exercise common prudence in their operations, and not build on unimproved or only partially opened streets. As for the wooden drain, so far as can be gathered from the evidence, which, on this point, is not very explicit, it appears to have been constructed without the authority of the municipal officers, and they were quite entitled to cut through it if it stood in the way of their works. It does not appear that they were ever notified of the probable effect of cutting through this wooden drain, so that the question of negligence or wilful damage does not come up in any shape. We think, therefore, the judgment should be confirmed with costs.

Judgment confirmed.

Geoffrion, Rinfret & Dorion for Appellant.
R. Roy, Q. C., for Respondent.