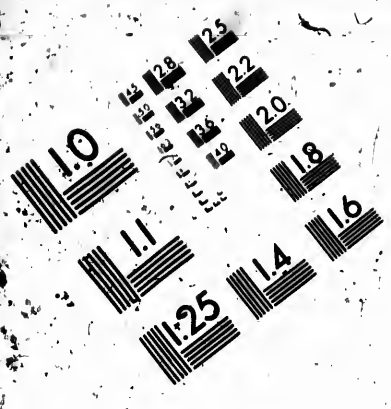

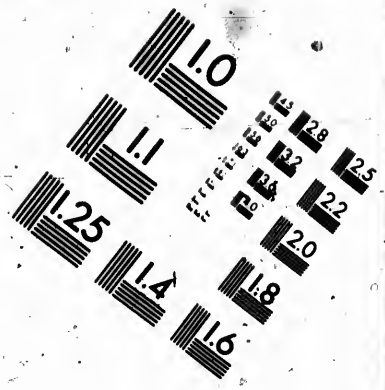

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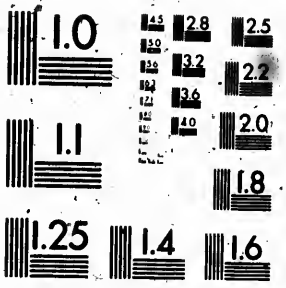

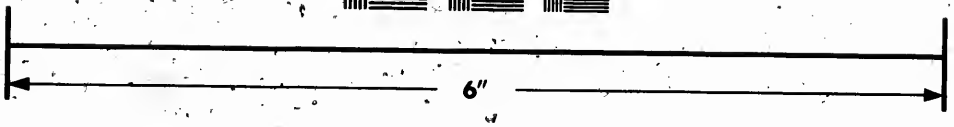

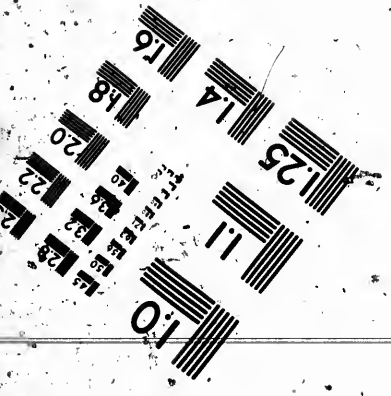

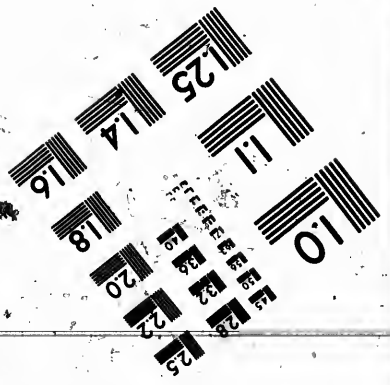

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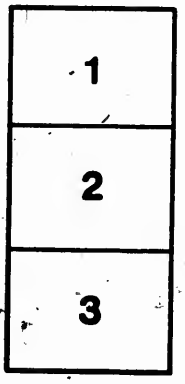

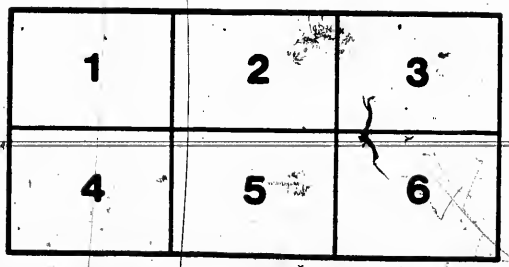

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THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

BAS-CANADA.

VOL. VIII.

Editorial Committee:

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

THE INDICES:

BY S. BETHUNE, Q.C.

Montreal:

PRINTED AND PUBLISHED BY JOHN LOVELL.

1864.

DEC 12 1961

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Contributors.

S. BETHUNE, Q. C.
P. R. LAFRENAYE.
J. DOUTRE, Q. C.
F. W. TORRANCE.
J. J. C. ABBOTT, Q. C.
T. W. RITCHIE.
ALEXANDER MORRIS.
P. BECHAND.

D. H. SENECAL.
W. F. GAIRDNER.
J. L. MORRIS.
J. G. K. HOUGHTON.
E. L. DE BELLEFEUILLE.
A. BRANCHAUD.
W. E. BULLOCK.
E. S. LYMAN.

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COURT OF QUEEN'S BENCH

MONTREAL, 6th SEPTEMBER, 1861.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram SIR L. H. LAFONTAINE, BART., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

EDWARD STUART LESLIE *et al.*

Defendants in the Court below,

APPELLANTS;

AND

MOLSON'S BANK,

Plaintiffs in the Court below,

RESPONDENTS.

HELD.—If it be contended that the affidavit upon which a *saisie arret* before judgment has issued is false—the proper mode in which to traverse the affidavit and procure the annulling of the attachment, is by an *exception à la forme*.

In this case an affidavit was made in the Court below in the usual form, setting forth, among other things, that the appellants (defendants in the Court below,) had secreted, or were immediately about to secrete their estate and effects with intent to defraud their creditors.

The appellants filed an *exception à la forme* denying the secreting and intention to secrete—and concluding that the attachment be quashed.

The respondents demurred, insisting that neither the allegations of the affidavit nor the regularity of the issue of the *saisie arret* could be put in issue.

The Court below (Monk, J.) maintained the demurrer and dismissed the exception; his Honor declaring however that he did so in conformity with what was understood to be the jurisprudence, though his individual opinion was in favor of the proceeding adopted by the appellants.

The defendants appealed, and the judgment of the Court below was reversed. The pretensions of the parties and the decision of the Court upon them, are sufficiently explained by the opinions of the judges as expressed at the time of rendering judgment.

MEREDITH, J., *dissentiens*.—I perfectly agree with the other Judges of this Court in thinking that the question presented for our consideration in this case, is to be determined by our own common law, and not by the law of England; and that under our common law, a defendant whose goods and chattels are attached under a *saisie arret* before judgment, has a right to deny, and if he can, disprove the charge of fraudulent conduct upon which the attachment issued, and thereupon to have it set aside. Indeed it would require nothing less than the express pro-

Edward Stuart Leslie et al. and Molson's Bank.

vision of a Statute to induce me to say that a defendant whose property has been attached, upon a charge of fraud, should not be allowed to repel the charge made against him, so as to regain the control of his property; and the learned Chief Justice has most satisfactorily shown that there is nothing in our provincial laws, to deprive a defendant of the right to which I have adverted.

But at the same time that I, unhesitatingly, admit the existence of this right, I do not think it is one that can be exercised by an exception as to form. An *exception à la forme*, as the very name indicates, is an exception as to the regularity or form of the proceeding by which the defendant has been impleaded. In the present case the law requires an affidavit in a certain form to be filed; and an affidavit in due form has been filed; there is therefore, I think, nothing irregular in the form of the plaintiff's proceedings.

It is thought, however, that a defendant has a right, by exception as to form, to impugn the truth of the affidavit, as to the fraudulent conduct with which he is charged, in order to show that the process has not issued regularly. It seems to me, however, that that view cannot be maintained. According to the Statute an affidavit for a *saisie arret* must contain two essential allegations, firstly, that a debt of a certain amount is due by the defendant—secondly, that the defendant has been guilty of fraudulent conduct of a certain kind. It would not, I think, be contended that a defendant could put in issue the first of these allegations by an exception as to form, and I see no reason for saying that the second of the two allegations could be denied by an exception as to form, that could not, with equal force, be urged with respect to the first.

It seems to me, upon principle, that a defendant has the same right upon the merits, to deny the charge of fraud urged against him, as he has to deny the debt which he is alleged to owe; and if the charge of fraud can be denied by a plea to the merits, it seems to follow that it cannot be denied by an exception as to form; because the same matter cannot be the subject of a plea to the merits, or of an exception as to form indifferently.

I am not by any means prepared to say that an order for an attachment may not be regarded as suggested by the learned Chief Justice, as an *ordonnance de Juge sur requete non communiquée*; or that under certain conditions a defendant ought not to be allowed to complain of such an order by opposition or petition, but I do not think that such an opposition or petition could be deemed an *exception à la forme*.

I am therefore of opinion that the judgment of the Court below ought to be confirmed, but that our judgment ought to be so worded as to show that we admit the right contended for by the defendants.

SIR L. H. LAFONTAINE, Bart., C. J.—Saisie-arrêt avant jugement, émané le 16 mars 1860, contre les appelants et entre les mains de trois tiers saisis, ainsi émanée sur l'affidavit de William Sache, caissier de la dite Banque.

Le 5 avril, les défendeurs présentent une exception à la forme.

Le 29, motion des mêmes, à l'effet de faire déclarer non valablement émané le bref des saisie-arrêt, et de l'annuler, "inasmuch as no sufficient proof upon oath, that the defendants in this cause at the time of, or previous to the issuing of the writ of attachment or *saisie arret* before judgment in this cause, were

immediately about to secrete their estate, debts and effects, was made previous to the issuing of said writ of attachment." Le 25, les Défendeurs sont forclos de plaider au *mérite* de l'action, et acte de cette forclusion en est donné à la banque demanderesse.

Le 30, la motion faite le 20 est rejetée.

Le 16 mai, la demanderesse répond à l'exception à la forme le 25. Réplique à ces réponses. Le 31, la réponse *en loi* à l'exception est maintenue, et l'exception est déboutée.

Ci-suit l'exception à la forme.

" And the said defendants for preliminary plea or *exception à la forme* to the writ of attachment or *saisie-arret* before judgment, issued and executed in this cause, say, " That the said writ of attachment or *saisie arret* is irregular, illegal and informal, and that it was irregularly, illegally and informally issued and taken out.

" That there was no ground or sufficient proof upon oath for justifying the issuing of such a process.

" That the affidavit of William Sache upon which [redacted] writ and process was issued is false and unfounded in so far as it goes to say that he the said William Sache was credibly informed and had reason to believe and did really believe in his own conscience that the defendants had secreted and were immediately about to secrete their estate, debts, and effects with a view to defraud their creditors and particularly the plaintiffs.

" That this allegation in the said affidavit is false and untrue.

" That the defendants on the contrary have always as well before, as at the time the said affidavit was made, conducted themselves towards their creditors and the plaintiff in particular, according to law in the most open and frank manner, and always given them every facility they required in the way of ascertaining the state of their affairs and otherwise.

" That the said defendants have never secreted and have never been immediately about to secrete their estate, debts and effects with a view to defraud their creditors and the plaintiff in particular.

" Wherefore the said defendants reserving their right to move to quash the said *saisie arret*, or take such other proceedings as they may deem proper to have the same set aside, pray that the said writ of attachment or *saisie arret* before judgment and all the proceedings had thereupon be declared illegal, null and void and set aside (quashed) and *main-lévee* given to said defendants of said seizure with costs whereof the undersigned pray distraction in their favour.

Montreal, 5th April, 1860.

(Signed,) *Dorion, Dorion, & Sentcal*, attorneys for defendants.

De la part de l'intimée, saisissante, il nous a été exposé qu'elle avait procédé sans l'autorité de la 10e section de l'ordonnance 27, Geo. III, ch. 4., et pour combattre l'exception à la forme des défendeurs, elle argumente de ce qui a lieu dans le cas du *capias ad respondendum*. Il faut donc comparer les deux lois et voir si elles renferment des dispositions semblables.

Pour qu'il pût y avoir lieu à l'émanation d'un *capias ad respondendum*, l'ord. de la 25e Geo. III sect. 4, exigeait un " serment" ou " affidavit" (textes français et

Edward Stuart Leslie et al and Molson's Bank.

anglais). Ce mode de procédé était emprunté au système anglais, ce qui explique pourquoi les autorités tirées des décisions anglaises sont si souvent citées en matière de *capias*. Il fallait que par le "serment" ou "affidavit" le juge fut "satisfait" que le défendeur était personnellement endetté, qu'il était sur le point de quitter la province, et que, par ce départ, le demandeur pouvait être privé de son recours contre lui.

C'est deux ans plus tard qu'a été promulgué l'ord. de la 27e Geo. III, ch. 4, dont la 10e section porte qu'il ne sera donné à l'avenir aucun ordre de saisie-arrêt avant jugement, excepté lorsqu'il y aura *preuve légale sous serment* (texte français) et *due proof on oath* (texte anglais), *à la satisfaction d'un des juges de la cour qui donnera tel ordre* (texte français) et *to the satisfaction of one of the judges issuing the same* (texte anglais), de certains faits énoncés dans la dite section.

Les mots "preuve légale" qui doivent signifier quelque chose, ne se trouvent pas dans la partie ci-dessus citée de l'ord. de 1785, qui a rapport au *capias*. L'affidavit d'une seule personne aurait-il dû suffire pour établir cette "preuve légale"? Remarquons que, d'après les dispositions de l'ord. de 1785, l'affidavit du demandeur seul, attestant les faits requis, suffit pour justifier l'émanation d'un *capias*, car ces dispositions le disent en termes exprès. Il n'y a rien de la sorte dans l'ord. de 1787, relative à la saisie-arrêt avant jugement. Elle ne dit pas par qui, ni par quel nombre de personnes, sera faite sous serment la *preuve légale* qu'elle exige. N'est-ce pas nous laisser sous l'empire du droit commun, qui requérait deux témoins pour la preuve de certains faits, tel que celui de la fraude? En effet, cette preuve légale doit montrer que le défendeur est sur le point de recéler ses biens, dettes et effets, ou qu'il est dans l'intention de se cacher, ou de quitter la province, *dans la vue de frauder ses créanciers*. La saisie-arrêt n'est pas, que je sache, un élément du droit anglais, du moins telle que nous la connaissons et pratiquons dans le Bas-Canada. Elle est essentiellement de droit français, sauf quelques règlements particuliers que nos lois statutaires ont pu faire sur la matière. Du reste l'ordonnance de 1787 le reconnaît elle-même par la manière dont elle s'exprime dans la 10e section: "excepté dans le cas de dernier équipeur, *suivant l'usage du pays*."

Le *capias ad respondendum* et la saisie-arrêt avant jugement sont des procédures d'une extrême rigueur; l'un prive de la liberté, l'autre peut causer une ruine complète. Les lois qui permettent d'y avoir recours, doivent donc être interprétées strictement. Ne perdant pas de vue la différence du language du législateur dans nos deux ordonnances de 1785 et 1787, je suis porté à dire qu'on n'aurait pas dû, quant à la saisie-arrêt, argumenter, de ce qui se pratiquait quant au *capias*. Je sais que, par le passé, on s'est contenté de l'affidavit ou serment d'une seule personne, même de celui du demandeur lui-même. J'avoue qu'il serait difficile de revenir contre cette pratique, surtout si la question s'est déjà présentée, ce que j'ignore. Mais si elle ne s'est jamais présentée comme elle l'est aujourd'hui, peut-être trouverons-nous à propos de renoncer à suivre, en fait de procédure, une pratique qui, évidemment, est contraire à la loi, si l'interprétation que je donne à cette loi est exacte et si la nouvelle législation, subséquente à l'introduction de cette poursuite, n'a apporté aucun changement.

Admettant, pour un moment, que le simple affidavit d'une seule personne, même celui du demandeur, doive suffire pour permettre l'émanation d'un bref de saisie-arrêt avant jugement, toujours est-il que c'est une procédure qui, jusque-là, est *ex parte*, que l'ordonnance que le juge accorde, est ainsi accordée sur *requete non communiqué ;* et contre une pareille ordonnance, il était permis de se pourvoir par simple requête à fin d'opposition, sous l'autorité de l'ordonnance de 1667, titre XXXV, art. 2. Dans son commentaire sur cet article, RODIER se demande: Qu'est-ce qu'un arrêt donné sur requête ?" "C'est," dit-il, "une ordonnance ou un arrêt rendu sur la requête d'une partie non communiquée ou signifiée à l'autre ; ou un arrêt rendu sur requête de "Soit-Montré" au Procureur général sans que l'autre partie en ait eu communication ; de sorte que c'est comme si celui-ci n'eût pas été partie." Puis il ajoute : "Si cet arrêt est émané de la même cour où on le produit, on peut l'attaquer par la voie simple de l'opposition en la même cour, "c'est-à-dire" par simple requête, pour faire connaître que c'est une exception à l'article 1er du dit titre XXXV."

La *preuve légale*, exigée par l'ord. de 1787, de quelque manière qu'elle soit faite, ne sera tout au plus qu'une preuve *primâ facie* des faits qu'elle affirme. Cette preuve, il doit être permis à la partie défenderesse, du moins lorsqu'après coup elle lui est communiquée, de la détruire, si elle le peut. L'ordonnance de 1667 lui en donnait le droit, et je ne vois nulle part que nos lois statutaires le lui aient ôté. Si ce droit subsiste encore, il me semble que, dans notre système de procédure, un défendeur l'exerce régulièrement par une exception à la forme. Cela équivaut à toutes fins à la simple requête du droit français, puisqu'il ne la présente que lorsqu'il est appelé à répondre à la demande formulée contre lui, réponse qu'un défendeur ne peut faire que par le moyen d'exceptions ou de défenses. L'affidavit est une formalité nécessaire à l'émanation de la saisie-arrêt ; le demandeur la remplit séul ; sans elle, cette saisie ne pourrait pas subsister. L'affidavit donne l'existence à l'exploit de saisie-arrêt ; si les faits qui y sont affirmés sont vrais, ils constituent la validité de l'exploit ; s'ils ne le sont pas, l'exploit est nul. En attaquant l'affidavit, il attaque nécessairement l'exploit. Il le fait donc régulièrement quand il le fait par une exception à la forme. (Pothier, Proc. civile, p. 15.)

Il me semble que l'ord. de 1787 a laissé au défendeur dans toute sa plénitude le remède qu'il invoque aujourd'hui, d'abord parce qu'elle a gardé le silence à cet égard, ensuite parce que le législateur ayant plus tard, comme je le ferai voir bientôt, donné un remède semblable dans les cas de *capias ad respondendum*, elle l'a fait sans rien dire de la saisie-arrêt, quoiqu'il y eût eu pour elle la même raison de le faire, si le remède n'eût pas déjà existé pour le saisi.

Le statut de 1849, ch. 42, tout en ayant pour objet d'abolir l'emprisonnement pour dette, ainsi que son titre et le préambule l'annoncent, a néanmoins ajouté aux cas où cet emprisonnement peut avoir lieu ; c'est lorsque l'affidavit constate que "le défendeur a caché ou est sur le point de cacher ses biens et effets, avec l'intention de frauder ses créanciers en général ou le demandeur en particulier." (Vict. 27.)

L'on voit que ce dernier cas était celui où, ci-devant, il était permis de procéder par voie de saisie-arrêt avant jugement, et non par voie de *capias*. Mais

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le statut de 1849, en donnant la voie de *capias* dans ce dernier cas, ajoute, tant pour ce cas que pour les autres," qu'il sera loisible à la cour ou à tout juge de la cour d'où aura émané l'ordre d'arrêter toute personne, soit en terme ou en vacance, d'ordonner que cette personne soit remise en liberté, s'il lui est démontré par une requête sommaire et des preuves satisfactoires, que "le défendeur n'a pas caché et n'était pas sur le point de cacher ses biens et effets avec l'intention frauduleuse, lorsque ce motif aura été assigné à l'arrestation." (Même section.)

Cette disposition est reproduite dans les Statuts Refondus du Bas-Canada, ch. 87, sect. 1 et 8.

Ainsi, lorsqu'un débiteur sera arrêté sous l'autorité d'un *capias*, même dans le cas de recel de ses effets avec intention frauduleuse, il aura le droit, en démontrant à un juge, sur requête sommaire, que la cause assignée est fausse, d'obtenir sa liberté, et le saisi, dans le même cas, n'aura pas le même remède! C'est ce que je ne peux concevoir. Non, je crois qu'il vaut mieux dire que si la loi de 1849 n'a pas donné ce remède au saisi, c'est qu'il existait déjà pour lui.

Je remarquerai, au moment de finir, que Roger, dans son traité de la saisie-arrêt, No. 149, vient à l'appui des prétentions des appelants, et il cite Pigeau, t. 2, p. 157.

Quand on songe qu'à présent, non seulement le juge et le greffier ont le pouvoir d'ordonner l'émanation d'un *capias* ou d'un bref de saisie-arrêt, mais encore un simple commissaire nommé pour recevoir des affidavits peut également l'ordonner, nous avons un motif additionnel de donner à la loi que l'appelant invoque une bien stricte interprétation.

C. MONDELET, J.—I have never entertained the slightest doubt as to the nature of the proceeding we have seen practised in our Courts, I mean the *saisie arrêt avant jugement* under the operation of our provincial ordinance of 1787, c. 4, s. 10. It is merely and essentially a *procédé suivant la loi francaise.* It does not in the least partake of the character of the *capias ad respondendum* such as regulated by 25 Geo. III, c. 3, s. 4. That procedure should therefore be met at once by a preliminary plea as has been done in this case. We are not trying the validity of the claim, but merely whether the *saisie arret* has been duly or rather regularly issued and carried out.

In such a case the *exception à la forme* was the correct course.

As to whether there should be two witnesses (*preuve légale*) we have nothing to do with that now. It may come up later when we are called upon to decide upon the merits of the exception.

I am therefore without any hesitation in my opinion that the judgment of the Court below should be reserved.

The judgment in appeal was *motivé* as follows:

1° Considérant qu'en cette instance il a été émanée sur l'affidavit ou serment de William Sache, une saisie-arrêt avant jugement; que l'affidavit est en pareas une formalité nécessaire pour l'émanation de la saisie-arrêt, qui ne pourrait pas subsister sans cela; que l'affidavit donne, par conséquent, l'existence à l'ex-

ploit de saisie-arrêt; que la validité ou invalidité de cet exploit dépend de la vérité ou de la fausseté des faits qui sont énoncés; (supposant toujours que, d'après la manière dont ils sont exposés, ils soient suffisants en loi), qu'en attaquant l'affidavit, la partie saisie attaque nécessairement le dit exploit; que cela peut se faire régulièrement par une exception à la forme;

2° Considérant que, par leur exception à la forme à la dite saisie-arrêt, les défendeurs appelants ont attaqué le susdit affidavit, et, par la dénégation des faits y énoncés, ont lié contestation avec la demanderesse sur la validité de la dite saisie-arrêt.

3° Considérant que, par sa *réponse en droit* à la dite exception, la demanderesse, intimée, a mis en question la validité de la dite exception; mais que la dite réponse est mal fondée;

4° Considérant qu'il aurait dû être ordonné par la cour de première instance qu'avant faire droit il fût procédé à la preuve sur la contestation liée en cette cause par la dite exception à la forme, et par suite d'icelle;

5° Considérant que, partant, il y a eu mal jugé dans le jugement dont est appel, en ce qu'il maintient la dite réponse en droit à la dite exception à la forme et déboute les défendeurs de la dite exception; infirme le susdit jugement, savoir, le dit jugement rendu le 31 mai 1860 par la cour supérieure, siégeant à Montréal, et ce avec dépens sur le présent appel, contre la dite demanderesse intimée; et cette cour, procédant à rendre le jugement que la dite cour supérieure aurait dû rendre, déboute la dite demanderesse de sa dite réponse en droit à la dite exception à la forme, déclare que la dite exception à la forme procédait valablement, et ordonne, qu'avant faire droit, enquête soit faite sur la contestation liée entre les parties par la dite exception à la forme, et par suite d'icelle, et ce suivant la loi et la pratique de la dite cour supérieure, et condamne la dite demanderesse intimée aux dépens engagés en la dite cour supérieure sur l'inscription et audition en droit sur la dite exception à la forme et sur le dit jugement, qui est infirmé par les présentes.

Judgment reversed.

Cherrier, Dorion, & Dorion, for appellants.
R. Laflamme, for respondents.
(J. J. C. A.)

Note. At the argument, it was stated by one of the honorable judges, that the report of the case of Prefontaine and Prévost et al. 1 L. C. Jurist, P. 104, does not correctly convey the views of the judges in respect of the point under discussion.

SUPERIOR COURT.

MONTREAL, 30th APRIL, 1863.

Coram SMITH, J.

No. 504.

Molsons Bank vs. *Leslie et al*,

AND

Leslie et al. Tiers Saisie.

FRAUDULENT ASSIGNMENT ATTACHMENT.

Messrs. Leslie & Co., Merchants, became insolvent and made an assignment of their estate to three trustees by a deed (23rd February, 1860, John C. Griffin, N.P.) containing *inter alia* the following clauses; "That upon a surrender of all their said assets to their creditors the said assignors and each each of them may obtain a discharge from their present liabilities. * * * * * * * &c.

And it is hereby agreed as a condition hereof, that any creditors of the said assignors who shall desire to have the benefit of the present assignment, and to receive his or their share of the proceeds of the said estate and assets, shall have the right so to do, provided always that before any such creditor or creditors shall receive any dividend or sum of money whatsoever, he or they shall duly make and execute in authentic form a deed by which his or their acceptance of the terms of these presents, and in consideration thereof, his or their discharge of the said assignors shall be fully and validly effected; and the proportion or share in such dividend or dividends of any creditor or creditors who shall refuse or neglect to execute such acceptance and discharge, shall be retained by the assignees or their assigns, subject to subsequent distribution as assets of the said estate, should such creditors persist in such refusal."

Molsons Bank, creditors, thereupon sued out a writ of *saisie arret* before judgment against Leslie & Co. on the affidavit of William Sache, their cashier, that Leslie & Co. had secreted and were immediately about to secrete their estate, &c. (Revised Statutes, L. C. p. 96), relying upon the provisions of the deed of assignment as their justification for the attachment.

Leslie & Co. attacked the truth and sufficiency of the allegations of the affidavit, by an exception *à la forme*.

HELD: 1o. That Leslie & Co. having become insolvent, their whole estate was the *gage* of the creditors

2o. That they could not do a single act whereby the rights or position of their creditors could be affected.

3o. That the words of the statute did not simply mean "hiding:" that the French expression "détourner" came nearer it. Secreting meant placing property out of the reach of creditors to prevent them from getting their rights, making their position different from what the law made it.

4o. That the conduct of Leslie & Co. in making such assignment was in law a fraud, and Molsons Bank were justified in suing out the attachment.

A preliminary proceeding in this case is reported 8 L. C. Jur. P. I.

Messrs. Leslie & Co., merchants, became insolvent, and made an assignment of their estate to three trustees by a deed (23rd February, 1860, C. Griffin, N. P.) containing *inter alia* the following clauses; "That upon a surrender of all their said assets to their creditors the said assignors and each of them may obtain a discharge from their liabilities, &c.

And it is hereby agreed as a condition hereof, that any creditors of the said assignors who shall desire to have the benefit of the present assignment, and to receive his or their share of the proceeds of the said estate and assets, shall have the right so to do, provided always that before any such creditor or creditors shall receive any dividend or sum of money whatsoever, he or they shall duly make and execute in authentic form a deed by which his or their

acceptance of the terms of these presents and in consideration thereof, his or their discharge of the said assignors shall be fully and validly effected; and the proportion or share in such dividend or dividends of any creditor or creditors who shall refuse or neglect to execute such acceptance and discharge, shall be retained by the said assignees or their assigns, subject to subsequent distribution as assets of the said estate, should such creditor or creditors persist in such refusal."

Molsons Bank, creditors, thereupon sued out a writ of *saisie arret* before judgment against Leslie & Co., on the affidavit of William Sache, their cashier, that Leslie & Co. had secreted and were immediately about to secrete their estate, &c. (Revised Statutes L. C. p. 96), relying chiefly upon the provisions of the deed of assignment as their justification for the attachment.

Leslie & Co. attacked the truth and sufficiency of the allegations of the affidavit, by an exception *à la forme*, denying that they had secreted or were secreting, &c., &c.

The plaintiff met the exception by an answer in law which was maintained in the Court below but dismissed in appeal, (8 L. C. Jur. P. I.) and by a second answer, whereby they alleged:

"That the affidavit of the said William Sache upon which the writ and process was issued in this cause is true, and all and every the allegations thereof, that the said William Sache was credibly informed, had every reason to believe and did verily and in his conscience believe that the said defendants had secreted and were immediately about to secrete their estate, debts and effects with a view to defraud their creditors and particularly the plaintiffs.

That the said defendants were and had been for two months previous to the writ of attachment in this cause issued insolvent *en déconfiture*.

That after their open and declared insolvency, they made and executed before Griffin and his colleague, Notaries Public, on the twenty-third day of February, one thousand eight hundred and sixty, a pretended provisional assignment of all their estate, debts and effects without the assent, advice or information of any of their creditors and without any notice given to them, selecting for their pretended assignees the persons of the Honorable James Leslie, their father, Alexander Maurice Delisle, and Henry Starnes, Esquire, formerly a partner, jointly with the said defendants, and whom the creditors had every reason to suspect to be a debtor of the said defendant in a large amount, and to have left the said firm when insolvent. That moreover in and by the said pretended deed of assignment, the said defendants did impose generally upon all their creditors, conditions contrary to law, in effect exacting from them and each of them before they should share or partake in the proceeds of the estate, so assigned, a full and complete discharge of all their said respective creditors' claim, moreover granting to the said pretended assignees the right and authority to settle and compromise a pretended claim of the wife of the said Patrick Leslie, one of the said defendants amounting to five thousand pounds currency, as they, the said so-called provisional assignees might deem fit, and also requiring and exacting from all and every their creditors, the sanction, approbation, and authority to carry out such arrangement, and in default of compliance thereto denying them any

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right to share or participate in the proceeds of their said bankrupt estate as the whole will more fully and at large appear by reference to the said deed of assignment, a copy of which is herewith fyled.

That the said plaintiffs jointly with the other creditors of the said defendant, by a notarial protest executed before Gibb and his colleague Notaries Public, on the twenty-third of February last, did demand a full, complete and unconditional assignment from the said defendants, which they refused.

That moreover the said defendants did, after their declared insolvency, during the month of February last and during the two months previous to the institution of this action sell and dispose of their real estate, to wit, of real estate of great value in Upper Canada and in Lower Canada in favor of their father, the Honorable James Leslie, at a price greatly under its value.

That by such facts the said defendants had illegally secreted, and were about immediately to secrete their estate, debts, and effects, and the said plaintiff was justified in law, and had a right to obtain the issuing of a writ or process of attachment against the said defendants."

The plaintiffs also fyled a *defense en fait* to the *exception à la forme*.

The parties went to evidence, and after a hearing on the merits, the Judge hearing the case remarked on it as follows:

SMITH, J.—This was an action brought by Molsons Bank against Leslie & Co. to recover a large sum of money due by the defendants to the Bank, and for which a *saisie arrêt* before judgment was issued on the 17th March, 1860, to attach the defendant's estate in the hands of the Hon. Jas. Leslie, Henry Starnes and A. M. Delisle, the provisional assignees. The *saisie arrêt* was returned into Court, and the defendants pleaded an *exception à la forme*, alleging that there was no ground for the *saisie arrêt*; that the allegations contained in the affidavit of Mr. Sache, the cashier of Molsons Bank were untrue and unfounded. It was upon the evidence adduced on this point that the Court was now called to give a decision. The allegations of Mr. Sache's affidavit were of the usual description, that he had reason to believe that the defendants, Leslie & Co. had secreted, and were immediately about to secrete, their estate, debts, and effects, with intent to defraud their creditors, &c. Upon the truth or falsity of this pretension the plaintiff's case must rest. We now come to the question, what is to be considered fraud? and what description of circumstances must happen to entitle the plaintiff to a *saisie arrêt*? It was to be observed that the issue was general. The *exception à la forme* stated that the facts alleged in the affidavit were not true; the plaintiff replied that they were. The first and most important point for the plaintiff was this, that shortly before the issuing the *saisie arrêt*, the defendants, Leslie & Co., were in a state of utter insolvency. That they had made over, by what they called a provisional assignment, to the Honorable James Leslie and Messrs. Delisle and Starnes, the whole of their property. The creditors, not pleased with this provisional assignment, called upon Leslie & Co., to make an assignment of their property, general and equalized. The defendants refused to do so, and then the *saisie arrêt* was issued. Now we must look to the condition of the firm at the time of this demand. It was perfectly certain that they were in a state of insolvency at the date of the provisional assignment,

It was stated in the deed that the assignment was made to prevent the estate from being wasted away by suits instituted by the creditors, and for the protection of the interests of the creditors generally. Full authority was given the assignees to collect the debts due to Leslie & Co., and to retain the estate till a number of liabilities for which the defendants were endorsers, should have matured, that the actual amount of their liabilities might be ascertained. Now came an important clause in the assignment, to the effect that the assignees should investigate the position of the firm, and submit a full report to the creditors of the amount of dividend the estate was likely to pay, and all other information they might be able to impart, the creditors to give the defendants a complete discharge from their liabilities. The proposition arising out of this statement amounted to this—that these men, in a state of insolvency, without any intimation to their creditors, assign over the whole of their estate to assignees and that no one of the creditors shall be entitled to the benefit of the assignment, unless he be willing, in the first place to give them a general discharge. It was necessary to make a remark upon this. When the firm became insolvent, the whole estate became *gage* to the creditors. It was no longer in the power of the firm to do any act which affected the rights of the creditors in any respect, or which might alter the quality existing among them. Consider what a strange practice it would be, if it were permitted to a debtor to place his property in the hands of a third person, and say to his creditors, "I have placed my property there, and you will be permitted to participate in the benefit, provided you give me first a general discharge." It was a principle so wholly adverse to law, that a man should be entitled to dictate thus to his creditors, when the law declared that he should not even have power to do a single act affecting the creditors' rights or positions, that it seemed absurd to enunciate such a proposition. Although, therefore, these gentlemen might have acted in good faith, and with a sincere desire to benefit their creditors, and prevent the estate from being frittered away, yet this clause in the assignment struck it with absolute nullity. The defendants had, in fact, no more right to make this proposition than to say to their creditors, "Instead of getting twenty shillings in the £, we shall force you to take five shillings." It was said on behalf of the defendants, that the provisional assignment was made openly, and notified to the creditors, and, consequently, there could be no intention to conceal the fact from them. But this was merely playing with words. "Secreting," the word used in the Statute, did not mean simply "hiding." The French word "*detourner*" came nearer the meaning conveyed by it. It signified the placing of property out of reach of the creditors, to prevent them from getting their rights, and making their position different from what the law makes it. This was an act which the law could never look upon as legal. What facts did we find on investing the case? First that the estate was absolutely insolvent; secondly, it was admitted by the parties themselves, that from the state of their books, it was utterly impossible to tell what position the insolvents were in; or what the estate would or could realize; thirdly, that there was no possibility of ascertaining the position of the estate till the books had been wound up; and that no balance had been struck from the time that Mr. Starnes had ceased to be a member of the firm; fourth-

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ly, a large deficiency was found in the estate; and although the testimony of one of the witnesses subsequently shewed that part of this deficit had been accounted for, yet the fact remained that the insolvent firm assigned their estate while a large deficiency appeared on the face of their statement. It was under these circumstances that they now came up with their *exception à la forme*, contending that the allegations of Mr. Sache's affidavit were unfounded, because, as they alleged, there had been no fraud on their part. But his Honor had no hesitation in saying that the law characterized such conduct as fraudulent. The Statute simply required that fraud should have been committed in the eye of the law, though the parties might have had the very best intentions. It had been argued that this was not fraud, as the plaintiffs had a revocatory action, to bring back the property to the estate. But his Honor was of opinion that this action did not apply under the circumstances. The Court would not enter into any other considerations presented by the case. The judgment rested upon the deed of assignment. This deprived the creditors of their right, and consequently, fell under the provisions of the statute, which constituted it fraud. The judgment of the Court would therefore dismiss the *exception à la forme* with costs.

The judgment was *motivé* as follows:

"The Court having heard the plaintiff and the said defendants by their respective counsel upon the merits of the *exception à la forme* pleaded by the said writ of attachment or *saisie arret* before judgment issued in this cause, having examined the proceedings, evidence adduced by the parties respectively and deliberated, considering that the said defendants have failed to establish the allegations of their *exception à la forme*, and that the said plaintiffs have established that there was just and probable cause for the issuing of the *saisie arret* in this cause, and the allegations in the affidavit on which the said writ issued are true and founded in fact, doth reject and dismiss the said *exception à la forme* with costs.

Laflamme, Laflamme & Daly, for plaintiffs.
Dorion, Dorion & Sénecal, for defendants.

Exception dismissed.

(F. W. T.)

MONTREAL, 30th NOVEMBER, 1863.

Coram SMITH, J.

No. 2672.

Kent et al. vs. *Cranwill.*

INSCRIPTION FOR ENQUETE AND HEARING.

HELD:—That when a cause is inscribed for Enquête and hearing at the same time, eight clear days notice of inscription is necessary.

Popham, for plaintiffs.
Rose & Ritchie, for defendant.
(W. F. G.)

MONTREAL, 26TH JUNE, 1863.

Coram BADGLEY, J.,

No. 1599.

Grant vs. *The Equitable Fire Insurance Company.*

POLICY—CONSTRUCTION.

HELD:—1o. That the following words in a fire policy:

"On the hull and joiner work of the steamer 'Malakoff (now in Tate's dock, Montreal,) *navigating the River St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports,* including outfitting in the spring, two thousand four hundred dollars; on the engine therein, one thousand six hundred dollars, as per Application No. 17,783, filed in this office," describing the subject insured, imported an agreement that the vessel was navigating and to navigate.

2o. That the words used must be considered to be a warranty, and the engagement not having been performed, the insurer was discharged.

3o. That in view of the warranty on the face of the policy and the admitted breach of it, the verdict of the jury was of no avail, and the Court must look to the law beyond the verdict and dismiss the action.

This was an action by the plaintiff to recover from the defendant £860 currency, besides interest from service of process and costs of suit. The action was based upon a policy of insurance issued by the defendants bearing date the 5th August 1858 and covering a period beginning the 30th July 1858, the date of the application for the policy by the plaintiff, and ending 30th July, 1859. By this action the plaintiff claimed to recover an insurance against fire on the steamer Malakoff described in the policy in the following words:

"On the hull and joiner work of the steamer Malakoff (now in Tate's dock Montreal,) *navigating the river St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports,* including outfitting in the spring, two thousand four hundred dollars, on the engine therein, one thousand six hundred dollars as per application No. 17,783 filed in this office."

Two other insurances of a like amount were effected in the Ætna and another company.

The steamer was destroyed by fire in Tate's docks on the 25th June, 1859, having never navigated and, in fact, having never left the dock.

The claim of the plaintiff was for a total loss, less £300 the value of the remains; £2000 had been recovered from the other offices.

The claim was resisted on the ground that the plaintiffs had represented that the steamer was then navigating the St. Lawrence between Quebec and Hamilton, when she was in fact laid up as a useless and unproductive vessel.

The defendant further, amongst other defences, pleaded that the plaintiffs had warranted that the vessel was navigating, and that the policy was void by reason of breach of the warranty.

At the trial an admission of the plaintiff was produced to the effect that the steamer was not navigating, and had continued in the docks. The case went to trial before the Honorable Mr. Justice Smith and a special jury on the 14th April 1863. The following issues were submitted to the jury, who returned the verdict stated beneath.

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1. Were the subjects insured wholly or partly consumed by fire on the night of the twenty-first June, 1859? and if in part state what part or parts were so consumed by fire.

Answer.—Were totally consumed except the old iron valued at three hundred pounds remains of engine.

2. Was the plaintiff's interest in the said subject insured, that of proprietor, to wit on the fifth of August, 1858, up to and on the night of 25th June, 1859, and did he suffer loss by the burning thereof?

Answer.—Yes.

3. What was the actual cash value, on the 25th June, 1859, and immediately before the fire, of the said subjects insured respectively, and if only partly burned, what was the actual cash value immediately after the fire of the parts respectively which were not consumed by fire?

Answer.—Cash value before the fire: hull and joiner work £1800; engine and appurtenances £900, part not consumed, worth £300, remains of engine.

4. Has the plaintiff met the conditions of the said policy?

Answer.—Yes.

5. Were the hull and joiner work of, and the engine in, the said steamer insured at the date of the said policy and fire in two other insurance offices, and what were the names of the said offices? and was said other insurance indorsed by defendants on said policy, and for what amounts were said subjects respectively so insured?

Answer.—Were insured in the Home and Etna offices to the amount of £1000 each and said insurances were endorsed on the policy.

6. What amount of loss has the plaintiff suffered by said fire in respect of which ought defendants to have paid him?

Answer.—£840, £600 in respect of hull and joiner work, and £240, in respect of engine and appurtenances.

7. Was the steamer Malakoff on the 30th June, 1858 or at any other time between that date and the 30th July, 1859, navigating the St. Lawrence between Quebec and Hamilton?

Answer.—No.

8. Did the plaintiff at, or before the time he agreed with the defendant for the insurance policy, plaintiff's exhibit No. 1, represent to the defendants that the steamer Malakoff was then navigating the River St. Lawrence between Quebec and Hamilton, and was such representation material?

Answer.—No.

9. Was the policy of insurance aforesaid issued by the defendants at a lower rate of premium than would have been exacted by the defendants if they had known that the Malakoff was not navigating the St. Lawrence but was laid up in Tate's dock, and so remained laid up till her destruction by fire?

Answer.—

10.—Was the [illegible] steamer and appurtenances insured at the date of the said policy and [illegible] knowledge of the defendants in how many, and what other Insurance [illegible] other than defendants' and for what amounts respec-

tively; and were actions pending on the part of the plaintiff for the recovery of such amount of insurances?

Answer.—Was insured in the Ætna and Home offices to the amount of $4000 each, and said insurances were indorsed on the Policy: actions were pending for the recovery of the amount of insurances.

11. Did the plaintiff, when applying for the said insurance, conceal from the defendants the fact that the hull of the Malakoff was and had been the hull of the old steamer North America, and was such concealment material?

Answer. No.

After the trial, the defendants following the precedent established in the case of Grant vs. The Ætna Insurance Company 5 L. C. Jurist. 285, and 6, L. C. Jur. 224, moved that inasmuch as there was in the policy of insurance an express warranty that the said steamer was then navigating and would continue navigating, which warranty had not been complied with, and inasmuch as the evidence produced at the trial had proved material misrepresentation and concealment by the plaintiff in his application for said policy, and the verdict of the Jury was rendered contrary to law and evidence, that notwithstanding the verdict found by the Jury in favor of the plaintiff judgment be entered up in favor of the defendants, and that by such judgment it be adjudged that the said policy in consequence of such breach of condition and warranty is null and void and the same be set aside, and the action of the plaintiff dismissed with costs.

After hearing of counsel and deliberation, the Court by the Hon. Mr. Justice BADGLEY granted the motion, and dismissed the plaintiffs' action. His honour in rendering judgment said:

This is an action on a policy of insurance effected by the plaintiff with the defendants for one year from the 30th July, 1858, for $4000 on the steamer Malakoff destroyed by fire on the 25th June 1859; and in which action a verdict was rendered against the defendants for £840 cy.

The case comes upon the motion of the defendants upon grounds stated, to set aside the verdict and to enter up judgment for them.

The policy of insurance was effected through George Tate the plaintiff's agent and was dated on the 5th August 1858, to take effect for one year from the 30th July previous, and was as follows, "on the hull and joiner work of the "steamer Malakoff (now in Tate's dock, Montreal), navigating the river St. "Lawrence between Quebec and Hamilton, stopping at the intermediate ports, "including outfitting in the spring $2400, on the engine therein $1600, as per "application 17,783." The application referred to was signed by the said George Tate, as the plaintiff's agent, and contained the same identical subjects of the steamer Malakoff navigating the St. Lawrence between Quebec and Hamilton stopping at the intermediate ports, but did not mention the words (now in Tate's dock Montreal;) an unsigned paper was also produced, attached to the application which described the said *subjects*, and also contained those words not to be found in the application.

The insurance was of course subjected to the conditions printed on the back of the policy, which was also endorsed with two other policies effected by the plaintiff upon the same steamer, &c., at the Ætna and Home offices, each for $4000.

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The plaintiff's declaration set out the policy, the subjects insured, the time and amount of the insurance, the destruction of the steamer by fire on the 25th June, 1859, whilst lying in Tate's dock, whereby plaintiff suffered the loss of the sum by him insured, and prayed for its recovery; this the defendants resisted upon the several grounds set out in their pleadings, and which comprehended breach of warranty, misrepresentation, concealment, all voiding the policy, and alleging in substance that the defendant's contract of insurance was effected upon the statement to them made by said Tate, the plaintiff's agent, as set out in the application and policy, namely, that the said steamer was navigating the river St. Lawrence, &c. &c., stopping at the intermediate ports, and that she was a new boat; whereas in fact she was not navigating but was laid up, and moreover that she was the hull of an old steamer, as stated in the pleadings.

The cause having been left to a jury upon articulations of fact of record, they found the total destruction of the subjects insured except the remains of the engine which they valued at £300; the plaintiff's interest in the insurance, the cash value of the subjects insured immediately before the fire, at £1800 on the said hull and joiner work, and £900 on the engine and appurtenances, less the said sum of £300 for remains of the engine; the plaintiff's compliance with the terms of the policy, his loss of £840 under this policy, namely £600 on said hull and joiner work and £240 on the engine and appurtenances; that the Malakoff had not at any time navigated the river St. Lawrence during the period of risk until her destruction; that no lower premium was exacted than if Defendant had known that she was laid up; that plaintiff did not represent to defendants that she was then so navigating, nor did conceal from them that her hull was that of the old steamer; they also found the previous insurances effected at the said other offices as above stated.

Admissions on both sides were made and filed of record in relation to facts upon which parts of the verdict were found, and it was also proved that the plaintiff had received the insurance money upon the other insurances. The defendant's motion rested upon the breach of the condition and warranty contained in this policy that the steamer was navigating; 2d, upon the plaintiff's material misrepresentation and concealment in his application for the policy; and 3d, that the verdict found was contrary to law and evidence and that it should be set aside and judgment rendered avoiding the policy and dismissing the plaintiff's action.

The plaintiff has assimilated this case to the previous case of the same plaintiff against the Ætna office, one of the insurances, whose policies were indorsed on this policy, and which was finally decided in the plaintiff's favour by the Judicial Committee of the Privy Council, maintaining the verdict rendered for him in that case, and he has required that the same interpretation should be applied in this case as was applied to that; that the policy should be construed in a plain sense, such as laymen would apply to such acts, and that the rule as to the insurer's intention should control this case; in other words "that a statement of information, expectation, belief or intention set out in the policy on the part of the insured is not a warranty of the truth of that which is intended, believed, &c., but at most a representation or perhaps a warranty that such is really the belief, or

intention of the insured at the time the statement is made." This is American doctrine as found in Sumner's Reports, 434, 2 Duer., p. 644, and has to some extent been supported by the interpretation put upon a part of that contract by the tribunal in England: the entire contract was not read there; the interpretation given to the terms of the policy, was confined simply to the words "*intended* to navigate"; and upon the interpretation made by that tribunal the judgment in England was rendered. However that may be, it is manifest that the terms of the two policies do not assimilate. In the Ætna policy the terms were "upon "the Malakoff now lying in Tate's dock Montreal, and intended to navigate the "St. Lawrence and lakes from Hamilton to Quebec, &c., and to be laid up for "winter in a place approved by the company." The terms of the defendant's policy are "on the steamboat Malakoff, (now in Tate's dock Montreal,) navigating the river St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports," &c. The difference between these *two policies* is plain and manifest, and not only so, but it is the difference between the intention to do a thing and the doing of it, the intention and the act. In this instance it is not a case of intention *bonâ fide*, or otherwise, entertained by the insured when the policy was effected; it was not something impossible which the insured intended should take effect or be made operative in *futuro;* on the contrary it was the fact of the thing being done in *præsenti*. It will be seen that the words *now in Tate's dock, Montreal*, are in brackets, and are only incidental to the main action of the steamer, navigating the St. Lawrence and stopping at the intermediate ports; now as already observed it was reported in the Ætna case that the question dependent upon the meaning to be attached to the words of the policy *intended to navigate*, which were held not to be a contract to navigate; but the Court at the same time declared that if these words had imported an agreement that the vessel shall navigate in the manner described in the policy—then being an engagement contained in the policy, they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or immaterial, the insurers would be discharged. When the assured says, "I am navigating my vessel and stopping her at intermediate ports, although now in Tate's dock," the only reasonable and true natural meaning is the navigating of the vessel; and without going over the authorities referred to in the Ætna case, which are familiar to the bar, it is sufficient to observe that the words in this policy constitute the agreement referred to by the Judicial Committee, and that as such they are subjected to the consequences of a breach of the condition by the insured. Without referring at any length to authorities it is sufficient to say that "a warranty by the assured in relation to the exist-"tence of a particular fact must be strictly true or the policy will not take "effect: this is so whether the thing warranted be material to the risk or not: "it would perhaps be more proper to say that the parties have agreed on the "materiality of the thing warranted, and that the agreement precludes all in-"quiry on the subject." It is in evidence that the insurer the Defendants, did rely upon the thing, and were thereby induced to enter into the contract which they would not otherwise have done, and therefore the material want of truth respecting it necessarily avoids the policy;—whatever it may result from, whether

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mistake, accidents or otherwise, the insured is bound by it. This is not a question of the mere change in the use or disuse of the steamer, the subject insured not increasing the risk, but it is the existence of a fact constituting the agreement upon which the insurance was entered upon by the insurers.

Many parts of the finding of the jury with reference to the words of the contract and the materiality or otherwise of the representations made go for nothing; the jury could not pass upon or interpret the contract. Moreover the verdict found the cost value of this steamer to be £2700 less £300 for remains of engine. The entire loss was therefore £2400, of which the verdict found £2000 were covered by the Ætna and Home policies, which were proved to have been paid before this trial so that the exact loss suffered by the insured and for which they could claim to be indemnified so far as this policy is concerned, is only £400; the verdict is for £840. For this and other defects the verdict is liable to be set aside, but the motion does not ask for a new trial, and merely calls upon the Court to render a judgment in the cause to decide the contestation, which the parties are entitled to demand; the judgment will not rest upon facts of evidence which may have been incorrectly found and might be submitted once again to a jury for correction, but it rests upon the breach of an admitted agreement which the law declares annuls the contract sought to be enforced whatever the evidence may be, required no verdict to settle or interpret and which can only be decided by the Court. In this case, and in all such cases, the Court must look to the law beyond the verdict, and by applying the law itself declare the legal result. The law does not support or assist the verdict; it goes directly to the action, and seeing the warranty on the face of the policy, and the fact of its breach being admitted, the verdict of the jury as to the facts of the case is of no avail and the judgment must therefore be rendered against the plaintiff, granting the Defendants' motion, and dismissing the plaintiff's action with costs.

The Judgment was motivé as follows:

"The Court having heard the parties by their counsel upon the motion of the defendant of the 18th day of April, 1863, that inasmuch as there was and is in the policy of insurance declared upon by the plaintiff an express condition and warranty that the said steamer "Malakoff" was navigating and did and should continue to navigate the river Saint Lawrence between Quebec and Hamilton, stopping at intermediate ports, to wit during the season of navigation while the said policy should remain in force; and it appears and is admitted in and by the written admission of the plaintiff that the said condition and warranty was not complied with and that in fact the said steamer always remained in Tate's dock and was not navigating and did not navigate, and that inasmuch as the evidence adduced at the trial had in this cause proved material misrepresentation and concealment by the plaintiff, in his application for said policy, that in consequence of the facts set forth in said motion, and notwithstanding the verdict rendered by the Jury in this cause in favor of the plaintiff, judgment be entered up in favor of the defendants, and by such judgment it be declared that the said policy in consequence of such breach of the said condition and warranty was and is null and void, and the same be set aside, and the action of the

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plaintiff be hence dismissed with costs: having examined the proceedings and record in this cause, and seen and examined the admissions respectively fyled by the parties and the findings and verdict of the said jury, and deliberated; considering that the declaration of the said plaintiff in the said policy of insurance upon which this present action was brought, and enunciated in the following words; "on the following property owned by assured, namely, on the hull and joiner work of the steamer Malakoff (now in Tate's dock Montreal) navigating the river St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring," contains an express condition and warranty upon and for the said steamer Malakoff mentioned in and insured by said policy and mentioned in the said declaration in this cause fyled, and was a condition of the said policy to be kept and observed, and considering that it is admitted by the Plaintiff in and by his admissions fyled in this cause, that the said condition and warranty were not complied with, and that the said steamer was not navigating as aforesaid, and did not navigate at any time in and from the effecting of the said insurance until the destruction thereof by fire as stated in the said declaration of the plaintiff, and always remained in Tate's dock; and further considering that the action and *demande* of the said plaintiff in this case was unfounded in law, doth, notwithstanding the said verdict, grant the said motion of the defendants that the action of the plaintiff in this behalf be dismissed with costs, and in consequence the plaintiff's action and *demande* is hence dismissed with costs."

Action dismissed.*

Mackay & Austin for Plaintiff.

Torrance & Morris for Defendants.

(A. M.)

*The following is the charge of Mr. Justice SMITH to the Jury who tried the issues:

Gentlemen of the Jury.

This is an action brought against the Equitable Fire Insurance Company to recover on a policy of insurance effected with that company on the steamer Malakoff. This vessel was insured in three offices,—the Œtna, Home, and Equitable, for £3000 in all and the present action is brought for the third part of that sum, which was the amount actually insured in this Company, and claims one third of the actual loss sustained. Thus the Equitable is mingled with the other companies in the risk and loss, but I need hardly tell you stands in this action upon its own policy and contract entirely.

The Malakoff was destroyed by fire in July, 1859; and the defendants refused to pay on three grounds. Their three objections to the policy are;

1. Breach of warranty on the face of the policy. They say that something is there stated which is not the truth, and that this is a breach of warranty and the plaintiff cannot recover.

2. That there was misrepresentation at the time of the contract. That the truth was not stated to them. If it had been they would have asked a larger premium. That this was therefore material.

3. That at the time of the insurance the plaintiff concealed from the defendant the act that she was not a new boat but the hull of the old steamer North America.

The policy, the loss, the value are admitted, and it is admitted that the requisite conditions have been complied with on the part of the plaintiff.

As to the first point the defendants say the vessel was described as navigating, and that that was untrue, and being incorporated in the policy became a warranty. There are two descriptions of warranties, express as to matters of fact and description, and promissory, undertaking that something shall be done.

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(His Honor then read the description of the property from the policy of insurance.)

"Now in Tate's dock navigating the River St. Lawrence between Quebec and Hamilton stopping at intermediate ports;" The defendants say that this is a warranty that she was then navigating. But what is the real meaning of these words? The plaintiff was bound to describe the property as it actually was. He says she is in Tate's dock. But had he stopped there he must have left her in dock during the period, for had he taken her out for a single moment, then confined to that restricted representation he could not have recovered. The very words *now* in Tate's dock clearly show that she was only there for a time, and that the vessel was or had been navigating and as she was then in Tate's Dock it was necessary to state it to preserve her right of navigating as she had always done. But as has been proved, the vessel was meant to navigate, and had been navigating previously and the plaintiff sought to preserve to himself the free privilege of her continuing her occupation if circumstances favored. Thus the words "navigating the River St. Lawrence" are introduced. Imagine any thing else, and the sentence involves plain contradiction. The plaintiff virtually says "I have got a vessel in the "habit of navigating; she is now in Tate's dock, but I reserve my right to navigate "if I choose to run my vessel." It is monstrous to suppose that here was an express undertaking to navigate; according to defendants' contention had she gone into harbour the plaintiff could not have recovered.

The second point as to the representations depends upon the other to a great extent. I do not think you can have any hesitation in coming to the conclusion that there was no misrepresentation; Tate reserved his right to navigate. Suppose he did say, she was to navigate; she must rest somewhere. In point of fact she did navigate ever since she was rebuilt. At the time of the policy it happened that she was not running.

Then he to the third point, if you believe Tate's evidence he did not state the vessel was new; further it was notorious that she was the old North America. She was so registered. Where then was the concealment? Tate was not bound to state this. He says he did not state it. The policy is a fire policy not a marine one; further the subject was there, and her condition could have been ascertained.

What difference would these representations have made in the risk? The insurance Companies say there is greater risk to a vessel in dock in summer than when navigating. Common sense is completely against such a view. A vessel navigating has fire in full play besides many attendant combustibles such as oil, &c. Is this a greater danger than a vessel in a dock 300 feet square and with, so far as the evidence goes, no vessel proved to have been near her. Whatever the companies may say, common sense dictates the answer to such a question.

I charge you gentlemen that in point of law there is not the slightest defence to this action.

AUTHORITIES CITED BY DEFENDANTS.

WARRANTY.
2. Parke, 660-2. 8th. ed. 1842, cap. 18.
Phillips, Ins. Nos. 754, 755, 757, 762, 866.
Angell, Ins. §140, 142, 142a, 145.
1 Bell, Comm. Law of Scotland, 627, 5th ed.
Ellis, Ins. pp. 29, 39, English ed.
Boudousquie, de l'Assurance, No. 117.
Grant vs. Ætna Insurance Co., 5 L. C. Jur. 285, 6 L. C. Jur. 224-6.

REPRESENTATION.
1 Bell, 627.
Pothier, Assurance, No. 196.
Angell, Insurance, § 147, et seq.
Ellis, Ins. n. 4, p. 84, et seq. Amer. ed., A. D. 1854.

CONCEALMENT.
Angell, cap. 17.
Ellis, n. 5, p. 99. Absence of fraud does not save the policy.
Angell, Ins. § 175.
Pothier, Loc. cit.
Boudousquié, No. 118, 119.

INTEREST.
2 Phillips, chap. 27, sec. 13; must be proved.

QUEEN'S BENCH, 1863.

MONTREAL, 7TH DECEMBER, 1863.

Coram HON. SIR L. H. LA FONTAINE, BART., Ch. J., DUVAL, J., MONDELET, A. J., and MONK, J. *ad hoc.*

No. 91.

Maurice Cuvillier et al., (Defendants in Court below,) *Appellants*;

AND

The Bank of British North America, (Plaintiff in Court below,) *Respondent.*

HELD:—That a decree of Her Majesty in Her Privy Council, reversing a judgment of the Court of Queen's Bench for Lower Canada, which had confirmed a judgment of the Superior Court for Lower Canada, dismissing an action therein brought, and directing the Superior Court to enter up judgment for the plaintiff, is inoperative, and a judgment entered up accordingly by such Superior Court will be reversed on appeal.

This was an appeal from a judgment rendered by the Superior Court, at Montreal, (HON. MR. JUSTICE SMITH, presiding,) on the 30th of September 1861, granting the conclusions of a petition presented to that Court by the respondent, on the 17th of September, 1861, the allegations of which petition were as follows:

"That by the judgment rendered in this cause on the thirtieth day of April eighteen hundred and fifty-eight, the declaration and action of your petitioner as far as the defendants Angélique Cuvillier, and Alexander M. Delisle, Mary Anne Cuvillier and George Burns Symes and Luce Cuvillier, were concerned, was dismissed with costs.

That your petitioner in due course appealed from the said judgment to the Court of Queen's Bench for Lower Canada, sitting in and for the District of Montreal, and by the judgment rendered by that Court on the first day of December eighteen hundred and fifty-nine the said judgment so rendered by this Court was confirmed.

"That your petitioner thereupon in due course appealed to Her Majesty in Her Privy Council, and by the judgment and decree rendered and given on the sixteenth day of April now last past, and which has been duly recorded and registered in the registers of this Honorable Court, Her Majesty by and with the advice of Her Privy Council, ordered that the said judgment of the Court of Queen's Bench of Lower Canada of the first December, eighteen hundred and fifty-nine, and the same was thereby reversed with costs, and that this Honorable Court be, and the same was thereby directed to cause judgment to be entered for your petitioner accordingly."

The petition then, in effect, concluded, that the Court below would be pleased to cause judgment to be entered accordingly in favor of the respondent, condemning the said Angélique Cuvillier, Mary Ann Cuvillier, and Luce Cuvillier jointly and severally, to pay and satisfy to the respondent the sums of money, interest and costs claimed in and by the respondent's declaration in the said cause fyled.

The following is a copy of Her Majesty's judgment and decree in the said petition referred to:—

AT THE COURT AT OSBORNE HOUSE, ISLE OF WIGHT,
The 16th day of April, 1861.

PRESENT:

The Queen's Most Excellent Majesty,
His Royal Highness the Prince Consort,

M. Cuvillier et al. and The Bank of B.N.A.

Lord President,
Lord Chamberlain.

Whereas, there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 6th of February, 1861, in the words following, viz:—

"Your Majesty having been pleased by your general order in council of the 29th November 1859, to refer unto this committee a humble appeal from the Court of Queen's Bench of Lower Canada, between the Bank of British North America, appellants, and Angélique Cuvillier, and Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier, respondents, and likewise a humble petition of the Bank of British North America of St. Helens Place in the city of London, setting forth that a suit was lately instituted in your Majesty's Superior Court for the District of Montreal, in the Province of Lower Canada, by the appellants, against Angélique Cuvillier and Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes, and Luce Cuvillier, together with Maurice Cuvillier, and Dame Marie Claire Perrault, for the recovery of the sum of four thousand one hundred and seven pounds, twelve shillings currency, being the amount of seven several bills of exchange and a certain promissory note, and the damages and costs for the non-payment thereof respectively, together with interest thereon respectively upon and by virtue of a certain notarial deed dated the 26th day of July, 1849; that on the 30th day of June, 1855, the said Dame Marie Claire Perrault, Angelique Cuvillier, Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier pleaded *exceptions peremptoires* and *defenses en fait* to the plaintiff's said demand, that the said Dame Marie Claire Perrault departed this life on the 23rd day of October, 1855, whereby and by Acts thereon granted she ceased to be a party to this suit; that the said Maurice Cuvillier on the 21st day of September, 1857, confessed judgment in favor of the plaintiffs; that on the 30th day of April, 1858, the said Superior Court gave judgment in favor of the said respondents, Angelique Cuvillier, Alexander Maurice Delisle, Mary Ann Cuvillier, and George Burns Symes and Luce Cuvillier, but gave judgment against the said Maurice Cuvillier; that the appellants appealed from the said judgment of the Superior Court to the Court of Queen's Bench of Lower Canada, and on the first day of December, 1859, the said Court of Queen's Bench gave judgment affirming the said judgment of the Superior Court, the Honorable Mr. Justice Aylwin dissenting; that the appellants feeling themselves aggrieved by the said judgment and being advised that the same was unjust and erroneous, craved leave to appeal therefrom to your Majesty in Council and that such leave was accordingly granted to the appellants upon the usual terms, with which the appellants have duly complied, and humbly praying your Majesty that the said judgment may be reversed, varied or altered or for other relief in the premises. The lords of the committee in obedience to your Majesty's said general order of reference have taken the said humble appeal and petition into consideration, and having heard Counsel on both sides, their Lordships do agree humbly to report to your Majesty as their opinion that the judgment of the Court of Queen's Bench of Lower Canada of the 1st December, 1859, ought to be reversed, and that said Superior Court for the District of Montreal (Lower Canada) ought to be directed to cause judgment

to be entered for the appellants (the plaintiffs in the original suit) accordingly:—

And in case your Majesty should be pleased to approve of this Report, and to order as is herein recommended, then their lordships do direct that there be paid by the said respondents to the said appellants the sum of two hundred and eighty-three pounds sixteen shillings and sixpence sterling for the costs of this appeal."

Her Majesty having taken the said report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order, as it is hereby ordered, that the said judgment of the Court of Queen's Bench of Lower Canada of the 1st December, 1859, be and the same is hereby reversed, with two hundred and eighty-three pounds sixteen shillings and six pence sterling costs and that the Superior Court for the District of Montreal (Lower Canada) be, and the same is hereby directed to cause judgment to be entered for the appellants (the plaintiffs in the original suit) accordingly, whereof the Governor General, Lieutenant Governor or Commander in Chief of the Province of Canada for the time being, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

(Signed) ARTHUR HELPS.

I hereby certify that the above is a true and correct copy of Her Majesty's Order in Council on this Appeal.

[L. S.] (Signed) HENRY REEVE, Reg. P. C.

The following is the judgment rendered by the Superior Court on the petition so presented by the respondent:—

"The Court, having heard the parties by their respective counsel, upon the petition of the said plaintiff, presented to this Court on the 17th day of September, 1861, praying that this Court cause judgment to be entered up in this cause in favor of the said petitioner, the plaintiff in this cause, in accordance with the judgment or decree of Her Majesty in Her Privy Council rendered and given on the 16th day of April, one thousand eight hundred and sixty-one, having seen and examined the judgment mentioned and set forth in the said petition, and more particularly the said judgment order or decree of Her Majesty in Her Privy Council of the 16th day of April, 1861, and duly enregistered in the registers of this Court, whereby the judgment of the Honorable the Court of Queen's Bench for Lower Canada of the first day of December one thousand eight hundred and fifty-nine was reversed with costs, taxed at £283 16s. 6d. sterling money of Great Britain, equal to £345 6s. 5d. current money of this Province, and this Court was thereby directed to cause judgment to be entered for the said petitioner, the said plaintiff in the original suit; accordingly, having examined the proceedings and deliberated, doth grant the said petition, and in consequence the Court now here doth order judgment to be entered up accordingly in this cause in favor of the said plaintiff and petitioner, and doth adjudge and condemn the said defendants Angelique Cuvillier, Mary Ann Cuvillier and Luce Cuvillier, jointly and severally, to pay and satisfy to the said plaintiff the sum of Four thousand one hundred and seven pounds twelve shillings current money of this Province of Canada, for the causes, matters, and things in the plaintiff's declaration stated, with interest on six hundred and twenty-five pounds from the 31st day of October one thousand eight hundred and fifty-four, on six hundred

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and twenty-five pounds from the fourth day of November eighteen hundred and fifty-four, on six hundred and twenty-five pounds from the 6th day of November eighteen hundred and fifty-four, on seven hundred and fifty pounds from the eighth day of November eighteen hundred and fifty-four, on four hundred pounds from the 16th day of November eighteen hundred and fifty-four, on four hundred pounds from the 25th day of November eighteen hundred and fifty-four, on four hundred and fifty pounds from the sixth day of December eighteen hundred and fifty-four, and on one hundred and seventy-six pounds fourteen shillings and six pence from the eleventh day of January eighteen hundred and fifty-five and on fifty-five pounds seventeen shillings and six pence, from the ninth day of March eighteen hundred and fifty-five, date of the service of process in this cause until actual payment and costs of suit."

Abbott, for appellants;

The questions which arise on this appeal are:

1st. Whether or no the Superior Court, having rendered a final judgment in a cause, has any right to take up the same cause, and render a different judgment in it.

2nd. If it can, whether it can exercise that right before the first judgment has been formally reversed by the final Court of Appeal.

The Superior Court pronounced a judgment in this cause on the 30th April, 1858, dismissing the respondents action against the appellants.

On the 1st December, 1859, that judgment was confirmed by this Court.

On the 16th April, 1861, Her Majesty in Her Privy Council ordered:

"That the said judgment of the Court of Queen's Bench of Lower Canada, of "the 1st December, 1859, be, and the same is hereby reversed with £283.16.6 "stg., costs; and that the Superior Court for the District of Montreal, (Lower "Canada,) be and the same is hereby directed to cause judgment to be entered "for the appellants (the plaintiffs in the original suit) accordingly; whereof the "Governor General, Lieutenant Governor or Commander in chief of the Prov-"ince of Canada for the time being, and all other persons whom it may concern "are to take notice and govern themselves accordingly."

On the 17th September, 1861, the respondents presented a petition to the Superior Court at Montreal, praying that Court to cause judgment to be entered up for the respondents; condemning the appellants jointly and severally to pay and satisfy to the respondents the sum of £4107.12 cy., and interest, and judgment was accordingly rendered by that Court on the 30th September, 1861, granting the prayer of the petition and pronouncing a formal and final judgment against the appellants according to the conclusions of the petition.

It is from this judgment the appellants have appealed, and they rely upon the following grounds in support of their appeal:

1. That the said order in council does not reverse the final judgment rendered in the Superior Court on the 30th April, 1858, but only the judgment of this Court rendered on the 1st December, 1859, and that the first mentioned judgment still subsisted when the judgment now appealed from was rendered, and in fact still subsists.

2. That by the final judgment rendered in the said cause in the Court below on the 30th April, 1858, that Court was disseized of the contestation and had no jurisdiction to render any second or other final judgment therein. And that if the Privy Council were of opinion that the judgment of the Superior Court was erroneous, they could only give effect to that opinion by setting aside the judgment, and pronouncing the judgment which in their opinion the Court below should have rendered.

The appellants believe that the first of these grounds of objection is true in point of fact, and that the second is equally well founded in law. They are advised that the Courts of this country have hitherto preserved the right of expressing their own opinions upon every subject that has been litigated before them, and have never yet permitted themselves to be made the mere registrars of the decrees of other tribunals.

And as the appellants are aggrieved by the order in question, as it has been construed by the Court below, they conceive with all due respect to the august tribunal which entertains a different view of our law from both of our highest Courts, that they are entitled at least to a clear, distinct, and unmistakeable expression of that view and of the judgment which in the opinion of the Court of last resort the Court below ought to have rendered. That this is not afforded by the order of the 16th April, 1861, is rendered apparent by the fact that it would have satisfied that order to have "entered judgment for the plaintiff" upon any one of the numerous contracts set up in the plaintiff's declaration, as fully as to have entered up judgment upon them all.

If this Honorable Court should sustain the views of the appellants, they will be afforded an opportunity of showing before Her Majesty in Her Privy Council the points upon which, as they humbly conceive, Her Majesty has been erroneously advised. And as the appellants believe that the law of this country fully bears out their pretensions, they respectfully urge upon this Honorable Court the reversal of the judgment of the Court below.

Bethune, for respondent, submitted,—

That the Honorable Judge who pronounced the judgment now appealed from is the same Judge who pronounced the original judgment which gave rise eventually to the appeal to Her Majesty in Her Privy Council. It was urged at the argument on the petition, by the appellants' counsel, that a compliance with the mandate contained in Her Majesty's decree would amount, in effect, to a reversal by the said Honorable Judge of his own judgment, but, considering the decree to be a virtual reversal in itself of that judgment, and that sitting as he was in Her Majesty's own Court, as Her ministerial agent or representative, administering justice in Her name, he could not refuse to obey the order contained in Her Majesty's decree. The Honorable Judge therefore had no hesitation in entering up judgment accordingly in favor of the respondent, and the respondent confidently trusts, that this Honorable Court will have less hesitation in declining to interfere with his action in that behalf.

Une question presqu'en tout semblable à celle sur laquelle cette Cour a eu à se prononcer, le 3 sept. 1860, dans la cause de *l'Assurance de Montréal*, contre *McGillivray*, se présente sur cet appel.

Dans la *Cour Supérieure* (Cour de première instance) l'action de la *nqBaue*

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(présente intimée) a été déboutée par jugement de l'Honorable Juge Smith, rendu le 30 avril 1858.

De ce jugement, la Banque a appelé à cette Cour (Cour du Banc de la Reine, qui a juridiction en appel) ; et le 1er dec. 1859, cette Cour a confirmé purement et simplement le dit jugement du 30 avril 1858.

Il y a eu appel à Sa Majesté en Conseil.

La *Cour Supérieure* avait été désaisie de l'instance (ou procès) par l'effet de l'appel de son jugement à la dite Cour du Banc de la Reine, et cette dernière Cour a été désaisie elle-même par l'effet de l'appel à Sa Majesté en conseil.

Au Conseil Privée, le rapport du comité judiciaire a été défavorable aux intimés, et il a plu à Sa Majesté d'approuver ce rapport, le 16 avril 1861, et le Décrêt est comme suit ;

"Her Majesty having taken the said Report into consideration was pleased "by and with the advice of Her Privy Council to approve thereof and to order "as it is hereby ordered that the said judgment of the Court of Queen's Bench "of Lower Canada of the 1st December, 1859, be and the same is hereby re- "versed with £283.16.6, sterling costs, and that the Superior Court for the "District of Montreal, (Lower Canada,) be and the same is hereby directed to "cause judgment to be entered for the appellants (the plaintiffs in the original "suit) accordingly, whereof the Governor General, &c., &c."

Le 8 juin 1861, cette Cour (Cour du Banc de la Reine) a accordé une motion faite par les appellants (La Banque), leur donnant acte de la production par eux faite le même jour du dit décrêt de Sa Majesté en Conseil, du 16 avril 1861, sur l'appel interjeté par les appellants du jugement rendu par cette Cour le 1e décembre 1859, et a ordonné que le dossier (record) dans cette cause soit remis à la dite Cour Supérieure.

Le 25 juin 1861, dans la Cour Supérieure, M. le Juge Smith, sur motion des demandeurs (appellants), leur donne aussi acte de la production du décrêt de Sa Majesté en Conseil, du dit jour 16 avril 1861, et en ordonne l'enregistrement dans les régistres de la dite Cour Supérieure.

Puis par jugement rendu en la dite Cour Supérieure le 30 septembre 1861, sur pétition des demandeurs appellants, présentée le 17e jour précédent, M. le Juge Smith, en obéissance au dit décrêt, a ordonné que jugement fût en conséquence entré en faveur des demandeurs, et le dit jugement qui y est au long mentionné fut rendu ; c'est celui dont il y a maintenant appel devant cette Cour, et sur lequel appel nous avons maintenant à prononcer.

Dans la cause de *l'Assurance* et *McGillivray*, la même question s'est présenté et j'ai là exprimé mon opinion (voir le 5 volume du *Jurist*, Bas Canada, p. 164). Je persiste respectueusement dans cette opinion qui semble avoir été trouvée exacte par le conseil privé, car cet Honorable Tribunal a, le 8 février, 1831, modifié ou changé son premier rapport, (voir *Moore's* Reports, volume 13, p. 125.)

L'on voit que, par le décret dont il s'agit ici, le jugement de cette Cour (Cour du Banc de la Reine) a bien été infirmé ; et nous devions donner aux parties *acte* de ce dispositif du décret ; mais le premier jugement de M. le Juge Smith, celui du 30 avril 1858, n'a pas été infirmé. Le décret dit seulement à la Cour Supérieure d'entrer le jugement pour les demandeurs. Mais quel doit être ce jugement ? Le décret ne le dit pas. Sera-ce pour le capital en entier,

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ou seulement pour une partie? Sera-ce pour le capital seulement, ou pour le capital et les intérêts? Sera-ce enfin pour les intérêts seulement, sur tous les titres de créance, ou seulement sur partie des titres? Le décret n'en dit rien.

Le fait est que, dans notre système le juge *a quo*, quand il y a appel à un Tribunal Supérieur, n'est plus saisi de la cause, et ne peut pas être appelé à infirmer propre jugement. C'est au tribunal d'appel à l'infirmer, s'il y a lieu, et alors son jugement, étant celui que la Cour de première instance aurait dû rendre, est envoyé avec le dossier à la dite Cour, pour y être exécuté. Il en est de même de notre Cour en Appel (Cour du Banc de la Reine.) Quand il y a appel de notre jugement au Conseil Privé, nous ne somme plus saisis de la cause. S'il est infirmé par le Conseil Privé, nous devons obéir respectueusement, comme nous le faisons toujours, au jugement que rend le conseil, que nous renvoyons ensuite au Tribunal de première instance pour que là il reçoive son exécution, suivant son dispositif et le cours ordinaire de la loi. Ainsi donc, quand il y a appel successif d'un jugement de la dite Cour Supérieure, d'abord à cette Cour, puis à Sa Majesté en Conseil, c'est au décret qui prononce en dernier ressort à dire quel jugement aurait dû être rendu par la dite Cour Supérieure, en un mot, c'est le décret de Sa Majesté en Conseil qui doit énoncer le jugement même, et son dispositif. Pour nous, nous n'avons plus, dans ce cas, qu'à l'exécuter, ou plutôt à le faire exécuter par la dite Cour Supérieure, même quoique nous puissons ne pas l'approuver. De la part de la Banque l'on nous a dit qu'il n'y avait qu'un défaut de forme. Il y a plus que cela; nous sommes sans jugement que nous puissons faire exécuter. Mais n'y eût-il qu'un défaut de forme, cela serait encore très-important, en ce qui regarde le maintien, dans un ordre régulier de la Hiérarchie des Tribunaux.

Sur le tout, ainsi que je l'ai déjà fait dans la cause de *l'Assurance* et *McGillivray*, "je dois respectueusement exprimer mon opinion que le décret dont il s'agit n'a pas été assez loin, qu'il aurait du prononcer le jugement qui, selon "l'avis du conseil, aurait du être rendu par la Cour de première instance (Cour Supérieure)," et que, par conséquent, dans l'état de la procédure, M. le Juge Smith a outrepassé ses pouvoirs en procédant comme il l'a fait, en infirmant son propre jugement, et en prononcant un jugement que n'avaient prononcé ni cette Cour, lorsqu'elle était saisie de la cause au mérite, ni le Conseil Privé de Sa Majesté. Il n'avait plus qu'à exécuter, et cependant il se trouve qu'il n'avait encore rien qu'il pût exécuter.

MONDELET, A. J.—This Court had confirmed the judgment of the Superior Court which dismissed respondent's action. An appeal was instituted to the Privy Council, by whom the judgment of this Court was reversed, but the judgment of the Superior Court remained untouched. The Superior Court was directed to enter judgment in favor of respondent. Judge Smith, upon a petition to that end, so entered a judgment in favor of respondent. An appeal is now had to this Court of the latter judgment of the Superior Court.

It appears to me that the Superior Court had no power to enter such a judgment.

1°. That Court was *functa officio* after the rendering of the first judgment dismissing respondent's action.

2°. By entering such a judgment it has *de facto* assumed an appelate jurisdiction, and reversed its own judgment, rendering one *toto cælo* different from, an ontrary to the first. Besides

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The Privy Council may, as it has done, reverse the judgment of this Court, and might have (but forgot it) reversed the judgment of the Superior Court, which this Court had confirmed. As to the Privy Council ordering or directing the Superior Court of Lower Canada, with which it has nor can have no *direct* communication and of course no order to give to it, to render such or such judgment it is out of the question. The Superior Court should have plainly said that it had no power to do so.

It follows therefore that the judgment of the Superior Court, which is now appealed from, must be reversed.

The following is the judgment so rendered by the Court of Queen's Bench:—

La Cour * * * considérant que, dans la Cour Supérieure (Cour de première instance) l'action de la dite banque (présente intimée) a été déboutée par jugement rendu, le 30 avril 1858, par l'Honorable James Smith, un des juges de la dite Cour; que, sur appel du dit jugement à cette Cour, le dit jugement a été, le 1er décembre 1859, confirmé purement et simplement; que, de ce moment là, cette Cour a cessé d'être saisie de l'instance et n'a plus pouvoir de s'occuper du mérite de la cause; que Sa Majesté en Conseil a été saisie de l'instance par l'appel interjetté du dit jugement rendu par cette Cour, le dit jour 1er décembre 1859:—Considérant que le décrêt dont il s'agit, et qui consiste dans un rapport du comité judiciaire du Conseil Privé, approuvé par Sa Majesté en Conseil, le 16e jour d'avril 1861, infirme purement et simplement le susdit jugement rendu par cette Cour le dit jour 1er décembre 1859, sans néanmoins prononcer le jugement qui, dans la pensée du dit comité judiciaire, aurait du être prononcé par la dite Cour Supérieure siégeant à Montréal (Cour de première instance) et sans même exprimer d'opinion à cet égard, se contentant seulement de dire à la dite Cour Supérieure d'entrer jugement pour les démandeurs, mais sans spécifier en même temps quel devra être ce jugement;—considérant que, dans le système de lois que nous avons à administrer, le tribunal, dont il y a appel à un tribunal supérieur, n'est plus saisi de la cause, et ne peut pas être appelé à infirmer son propre jugement au mérite; que c'est au tribunal d'appel à l'infirmer, s'il y a lieu, et de plus à prononcer en même temps le jugement qui, dans l'opinion du dit tribunal, aurait dû être rendu par le tribunal de première instance; qu'au pareil cas, le décrêt de Sa Majesté en Conseil est envoyé, pour son exécution, à la présente Cour d'Appel, voit qui alors à ce qu'il soit exécuté par la dite Cour Supérieure (Court de première instance);—considérant que la dite Cour Supérieure a, par son jugement du 30 septembre 1861, duquel jugement il y a maintenant appel à cette Cour, infirmé son premier jugement rendu en cette cause, savoir celui du 30 avril 1858, en rendant un jugement tout différent à ce dernier, ce que la dite Cour Supérieure n'aurait pas dû faire, devant au contraire s'abstenir d'infirmer elle-même son propre jugement au mérite, sauf à la partie qui lui avait présenté requête à cet effet, à interjeter appel de sa décision à cette Cour, et de là à Sa Majesté en Conseil; et qu'en agissant ainsi, la dite Cour Supérieure a agi contrairement aux lois du Bas Canada, et que, par conséquent, il y a lieu d'infirmer le susdit jugement du 30 septembre 1861;—infirme, &c., &c., &c.*

Abbott & Dorman, for appellants.
Bethune & Dunkin, for respondent.

Judgment of Court below reversed.

(S.B.)

* *Vide* 5 L. C. Jurist, P. 57, for Report of the case in the Privy Council.

COURT OF QUEEN'S BENCH.

MONTREAL, 1st SEPTEMBER, 1862.

Coram SIR L. H. LAFONTAINE, Bart., C. J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, A. J.

DAME ROSALIE JARRY & *vir*,
(*Adjudicataire in the Court below,*)
APPELLANTS;

AND

THE TRUST AND LOAN COMPANY OF UPPER CANADA,
(*Opposant in the Court below,*)
RESPONDENT.

FOLLE ENCHERE—MARRIED WOMEN—ASSIGNATION.

HELD:—That where a rule for *folle enchere* obtained against a married woman has not been served upon the husband of the woman, all the proceedings on the application for *folle enchere* will be set aside as null and void, inasmuch as the married woman, notwithstanding her being separated as to property, has not ceased to be *sous puissance de mari*.

On the 21st November, 1859, the appellant, Dame Rosalie Jarry, became *adjudicataire* of a property sold by the Sheriff of the District of Montreal, in execution of the judgment of separation as to property obtained by the appellant Jarry against her husband Simon Lacombe. The bid of the appellant Jarry was received by the Sheriff, and she became *adjudicataire* by virtue of a special power of attorney from her husband, of which an authentic acte was attached to the return of the writ of execution.

The appellant Jarry, who had retained in her hands the price of her adjudication by giving security, not having deposited this price after the judgment of distribution which gave the amount to other creditors, the respondent, who was one of these creditors, made in the Court below a motion and obtained a rule *nisi*, in order to the re-sale of the land in question *à la folle enchère* of the *adjudicataire*.

This motion and rule were served only upon the appellant Jarry, and her husband received no notice whatever.

The appellant Jarry alone appeared at the return of the rule, and the following judgment (28th February, 1862, BADGLEY, J.) was rendered:

"The Court, having heard the said opposant, the Trust and Loan Company of Upper Canada, and the said adjudicataire by their counsels upon the rule for *folle enchère* obtained by the said opposant against said adjudicataire on the seventeenth day of December, one thousand eight hundred and sixty-one, examined the proceedings and deliberated thereon, doth declare the said rule absolute with costs, inasmuch as it appears by the answer or declaration in writing of the Sheriff of this District made and fyled in this cause to the motion of the said opposant, the Trust and Loan Company, requiring him to shew cause why he, the said Sheriff, had not paid to the said opposant the different sums of money awarded to the opposant in and by the judgment of distribution duly homologated according to law in this cause, and afterwards delivered to the said Sheriff according to the course and practice of this Court, that the said Dame Rosalie

Dame Rosalie Jarry, et vir. and The Trust and Loan Company of U. C.

Jarry, the plaintiff and adjudicataire of the immovable property hereinafter mentioned and described, has neglected and refused to pay to the said Sheriff the amount of her purchase money still due, to wit, the sum of five hundred and twenty-five pounds four shillings and seven pence currency, of lot number one described in the schedule filed in this cause by the said Sheriff annexed to his return to the writ of execution issued in this cause marked A as follows, to within the French language, No. 1. 'Un lot de terre sis et situé en la cité de Mont-'réal, de la contenance de quarante pieds de longueur sur quatre-vingt-dix-neuf 'pieds de profondeur, tenant par devant à la rue St. Catherine, en arrière par 'les héritiers Guy, du côté Ouest appartenant aux dits héritiers Guy et Fred-'erick Finlay, du côté Est à Pierre Labelle, avec une maison en briques à un 'étage et une écurie en briques dessus construites.' Doth order that a writ of *Venditioni Exponas* do issue in due course of law in this cause, ordering the said Sheriff, after the usual advertisements and publications in that behalf, to proceed to the sale *de novo* of the said lot of land purchased as aforesaid by the said Dame Rosalie Jarry, at the *folle enchère* costs and charges of the said Dame Rosalie Jarry."

The judgment of the Court below was reversed in appeal, and the judgment in appeal was recorded as follows:

La Cour, * * * 1° considérant que la demande ou Règle pour folle enchère, obtenue contre l'appelante, n'a pas été signifiée au mari de la dite appelante, et que, par conséquent, toute la procédure sur la dite demande pour folle enchère est entachée de nullité, et que la dite appelante est bien fondée, en répondant à la dite règle, à invoquer cette nullité, puisqu'elle n'a pas cessé, nonobstant sa séparation de biens, d'être sous sa puissance de mari, et qu'il s'agit, en cette instance, d'adjudication d'immeubles;

2° Considérant que, dans le jugement de la Cour de première instance, qui ordonne qu'il émane un bref de *Venditioni exponas*, à l'effet de faire procéder *de novo* à la vente du terrain en question à la folle enchère de la dite Rosalie Jarry, il y a mal jugé, duquel jugement le présent appel a été interjeté;

Infirme le susdit jugement, savoir le jugement rendu le 28 février 1862, par la Cour Supérieure siégeant à Montréal, avec dépens, sur le présent appel contre l'intimée; et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre, met au néant la dite demande, ou règle pour folle enchère, et toute la procédure, concernant icelle, comme étant entachées de nullité, et remet les parties dans le même état qu'elles étaient avant l'introduction de la dite demande ou règle, pour folle enchère, le tout avec dépens, etc.

Appeal maintained.

Bondy & Fauteux, pour les appelants.
H. Judah, pour l'intimée.
(F. W. T.)

Vide *Cloutier* v. *Cloutier*, 10 L. C. Rept. 457, and *McDonald* v. *McLean*, 11 L. C. Repts, both decided by Taschereau, A. J., at Quebec.

MONTREAL, 12TH NOVEMBER, 1863.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram SIR L. H. LAFONTAINE, Bart., C. J., DUVAL, J., MEREDITH, J., MONDELET, A. J.

No. 79.

JOHN STODDART et al.,

Plaintiffs in the Court below,

APPELLANTS;

AND

LOUIS LEFEBVRE,

Defendant in the Court below,

RESPONDENT.

HELD:—That when it is proved, in a petitory action, that the possession of the defendant's predecessors in the occupation of the land claimed is antecedent to the date of the plaintiff's title, although the defendant may not be able to avail himself of such possession in support of a plea of prescription of thirty years, for want of a title thereto, the action of the plaintiff will nevertheless be dismissed.

This was an appeal from the following judgment rendered by the Superior Court at Montreal, the Hon. Mr. Justice Berthelot presiding, on the 30th April, 1861 :—

"La Court, après avoir entendu les parties par leurs avocats sur le mérite de "cette cause, examiné, la procédure, pièces produites et le témoignage et avoir "sur le tout mûrement délibéré, considérant que la seule portion où partie de "l'immeuble revendiqué par les demandeurs, et désigné en leur déclaration, "dont le défendeur est en possession, est désignée comme suit, savoir: tenant "par un bout à la profondeur de sa terre, qui a son front sur le chemin de "Chambly, à l'autre bout à la terre des héritiers Bigonnesse, du côté North-Est "par la terre de Julien Brosseau, et de l'autre par la terre du Docteur Grosbois, "et qu'il en a été ainsi en possession tant par lui que par ses auteurs et prédé- "cesseurs, les propriétaires de la terre qui a son front sur le chemin de Chambly, "depuis plus de trente ans, et ce franchement, publiquement et sans inquiéta- "tion, ce qui appert par la preuve, et que par là il en a acquis la propriété par la "prescription de trente ans, par lui invoquée dans et par son plaidoyer, a dé- "bouté la dite action avec dépens, ditraits à MM. Moreau, Ouimet et Morin, "avocats du défendeur."

The action in the Court below was a petitory one, and reposed on a deed of sale and concession executed on the 27th October, 1809.

The defendant pleaded, in effect, the prescription of thirty years; denying specially that the plaintiffs and their *auteurs* ever had possession of the property in dispute.

MEREDITH, Justice, *dissenting*.—It is established incontrovertibly that the real estate in dispute in this cause forms part of a lot of land granted by the Baroness of Longueuil to one Duncan Montgomery, by a deed of sale and concession bearing date the 27th October, 1809; and that the appellants are the legal representatives of the said Montgomery. It is also, I think, sufficiently proved that Montgomery took possession of the land so granted to him.

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Léon Bigonnesse, the owner of an adjoining farm, says:

"J'ai connaissance que le dit feu Duncan Montgomery a souvent vendu du "bois sur ce terrain aux habitants de Chambly; il vendait ce bois au demi ar- "pent, ou au voyage. Je n'ai pas acheté du bois moi-même du dit Mont- "gomery, parce que nous en avions sur notre terre."

The evidence of this witness is confirmed by that of Antoine Bigonnesse and Joseph Huot; and considering that Montgomery had, beyond doubt, a good title to the land respecting which it is proved he exercised acts of ownership, I think that the fact of his having taken possession is sufficiently proved. (1) At the same time it may be observed that the title deed of 1809, from the Baroness of Longueuil to Montgomery, upon which the plaintiffs rely, bears date before the commencement of the possession of Huot, which the defendant wishes to unite to his own; and authorities are not wanting to establish that, under such circumstances, the title of the plaintiffs ought to prevail over the subsequent possession relied on by the defendant.

The well known rule on this subject as it is to be found in Merlin's Repertoire is as follows: "Mais quand le titre que vous produisez est antérieur à la pos- "session de la personne contre laquelle vous avez une demande en revendica- "tion, il est, seul, suffisant; parce qu'on présume que celui qui vous a vendu ou "donné l'héritage, en était le possesseur et le propriétaire."—(2)

The same rule is to be found in Guyot's Répertoire, (1) and evidently has been taken from the No. 324, of Pothier, "Traité du Domaine de propriété." In the present case no doubt has been cast upon the title from the Baroness of Longueuil to Montgomery; and, according to the foregoing authorities, under that title, which has not been questioned, and is of ancient date, the plaintiffs ought to have judgment in their favour, unless the subsequent possession upon which the defendant relies is sufficient to support his plea of prescription.

The chief question as to this part of the case, is as to whether the defendant can avail himself of the possession of Huot, antérior to his own, there being nothing to connect the two possessions, excepting that the one appears to have followed immediately after the other.

The authorities cited as to this point, by the learned counsel for the plaintiffs in the Court below, now the appellants, seem to me to establish clearly that this question ought to be answered in the negative.

Nothing can be more explicit than the rule from Troplong quoted by the appellants: "Il faut qu'il y ait entre le possesseur actuel et le précédent pos- "sesseur, une relation juridique, car s'ils se trouvaient juxtaposés, sans un lien "de droit, (which is exactly the case before us) *l'union ne pourrait s'opérer.*"(2) And the example given by Troplong shows, beyond doubt, that in the passage just quoted he had reference to the prescription of thirty years.

Troplong refers to Dunod, page 20, where we find the following passage:

(1) Troplong, Prescription, vol. 1, p. 434, No. 251, and authorities in note (6) Ed. of 1836.
(2) Merlin, Rep. Verbo Revendication, § 11, No. 3, vol. 29, p. 418.
(1) Guyot, Rep., vol. 15, p. 622, Verbo Revendication.
(2) Troplong, vol. 1, Prescription, No. 435.

"L'on peut, pour rendre la prescription complète, joindre à sa possession "celles de son auteur médiat ou immédiat, soit qu'on y ait succédé à titre uni- "versel ou particulier, à titre lucratif ou onéreux; si, par exemple, l'on est héri- "tier d'une personne qui ait possédé pendant vingt ans, il suffira d'en posséder "encore dix pour prescrire par trente années."

Dunod, it is also plain, speaks of the prescription of thirty years; and in common, as I believe, with all the other writers on the subject, (1) takes it for granted that one man cannot take advantage of the possession of another, unless he has succeeded to such other person "*à titre universelle ou particulier;*" unless, in a word, there be between them some legal connecting link.

As explaining the true meaning of the word *auteur* or *prédécesseurs*, I may here refer to a passage in Marcadé to which our attention was also drawn by the learned counsel for the appellants.

That author says: "C'est un point important que de savoir quel est en notre "matière le sens précis du mot auteur, puisque, selon que le possesseur qui m'a "précédé est ou n'est pas mon auteur, je pourrai, ou ne pourrai pas bénéficier "de sa possession." (2)

I may incidentally remark that here the author evidently takes it for granted that a possessor of real estate cannot, merely as such, claim the benefit of the possession of the previous possessor. Marcadé, after adverting to the rules on this subject laid down by Pothier and Troplong, gives his own definition of the word *auteur* as follows: "L'auteur est celui à qui le possesseur actuel a l'égale- "ment et régulièrement succédé dans la possession," and the author adds: "Du "moment en effet que la substitution du possesseur actuel au précédent s'est "faite d'une manière légale et pour une cause juridique, du moment que ce pos- "sesseur actuel est bien le successeur légitime de l'autre dans la possession, celui- "ci [redacted] donc bien son auteur."

The respondent placed great reliance on the words "supposé qu'il ne fasse "apparoir de titre," which form part of the 118th article of our custom; but in my opinion, these words establish that a party claiming the prescription of thirty years need not show any other title than his prescription to the property in dispute; but they do not show that a party claiming the benefit of the prior possession of another person can effectually do so without showing that the second possessor has taken the place of the first, as Marcadé says, "d'une manière "légale et pour une cause juridique."

At the argument in this cause, I adverted to a number of petitory actions instituted by me in 1839, in this district, for the heirs Allsopp; and on looking into the records of some of those cases, I find that each of the defendants pleaded the prescription of thirty years, "*tant par lui-même que par ses auteurs et pré-* "*décesseurs*," and claimed the value of improvements made in the same way "*tant par lui-même que par ses auteurs et prédécesseurs.*"

The defendants, in order to avail themselves of the possession of the previous possessors, submitted interrogatories such as the following to their witnesses:

(1) In addition to the authorities cited by the appellants, V. Code Civ. du Bas Canada, Tit. de la Prescription, chap. 2, art. 19

(2) Marcadé, Prescription, page 180.

Stoddart et al., and Lefebvre.

"From whom has the defendant purchased the said lot of land and when?" "Has not the defendant purchased said parcel from one.....who had purchased the same from one.....?" But these interrogatories were, of course, rejected; and the judgments rendered in those cases by Chief Justice Vallières, and Judges Rolland, Gale and Day concluded as follows:

"The Court rejecting the defendant's claim for improvements made by persons "who possessed the said land before him, and by him called his *auteurs*, but not "proved to be such." (1)

It may be right to mention, although I do not think it affects the principle which those judgments tend to establish, that although the possession proved in the Allsopp cases extended over a very long period, and although the improvements proved in those cases to have been made were very extensive, yet it was also established that the lands in dispute were generally known as belonging to the Allsopp family, and that the defendants, and those who had been in possession before them, were not generally considered as the owners of the land, but as persons holding it for their improvements.

I shall conclude by observing that at the time of the argument in this cause it seemed to me, and it still seems to me, that to be convinced of the unreasonableness of the doctrine contended for by the respondent, it is only necessary to attempt to apply that doctrine to any ordinary case: for instance we shall suppose B, having held a lot of land belonging to A for a period of twenty-eight years, and being unwilling any longer to retain property not belonging to him, to give it up: and C, then, without any authority from B, to take possession of the same land,—I ask, would it not, to say the least, be quite as reasonable, in the case supposed, for A, the true owner, to say that B possessed for him, as it would be for C, the second possessor, to claim the benefit of the possession of B. And I further ask, would it be possible, in a controversy between A, the owner of the land by title, and C, the possessor of it for two years, to award the land to C; because in addition to his own possession of two years, another person, namely B, had held the same land for twenty-eight years.

Again, let us suppose that the defendant in this cause had pleaded that one Huot possessed the land in question for a period of twenty years, *franchement publiquement et sans inquiétation;* and that he, the defendant, then entered upon the land and possessed it in the same way for ten years; and that the defendant, by his plea, claimed the land in consequence of Huot's possession, and his own,—I think no difficulty would be felt in holding such plea bad upon demurrer; and yet the allegations of such plea would agree, in principle, with the facts proved in the present case.

When this view of the case was mentioned at the argument, the senior counsel for the respondent observed, that there is a presumption in favour of the

(1) *Vide* No. 411, Allsopp *vs.* Scott, 1842,—407, Allsopp *vs.* Buck,—409, Allsopp *vs.* Buck,—415, Allsopp *vs.* Gibbs,—412, Allsopp *vs.* Gillard. In the article 2235 of the Code Civil, it is the word *auteur* that is used, but our custom uses the word *prédécesseur* not only in the article respecting the prescription of thirty years without title, but also in the articles respecting the prescription of ten and twenty years with title. *V.* articles 113, 114, and 118, C. de P.

second possessor, that he is entitled to the possession of the first. No authority, however, was then cited, or has since been submitted, in support of this view, which is opposed to the opinions of Troplong, Dunod, and other writers on this subject, already adverted to, and it will be recollected that the Court of King's Bench at Montreal, Chief Justice Vallières being president, refused to admit such a presumption even to support a claim for improvements. Stoddart et al., and Lefebvre.

Upon the whole it seems to me that the plaintiffs showed a good title to the land in dispute, namely, the grant from the Baroness of Longueuil, in 1809; and therefore that the defendant was not entitled to succeed on account of the weakness of his adversary. And I am further of opinion that the defendant was not entitled to succeed on account of his own strength, because he could not add Huot's possession to his own; and I therefore think that he was not entitled to the judgment which has been rendered in his favour.

Mr. Justice Duval and Mr. Justice Mondelet agree with me in saying that the defendant is not entitled to avail himself of the possession of Huot; and this being admitted, it seems to me to follow that the plaintiffs, whose title and acts of possession (by their admitted *auteurs*) are long anterior to the possession of the defendant, ought to recover the land in dispute. I am, however, alone in this opinion.

SIR L. H. LAFONTAINE, Bart., C. J.—Question de prescription de trente ans sans titre.

1o. En fait, je suis d'opinion que le défendeur a fait sa preuve, c'est-à-dire que, tant par lui que par ses prédécesseurs, il a possédé par l'espace de trente ans, ainsi que l'exige l'article 118 de la coutume de Paris.

2o. Le point de droit soulevé par les appelants, est que Lefebvre, l'intimé, ne peut joindre la possession de Huot à la sienne, *n'ayant pas prouvé qu'il était aux droits du dit Huot.*

En effet, l'intimé n'a pas produit et n'a pas invoqué de titre; il s'est contenté d'invoquer le fait de la possession de son prédécesseur Huot et de joindre cette possession à la sienne. L'article 118 lui donnait ce droit: "supposé qu'il ne fasse apparoir de titre," porte le susdit article.

Les appelants ont cité plusieurs autorités qui, dans ce qu'elles peuvent avoir, en apparence, d'applicable, ne se rapportent qu'aux prescriptions de 10 ou 20 ans, et plus particulièment aux vices qui entachent ces prescriptions, tous plus ou moins reconnus dans le droit romain; "mais ils n'étaient pas un obstacle à la prescription trentenaire," dit *Troplong*, au no. 437, le deuxième qui suit le numéro cité par les appelants. *Dunod* a aussi été cité par eux. "Mais l'autorité de *Dunod*," ajoute *Troplong*, au no. 442, "est ici très-suspecte; il a laissé en route son guide habituel, d'Argentré, et n'a pas fait attention à cette doctrine du savant interprète de la coutume de Bretagne: "Lorsque nous interrogeons nos institutions, nous trouvons que l'usage du barreau, le consentement du peuple, l'autorité du droit national, nous ont affranchi de ces distinctions de vices réels et personnels. Nous les avons exclus de la pratique et des jugements. Aucun vice ne s'oppose à l'acquisition des tiers par la prescription. L'utilité publique l'a emporté chez nous, et nous avons voulu consolider le domaine de choses et tranquiliser les acquéreurs."

"Dunod, dit Troplong, a pu penser peut-être que d'Argentré n'a ainsi parlé que pour la coutume de Bretagne; mais tel était le droit commun."

Stoddart, et al., and Lefebvre.

Il nous suffit de comparer les trois articles de la coutume de Paris qui ont rapport aux deux principales divisions de la prescription. L'article 113, (prescription de 10 à 20 ans) dit: "*à juste titre et de bonne foi*, tant par lui que par ses prédécesseurs, *dont il a le droit et cause*..." et l'article 114 (sur la même prescription) "par lui et ses prédécesseurs, *desquels il a le droit et cause*.....à juste titre et de bonne foi....."

Dans l'article 118 (prescription trentenaire) on trouve bien les mots tant par lui que par ses prédécesseurs," mais, ni avant, ni après on ne trouve ceux: "dont il a le droit et cause," non plus que ceux: "à juste titre et de bonne foi," des articles 113 et 114. Puis, on lit, de plus, dans l'article 118: "supposé qu'il ne fasse apparoir de titre." En prescription de 10 ou 20 ans, il faut un titre; de plus, pour avoir droit à la conjonction de possession, il faut que celui qui invoque la prescription établisse qu'il "a le droit et cause" de son prédécesseur, soit à titre universel, tel qu'un héritier, soit à titre particulier, tel qu'un acheteur. Rien de cela n'est exigé en prescription trentenaire. "Celui qui n'a ni titre ni bonne foi," dit *Troplong*, au no. 819, "prescrit contre toutes les actions personnelles et réelles par trente ans." C'est en commentant l'article 2262 du Code Civil, que *Troplong* s'exprime de la sorte, et l'on sait que cet article est ainsi conçu: "Toutes les actions, tant réelles que personnelles, sont "prescrites par trente ans, sans que celui qui allègue cette prescription soit "obligé d'en rapporter un titre, ou même qu'on puisse lui opposer l'exception "déduite de la mauvaise foi." C'est, en ce qui peut regarder la question qui nous occupe, la simple répétition de l'article 118 de la coutume de Paris.

Cet article permet à un défendeur qui est troublé et qu'il exempte de faire "apparoir de titre," de "bonne foi," non plus, par conséquent, qu'il "a le droit et cause" de son prédécesseur, de joindre seulement la possession de ce prédécesseur à la sienne. Voilà toute la preuve que la *coutume* exige du défendeur, qui invoque la prescription trentenaire. C'est un simple fait que le défendeur a la liberté et le droit de prouver, sans prouver en même temps les rapports qui ont pu exister entre lui et son prédécesseur. Autrement, il faudrait aller au delà de l'article 118, et dire qu'il exige ce qui n'y est pas écrit, ou plutôt qu'il exige même le contraire de ce qui y est écrit, à savoir: "supposé qu'il ne fasse apparoir de titre."

Si, en pareil cas, un défendeur doit être tenu à faire la preuve des rapports qui ont pu exister entre lui et son prédécesseur, ce ne pourrait être tout au plus, ce me semble, qu'une preuve verbale. Or, des témoins prouvent que l'intimé a acquis de Huot ou de ses héritiers.

Je suis donc d'avis de confirmer le jugement.

DUVAL, J.—I concur in the judgment which is now being rendered, on the ground that the land in dispute is proved to have been in possession of Pierre Huot before and at the date of the concession deed to Montgomery in 1809. We have first old Madame Grégoire, a daughter of Huot, who was 70 years of age when she was examined, who swears she was born on the land, and that her father lived there until he died, about 33 years ago. Then we have the evidence of Michel Paré, who was 80 years old when examined, who swears that Pierre Huot died about 30 years ago, and that he was then in possession of the land, and had been continuously in possession of it for upwards of 30 years.

In the absence therefore of proof of adverse possession by Montgomery, or any one claiming through him, I cannot see why we should disturb the judgment of the Court below.

The plaintiff has put his own interpretation on his alleged title. What reason does he assign for allowing this property to remain in the possession of others for upwards of 30 years? He has made an attempt to prove that he sold wood off this property. As the land was *en bois debout* this is an act of trespass, not of possession recognized by law. I cannot, however, concur in the opinion expressed by His Honor the C. J. on the question of prescription; the defendant cannot, in my opinion, avail himself of the possession of those who preceded him, for they are not his *auteurs*. Troplong has correctly laid down the rule of law on this subject.

MONDELET, J.—Action pétitoire.—Défense et prescription de 30 ans, tant par lui-même (défendeur) que par ses prédécesseurs.

Il est assez difficile de savoir à quoi s'en tenir à l'égard de l'une ou de l'autre partie.

D'abord la possession du défendeur n'a pas été *de lui-même* 30 ans. Que veulent dire ces mots "*prédécesseurs*" de la coutume? Suffit-il que le défendeur possède et qu'il apparaisse qu'il possède ce qu'ont possédé des individus qu'il ne représente, ni à titre universel, ni à titre particulier ou autre? J'en doute fort et je m'aperçois que ceux qui ont écrit sur cette question sont loin d'être d'accord. Que faire? La coutume parle de *prédécesseurs*; les tribunaux doivent-ils dire que ce mot signifie ou implique cession de droit à quelque titre? La coutume se tait, mais la raison ne semble-t-elle pas nous suggérer qu'il faut qu'il apparaisse quelque rapport entre les prédécesseurs et celui qui, à sa propre possession, prétend unir celles de gens avec lesquels il ne fait pas voir qu'il ait le moindre lien? Cela me paraîtrait assez vraisemblable.

Quant à la tradition de la part de Montgomery aux demandeurs ou à ceux qui seraient dans le cas de se présenter, où en est la preuve?

Les Huot et les Guertin ayant eu la possession avant le titre des seigneurs à Montgomery, ne s'en suivrait-il pas, si toutefois le mot *prédécesseurs* reçoit de la part de la Cour l'interprétation qu'y donne le défendeur, que cette longue possession suffirait pour repousser la prétention des demandeurs? Je le penserais.

Autre question: le défendeur, dit-on, n'a jamais été en possession d'un lot décrit comme ayant 45 arpents; ce n'est pas le même terrain. On a dit: s'il a moins de 45 arpents les demandeurs auraient moins. La réponse est qu'il s'agit de la description. Or un lot de terre, une terre, un terrain décrit comme ayant 45 arpents, et qui se trouve avoir d'autres terrains et aboutissants, et moins d'arpents, n'est plus le même terrain. Si tel est le cas, l'action, telle qu'intentée, ne pourrait tenir.

Pour le présent je suis enclin à dire que l'action devrait être déboutée comme elle l'a été.

Judgment of Court below confirmed.

Dorion, Dorion & Sénécal, for appellants.
Moreau, Ouimet & Morin, for respondents.
Henry Stuart, Q.C., Counsel.

(S.B.)

COUR SUPERIEURE.

ST. HYACINTHE, 28 NOVEMBRE 1863.

Coram SICOTTE, J.

No. 754.

MERRILL *vs.* HALARY.

JUGÉ:—Que l'acquéreur de biens immeubles par contrat antérieur au statut 23 Victoria, chap. 59, peut, s'il est troublé ou a de fortes raisons de craindre d'être troublé par action hypothécaire ou en revendication, retarder le paiement du prix d'achat, jusqu'à ce que le vendeur ait fait cesser ce trouble, tout comme s'il était acquéreur en vertu d'un contrat postérieur à cette loi.

PER CURIAM:—Le demandeur réclame le prix de vente d'un immeuble vendu le 7 juillet 1857.

Le défendeur plaide qu'il a juste sujet de craindre d'être troublé par des actions hypothécaires ou en revendication, à raison des droits acquis sur l'héritage, au profit de Messieurs Woods, les vendeurs du demandeur, et dont le contrat de vente a été enregistré pour la conservation de leur privilége et hypothèque de bailleurs de fonds.

Le demandeur par ses réponses attaque le droit du défendeur à faire valoir ce moyen, parce que le statut, chap. 59, 23 Victoria, n'a pas d'effet rétroactif, et ne peut s'appliquer aux contrats de vente passés avant le 19 mai 1860.

Quelle était la loi sur la vente, avant 1860 ?

Le vendeur devait livrer la chose vendue et garantir l'acquéreur dans sa possession et contre tous troubles. L'acquéreur devait payer le prix convenu ; et à défaut du paiement, le vendeur pouvait revendiquer la chose vendue comme étant encore la sienne ; le contrat de vente n'étant parfait que par la livraison de la part du vendeur et par le paiement de la part de l'acquéreur.

La loi de 1860 n'a pas abrogé ces dispositions.

Il y avait bien, avant 1860, une jurisprudence, qui était loin d'être uniforme et universelle, appuyée sur l'opinion imposante de Pothier, qui allait à établir que l'acquéreur ne pouvait refuser le paiement, à raison de la seule crainte d'éviction ou de troubles qui pourraient surgir par l'exercice de droits hypothécaires, et qu'il fallait un trouble constaté par poursuite judiciaire pour permettre à l'acquéreur de refuser le prix.

Pothier ne cite qu'un arrêt rendu en 1669, qui avait ainsi jugé.

Cette opinion, qu'on prétendait fonder sur le droit romain, si propre par ses subtilités à permettre différentes conclusions, n'était pas acceptée par tous les jurisconsultes ; et c'est dans les textes mêmes des lois romaines que l'on cherchait la preuve que cette opinion était contraire à la loi et à la jurisprudence romaines.

Car loi romaine bâsait le droit à la propriété, non pas sur la convention, mais sur la tradition. Le contrat, la convention seule, ne fesait pas acquérir le domaine ; il fallait qu'il y eût tradition. Cette doctrine de la nécessité de la tradition prévalut en France, dans les pays de droit écrit, mais non dans les pays coutumiers, mais non dans la coutume et vicomté de Paris. Cela fut jugé dans ce sens, en 1726, par le parlement.

De Grainville, qui rapporte cet arrêt, dit: "La question paraît considérable, parce que l'autorité des auteurs paraissait contraire à des principes d'équité, qui faisaient une grande impression. Nonobstant ces autorités on a décidé que la loi "Quoties" n'en était point une dans la coutume de Paris."

Merrill vs. Halary.

Cette loi était dans ces termes: *Quoties duobus in solidum prædium jure distrahitur, manifesti juris est, cum cui priori traditium est in detinendo dominio esse potiorem.*

La loi "Quoties" n'est pas reçue en Canada. Ainsi jugé en appel en 1836, dans la cause de Bowen vs. Ayer, et en Cour Supérieure, dans Dusseau vs. Daigneault.

Cette nécessité de la tradition, que le code français a rejeté, et que notre jurisprudence a également réprouvée, est la bâse de l'opinion de Pothier sur l'exécution du contrat de vente, et il est important de constater ce fait pour bien comprendre les divergences d'opinions sur une autre sorte du même contrat et sur d'autres textes de la loi sur le même sujet.

Avant 1860, l'acquéreur pouvait-il refuser le prix, avant qu'il y eût trouble?

Domat, livre 1, tome 2, section 3, No. 11, enseigne que: "si l'acquéreur découvre, avant le paiement, qu'il soit en péril d'éviction, et s'il le fait voir, il ne pourra être obligé de payer le prix qu'après qu'il aura été pourvu à sa sûreté." C'est à Domat que les rédacteurs de code ont emprunté une disposition analogue à celle que nous avons écrite en 1860.

Bourjon, vol 1, page 477, no. 10, dit: "Lorsqu'il y a péril d'éviction et que le péril est juridiquement prouvé, le prix, quoique échu, ne peut être exigé. Cette suspension de paiement est fondée sur une souveraine équité." Au No. 12, "découverte faite par l'acquéreur que l'héritage est sujet à un douaire coutumier, suspend l'exigibilité de moitié du prix; c'est rente d'autrui," dit Bourjon, "ce qui est bien suffisant pour fonder la proposition."

Cette seconde citation de Bourjon fait voir que, par les mots "juridiquement prouvé," cet auteur n'entendait pas parler de poursuites judiciaires.

Il est important de rappeler que Domat et Bourjon se fondaient sur le droit romain, qui voulait que "*ante pretium solutum, domini questione motâ, pretium emptor solvere non cogitur, nisi fidejussores idonei a venditore ejus evictionis offerantur.*"

Sous l'empire des lois romaines, qui était la bâse de l'ancienne législation ou plutôt de l'ancienne jurisprudence, la seule crainte d'éviction, si elle était prouvée, avait un fondement réel suffisant, pour que l'acquéreur ne put être tenu de payer son prix, sans caution, même à l'égard des créanciers indiqués par le contrat, pour recevoir le prix.

Celui qui achète veut acquérir un héritage et non des procès, dit Dénisart, en déclarant que celui qui avait acquis un héritage grevé de substitution pouvait faire résilier et annuler son acquisition; et il cite un arrêt qui l'avait ainsi jugé.

La loi de 1860 a-t-elle introduit un droit, un principe nouveau, en statuant que: si l'acquéreur de biens immeubles est troublé ou a de fortes raisons de craindre qu'il sera troublé par quelque action hypothécaire ou en revendication, il aura droit de retarder le paiement du prix d'achat jusqu'à ce que le vendeur ait fait cesser ce trouble, à moins que le vendeur n'aime mieux donner caution-

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nement, ou à moins qu'il ne soit stipulé au contrat de vente que l'acquéreur paiera nonobstant tel trouble ou crainte de tel trouble ?

Cette loi ne change certainement rien à l'ancienne jurisprudence, quant au péril d'éviction pouvant surgir de l'action en revendication, telle qu'enseignée par Pothier, par Bourjon, dans le cas de la vente du bien d'autrui ou du douaire coutumier. Si elle n'est pas conforme à l'arrêt isolé de 1669, elle est en tout point conforme à l'esprit comme à la lettre du droit romain.

Cette loi n'a fait que proclamer des règles admises précédemment, comme raison écrite ; et vu le conflit d'opinions qui pouvait exister, non pas sur le droit, mais sur l'exercice de ce droit, n'a fait que formuler une disposition conservant d'une manière plus précise une régle découlant du principe essentiel à la vente et reconnue dans tous les temps : celui de livrer la chose vendue et de maintenir l'acquéreur dans sa possession.

Le principe de la rétroactivité n'est pas applicable, parce que le produit de cette loi n'a pas soumis le passé à son empire, même en supposant qu'elle fut introductive, sinon d'un droit nouveau, mais au moins d'un procédé nouveau relativement au remède que l'acquéreur pourrait à l'avenir employer pour être protégé dans sa possession. Ce n'est pas le contrat qui est attaqué ou modifié, dans ses effets essentiels et dans les causes inhérentes au contrat, mais ce sont seulement les suites du contrat qui sont réglementées. La nécessité de payer à temps convenu n'a pas été modifiée, mais si quelque chose a été modifié, c'est seulement l'exercice du droit de se faire payer. Or, il est justement enseigné par Merlin, (Rép. Jur., verbo Effet rétroactif) " que ce n'est pas rétroagir que de subordonner à l'avenir l'exercice de droits résultant de lois antérieures, à telles formalités, à telles diligences, à telles conditions qu'il plaît à la loi nouvelle d'imposer."

Ainsi l'intérêt conventionnel de l'argent, fixé par une loi antérieure, est exigible d'après le taux permis par cette loi. Mais une législation nouvelle peut dire au créancier : " tu te feras payer dans tel délai, sinon la prescription de deux ans sera accordée contre les intérêts, quoique la loi, sous l'empire de laquelle le prêt fut fait, ne permettait de prescrire qu'après trente ans."

Ainsi on a jugé que le rachat d'une rente constituée, faute par le débiteur de servir les intérêts durant deux ans, devait être réglé, non pas d'après l'ancienne législation, qui voulait que le rachat fût toujours à la volonté du débiteur, mais d'après le code qui a innové, mais sans rétroagir sur le contrat même, en modifiant seulement les suites du contrat, en décrétant que le débiteur d'une rente constituée en perpétuel peut être contraint au rachat, s'il cesse de remplir ses obligations pendant deux ans.

Ainsi jugé, que dans le cas d'un bail consenti sous une loi de 1791, qui n'admettait pas la tacite reconduction, et dont l'expiration est arrivée sous le code, le fermier a pu continuer l'occupation par tacite reconduction, en vertu, non du bail, mais des dispositions nouvelles du code, qui permet la tacite reconduction.

La vraie maxime est, que les lois qui interviennent pour garantir l'exécution des conventions, sont applicables du jour de leur sanction à toutes les infractions, à toutes les causes de tort ou d'injustice, qu'elles ont pour objet de prévenir ou de réprimer ; et cela, sans distinction de la date des contrats qui contiennent

ces conventions; autrement, on verrait l'étrange anomalie du concours indéfini, et durant des siècles, de deux législations différentes sur l'exécution d'un même genre de contrat.

Notre régime hypothécaire fut profondément modifié par la loi sur la publicité des hypothèques. Cette loi, faite dans le but de protéger les acquéreurs et les créanciers contre les troubles et contre les fraudes, a bien introduit un nouveau système, mais elle n'a pas pu abolir, et elle n'a pas aboli les hypothèques constituées suivant l'ancien mode; mais, dans l'intérêt général, elle a fort bien dit aux créanciers, et sans rétroagir; vous ferez inscrire vos hypothèques dans telle forme, dans tel délai, sinon vous serez déchus.

Notre loi de 1860 est presque dans les termes de l'article du code français. Ce dispositif de notre régime hypothécaire, n'étant que pour garantir l'exécution des conventions et assurer les justes droits de chaque partie dans l'accomplissement et dans les suites du contrat, ne soumet pas le passé, mais seulement l'avenir, à l'empire de la loi, et n'a pas d'effet rétroactif.

C'est au tribunal à décider s'il y a juste sujet de crainte de la part de l'acquéreur, quand la question sera soumise plus tard. Aujourd'hui il n'y a qu'à prononcer sur la réponse en droit du demandeur à la première exception du défendeur; et, pour les raisons qui viennent d'être indiquées, la cour déclare cette réponse en droit mal fondée et la déboute avec dépens.

Réponse en droit renvoyée.

Bourgeois et Bachand, pour le demandeur.
R. E. Fontaine, pour le défendeur.
(P. B.)

MONTREAL, 31st OCTOBER, 1863.

Coram BERTHELOT, J.

No. 1052.

Joseph vs. Joseph.

HELD:—That on an application for imprisonment of a witness, resident in Montreal, for contempt, in not obeying a *subpœna* personally served, it is not necessary to prove the service of the *subpœna* by affidavit, nor that the original writ was exhibited to the witness, nor that tender was made of fees or expenses.

This was a rule against the defendant who resided in the city, and had been personally served with a *subpœna*, but failed to attend, to show cause why he should not be committed for contempt.

Dorman, showing cause, contended that the application was fatally defective, for want of proof, by affidavit, that service of the subpœna had been personally made, that the original had been exhibited, and that tender of fees or expenses had been made, and cited in support, 2nd Taylor on Evidence §1142-1124—Garden vs. Cresswell, 2nd Meeson and Welsby, p. 318, and Sexton *vs.* Boston, and Egan, Int. party, 5th L. C. Jurist, p. 344.

Bethune, for plaintiff, argued that however necessary it may be in England to make proof of service by affidavit, it could not be insisted on in Lower Canada. In England the subpœna is not served, as here, by a public officer. When

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therefore an application like the present is made in England, proof of service by affidavit is absolutely necessary, otherwise the Court would be without evidence that a subpœna was served at all, much less that it was served personally. Here, on the contrary, we have the return of service by the public officer made on his oath of office, and have consequently no need for an affidavit; all that the affidavit could establish being already fully supplied by the official return. Then as to the necessity of exhibiting the original writ, no such practice has ever prevailed in this country. And, upon the question of previous tender of fees or expenses, a witness residing in the city was bound to attend under our system, without such previous tender.

PER CURIAM:—I can see no difficulty in maintaining the present rule, but as this is the first case that I am aware of where the proceedings have been allowed by the witness to proceed so far as the maintaining of the rule, I shall grant the defendant a *locus penitentiæ*, and order him consequently peremptorily to appear on a fixed day. In maintaining this rule I do not hesitate to say that I am against the defendant on all the points raised by his counsel.

Rule for contempt maintained.

Strachan Bethune, for plaintiff.
Abbott & Dorman, for defendant.
(S. B.)

MONTREAL, 31ST DECEMBER, 1863.

Coram SMITH, J.

No. 1404.

Chapman vs. Nimmo.

HELD:—1. That if it be contended that the allegations of an affidavit for a *sa: ar:* before judgment are not true—and that the *sa: ar:* should be quashed, the only proper mode of doing so is by an exception *à la forme*.

2. That if a plea contains allegations and conclusions properly appertaining and peculiar to two different classes of pleas, and they are capable of being separated from each other—those which do not properly belong to the plea fyled will be rejected from it on demurrer.

Semble. That the more correct course would be to reject the whole plea with leave to replead.

Action on promissory notes not matured—commenced by *sa: ar:* before judgment. The affidavit was in the usual form.

The defendant fyled preliminary exceptions—on grounds which did not traverse the allegations of the affidavit as to the alleged secreting—and they were dismissed.

He then fyled a special plea to the merits, in which he alleged amongst other things:—

1. That the defendant was not insolvent, that the action was therefore premature.

2. That the defendant was not about to secrete his estate and effects.

3. That he never did secrete his estate and effects.

4. That at the time of the institution of the action the plaintiff was not the holder or owner of the notes sued upon.

And he concluded that the affidavit be declared unjustifiable and unwarranted, and the *saisie arrêt* quashed; and further that the action be dismissed.

The plaintiff demurred to those portions of the plea and conclusions which assailed the affidavit and the writ of *sa: ar:* and prayed that they might be rejected from it.

Abbott, Q.C., for plaintiff cited the case of Hubbard *vs.* Kemp (Sup. Court, Montreal,——1857,) in support of the demurrer, and urged that the plaintiff followed the ordinary course in seeking to strike out the objectionable portions of the plea, to establish that the objections to the affidavit and *sa: ar:* should have been taken by exception *à la forme*, he cited Leslie vs. Molsons Bank (8 L. C. Jur., p. 1.)

Macrae, for defendant, urged that the plea only took issue with the allegations contained in the declaration—and contended that the plaintiff could not allege inconsistency in the defendant's plea, since it only traversed his own declaration in the order in which the allegations appeared there.

He contended that although the case of Leslie *vs.* the Molsons Bank established the doctrine that questions upon the affidavit could be tried by *ex: à la forme*, that case did not go so far as to show that they could not also be tried by a plea to the merits.

Abbott, Q. C., in reply argued that from the fact of an allegation being in the declaration, it did not follow that it could be traversed by a plea to the merits, and instanced allegations descriptive of quality, domicile and the like, which could not.

And that if the issues raised by the plea upon the affidavit and writ of *sa: ar:* could properly be tried upon an *ex: à la forme*, they could not be so tried upon a plea to the merits, as there was a broad distinction between the subject matter and purpose proper to those two classes of pleas, which rendered it impossible that the same subject matter and purpose could be appropriate to both of them.

SMITH, J.—The objections to the affidavit and *sa: ar:* are plainly inconsistent with the remainder of the plea which attacks the foundation of the plaintiff's action. I am of opinion that in such cases the proper course would be to reject the pleading which is defective, and allow the party to replead—but the practice of the Court has undoubtedly been to strike out objectionable parts of a plea and leave the remainder. Though I consider this practice extremely unsatisfactory and inconvenient, I feel myself obliged to follow it, and shall act in this case in conformity with it.

The clauses of the plea and conclusion objecting to the affidavit and *sa: ar:* are therefore rejected with costs.

Demurrer maintained.

Abbott & Dorman, for plaintiff.
Macrae, for defendant.
(J.J.C.A.)

NOTE. Upon verifying the citation of Hubbard *vs.* Kemp, it appears that in that case the plaintiff demurred to a part of the plea only and concluded for the rejection of that part. But that the judgment as drawn (Day, Smith, and Mondelet, Justices) rejected the whole plea.

QUEEN'S BENCH, 1863.

MONTREAL, 12TH NOVEMBER, 1863.

Coram SIR L. H. LA FONTAINE, BART., Ch. J., DUVAL, J., MEREDITH, J., MONDELET, A. J.

Nos. 69, 12, 66.

Moses E. David (Plff. in Court below), Appellant,

AND

Alex. McDonald et al. (Defdts. in Court below), Respondents;

AND

The said *Alex. McDonald et al.*, Appellants,

AND

The said *Moses E. David*, Respondent;

AND

John W. Hopkins et al. (Defents. in Court below), Appellants,

AND

The said *Moses E. David*, Respondent.

HELD:—1. That where the floors of a building have sunk, in consequence of the insufficiency of the timber used to support the bridging joists and floors, the architects and superintendents and the carpenters and joiners, employed in erecting the building, are jointly and severally responsible for the damages incurred.

2. That parties thus *solidairement* liable may be sued in one and the same action.

3. That in estimating such damage, allowance will be made in favour of the architects and contractors for what the work would originally have cost, had timber been originally used of a size and quality sufficient to support the bridging joists and floors.

4. That in estimating such damage no allowance will be made to the proprietor for moneys paid by him to his tenants, for actual expenditure by them in removing out of the building during the time that the necessary repairs are being made.

These were appeals from a judgment rendered by the Superior Court at Montreal, on the 28th day of February, 1862, condemning the respondents and appellants, A. & A. McDonald and Hopkins, Lawford and Nelson, jointly and severally, to pay to the appellant and respondent David the sum of £51 1s 8½d cy., with interest from the 24th Sept., 1859, and costs.

The action in the Court below was brought against the said A. & A. McDonald, as the contractors, and Hopkins, Lawford, and Nelson, as the architects and superintendents, for the recovery of £420 cy., for damages incurred by David, by reason of the sinking of the floors of the second and third storeys of a building on Great St. James street, belonging to him, in which A. & A. McDonald had executed and performed all the carpenters' and joiners' work connected with the alteration and conversion of the same "into three stores," according to certain plans and specifications, prepared by and under the superintendence of the said Hopkins, Lawford and Nelson. The sinking of these floors, which was to the extent of one or two inches, commenced very shortly after the stores were occupied, and was caused by the insufficiency of the timber and materials used by the said A. & A. McDonald to support the bridging joists and flooring.

The architects and contractors severed in their defence:

A. & A. McDonald pleaded firstly an exception of cumulation, which was dismissed on the 31st December, 1859; secondly, an exception to the effect, that they were "mere jobbers, labouring carpenters and not professional

architects," and that everything they did was done "under the superintendence, control, direction, orders, and approval" of said Hopkins, Lawford and Nelson, and of plaintiff;" thirdly, an exception to the same effect as above, and further that the sinking of the floors was caused by the plaintiff or his tenants having "overloaded the floors of said buildings, at divers times, in a careless, negligent way," and lastly a *défense au fonds en fait*.

Hopkins, Lawford and Nelson pleaded an exception to the form, on the ground that they had been improperly joined in the action with A. & A. McDonald, which was dismissed on the 31st December, 1859.

They also pleaded the same matter by way of exception to the action on its merits, and by another exception they alleged that the defendants now pleading "are architects, and were requested by the plaintiff to make plans and specifi- "cations for carrying out certain alterations which the plaintiff proposed to make "in an old building belonging to plaintiff, situated in Great St. James Street, and "running through to Fortification lane, being the building in the plaintiff's "declaration referred to, restricting and binding the cost of said alteration, which "plans and specifications were made in a proper and workmanlike manner, and "were found fault with, and were by plaintiff and by his directions, and were "reduced as to outlay and expensiveness, the plaintiff insisting on the cheapest "possible mode of carrying out his views, and that the old floors were retained "by plaintiff from motives of economy, and only finally determined to demolish "the old flooring when three fourths of the floor joists had been laid, and the "plaintiff objected from the same reason, from girders being placed on the said "stores, and diminished the size of certain timbers, and omitted others.

"That the plans and specifications made were made to carry out the plaintiff's "said views, and without any warranty of any kind, and were revised and altered "by the plaintiff's request to suit his views; that the defendants never made the "representations in plaintiff's declaration referred to; that the allegations in the "said declaration, that the floors of the second and third stories had sunk two "inches 'by insufficiency of the timber used by the said Alexander and Allan "McDonald to support the bridging joists and the flooring, and was attributable "to the want of care, skill and attention of the said Alexander and Allan McDonald "and Hopkins, Lawford and Nelson, in the erection and completion of the said "works,' being the only allegations as to failure, want of skill or neglect on behalf "of the defendants, now pleading, is so vague as to prevent the defendants, now "pleading, from answering thereto; that the said allegation, in so far as it intends "to impute blame to the defendants now pleading, is denied, as also any joint and "several liability on the part of the defendants now pleading, with the said Alex- "ander and Allan McDonald.

"That moreover the front wall of the said building, built by Payette and "Perrault, settled several inches, and the said defendants, now pleading, recom- "mended that it should be taken down, and the plaintiff, nevertheless, compro- "mised with the said builders by deducting a large sum from their contract, to "wit, four hundred dollars: thereby, in the management and the carrying on of "said works, asserting his own right to control the performance of the work, "as well as the cost and the mode of carrying on the same.

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"That moreover if any damage was caused to the plaintiff, it was by his the "plaintiff's agents and servants, and not by the defendants now pleading, and if "the said sinking had been alleged to be attributable solely to the want of skill "and care of the defendants now pleading instead of being alleged as in the "plaintiff's declaration is set forth, and if it were proved to have been so attri- "butable, yet the plaintiff could not recover the damage set forth, which is not "direct damage, flowing from such want of care and skill or from neglect; that "moreover the said plaintiff's expenditures as alleged were not the legitimate or "necessary results of such alleged sinking, but were, in fact, wholly new works, "and were made with a view to improve said property, and the same cannot be "brought against any of the defendants or recovered in this action."

They also filed a *défense au fonds en fait.*

The cause was heard on the merits on the 22nd May, 1861, and David then submitted that he was entitled to judgment for $1550.75, as per statement, forming paper 68 of the Record.

On the 30th September, 1861, the Court (HON. MR. JUSTICE SMITH presiding) rendered the following Interlocutory order:

"The Court, having heard the parties by their respective Counsel upon the merits of this cause, and also upon the motion of the plaintiff, that the several objections by him taken at *Enquête*, as shown on the face of the depositions, be now maintained, having examined the proceedings, proof of record, and deliberated, doth reject the said motions; and, considering that the said plaintiff hath fully proved and established that the second and third flooring of the stores, erected by the said defendants under the contracts and agreements set forth in the declaration of the said plaintiff, had given way and sunk, as complained of in and by the said action; and, further considering, that it hath been fully proved and established that the sinking of the said floors was occasioned by the want of care and skill of the said defendants in using insufficient materials, inadequate to the weight of the flooring to be constructed, and that by reason thereof, and by law, the said defendants became and are jointly and severally liable as complained of in and by the said action; and further considering that it is not satisfactorily proved what sum of money would be requisite to place the flooring in the condition in which it ought to be under the terms of the contract entered into by the said parties in conformity to the specifications under which the said stores were erected, and that by the contract secondly entered into by the said plaintiff and the said Alexander McDonald, and bearing date at Montreal the nineteenth day of March, one thousand eight hundred and fifty-nine, the specifications were altered so as to meet the changes set forth in the said contract, and that it is not possible to determine what portion of such new works had reference to the flooring exclusively, or to the sum of money absolutely necessary to be expended in order to remedy the defects complained of, the Court, *avant faire droit* on the amount of damage which the said plaintiff is entitled to claim by reason of the defects complained of, doth order, that within fifteen days after the entering of the present judgment *Experts* be named by the said parties, *si non d'office* by this Court or a Judge thereof in vacation, and said *Experts* will visit the said stores, and by examination of the said specifications under which

the said stores were erected, and by the examination of witnesses, if necessary to be first duly sworn before a Commissioner duly authorized to take affidavits to be used in this Court, to estimate what sum of money it would be necessary to expend to have the flooring made safe and sufficient to meet the requirements of the said specifications, and to make their report on or before the seventeenth day of February next."

David, considering the reference of the Court as much too limited and restricted in its character, fyled an exception to the judgment and declined naming an *Expert*. The *Expertise* was consequently conducted without any interference therein by him.

On the 17th February, 1862, the *Experts* made the following Report:

"The undersigned *Experts'* named for the purposes of the judgment in this cause, of date 30th September last past, being duly sworn before a Commissioner duly commissioned for taking affidavits for this Court, do submit the following report which in our judgment will form a basis for the due consideration of the Court, to arrive at a settlement of so complicated a question in points of law and justice to all parties interested.

First, We are unanimously of opinion that the plaintiff has sustained no damage to the stores situated in [illegible]t. James street and St. Peter street, and as more fully described in the [illegible] contract, plans and specifications executed before J. H. Isaacson and Colleague, Notaries Public, bearing date 15th Sept., 1856, by the sinking of the second and third story floors as complained of.

Secondly, Having visited the above named stores, in company with the plaintiff in this cause, Alexander McDonald and James Nelson, two of the defendants in this cause, and being fully satisfied, from a thorough investigation of the building in connection with the original plans, specifications and contract in all their parts, and from various questions answered by the plaintiff and the two defendants above named on the points at issue, that the sole cause of the sinking of the second and third story floors was caused by the weakness of the timbers, and not from any other cause or defects in the material or labour employed in the building.

Thirdly, Having examined Tevil Appleton, being first duly sworn before a commissioner, duly appointed to take affidavits for this Court, doth state that he examined the stores, and submitted a report in connection with D. McNiven to the plaintiff, bearing date 3rd Feby, 1859, and was employed by the plaintiff to make out a new specification and plan for the strengthening of the second and third story floors. He further states that the pilasters and beams were not necessary for the support of the top ceiling, but were placed there for the benefit of the plaintiff in giving him an additional floor not contemplated by the original contract, plans and specifications. He further states that in taking down the floors, the timbering employed by the contractors, defendants in this cause, was much stronger than the sizes specified, and of good sound timber.

Fourthly, Having examined the plans and specifications under which the stores were erected, the materials used and the methods employed in checking and dovetailing the old beams into the new girders, which was done in the best manner and with the very best material, we further say that the deflection of the timbers

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was in consequence of a defective specification in the original contract in not providing for sufficient sized timber to sustain the weight intended to be put into the stores, and not from any other cause.

Fifthly, We further say that had the plaintiff carried out the instructions of his architects, defendants in this cause, as shown on original drawings, made and providing for and against such deflections complained of, the plaintiff insisting upon cutting down expenses by employing all the old timbers in the new alterations and effecting a saving in the original contract as executed by the defendants in this cause, amounting to the sum of seven hundred and ninety-three dollars 58 cents, which the plaintiff would have had to pay on the original contract.

Sixthly, We further say that the amount of costs required to put in the timbering of sufficient size and strength for the two floors complained of, according to the first contract as executed by the defendants in this cause, would amount to the sum of seven hundred and ninety-three dollars fifty-eight cents ($793.58): that is to say, the plaintiff would have had to pay the above sum as an extra amount beyond the contract sum entered into by the defendants, during the progress of the building under the second contract dated 19th day of March, 1859. The contract sum and value of the work done and executed was worth the sum of nine hundred and ninety-seven dollars 92½ cts., making a difference of costs between what the alterations would have cost at the time of the first contract during the progress of the works, and the second contract when the stores had been occupied, of the sum of two hundred and four dollars 34½ cts.

All which is respectfully submitted, and hath signed

S'd. HECTOR MUNRO,
" LAIRD PATON,
" WILLIAM RUTHERFORD.

Recapitulation of the figures showing the amount the plaintiff would have had to pay as extra work beyond the plans and specifications as originally contracted, for the sum of..... 793.58

The amount of cost and value of the work done and executed by Alexander McDonald, under contract dated 19th March, 1859, the sum of..... 997.92½

Showing the difference betwixt what the extra work would have cost under the first contract as extra work, and the second contract as finished..... 204.34½

There is a large amount of extra work done, such as the top story flooring, beaming, plastering, and sundry other works which have been done and executed solely for the benefit of the plaintiff, and for which we have taken no notice, and have confined our estimate and value of the work done to the second and third floors complained of.

Signed, HECTOR MUNRO,
" LAIRD PATON,
" WILLIAM RUTHERFORD.

The case having been re-submitted on the reports of the *experts*, the Court (the HON. Mr. JUSTICE SMITH presiding) pronounced the following judgment on the 28th February, 1862:—

"The Court, having heard the parties by their Counsel upon the merits of this cause, having examined the proceedings, seen the report of the *experts* named for the purposes of the judgment rendered in this cause on the thirtieth day of September last past, the said report filed in this cause on the 17th day of February inst., and having deliberated, doth adopt and homologate the said report, and doth adjudge and condemn the said defendants, jointly and severally, to pay and satisfy to the said plaintiff the sum of £51 1 8¾ current money of the province of Canada, with interest thereon from the 24th day of September, 1859, date of service of process, until actual payment and costs of suit."

Bethune, for David, contended (amongst other things) that the *experts* and the judge in the Court below had erred, in deducting what David might have had to pay originally had the timbers then been constructed of proper size and quality from the amount he actually expended in the repairs, as it was in evidence that none of the timber originally used was taken out in making the repairs; the new timbers being used merely as so much support to the old ones. The amount thus expended by David in putting in the new timbers was clearly in excess of all he had expended originally; what was thus spent originally being so much sunk irrespective of and in addition to what he had to expend afterwards. Then the Court below had not allowed any thing for the moneys David was obliged to reimburse to his tenants for their actual expenses of removing, &c., in consequence of the repairs, and which were proved to amount to $94.05. This was an evident error or oversight on the part of the judge who rendered the judgment appealed from, and ought in justice to be rectified by the Court of Appeal.

Mackay, for the contractors, contended that they and the architects ought not to have been sued together as in this case; that they could not legally be condemned in the same sum of damages, the liability of each set of defendants flowing from different *faits* or contracts; that they abundantly proved all their pleas; that they were and are not liable as alleged; the architects themselves swear to this, and very honorably have taken all blame from off the contractors. [Paper 64 of the Record.] Mr. David's instructions to the architects, as to what he wanted and what they were to make plans for, are stated in that paper, and are important. Mr. David ought to have been content with his recourse against the architects.

Much of the £420 sought by David he makes no proof of, and into it he would make enter an extra value, or *plus value*, thrown into his building on the last occasion of their being repaired. Upon making these last repairs he used materials and did works never contemplated in 1856. The experts best able to estimate such things have reported upon everything; their report upon which the final judgment passed is for quite enough against the architects in favour of David.

Robertson, for the architects, submitted the following points:—

1st.—That the judgment on the preliminary exception should have declared the declaration insufficiently libelled and vague, and that the appellants were not bound to answer it.

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2nd.—That no facts shewing a joint and several liability are alleged in the declaration; and that the plaintiff's action should not have joined matters arising from the contract with the McDonalds, with the claim against the appellants.

3rd.—That the plaintiff was the cause of this damage by his own act and by the instruction given to the appellants to make such plans as would reduce the cost and keep the old joists, and by not declaring that he required store houses of the strongest description, and by rejecting the plans as made by the appellants.

4th.—That the plaintiff was not justified in making, at the defendant's expense, first-class stores, and improving them far beyond the extent contemplated.

5th.—That the only liability of the appellants was for fair and reasonable professional skill in carrying out the alterations in the building, but that there was no responsibility or guarantee that the stores were to be sufficient to store the heaviest goods, the upper part being intended for light stores and for show rooms, for which purposes they were sufficient.

6th.—That the Court erred in rendering the interlocutory judgment, and that the report, in so far as it lays liability on the appellants, is erroneous, as well as the final judgment appealed from.

MONDELET, J., dissenting: (taking up first the David Appeal:)

The appellant in this case concludes to the confirmation of the judgment to the extent of £51 1 8¾, but complains of it, inasmuch as he pretends he should have obtained a condemnation for the whole amount he had sued for.

Before I advert to the merits of the case, I have to say, that the *exceptions de cumulation* put in by the McDonalds and the others should have been maintained and the app. ordered to *opter*, à *defaut de quoi*, his action should have been dismissed. I therefore think that in that respect, the judgment which dismissed those *exceptions de cumulation* should be reversed, and as a consequence thereof the final judgment should be reversed.

As to the merits, my opinion is that there has been no fault of the builders or architects: at least, it is doubtful whether they alone are to be blamed, the evidence as to David's own acts and directions, though not very satisfactory, still leaves enough upon one's mind as to lead to a favorable view of the case in favour of defendants. Besides, it is proved sufficiently to induce belief that the beams and floors gave way and sank more from excessive pressure than from want of proper construction.

I therefore think that, 1st, the judgment of the Court below should be reversed in so far as the *exception de cumulation* is concerned. 2. Should the difficulty be got over, then it is my opinion that if David is to get anything he should not recover more than he has obtained by the judgment of the Court below. But here again, having serious doubts as to whether he is entitled to any thing, it is a matter, in my view of the case, which, there being a legitimate cause for doubt, the defendants should have the benefit of it and the action should be dismissed.

The Honorable Judge then observed that the same remarks applied to the two other appeals which he was of opinion should be maintained.

SIR L. H. LAFONTAINE, BART., CH. J.:—

Toutes les parties, (demandeur et défendeurs) ont appelé des jugements de première instance. On serait porté à dire que, puisqu'elles en sont toutes mécontentes, c'est que le jugement est bon à première vue. Et je le crois.

Les deux McDonald sont charpentiers-entrepreneurs, et comme tels sont associés, les autres défendeurs Hopkins, Lawford et Nelson sont architectes et aussi associés comme tels.

En 1856, le demandeur avait à faire faire à sa maison, au coin de la Grande Rue St. Jacques de cette ville, des changements qui nécessitaient des travaux assez considérables.

Il employa à cette fin, comme architectes, les trois derniers défendeurs, qui firent les plans et devis requis dans un tel cas. Les deux McDonald entreprirent les ouvrages de charpente et de menuiserie, d'autres entrepreneurs, Payette et Perrault entreprirent la maçonne.

Les premiers plans et devis préparés par les architectes, ne convenaient pas, à ce qu'il parait, aux gouts économiques du demandeur. Ils eurent à en faire d'autres dont l'exécution devait entrainer des dépenses moins considérables. Ces derniers plans, substitués aux premiers, furent donc choisis par le demandeur. Si ses gouts économiques l'ont emporté en cette occasion, et s'il en a souffert par la suite. il a du le regretter plus tard.

Les ouvrages finis, et certifiés par les architectes, le demandeur paya les différents entrepreneurs et les architectes.

Au commencement de l'année 1859, le demandeur s'aperçut que le second et le troisième planchers avait baissés de près de deux pouces. Il proteste tous les défendeurs le 9 février, par le ministère de notaires, et les somme de faire ou faire faire de nouveau les travaux qui avait été mal exécutés.

Prétendant avec raison qu'en pareil cas, l'architecte et l'ouvrier entrepreneur sont responsables des dommages conjointement et solidairement, il se pourvut en dommages contre tous les défendeurs par une seule et même action. Les architectes et les deux charpentiers ont plaidé séparément; et les deux parties défenderesses ont présenté, chacune, l'exception de cumulation d'actions, laquelle exception a été déboutée.

Le demandeur, dans sa *déclaration*, allègue la confection des plans et devis faits à sa requisition par les trois architectes, le choix de ces plans et devis; l'entreprise des deux McDonald, par acte notarié du 15 sept. 1856, la surveillance des architectes, avec toutes les clauses ordinaires en pareil cas, stipulées entre lui le demandeur et les charpentiers au dit acte du 15 septembre, la confection de tous les ouvrages, les certificats des dits architectes, leur paiement et celui des ouvriers, puis l'affaissement des planchers et les dommages en résultant, attribuant le tout à l'insuffisance des bois et des matériaux employés par les charpentiers et au manque de soin, d'habité et d'attention de la part des dits McDonald et des dits Hopkins, Lawford et Nelson, puis le protet du 9 février 1859, fait aux défendeurs, la rejection, par le demandeur, ou par ces ordres, des ouvrages qu'il avait dénoncé comme étant mal faits et défectueux, le coût que cela avait entraîné, savoir £420, "which by reason of the said several premises and by law the said plaintiff hath a right to recover from the said defendants jointly and

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severally," ajoutant "that the said defendants have repeatedly acknowledged their liability aforesaid, but have hitherto wholly neglected and refused to pay the said amount last mentioned."

Enfin le demandeur prend des conclusions conformes.

En y apportant toute la bonne volonté que les défendeurs, plaidant comme ils l'ont fait, semblent solliciter, il m'est impossible de voir cumulation d'actions dans une demande qui me parait être fort simple, et formulée dans une *déclaration* on ne peut plus logique. La doctrine qu'en pareil cas, la responsabilité de l'architecte et de l'ouvrier entrepreneur est solidaire, a déja été consacrée dans la cause de *Brown* et *Laurie*, et à moins que les défendeurs actuels, n'approuvant pas la décision, n'aient eu l'espérance qu'aujourd'hui les tribunaux pourraient abandonner une doctrine aussi salutaire, il me semble que leur exception de cumulation a été faite en pure perte.

Au mérite, c'est-à-dire sur le fond de la demande, c'était une cause à référer à des experts; et le juge qui a ordonné l'expertise a très-bien fait dans l'état de la procédure. Le demandeur à qui il était permis de nommer un expert, a néanmoins refusé de le faire. Il a fait plus, il s'est abstenu de prendre aucune part aux procédés des experts nommés par la Cour et les autres parties. Si c'est encore dans des vues d'économie, il est certainement le seul à blâmer. Le rapport des experts ne lui accorde que la somme pour laquelle le jugement final a été rendu, savoir £51 1s. 8½d. Et je suis d'opinion qu'il n'y a rien à trouver à redire contre le jugement.

Le demandeur ne pouvait s'attendre à obtenir une condamnation pour tout ce qu'il demandait, la rejection des travaux a été au delà de ce qui avait fait l'objet de l'acte du 15 sept. 1856, et on y a employé du bois bien plus coûteux que celui que les défendeurs charpentiers devaient employer aux termes du susdit acte. On a fait des embellissements qui ont pu donner plus de prix à la location des magasins. On parait avoir fait enfin ce que les premiers plans et devis des défendeurs architectes, plans et devis non acceptés dans le temps par le demandeur, avaient originairement proposé de faire. Mais ce n'est pas une raison de rejeter sur les défendeurs ce surcroit de dépenses, faites uniquement pour le profit du demandeur.

Sur le tout, je suis d'opinion de confirmer purement et simplement le jugement du tribunal de première instance, et, par conséquent, de renvoyer tous les appels.

MEREDITH, J., concurred in the judgment of the Court, but thought that David ought to have been allowed the $94.05 which he had proved he had expended in indemnifying his tenant Hill for expenses actually incurred by the latter in removing from the premises while the repairs were being made and in returning thereto. He could not see upon what principle this amount could be disallowed, as it was plainly not involved in the reference to the *experts*, and was not much special damage in addition to that established by their report.

Judgment of the Court below confirmed.

Strachan Bethune, for David.

Mackay & Austin, for the McDonalds.

A. & W. Robertson, for Hopkins, Lawford & Nelson.

(S. B.)

MONTREAL, 12TH NOVEMBER, 1863.

Coram, HON. SIR L. H. LAFONTAINE, Bart., Ch. J., DUVAL, J., MEREDITH, J., MONDELET, A. J.

No. 43.

Charles Brown et al., (Defdts. in Court below,) APPELLANTS;

AND

Philip Wood, the second (Plff. in Court below,) RESPONDENT.

HELD:—That where a manifest error exists in the judgment of the Court below, and the party who might claim the benefit of such error desists therefrom by *acte de desistement* fyled *au greffe*, and notification thereof served on the opposite party before service of writ of appeal, such error will be held to be effectually cured, and an appeal, instituted for the mere purpose of curing such error, will be dismissed with costs.

This was an appeal from a judgment rendered by the Superior Court for the district of Bedford, on the 15th day of May, 1862.

The action in the Court below was instituted for the recovery of $400, as a balance due by the appellants on their note in favour of the respondent, for $1000 ($600 having been paid on account on the 2nd December, 1861), and interest on the $400 from the 2nd December, 1861, and on the $1000 from the date of the note (2nd November, 1861) to the 2nd December, 1861, and costs.

The appellants pleaded a *défense au fonds en droit*, assigning the following reasons:

I. "Because said plaintiff in and by his said declaration describes and sets forth a promissory note not bearing interest, yet erroneously alleges that by law interest is exigible on said note from the day of its date until paid, and concludes accordingly."

II. "Because the conclusions taken by said plaintiff in his said declaration do not logically flow from the premises thereof, inasmuch as the promissory note sued on is therein described as not bearing interest, yet interest is demanded thereon previous to its maturity, and from the day of its date; and, inasmuch as said defendants are not sued severally, neither jointly with the third drawer of said note, nor in manner as they contracted."

III. "Because said plaintiff, in and by the conclusion of his said declaration, concludes and prays for a judgment for a greater amount than the instrument described in his said declaration warrants him in asking for, and because by law this Court cannot render judgment for a less sum than is prayed for in an action of special assumpsit on a promissory note."

The appellants also pleaded a *défense au fonds en fait*.

On the 14th February, 1862, the parties were heard on the issue raised by the *défense au fonds en droit*, and the Court dismissed the plea.

The case having been inscribed for final hearing on the merits, the Court rendered the following judgment on the 14th May, 1862:—"The Court * * * * "it is considered and adjudged that the plaintiff do recover from the defend- "ants, jointly and severally, the sum of four hundred dollars current money of "this Province of Canada, as and for the balance of the promissory note fyled in

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"this cause dated at Sweetsburg on the 2nd day of November, 1861, made by "the defendants and one Asa Hastings, jointly and severally, to the order of the "said plaintiff for the sum of one thousand dollars, payable in thirty days from "date, for value received, with interest on one thousand dollars from the second "day of November, one thousand eight hundred and sixty-one, up to the fifth "day of December, one thousand eight hundred and sixty-one, and interest on "the sum of four hundred dollars from the fifth day of December, one thousand "eight hundred and sixty-one, until actual payment and costs of suit *distraits* to "S. W. Foster, Esquire, attorney for the said plaintiff."

In the foregoing judgment there is a manifest error, in so far as the appellants are condemned to pay interest on $1000 from the 2nd November, 1861, to the 5th of December, 1861, which no doubt arose from the fact that in the declaration the respondent claimed such interest; the prothonotary in ordinary cases like the present being in the habit of guiding himself in great part by the conclusion of the declaration.

The error above alluded to having been discovered, the respondent notified the appellants in writing, on the 13th of June, 1862, that he desisted from that part of the judgment awarding him the interest in question, and fyled the notice, with bailiff's certificate of service, in the office of the prothonotary of the Court below, on the 14th of June, 1862. As an additional precaution he also fyled on the 16th of June, 1862, an *acte* of *désistement* of such interest, and on the 17th of June, 1862, and before the service of the present appeal, served the appellants with a copy of the *désistement*, together with a notice at foot calling attention thereto.

Doherty, for appellants, argued that the *désistement* referred to, even were it of record, and fyled *en temps utile*, which was not the fact, unaccompanied by an offer to pay the costs of appeal, can have no effect; and further, that the judgment appealed from being erroneous, and standing against him, he had a right to its reversal in so far as it is illegal, notwithstanding *any désistement* that respondent may be pleased to fyle. Respondent's declaration, that he will not execute the judgment, cannot save it in appeal: if illegal, the party against whom it exists has a right to its correction or reversal, without regard to anything said or done by his adversary, *after the rendering thereof*.

The appellants, however, have been always willing, and still are, to acquiesce in a *désistement* properly put of record, and upon payment of costs of appeal by respondent; although by law, entitled to the reversal of the judgment, in so far as complained of by their reasons of appeal, which they respectfully pray for.

Bethune, for respondent, contended that the present appeal having been instituted, as indicated by the reasons of appeal, for the sole purpose of curing the error which the respondent had already *in a double form* corrected, it was manifest that the costs of such appeal must fall on the appellants, the necessity of an appeal having been entirely removed before the issuing even of the writ.

The Court, *nemine contradicente*, confirmed the judgment of the Court below, with costs. Judgment of Court below confirmed.

Marcus Doherty, for appellants.

Bethune & Dunkin, for respondent.

(S.B.)

MONTREAL, 8TH SEPTEMBER, 1862.

IN APPEAL.

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram AYLWIN, J., DUVAL, J., McCORD, J. *ad hoc.*, POLETTE, J. *ad hoc.*

William Mann et al., (Plaintiff *par réprise* in the Court below,)

APPELLANTS;

AND

Samuel Wentworth Monk, (*mis en cause* in the Court below,)

RESPONDENT.

PRACTICE—NOTICE TO PARTIES.

HELD:—That of applications made to the Superior Court for the payment of moneys claimed by parties in a cause, notice must be given to other parties interested in the judgments or orders pronounced in the cause.

The sum of £4,752 8 0 cy. was claimed by the appellants, and formed part of the sum of £5056 18 0 cy., deposited in the hands of the then joint Prothonotary of the then Court of Queen's Bench, at Montreal, to await the further order of that Court. Several rules were taken upon the respondent, survivor of the said joint prothonotary, to show cause why he should not pay over the first amount £4752 8 0, to the appellants, and from adverse decisions on all these rules, thus taken by the appellants, the present appeal was instituted.

The deposit was made in the united causes.

Stuart for the respondent argued that inasmuch as the respondent was the sole surviving depositary of the moneys in question, for and on behalf of all the parties, plaintiff and intervening, in the above united causes, it was the respondent's imperative duty, in so far as he could take any action in the matter, to see that all the parties were now before the Court, or at least, in a position to have their rights, if they had any, also finally adjudicated upon. Under all the circumstances of the case, it should be formally and finally adjudicated whether any other parties in the original suits had or had not any right to the whole or part of the money claimed by the appellants. However desirous the respondent might be to see the matter finally disposed of, and although in furtherance of that object he had not only on all occasions carefully abstained from every proceeding calculated to cause delay, but in so far as his duty would permit it, sought to aid the late Mr. Hutchinson and the appellants in advancing proceedings in these causes, yet he conceived it would be a grave misapprehension of his duty, as an officer of the Court and the judicial depositary of such a large sum, if he failed to point out to the Court that only *three* parties out of between 30 and 40 had notice of these proceedings in the Court below, and even those who were notified were not made appellants here. He cited *Gillespie et al. vs. Spragg*, 6 L. C. Jurist, 25.

The judgment in appeal was *motivé* as follows:

"The Court * * * seeing that of the several applications made by the appellants to the Superior Court for the payment of the moneys by them claimed

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no notice has been given to the parties interested in the judgment or orders to be pronounced thereon, and that in consequence of such omission the appellants were not entitled to the prayer of their several demands, this Court doth confirm the judgment pronounced by the Superior Court on the twenty-second day of February, eighteen hundred and sixty-two, rejecting the motion of the said William Mann and others for a rule on the said Samuel Wentworth Monk, Esquire, prothonotary, requiring him to show cause why he should not forthwith pay over to the said William Mann and others the several sums of three thousand four hundred and fifty pounds fifteen shillings and three pence half-penny currency; with the sum of one thousand two hundred and ninety-nine pounds twelve shillings and nine pence currency, forming together the sum of four thousand seven hundred and fifty pounds eight shillings and a half-penny currency, awarded to the said late James Hutchinson by the order or judgment of the Judicial Committee of Her Majesty's Privy Council, rendered on the sixteenth day of February, one thousand eight hundred and thirty-eight, and the decree of Her Majesty in Her Privy Council of date the thirteenth day of May, one thousand eight hundred and fifty, as amended by the further decree of date the eleventh day of February, one thousand eight hundred and fifty-two, and why the said order or judgment and decrees should not be executed as regards said moneys. This Court doth further confirm the said interlocutory judgments herein rendered on the thirtieth day of December, one thousand eight hundred and sixty-one, rejecting a motion made by the said William Mann and others, for an order upon the said Samuel Wentworth Monk, Esquire, to pay the said William Mann and others.

And this Court doth further confirm the said interlocutory judgment rendered the thirtieth day of November, one thousand eight hundred and sixty-one, rejecting a petition made by the said William Mann and others for the payment to them of the said moneys; and this Court doth condemn the appellants to pay to the respondent the costs as well in this Court as in the Superior Court," &c.

Judgment confirmed.

Cross & Bancroft, for appellants.

H. Stuart, for respondent.

(F.W.T.)

COURT OF QUEEN'S BENCH.

MONTREAL, 12TH NOVEMBER, 1863.

Coram SIR L. H. LA FONTAINE, BART., C. J., DUVAL, J., MEREDITH J., MONDELET, J., BADGLEY, J.

In appeal from the Superior Court, District of Montreal.

DAVID TORRANCE *et al*,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

HUGH ALLAN,
(*Defendant in Court below,*)
RESPONDENT.

BILL OF LADING—INTERPRETATION.

HELD: 1°. That a common carrier can limit his liability by [illegible] inserted in the bill of lading.

2°. That a common carrier, who receives goods for England [illegible] his lighter, is not liable for loss arising from a delay in transhipment, owing to the [illegible] ship being already full, when the bill of lading contained a clause that, if, from any cause the goods did not go forward on the ship, the same should be forwarded by the next steamer of the same line.

The facts of this case appear from the judgment of the Superior Court, (Berthelot J.,) 6 L. C. Jurist, 190 et seq:

The appellants argued in appeal that the judgment which has been rendered in this cause, and whereby the respondents have been exonerated from liability, is erroneous and ought to be reversed. The general principle applicable to the case may be thus stated:

"A carrier is bound not only to transport the goods entrusted to him safely "but to do so within a reasonable time, and he is bound to account for the value "at the expiration of that time. It is as much a part of his contract, as to deli- "ver them in good condition, and in commercial adventures, time is one of the "elements upon which they are undertaken, and controls the results." Flanders § 313 and vide Rathbone *vs.* Neal, 4 Louis, R. 563.

As to the liability for the decline in price, the pretension of the appellants while reasonable, is sustained by authority. "Thus where the decline in price happened during a delay in transportation, for which there was no legal excuse, the carrier would no doubt be liable." Redfield on Railways, page 234 § 124. In Louisiana, in an analogous case, the carrier was held liable for the decline in price. "If the owners of a steamboat agree to transport goods, and suffer their "captain to depart without them, they are liable in damages for the difference "in value of the goods at the time of its arrival and that of the arrival of the "boat in which they were to have been shipped." Lowry & Young, 1 L. 233.

Is there anything in the facts of this case then to withdraw it from the application of these authorities, and exonerate the carrier from the consequences of his own neglect? The appellants contend there is not.

The respondents by their plea pleaded in defence to the action, 1st. that a contract note by the intervention of a broker, had been made between the agents E. A. & Co., and a mercantile firm of Routh & Co., to provide freight by the Anglo-

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Saxon, to sail from Quebec on 10th October, of 20,000 bushels of wheat and 1000 barrels of flour, "provided the steamer had room," and that Routh & Co. had sold to the appellants freight by the said steamer for 500 barrels of flour, subject to the same conditions; and 2ndly, that a clause in the bill of lading exonerated the respondents, it being in the following terms:

"In case the whole or any part of the goods shipped herein be prevented by *any cause* from going on said steamer, the owners are only bound to forward them by the succeeding steamer of the line."

The appellants maintained with regard to the first branch of the defense.

1st. That these contracts cannot be legally invoked in this cause, having been merged in the bill of lading.

"The settled rule is that when a contract has been reduced to writing, it is "understood as expressing the final conclusion of the contracting parties and "fully accepted as merging all prior negociations and understandings whether "agreeing or inconsistent with it." Smith on Contracts, * 27 note.

"All contemporaneous writings relating to the same subject matter are admissible as evidence provided only they are of equal solemnity with the principal document, and that no oral testimony be required for the purpose of connecting them therewith." Taylor on Evidence, vol. 2, § 826.

A similar rule is to be found in the French law.

"En général aucune pièce privée ne saurait prévaloir au connaissement. Elle "ne peut l'emporter sur la preuve publique de cet acte." Boulay, Paty, 283, vol. 2.

But should the Court be of opinion, that these contracts are admissible evidence, the appellants contend that they make in favor of their pretensions. The contract between Routh and Edmonstone, Allan & Co., it is true, was conditional upon there being room in the steamer for the flour, but it was to be delivered upon the demand of the agents at Montreal. Such demand was then a distinct declaration that there was room in the steamer; and in accordance with such a demand, the flour was delivered to and assumed by the carrier, who then became bound to carry it by the Anglo-Saxon on her then voyage.

But to turn to the second branch of the defence, viz: the condition in the bill of lading, the appellants maintain that this exception does not exclude the carrier from liability for his negligence and misconduct in not carrying the flour by the Anglo-Saxon. In the eye of the law, the flour must be regarded as being in fact on board of the said steamer. It was in the custody of the carrier and in his lighter, and he had granted a bill of lading, declaring it to be shipped on board of the Anglo-Saxon. "If the master receive goods at the quay, or send his boat for them, his responsibility commences with the receipt." Abbott, page 426, 6th Amer. Edit. [345.]

The respondents received the goods, and all the responsibilities of the carrier with regard to the flour, had in fact come into force, and were then immediately operative and effective.

The respondents, however, seek to avail themselves, in order to relieve them from this responsibility, of the exception in the bill of lading. With regard to this, however, it must be borne in mind, that the carrier is bound if he seeks to

take advantage of a special exception to prove not only that the cause of the loss was within the exception, but also that there was on his part no negligence or want of due care. Greenleaf, vol. 2, § 219.

What then does the carrier assign as a sufficient reason for bringing him within this exception, and justifying him for not carrying the flour by that trip of the Anglo-Saxon? Only that he had filled up the vessel with other freight. Is this "a cause," sufficient to entitle him to the benefit of the exception, and to permit him to carry the goods to the detriment and without the knowledge of the owner, on another vessel after a considerable delay? The appellants submit that even if we assume that the carrier could so restrict his liability as to avoid responsibility for his own negligence, a proposition which cannot be defended according to the principles which prevail in our law, the cause set up, is not such a cause as was contemplated by the words of the exception. The expression "any cause," can only be legally and reasonably interpreted to mean a cause independent of the mere act, will, or control of the carrier, and that his mere filling up of the vessel with other goods, was not such a cause as to exonerate him from his common law liability.

The doctrine laid down in Pardessus, vol. 3, page 199, No. 726, when treating of the delivery of goods in port, may be cited in illustration of this view:

"The captain is bound to deliver the merchandize to the consignees indicated to him within the delays accorded by the agreement or usage for unloading *à moins que des causes indépendantes de sa volonté ou de ses faites ne l'en empechent.*" Here no such independent causes are even pretended to exist.

Ritchie for respondent argued as follows:

It will be borne in mind that in the year 1857, the steamships of the line to which the "Anglo-Saxon" belonged stopped at Quebec, not coming up to Montreal. The principal freight engagements were however made at Montreal through the agents, Messrs. Edmonstone, Allan & Co. Owing to these circumstances and to the fact that the number of steerage passengers (by the number of whom the capacity of the ship for freight was materially affected) was not known previous to the vessel's departure, it was absolutely necessary that freight should be engaged conditionally. The practice of conditional engagements of freight was consequently adopted. To guard against the possibility of misunderstanding, the owners of the steamers, in the present instance, made it an express condition when the freight was originally engaged by Rae & Mitchell, the brokers, that the flour would only be taken "provided the steamer has room." This limited and conditional right to the carriage of flour at a certain rate was transferred by Messrs. Routh & Co., to the appellants. No greater right could be assigned by the former firm than that which they themselves possessed. The original contract consented to by the agents of the line of steamships foresaw the most probable reason which might operate a failure to carry by the "Anglo-Saxon"—*want of room*—and the undertaking was accordingly conditioned upon there being room in the steamer. The bill of lading contains the same condition, although the terms are more general, so as to cover other possible causes of detention. This bill of lading was prepared ready for signature by the appellants themselves in their own office, the written portion being in the hand-

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writing of Mr. David Torrance, one of the appellants. That gentleman virtually admits that the bill of lading was merely the *suite* of the previous contracts, for he says that before signing it, the agents must have been notified of the transfer to his firm. There was therefore no deception or surprise on the part of the owners of the steamships or their agents, and the liability of the respondent for the damages claimed in this case must depend simply upon the answer to the question, "Had the "Anglo-Saxon" room for the appellant's flour, or not?" The evidence of Scott, the shipping clerk at Quebec, is conclusive upon this point. He states distinctly that the ship was fully laden with cargo previously engaged; that she took all of the flour for which she had room.

The legal position of the respondent, as a common carrier, is precisely the same in this case, under the conditional engagement entered into by him, as it would have been had he refused to carry the flour by the "Anglo-Saxon." In that case an action of damages would only have lain against him upon proof that the ship either was not fully laden or that she had accepted cargo tendered subsequently to the demand of the appellants; in other words, that it had been in the power of the respondent to take the flour on board. The evidence of Scott, proving conclusively the inability of the respondent to carry the flour, for the reason that there was no room for it, would, in such an action, have exonerated him. It cannot be less effective in the present case.

MONDELET, A. J.—The appellants, plaintiffs in Court below, sought to recover £188,7,11d cy., damages for the loss sustained by the detention of 472 barrels of flour, part of 495 delivered to the agents of the steamer, Allan & Co., at Montreal, for conveyance to Liverpool, by the steamer, Anglo-Saxon, of which Edmonstone, Allan & Co., are proprietors, in October 1857, and which they did not so deliver in Liverpool, in time, &c.

The defence relies chiefly on two grounds, viz:

1st. That this undertaking was subsequent to another with Routh & Co., to transport 20,000 barrels of flour, of which latter contract, Plaintiffs became transferees, and were *au lieu et place* of Routh & Co., and that Plaintiffs contract was merged in the other, subject to the condition of a transfer of the flour to Liverpool, by the steamer Anglo-Saxon, if there was room in that steamer.

2nd. That the words, in the bill of lading, "any cause," meant, that defendant was by any cause such, for instance, as want of room in the steamer, exonerated from his obligation to transport the flour in the Anglo-Saxon, on that voyage, and was justified in detaining the flour, until the next steamer of the line went across.

The case is fully reported in the Jurist, vol. 6, p. 190 et seq:—

My opinion on this case is:

1st. That the contract with Routh & Co., of which Plaintiffs became transferee cannot affect the undertaking of defendant in favor of appellants to transport to Liverpool, the 495 barrels of flour as agreed by the Anglo-Saxon. The two contracts, are independent of one another.

2nd. The word "cause," can't mean *any cause* whatever, because it would mean any cause which appellants could create *themselves*, which would be absurd.

It must mean or does mean, a cause beyond defendant's control, a reasonable cause, moreover.

I am therefore of opinion the judgment of the Court below should be reversed, and judgment rendered for appellant for the £188 7s 11d as claimed in their declaration, together with costs in this and in the Court below.

MEREDITH, J.—I think that the judgment of the Superior Court, and the reasons assigned in support of it by Mr. Justice Berthelot, are right; and I propose to confine the few observations I am about to make, to the point urged by the appellant, as to the inadmissibility of evidence respecting the conditional freight engagement, between the respondents and H. Routh & Co., and respecting the transfer of a part of the rights of H. Routh & Co., under that engagement, to the appellants.

The latter rely upon the rule "that when a contract has been reduced to "writing, it is understood as expressing the final conclusion of the contracting "parties, and fully accepted as merging all prior negociations and understandings "whether agreeing or inconsistent with it."

This rule is doubtless a most salutary one; but like other general rules it is subject to certain exceptions, and one of those exceptions is:

"That parol evidence may in all cases of doubt, be adduced to explain the "written instrument, or in other words to enable the Court to discover the "meaning of the terms employed, and to apply them to the facts.*

The appellants themselves contend that,

"The expression *any cause* can only be legally and reasonably interpreted to "mean a cause independent of the mere will or control of the carrier; and that "his mere filling up of the vessel with other goods, was not such a cause as to "exonerate him from his common law liability."

In short the appellants contend, in effect, that the words "any cause" in the bill of lading must be understood as meaning *any reasonable cause*; and hence it becomes necessary to know, what the parties meant by *any reasonable cause* —and for this purpose I think we may well refer to the engagement for freight, in consequence of which, the bill of lading was made.

But, even if we had to decide the case irrespective of the engagement for freights, I think the exception in the bill of lading, read by the light of the surrounding circumstances, will be sufficient to justify the judgment of the Superior Court.

Judgment confirmed.

Torrance & Morris, for appellant.
Rose & Ritchie, for respondent.

(F.W.T.)

* 2 Taylor, No. 937.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

MONTREAL, 5th SEPTEMBER, 1861.

Coram SIR L. H. LAFONTAINE, BART., CH. J., AND AYLWIN, J., DUVAL, J., MEREDITH, J., AND MONDELET, A. J.

JACOB HENRY JOSEPH,

Plaintiff in the Court below,
APPELLANT;

AND

FRANCOIS XAVIER CASTONGUAY,

Defendant in the Court below.
RESPONDENTS.

USUFRUCT—SUBSTITUTION.

HELD:—The words "*jouissance*" "*usufruit*" used in a donation as describing the rights intended to be conveyed to a donee, may be construed to mean the rights to be enjoyed by a person *grevé de substitution*, if the general purport of the deed of donation indicates the intention of the donor to create a substitution, and not merely to transfer to one person the usufruit and to another the *nue propriété*.

2o. That in the case under consideration, a substitution was created by the deed of donation executed by the late widow Castonguay, (herein reversing the judgment of the Court below).

3o. That the usufruct actually created by the same deed of donation accrued to the surviving usufructuaries.

This case is reported at some length in the L. C. Jurist, Vol. 3, pp. 141 et seq:—The parties contended for the same positions in Appeal as they had assumed in the Court below. The opinion of their Honours, the Chief Justice and Mr. Justice Mondelet, will sufficiently explain the grounds of the decision in appeal.

MONDELET J.—La Cour de première instance a débouté l'action du demandeur, qui demande la réformation de ce jugement.

La question à décider, est de savoir si l'acte intitulé "donation" par Madame veuve Castonguay à trois de ses enfans, a transféré à sa fille, Julie Castonguay, la propriété d'un certain immeuble, et si cet immeuble a été substitué à ses enfans, et s'ils en devennient les propriétaires.

C'est là la prétention du demandeur appelant, qui demande le partage de l'immeuble aux défendeurs, se disant, lui appelant, aux droits de ceux qui, tant par le dit acte, que comme héritiers de leur père, Jean Baptiste Castonguay, sont devenus propriétaires pour 1/6 me chacun dans cet immeuble.

Les intimés soutiennent que cet acte de donation de Madame veuve Castonguay, n'a conféré à Jean Baptiste Castonguay son fils, à défaut d'enfans de Julie Castonguay, aucun droit de propriété. Que d'ailleurs, Jean Baptiste Castonguay eût-il acquis aucun tel droit de propriété dans cette immeuble, ses enfans ayant renoncé à sa succession, l'appelant, par l'acquisition qu'il a faite de ces enfans de Jean Baptiste Castonguay, n'a acquis aucun des droits qu'il réclame.

Tout dépend, par conséquent, de l'interprétation de la clause de la donation du 15 mai 1827. La voici:

"Dame St. Germain, veuve du feu Jean Baptiste Castonguay, avec lequel elle était commune en biens et sa légataire universelle en pleine propriété;

Dans la vue d'exercer un acte de pure libéralité de sa part envers dame

Julie Castonguay, sa fille et sa présomptive héritière, auquel elle ne pouvait être contrainte en aucune manière, et désirant se démettre de son vivant, en sa faveur, des lots de terre et maisons ci-après désignés, pour la saisir par anticipation, et la rendre, par ce moyen, usufruitière actuelle des biens d'une succession dont elle n'avait que l'espérance, et rendre ses présomptifs héritiers, qui lui sont substitués par ces présentes, propriétaires actuels des dits biens."

A reconnu avoir donné par donation entre vifs et irrévocable à la charge des substitutions, etc., ci-après exprimées.

"A Julie Castonguay, épouse de Luc Dufresne." * * *

La jouissance et usufruit, sa vie durante, d'un emplacement, etc., provenant de la communauté de la donatrice avec feu son époux, que la dite dame donataire usufruitière a dit bien savoir et connaître. * * *

A commencer la jouissance du dit emplacement du premier du courant et ainsi continuer à l'avenir, jusqu'à ce que l'usufruit constitué en sa faveur par ces présentes soi éteint et fini.

Et la dite dame donatrice, désirant conserver aux enfants à naître en légitime mariage de la dite dame donataire seulement, la propriété pleine et entière de l'emplacement ci-dessus désigné, sans l'étendre à un degré plus éloigné, veut et entend que le dit emplacement et maison ci-dessus donnés en jouissance à la dite dame donataire demeure substitué comme elle le substitue par ses présentes aux dits enfans à naître en légitime mariage de la dite dame donataire seulement, auxquels elle donne la propriété du dit bien, ce qui a été accepté pour eux par le dit Luc Dufresne, leur père, et la dite dame donataire, leur mère. * * *

"Voulant et entendant que ceux qui sont appelés à la présente substitution, "soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution "sera avenu, sans qu'ils soient obligés d'en faire demande en justice.

La présente donation ainsi faite par la dite donatrice * * * *pour conserver la propriété du dit emplacement aux enfants de la dite dame donataire.* * * *

"Et au cas de mort de la dite dame donataire sans enfants, la jouissance "et usufruit des dit emplacement et maison seront réversibles et appartiendront "à ses frères et sœurs survivants leur vie durante. Et si alors tous les frères "et sœurs de la dite dame donataire étaient décédés, la propriété du dit em"placement et maison appartiendra à leurs enfants nés et à naître en légitime "mariage pour être ensuite partagée entr'eux par souche. Que les enfants à "naître de la dite dame donataire, à elle substitués, ne pourront demander à "faire entr'eux le partage de l'emplacement et maison présentement donnés "qu'après le décès de tous leurs oncles et tantes.

"Et sous toutes les charges, clauses et conditions plus haut mentionnées, la "dite dame donatrice a transporté à la dite dame donataire tous droits de jouis"sance qu'elle peut avoir dans l'emplacement et maison présentement donnés, "et à ses enfants à naître en légitime mariage tous droits de propriété qui peu"vent lui appartenir dans le susdit bien, s'en dessaisissant à leur profit pour les "en faire jouir et mettre en possession, ainsi qu'il appartiendra."

Il me paraît que Madame Castonguay avait en vue d'effectuer quatre objets.

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1o. Se démettre de son vivant en faveur de sa fille Julie, sa présomptive héritière, de l'immeuble en question.

2o. De l'en saisir par anticipation.

3o. La rendre usufruitière actuelle des biens d'une succession dont elle n'avait que l'espérance.

4o. Rendre ses présomptifs héritiers, qu'elle leur substitue, propriétaires actuels.

Il est vrai que de tems à autre, on rencontre les termes "usufruit," "usufruitiers", mais il me semble que le cachet de la substitution est imprimé bien visiblement à cet acte.

Ne lit-on pas que la Donatrice exprime sa volonté que cette substitution ne sera pas étendue à un degré plus éloigné? N'y est-il pas dit que cet emplacement et maison ci-dessus donnée en jouissance à la dite dame donataire, demeureront substitués, comme elle les substitue par ces présentes, aux dits enfants à naître en légitime mariage de la dite donataire?

Plus loin, ne rencontre-t-on pas les termes suivants?

"Voulant et entendant que ceux qui sont appelés à la présente substitution soient saisis des biens leur substitués lorsque le cas de la substitution sera avenu."

On se cramponne aussi aux mots "jouissance" et "usufruit" pour faire croire qu'il ne s'agit que de cela. Mais il était bien naturel que la donataire, qui avait clairement exprimé la volonté de saisir de cet immeuble, sa fille Julie et de lui en assurer la jouissance durant sa vie, au cas où cette fille mourrait sans enfans, pourvût au cas où elle mourrait sans enfans, et de suite cette mère prévoyante tranche la difficulté, en disant que cette jouissance passerait par droit de réversibilité, à ses frères et sœurs, leur vie durant, et la propriété à leurs enfans après leur décès, pour être partagée entre eux par souche.

Il est certain que l'on doit plutôt chercher à découvrir l'intention de Madame Castonguay, qui s'attache à quelques expressions isolées et parsemées, pour ainsi dire, dans un acte où l'intention et la volonté bien clairement exprimées de la donatrice, lui impriment le caractère de substitution.

Si cette interprétation est exacte, alors l'action du demandeur est bien fondée. Dans cette hypothèse, le jugement de la Cour de première instance, qui est fondé sur ce que l'Honorable Juge (Smith) qui l'a rendu, regarde comme une donation d'usufruit, et non de propriété à Julie Castonguay, est une erreur; il doit être et j'opine qu'il soit infirmé.

Sir L. H. Lafontaine Ch. J.—Madame veuve Castonguay a, le 15 mai 1857, fait une donation entre-vifs à sa fille Julie Castonguay. Il s'agit d'interpréter cet acte. La même personne a fait dans le même temps des donations à trois autres de ses enfants, à la défenderesse, Madame Leclerc (Josephte Castonguay), le 11 mai 1827, à Jean Baptiste Castonguay, le 12 mai 1827, et à F. X. Castonguay le 14 mai 1827. Toutes ces donations disposent de terrains situés dans cette ville. Elles sont tout à fait semblables. On peut dire qu'elles contiennent, par anticipation, une disposition de la succession de la donatrice, au profit de ses enfants et petits enfants.

Y a-t-il substitution? ou y a-t-il seulement donation de simple usufruit?

une personne, et donation, en même temps, de la nue propriété à une autre? Ou, encore, dans le cas de Julie Castonguay, celle-ci étant décédée sans enfants, n'est-il question de disposition portant sur la propriété de l'immeuble dont il s'agit en cette cause, et qui a fait l'objet de la donation du 15 mai 1827? Cette dernière question a été résolue dans l'affirmative par le jugement dont est appel.

Il faut avouer que l'acte de donation semble présenter, à première vue, quelque confusion dans l'emploi qu'il fait des mots *jouissance, usufruit, substitution*. Mais il me semble résulter de toutes les clauses de l'acte, rapprochées les unes des autres, que l'intention de Madame Castonguay a été que la propriété et l'usufruit fussent plus tard remis à ses petits enfants, d'abord, dans le cas actuel, aux enfants de ses deux fils, J. Bte, et F. X., et de sa fille Josephte, et que, dans ce dernier cas, les petits enfants partageassent par souche. Si telle a été l'intention de la donatrice, il y a eu substitution, et par conséquent *charge de rendre*, qui est le trait caractéristique de la substitution.

On lit, dans ce qu'on peut appeler le préambule de l'acte: "Désirant *se demettre* de son vivant en sa faveur (Julie Castonguay) des lots de terre et maisons ci-après désignés." . . . . .la *démission* porte sur le tout. . . . ."pour la saisir par anticipation" . . . .la saisine porte également sur le tout . . . ." et la rendre par ce moyen *usufruitière actuelle*.". . . .une personne grevée de substitution est nécessairement usufruitière. . ." des biens d'une succession dont elle n'avait que l'espérance,". . . .On voit qu'elle veut disposer pour toujours de ses biens en entier . . " et rendre ses *presomptifs heritiers* qui lui sont *substitues* par ces présentes, propriétaires actuels des dits biens". . . .Elle dispose de ses biens en usufruit et en propriété. Elle n'en retient donc rien. Le mot *actuels*, ajouté à celui de *propriétaires* et considéré isolément, pourrait ne pas avoir été bien choisi, et c'est ce qui me semble avoir créé toute la difficulté, puisque l'on en conclut que la donatrice a, dès ce moment, là, dès le 15 mai, disposé d'une manière absolue, au profit de personnes autre que la dite Julie Castonguay, de la propriété séparément, et comme détachée et distincte de l'usufruit. Mais on ne saurait donner ce sens au mot que je viens de citer, d'abord parce que, dans la même phrase, elle a déjà parlé de *substitution* au profit des héritiers présomptifs, et ensuite parce que, plus loin, dans l'acte de donation, l'on trouve la clause suivante: "Voulant et entendant que ceux qui sont *appelés à la presente substitution* soient saisis des biens *ainsi substitués* aussitôt que *le cas de la substitution sera avenu*, sans qu'ils soient obligés d'en faire demande en justice." Cette clause claire et précise contredit le sens que l'on veut, de la part des intimés, donner au mot "actuels" rapporté plus haut, et démontre, au delà de tout doute, que l'idée d'une donation absolue de la nue propriété, distincte et séparée de l'usufruit, n'est pas entrée dans l'esprit de la donatrice, que cette donation de la propriété était faite par voie de substitution, et qu'elle en devait suivre le cours, la *saisine* au profit des *appelés* devant avoir lieu "aussitôt que le cas de la substitution sera avenu."

Julie Castonguay n'avait pas d'enfants lorsque la donation fut faite; elle ne paraît pas en avoir jamais eus. Dans ce cas, les motifs "ses présomptifs héritiers" qui sont au préambule, pouvaient comprendre ses frères et sœurs, neveux et [illegible] ot "actuels" le sens que les intimés lui donnent, c'est de

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suite déclarer que ces collatéraux ont eu "la propriété actuelle" du moment de la confection de la donation; et, puisqu'ils l'ont ainsi eue, les enfants de Jean Bte. Castonguay pouvaient disposer de leurs parts en faveur du demandeur. C'est, de la part des intimés, attaquer le bien jugé d'un jugement que néanmoins ils défendent.

Je recherche, comme c'est mon premier devoir de le faire, si l'intention de Madame Castonguay a été que ses biens passassent, propriété et usufruit, à ses petits enfants, neveux et nièces de la dite Julie Castonguay, dans le cas de mort de celle-ci sans enfants, et je la trouve, quant à l'immeuble dont il s'agit, dans le fait de la substitution dont il me paraît évident que la dite Julie a été chargée, en premier lieu, en faveur de ses propres enfants (cas qui n'est pas arrivé), en deuxième lieu en faveur de ses frères et sœurs, et dans le fait que ces derniers devaient être chargés de substitution au profit des petits enfants de la donatrice, et par conséquent *chargés de leur rendre*. Il y a plus, je trouve cette intention formellement écrite dans l'acte de donation. Prévoyant le cas possible du prédécès de ses trois autres enfants, la donatrice dispose ainsi: "Si *alors*, (c-à-d. au cas de mort de la dite Julie Castonguay, sans enfants) tous les frères et sœurs de la dite dame donataire étaient décédés, la propriété du dit emplacement et maison appartiendra à leurs enfants nés et à naître en légitime mariage, pour être ensuite partagée entre eux par souche." Pour ma part, je crois que cette clause était inutile. Aussi me paraît-elle être purement explétive. La donatrice, craignant peut-être que, dans ce cas, les petits enfants venant seuls à recueillir l'immeuble donné à la dite Julie, n'émissent la prétention de le recueillir par tête, a voulu faire disparaître toute prétention de la sorte, en ordonnant qu'ils partageraient par souche, c'est-à-dire que les enfants d'une branche, quoique plus nombreux que ceux d'une autre branche, ne prendraient néanmoins que la part que leur père ou mère aurait eue; nouvelle preuve de l'intention et de la volonté de la donatrice que ses propres enfants eussent une part, et partageassent également entre eux relativement à l'immeuble en question, et que la part, ainsi afférante à chacun d'eux, fût transmise à ses enfants. Le jugement attaqué a fait ici l'application de la règle ou du brocard, *inclusio unius negat de altero*. Je crois qu'il n'y avait pas lieu à cette application. Ne serait-il pas étrange que Mme Castonguay eût pu avoir l'intention de ne donner la propriété à ses petits enfants, neveux et nièces de sa dite fille Julie, que dans le cas où aucun de leurs père et mère n'aurait pas eu de fait l'usufruit? Cependant il est évident qu'elle voulait gratifier tous ses petits enfants; et justement parce que l'un des pères dans un cas, ou la mère, dans l'autre, aurait eu la possession de l'usufruit, on en conclurait que les petits enfants n'ont dans l'acte de donation aucune disposition en leur faveur, concernant l'immeuble en question. On prêterait ainsi gratuitement à la donatrice une intention contraire à celle que toute la teneur de sa donation fait apparaître.

En interprétant l'acte comme contenant une substitution, je ne fais que ce que les intimés ont déjà fait eux-mêmes. Peu de temps après que les actes de donation eurent été faits, ils les ont tous fait lire et publier en justice, parcequ'ils renfermaient substitution. Et dans la cause de Leclère et autres contre Perrin, défendeur, et Garceau, garant, jugée en Cour de première instance le 1er oct.

1856, lequel jugement a été confirmé par cette Cour le 1er mars 1858, les intimés ont soutenu fort et ferme que l'acte de donation fait à Jean Bte Castonguay renfermait substitution." Or cet acte est entièrement semblable à celui dont il s'agit plus particulièrement en cette instance. Le nom du donataire et les terrains donnés seuls ne sont pas les mêmes.

Il y a un autre point de la contestation à juger. Une disposition expresse de l'acte de donation attribue la jouissance aux survivants des frères et sœur de Julie Castonguay. Le jugement dont est appel reconnaît qu'il y a là substitution. F. X. Castonguay et Madame Leclère ont droit au bénéfice de cette disposition comme étant les deux seuls survivants; et au décès de l'un d'eux, l'autre aura seul l'usufruit, sa vie durant. Mais comme il est évident que la donatrice n'a pas voulu qu'il y eût partage du vivant de ses enfants, je suis porté à dire que l'action est prématurée, bien que je reconnaisse le demandeur comme ayant acquis un tiers de la propriété, c'est-à-dire le tiers qui a été dévolu aux enfants de J. Bte Castonguay.

The judgment of the Court was recorded as follows:

"1° Considérant que, par l'acte de donation entre vifs du 15 mai 1827 dont il s'agit en cette cause, fait par dame Marie Joseph St Germain, dite Gauthier, veuve Castonguay, de l'immeuble désigné dans la déclaration en cette cause, la dite Julie Castonguay est devenue propriétaire du dit immeuble à charge de substitution, non seulement en ce qui regarde l'usufruit, mais encore en ce qui regarde la propriété; d'abord au profit de ses propres enfants, et, au défaut de ceux-ci, au profit des enfants de ses deux frères, Jean Baptiste et François-Xavier Castonguay, et de sa sœur, Josephte Castonguay, la dite dame Leclerc, et que, ce dernier cas arrivant, la dite donatrice a expressément ordonné que le partage se fît par souche, ce qui prouve encore d'avantage que l'intention de la donatrice a été d'établir une substitution du dit immeuble au profit de ses enfants.

2° Considérant que, de plus, les frères et sœur de la dite Julie Castonguay, les survivant, recueillaient eux-mêmes à charge de substitution au profit de leurs enfants respectivement;

3° Considérant que la dite Julie Castonguay est décédé sans enfants et qu'à son décès, ses frères et sœur survivants ont eu, par une disposition expresse du dit acte de donation l'usufruit du dit immeuble, lequel usufruit, d'après la même disposition, doit passer aux survivants ou au dernier survivant des dits frères et sœur;

4° Considérant que le dit Jean-Baptiste Castonguay, qui avait survécu à sa sœur, la dite Julie Castonguay, est depuis décédé, laissant des enfants, et que ces enfants, en vertu de la dite substitution, sont devenus propriétaires d'un tiers indivis dans le susdit immeuble, et qu'ils ont pu en disposer à leur gré, mais sans préjudice du droit d'usufruit qui appartient au dit François-Xavier Castonguay et à la dite Josephte Castonguay, dame Leclerc, [illegible] survivant de ces deux derniers;

5° Considérant que le demandeur appelant a valablement acquis la part des enfants du dit Jean Baptiste Castonguay dans le dit immeuble, mais qu'il n'aura droit aux fruits et revenus des dites parts qu'à compter du jour du décès du survivant des dits François-Xavier Castonguay et de la dite Josephte Castonguay,

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dame Leclerc, et que, pour cette raison son action, en ce qu'elle a rapport aux fruits et revenus du passé, est mal fondée;

6°. Considérant que la dite action [redacted] demande le partage ou la licitation du dit immeuble est prématurée [redacted] de la donatrice étant qu'il n'y ait pas de partage ou de licitation [redacted] ses propres enfants, auxquels et au survivant desquels l'usufruit du dit immeuble est réservé; et ce, tant que durera le dit usufruit;

Infirme le jugement dont est appel, savoir le jugement rendu, le 31 mars 1859, par la Cour Supérieure siégeant à Montréal; et cette Cour, procédant à rendre le jugement que la dite Cour Supérieure aurait dû rendre [redacted] dit Demandeur, appelant, de la demande des fruits et revenus du dit immeuble, et, tout en le déclarant propriétaire d'un tiers indivis du dit immeuble, le déboute également de son action, en autant qu'elle tend à provoquer le partage ou la licitation du dit immeuble, attendu que, sous ce rapport, la dite action est prématurée, et condamne le demandeur, appelant, aux dépens dans la dite Cour Supérieure, et quant aux dépens dans cette Cour, chaque partie paiera les siens, et enfin ordonne que le dossier soit remis à la dite Cour Supérieure, siégeant à Montréal.

Abbott & Dorion for appellants. Judgment reversed.

R. Laflamme, counsel.

Cherrier, Dorion & Dorion, for respondents.

(J. J. C. A.)

APPEAL SIDE.

MONTREAL, 7th DECEMBER, 1863.

In appeal from the Superior Court, District of Montreal.

Coram SIR L. H. LAFONTAINE, BART., C. J., DUVAL, J., MEREDITH, J., BADGLEY, A. J.

EDWARD W. LANE,

Plaintiff in the Court below,

APPELLANT;

AND

DAME MARY A. CAMPBELL,

Defendant in the Court below,

RESPONDENT.

PRACTICE—COMMISSION—ROGATOIRE—BIRTH—STATUS—PROOFS.

HELD:—That a motion by a plaintiff for a *commission Rogatoire* to examine certain witnesses at or near St. Paul's, Minnesota, was well founded in law and practice of the Court.

That such commission may be granted on the application of the plaintiff though unsupported by affidavit.

Semble that such a commission applied for by a defendant should be supported by affidavit.

That where registers do not exist of the birth of a person, such [redacted] has a right of action to establish by a judgment of the Court the date and place of [redacted] birth and he does not need to show any special interest to procure such judgment apart from the non-existence of such registers.

That the date of birth is an important part of the status of a person giving him a right of action to establish such date.

This was an appeal from a judgment of the Superior Court at Montreal, rendered on the 30th May, 1863, dismissing a motion made by the appellant and plaintiff for a *commission rogatoire* to examine certain witnesses resident at or near St. Paul, Minnesota.

The action of the plaintiff was brought against the defendant who was his step-mother and tutrix of her minor children, Catharine Caroline Lane and Campbell Lane, the sole brother and sister, and co-heirs of the plaintiff.

The declaration of the plaintiff alleged the marriage of the late Elisha Lane with Harriet Wickstead on the 27th March, 1819; that the plaintiff was the only surviving issue of the marriage, and was born on or about the 10th October, 1822, at the Parish of Terrebonne, his father's then domicile; that Harriet Wickstead died on or about the 19th April, 1832; that Elisha Lane in 1848 married the defendant, Mary Ann Campbell; that the only surviving issue of this second marriage were Catherine Caroline Lane, born in 1855, and Campbell Lane, born in 1859; that Elisha Lane died in August, 1862, and the defendant was appointed tutrix to her minor children, the said Catharine Caroline and Campbell Lane, in September, 1862.

"That it is necessary for divers reasons that the plaintiff should be able to establish, and the plaintiff has an interest in establishing, his status as such sole surviving issue of the said Elisha Lane by the said marriage with the said Harriet Wickstead, as well as the date and period of his birth.

"That in order to establish such status and date and period of birth as aforesaid, diligent search has been made in divers registers and among divers records, both in the said Parish of Terrebonne and at various other places, but that the said plaintiff had nevertheless failed to discover any entry or registry or written proof of the said birth.

"That the plaintiff having such interest as aforesaid in the establishment of his said status and date and period of birth, applied to the said defendant as such tutrix as aforesaid to admit such status, and that the plaintiff was so born on the tenth October, 1822, yet nevertheless and notwithstanding incontestible evidence of such date and period aforesaid, the defendant has refused and still refuses to admit such status and date and period of birth unless the registered or certified entry of such birth be produced.

"That seeing the premises the said plaintiff desires to avail himself of the testimony of divers persons advanced in years while still living, and thereby as well as by writings and by documentary evidence to prove and establish his said status and the date and period of his birth aforesaid, and in order thereto is desirous of bringing before this Honorable Court the said Dame Mary Ann Campbell and the said Catherine Caroline Lane and Campbell Lane represented by the said Dame Mary Ann Campbell, their tutrix, as the persons interested in the establishment of such status and date and period of birth as aforesaid of the plaintiff, and in their presence duly and legally to prove the same to the end that the plaintiff may not be damnified by the want of such entry of record as aforesaid.

"Wherefore the plaintiff brings suit and prays that the said defendant, as well in her own right as in her said capacity as aforesaid, may be summoned to be and appear before this Honorable Court on the ninth day of March next, and that the said plaintiff may be permitted to adduce before this Honorable Court in this cause, evidence of his birth, and of the date and period thereof, and of his status as such issue of the said Elisha Lane deceased; and that upon the

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adduction of such evidence, the said status and date and period of birth may be declared by this Honorable Court; and that this Honorable Court do declare and establish that the plaintiff was born in the said Parish of Terrebonne, issue of the marriage of the said late Elisha Lane with the said late Harriet Wickstead, and that the said plaintiff was so born issue of the said marriage in the year of our Lord, 1822, to-wit, on the 10th October of the said year 1822, and that such further or other order may be made in the premises as to this Honorable Court may seem fit and just, the whole with costs.

The respondent pleaded to this action the following exception: That the plaintiff had always been publicly known and recognized as the son of Elisha Lane, issue of his marriage with Harriet Wickstead, and that such status has been recognized and assented to by legal documentary evidence, and more particularly by the inventory of the effects belonging to the community which existed between Elisha Lane, his father, and his late wife Harriet Wickstead, executed before Campbell and Colleague, Notaries Public, on the 29th March, 1844, and duly closed *en justice* at Quebec, the 3rd April, 1844, wherein it is stated that the said Plaintiff was the son of Elisha Lane, issue of his marriage with Harriet Wickstead, and of the age of nineteen years. Also in and by a certain *acte de tutelle* to the plaintiff at Quebec, on an *avis de Parens* duly homologated before Sir James Stuart, on the 19th February, 1844, wherein Elisha Lane was appointed tutor, and Thomas Gibb subrogated tutor to the plaintiff, then being a minor of 19 years.

That also by certain articles of clerkship executed before witnesses by and between Elisha Lane and G. O'Kill Stuart on the 21st August, 1844, wherein the said G. O'Kill Stuart agreed with the said Elisha Lane to take the said plaintiff, a minor of the age of twenty years, as his clerk, and the said plaintiff being a party to the said articles, did declare that he was a minor at that period and time of twenty years.

That the status having been always acknowledged and the plaintiff having always since his birth being in possession of the *état* or status, as the son of Elisha Lane, issue of his marriage with Harriet Wickstead, he has no interest whatever, and has shown none to entitle him to enter upon the evidence and period of his birth, and that the defendant is not bound by law to enter into a contestation upon such period of time of birth, which could only be valuable in order to establish his status, which has never been denied; but on the contrary universally admitted by all parties who have any knowledge of the family, and more particularly by the defendant and the public generally.

Wherefore, the said defendant, protesting against the admission of any documentary or verbal evidence to establish the date, period and place of birth of the plaintiff, prays that the action be dismissed.

Another exception was pleaded containing the ground above mentioned, and in addition that the plaintiff cannot be permitted to prove a period and time of birth other than that assumed by him in the articles of clerkship and established thereby, as also by the inventory and *acte de tutelle*.

The defendant lastly pleaded a *défense au fonds en fait*.

The plaintiff, by a first answer to the first plea of the defendant, averred that

the paper styled an inventory was null and void for reasons he should set forth when occasion should require, and that at the dates of said inventory and *acte de tutelle* he was a major of full age, and that he was no party to nor privy, nor was he cognisant of such pretended inventory and *acte de tutelle* till a very recent date; and further at the date of the articles of clerkship he was ignorant of his status as a major, and that such articles of clerkship were signed by the plaintiff at the request of the said Elisha Lane, and in such ignorance. The plaintiff further denied all the allegations of the said first plea.

The plaintiff similarly answered the second plea of the defendant.

The plaintiff also answered generally to the first and second plea of the defendant.

Among the articulation of facts produced by the plaintiff and answered by defendant were the following:

Articulation 3rd.—Is it not true that on or about the 27th March, 1819, the said Elisha Lane, being then in the Parish of Terrebonne in the then district of Montreal, intermarried with Harriet Wickstead of Montreal, spinster?

Answer.—Yes.

Articulation 4th.—Is it not true that the only issue of the said marriage now living was the said plaintiff, and that the said plaintiff was born at the said Parish of Terrebonne on or about the 10th day of October, 1822?

Answer.—It is true that the only issue of the said marriage now living is the plaintiff, but the date and place of birth is denied, and moreover is immaterial and impertinent.

Articulation 7th.—Is it not true that after diligent search to that end, the said plaintiff hath failed to discover any entry, or registry, or written proof of his said birth?

Answer.—The matter herein enquired is unknown to the defendant, and is, moreover, immaterial and impertinent.

Defendant submitted articulations as follows:

1st. Is it not true that in the extract from the records of Medical Examinations kept by the University of Edinburgh and fyled herewith, marked A, the Edward W. Lane mentioned therein is the plaintiff?

2nd. Is it not true that the said extract is a true and accurate extract in every particular from the Records of Medical examinations of Edinburgh?

The extract produced marked A, duly authenticated, shewed that at the College examinations which took place the 6th and 7th of July, 1852, the plaintiff entered himself as aged 28 years, residence Royal Circus, Edinburgh?

After issue joined, the plaintiff made the following motion:

"Motion on the part of the said plaintiff that a commission in the nature of a *commission rogatoire* do issue in this cause to commissioners to be named for the examination of certain witnesses resident at or near St. Paul in the state of Minnesota, one of the United States of America, to be produced, sworn and examined on behalf of the said plaintiff returnable without delay."

The following is the substance of the observations of the Honorable Judge in rendering judgment.

"This is an action brought by a gentleman against the tutrix of the minor

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children of his deceased father claiming to have his status as a son established. It is a general action of this description seeking nothing further than the establishment of such status. The defendant pleads that such status is admitted, and was never denied.

Issue is joined and the plaintiff moves for a *commission rogatoire* to examine an elderly lady whose evidence will be valuable as to the period of his birth. But it is not the date of his birth, but the fact of his birth that gives him his status, and that fact is established. If the plaintiff adduces evidence under this commission and the defendant contradictory evidence, the real issue is entirely unaffected, it being a question of status only.

Had the plaintiff complained of acts done by his father to his injury, and sought to set them aside, and had he shown that the validity of such acts depended on the date of his birth, there would have been an issue wherein I could have granted this commission, as it is the motion must be dismissed."

The following was the judgment, (Smith J.,) 30th May, 1863:

"The Court having heard the parties by their counsel, upon the motion of the plaintiff, of the twenty-second day of May instant, that a commission in the nature of a *commission rogatoire* do issue in this cause to commissioners to be named for the examination of certain witnesses resident at or near St. Paul, in the State of Minnesota, one of the United States of America, to be produced, sworn, and examined on behalf of the said plaintiff, returnable without delay, having examined the proceedings and deliberated thereon; it is ordered that the said plaintiff take nothing by the said motion."

The plaintiff was aggrieved by this judgment, and obtained leave to appeal from it.

R. Laflamme for appellant: The plaintiff required to examine as a witness on his behalf an aged lady of 70 years, sister of his mother, and who was present at his birth, and who is now resident at St. Paul, Minnesota, and the *commission rogatoire* was asked for chiefly to obtain her evidence. It was the duty of the plaintiff, and he did move for the commission at the earliest opportunity, and the practice of the Court always has been to grant the commission even when applied for by a defendant without any affidavit and without other formality than a motion in Court on notice to the other side. Willis v. Pierce, 2 L. C. Jurist, 77; Johnston v. Whitney, 6 L. C. Jurist, 29.

It was undoubtedly incumbent upon the plaintiff, to prove the allegations of his declaration which were put in issue by the *défense au fonds en fait*.

Henry Stuart for the respondent: The action instituted purports to be a demand to be recognized as the issue of the marriage of Elisha Lane and Harriet Wickstead, founded upon the facts that the defendant has denied such status, and that he has a manifest interest in being permitted to prove the same. Idle suits are not allowed by Courts of Justice, and the plaintiff cannot be allowed to proceed with his cause unless his status has been so denied. The defendant pleaded that he had always been recognized as such son, by her, by the family generally, and that it was a matter of public notoriety, and that he had been so recognized in the important family papers therein mentioned.

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The defendant by her answers admits the status, yet the plaintiff persists in attempting to adduce evidence to prove that which is admitted and which was never put in issue. The only interest which the plaintiff has exhibited in his declaration is to be declared the lawful issue of the marriage of his father with a former wife, but the plaintiff has no interest, and has certainly asserted no interest in proving his age. That is no part of the action; it would be merely a piece of evidence to prove the filiation, if denied. The intention of the plaintiff was not to establish the filiation, as is pretended by his declaration, because that had been always admitted, but to attempt to prove a period of birth which would disturb rights of property.

The inventory of the estate of his father and mother would be set aside, on the ground of his majority, he having been represented as a minor and by his sub-tutor. Abstract questions without shewing an interest involved will not be decided, and the defendant could only be called upon to dispute the question of the plaintiff's age, when he demands the partition of his father's estate as if no inventory had been legally made. In addition it was incumbent to prove that the registry of births at Terrebonne had been searched, and that no entry could be found therein, before oral evidence could be admitted to supply the absence of such entry.

The respondent, believing that the judgment rendered by the Court below is founded on law and justice, trusts that the same will be confirmed.

DUVAL, J., giving judgment in appeal, said:

This is an appeal from a judgment rejecting the plaintiff's motion for a commission in the nature of a *commission rogatoire* to examine witnesses in one of the United States of America. We are of opinion the motion should have been allowed. In the case of a defendant making the application, an affidavit of circumstances is required; not so when the motion is made by the plaintiff, unless there are grounds for supposing that he wishes to retard the proceedings. In this case the plaintiff wishes to prove a fact he considers essential to support his demand. He is the judge of his own interests, and has a right to conduct his case as he understands those interests, unless he does a wrong to his adversary. Of what does the defendant complain? He says the fact is of no importance. The Court cannot agree with him in this. The defendant further urges that parol evidence is at this stage inadmissible. The answer is, if well founded this objection may be taken at the arguments on the merits. The plaintiff ought therefore to be allowed to go on, this commission he desires to sue out, not being of a character which by any possibility can prejudice the rights of the defendant.

The judgment in appeal was motive as follows:

"Considering that the motion made by the appellant and plaintiff in the Court below, for a *commission rogatoire* to examine certain witnesses resident at or near St. Paul, Minnesota, one of the United States of America, was well-founded in law and was made according to the course and practice of the said Court, and ought therefore to have been granted, and that in the judgment pronounced by the Superior Court, sitting at Montreal on the thirtieth day of May one thousand eight hundred and sixty-three, rejecting the said motion, there is

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error: this Court doth annul and set aside the judgment so pronounced by the said Superior Court on the thirtieth day of May, one thousand eight hundred and sixty-three, and this Court proceeding to render the judgment which the said Superior Court ought to have rendered, doth grant the motion so made by the said plaintiff, and doth order that a commission in the nature of a *commission rogatoire* do issue addressed to certain commissioners to be hereafter named according to law, and to the course and practice of the said Superior Court for the purpose of examining the plaintiff's witnesses, resident at or near St. Paul, Minnesota, aforesaid, the said commission to be made returnable without delay.

And this Court doth condemn the respondent es qualités to pay to the appellant his costs as well in this Court as in the Court below."

R. Laflamme for appellant. Judgment reversed.

H. Stuart for respondent.

(T. W. T.)

MONTREAL, 1st MARCH, 1864.

Coram DUVAL, J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J.

No. 27.

JOHN YOUNG, *et al.*,

(*Plaintiffs in the Court below*,
APPELLANTS.

AND

JAMES E. MULLIN,

(*Defendant in the Court below*,
RESPONDENT.

HELD: That a party purchasing for over $100, at an auction, where the terms of sale are announced to be,—"over $100, four months, paper satisfactory to the sellers from this date,"—is not entitled to the credit, without giving or tendering such satisfactory paper, and, on failure of the purchaser to give or tender such satisfactory paper, the vendor may sue, in an ordinary action of *assumpsit*, for the price, purely and simply.

This was an appeal from a judgment rendered by the Superior Court at Montreal, on the 25th day of June, 1863, (The HON. MR. ASST. JUSTICE MONK presiding.)

The action in the Court below, was in the ordinary *assumpsit* form, to recover the sum of $2,616.72, as and for goods sold and delivered by the appellants to the respondent, and was served on the 19th of September, 1862.

The sale was one by auction, and took place on the 28th of May, 1862; at which the terms were announced to be,—"over $100, four months, paper satisfactory to the sellers from this date." And, according to the conditions of the sale, all purchasers who should pay their purchases before the 28th of June, 1862, were to be entitled to a discount of 2½ per cent.

The respondent pleaded, "that the tea in question, and for the price of which this action is brought, was sold to and purchased by him on the 28th day of said May last, upon a term of four months' credit;" that on the 27th day of September, 1862, (the 28th being a Sunday,) he, the respondent, had tendered

to appellants his accepted check on the Bank of Toronto, for the amount of his purchase, and that he was still willing to pay that amount with interest at 7 per cent., from the date last mentioned (which he consigned with his pleas,) but, that the appellants should not recover costs, and on the contrary, should be condemned to pay him costs.

The appellants replied specially, to the effect, that the respondent had not only failed to pay for his purchase in cash, or to give paper therefor, satisfactory to the appellants, payable in four months from the date of sale, but had positively refused, after repeated applications for settlement by appellants, who even offered to take the respondent's own note for the purchase, payable as above-mentioned; to settle otherwise than by giving his own note, dated some fifteen or eighteen days from the said 28th day of May, 1862, and payable in four months from its date.

And that the appellants, having exhausted every means in their power of obtaining an amicable settlement from the respondent, instituted the present action against him.

The following was the judgment of the Superior Court:

"The Court, having heard the parties by their respective counsel, upon the merits of this cause, examined the proceedings, proof of record, and having deliberated, considering that the defendant hath established, by legal and sufficient evidence, the material allegations of his pleas, firstly and secondly pleaded; considering that it appears, by the proof adduced, that the sale of teas mentioned in the pleadings in this cause, and the amount of such sale, were not completed and determined on the 28th day of May one thousand eight hundred and sixty-two, as pretended by the said plaintiffs; considering that it appears by the evidence adduced, that the said sale of teas, and the amount thereof were completed and determined at a period subsequent to the twentieth of June, one thousand eight hundred and sixty-two; considering that the offer to grant a note, or the tender of the note made by the defendant, is proved in this cause, bearing a date subsequent to the said twenty-eighth day of May, one thousand eight hundred and sixty-two, was, under the circumstances of this cause, a sufficient compliance with the terms and conditions of the said sale of the twenty-eighth day of May, one thousand eight hundred and sixty-two; considering that the tender of the amount claimed by this action, less the costs of suit, made by the defendant to the plaintiffs on the twenty-seventh September one thousand eight hundred and sixty-two, was a good, legal and sufficient tender under the circumstances of this case, doth declare the tender of the twenty-seventh day of September one thousand eight hundred and sixty-two good and valid, and doth condemn the defendant to pay to the plaintiffs the sum of two thousand six hundred and thirty-five dollars forty-seven cents, current money of this province of Canada, to wit: the sum of two thousand six hundred and sixteen dollars and seventy-two cents, being the price and value of a large quantity of tea of about eighty-one packages sold and delivered by the said plaintiffs to the said defendant at an auction on the twenty-eighth day of May one thousand eight hundred and sixty-two, at a credit of four months; and the sum of eighteen dollars seventy-five cents, being the interest calculated upon the said sum

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of two thousand six hundred and thirty-five dollars forty-seven cents, at the rate of seven *per centum per annum*, from the twenty-eighth day of September one thousand eight hundred and sixty-two, when the said amount became due to the third day of November one thousand eight hundred and sixty-two, date of the said pleas of defendant—and the Court doth adjudge and condemn the said plaintiffs to pay the costs of the present action, distraits in favor of M. Doherty, Esquire, the attorney of the said defendant."

Bethune for appellants, argued that the judgment appealed from had in effect maintained, that the respondent's offer of a note at 4 months, dated 15 or 18 days after the date of sale was valid, and that respondent was consequently entitled to an absolute credit, until about the 12th or 15th of October, 1862, and that the respondent's tender of check before alluded to was, under the circumstances of this case, a sufficient tender in law, whilst the judgment at the same time declared, that the debt became due on the 28th day of September, 1862.

Apart from the manifest contradiction to be found in the judgment as to the precise term of credit, it would seem that the Honorable Judge, who pronounced it, meant to hold with the respondent, that the credit was an absolute one for 4 months, whether from the 28th May, or the 12th or 15th of June, however, does not very clearly appear.

The judgment under either aspect was erroneous. The condition of sale manifestly made the term of credit dependent on the giving of a note, satisfactory to the appellants and dated on the day of sale, and payable in 4 months from that day. Such a note not having been either given or even tendered before action brought, and on the contrary the respondent insisting that he had a right to a credit of four months, and some 15 or 18 days, the appellants were clearly right in suing the respondent as they did for the amount of the purchase, purely and simply.

Stuart, Q. C., followed, and cited Packford & Maxwell, 6th Term Reports, p. 52, Owenson & Morse, 7th Term Rep., p. 64, Londesborough vs. Mowatt, 28 Eng. Law and Eq. Rep., p. 119; and Milford vs. Mayer, 1 Douglass' Rep., p. 55.

DOHERTY for respondent, contended: That the plaintiffs, by their answers, admitted the sale to be *à credit*, but pretended that this was on condition of defendant giving plaintiffs "paper satisfactory to sellers;" that the plaintiffs waited for a month after the sale before calling on defendant for a settlement; that defendant refused to pay cash or otherwise than by his own note dated fifteen or eighteen days from the 28th of May, 1862, and payable at four months from its date; that, as defendant would do nothing, the plaintiffs were compelled to institute the present action.

The *enquête* established that the sale, as understood by Mr. Law *himself*, one of the appellants, was on terms such as stated by defendant, *à terme*, and that defendant had the option to pay by his own note; that the teas in question were to be weighed before their price, a price per lb., could be arrived at; that this weighing was not performed till subsequent to 20th June; that defendant duly offered his note to plaintiffs, but they refused it, and subsequently, arbitrarily and prematurely, sued him, as if the sale had been for cash, which all agree

it was *not*. From all that was proved, it was plain that the *offres* made by defendant's plea did all justice to the plaintiffs.

The judgment appealed from, which declares defendant's *offres* good and sufficient, and awards plaintiffs the amount deposited, but charges them with costs of suit, is fully warranted by the facts proved. It violates no law. It has done plaintiffs no injustice, and there was no necessity of appeal from it.

Even according to plaintiffs own statements in their special answers, their action was misconceived. Supposing an *acheteur* at an auction to buy goods, on terms of giving "paper at four months, satisfactory to the sellers;" suppose him to get the goods, and, after that, on being put *en demeure* to refuse to give such paper;—the action of the *vendeur* against him, before the expiry of the four months, could not be and is not assumpsit, as for goods sold and delivered and to be paid for *cash*. Mussen *v.* Price, 4 East,

"Any lawyer would know that." Per Bayley, J., in Day *v.* Picton, 10 B. & Cresswell.

That is so in England, and so it is in Lower Canada.

"Si in diem sit obligatio ante diem non potero agere."

"Dies adjectus efficit ne præsente die pecunia debatur. Ex quo apparet die adjectionem *pro reo* esse."

Before the expiration of the four months, such *vendeur* can sue for the "objet promis par la convention," (the note,) or for damages. Or he can revendicate. If plaintiffs had right to such remedies, they might have used them; but they had no right to make other, new remedies, for themselves. When they sued, they had no right to the money sued for, alleged cash price of goods sold and delivered, alleged cash price due. *The retail price of the teas sold here was a note.* There was not *convention* for anything else.

Further, until the weighing of the teas, the sale was not completed. Any note, under such circumstances, ought properly to have been asked as from date of the weighing only. In all aspects, or any, the Court here, it is humbly submitted, cannot but confirm the judgment of the Court below.

Mackay, followed, and cited a case in the Superior Court, of McGinnis *vs.* McClosky.

Bethune, in reply:—The leading case in England relied on by the respondent (Mussen *vs.* Price *et al.*, 4th East's Rep., p. 147,) in no way contradicts the legal position assumed here by the appellants, namely that they had a right to sue, under the circumstances, before the expiration of credit of 4 months. In that case, which was one of assumpsit for the price of sale, the majority of the Judges held, not that the action was premature, but that it ought to have been one in damages and not in *assumpsit*, for the purchase money; admitting, at the same time, that the proper measure of damage would be the price at which the goods were sold. But even there, the Judge before whom the case was tried (ROOKE, J.,) charged the jury that unless the defendants could show that they had given or tendered the bill, the action lay for goods sold and delivered. And LORD ELLENBOROUGH, Ch. J., on the application for a new trial, said:—the "present feeling of my mind is, that this action is well brought." The question here involved, however, being one purely of form as to the mode of declar-

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ing, our own law proper must prevail, and that certainly never sanctioned such a subtle distinction as was maintained in the case under review. The law on this point is correctly stated in an *arrêt* reported by DALLOZ in his *Reçeuil Periodique*, vol. of 1835, pt. 2, p. 132:—"En matière commerciale, fauto par "l'acheteur de fournir, comme il s'y était obligé, des traites à terme en paie- "ment du prix de la vente, le vendeur peut, *avant l'expiration du terme, pour- "suivre son paiement* immédiat." And the doctrine enunciated in this arrêt is stated by DEVILLENEUVE & MASSE to be "*Jurisprudence*" in France. Dict. du Cont. Coml., Vo. Vente, page 691, No. 288.

BADGLEY, J.—At an auction sale of the appellants' teas, on the 28th May, 1862, conducted by John Leeming, auctioneer, the conditions of sale were as follows:

Of and under $100 cash on delivery—over $100, four months, paper satisfactory to the sellers, from this date.

The respondent purchased 91 packages which were delivered, of which 10 half chests were returned. The established amount of the purchase was $2616, 72 cts.

An invoice with the terms 4 months from sale inserted therein, was duly delivered to the buyer, and he was duly called upon to fulfil the conditions by giving the stipulated note.

Two *months* after the expiring of the first month, he offered to pay in cash, less a discount of 2½ per cent to 2 per cent, which was declined by the sellers, and simple interest offered by them, which was refused by the purchaser who both before and after that offer had been willing to give his note, but always for a period prolonging the 4 months 15 to 18 days after the time of *credit* limited. The purchaser claimed the extension of time on account of alleged delay in the delivery of the goods.

The evidence shows that the delivery was finally completed early in June without precising either the date, or the quantities previously delivered, and that the buyer made all sorts of objections about the quality and weight, which terminated in the return of the 10 half chests, the sale price of which deducted from the gross purchase left the net sum of $2616.72 cts. due by the purchaser. On the 17th of Sept., 1862, the vendors applied again for a settlement, which on the 18th was replied to by another offer of the buyers note with 10 days extra to run beyond the 28th Sept., the expiry of the 4 months' credit, which was declined, and the action was thereupon instituted on the 19th September.

On the 27th Sept., the 28th being Sunday, the buyer offered his accepted check for the full amount of $2616.72 cts., which was not accepted because he would not pay the costs of the action then incurred.

The vendors admit that the buyers' own note would have satisfied the sale conditions as to a satisfactory note—and that the offered accepted check was equivalent to cash.

The action instituted on the 19th Sept. is in the common assumpsit form for goods sold and delivered for the price of $2616.72 cts. and which the defendant then and there promised to pay, but neglected, &c.

The pleas set out the special contract, the purchase under the auction condition of an absolute credit of 4 months as a thereby special agreement and the

consequent prematurity of the action at the same time tendering the sum of $2616.72 cts. with interest for 17 days, from 28th Sept. to date of plea, but without costs, and praying costs against the plaintiff.

In reply, the plaintiffs admit the mode and conditions of the sale and purchase, as stated, the defendant's refusal to take advantage of the discount at one month as stipulated, and to conform to the conditions of sale, by giving his note dated at a credit of 4 months from the sale, and hence the institution of the action at the time.

The matter in dispute between the parties previous to the action was at first the difference between the simple interest offered, and the 2 per cent. tendered, amounting to about $20, then as to the amount of 10 days' interest upon the note tendered which note would have been received, had the buyer been willing to pay interest upon the extension fixed by himself, say about 25s, and lastly the costs which had accrued upon the action when the tender was made on the 27th Sept., and which would have been of no great amount. However trifling these differences between the parties might be, points of commercial and practical professional interest have arisen in the case and been submitted, which must now be decided.

Before settling the legal point in the case, it is right to remark, that the defendant has not in his pleadings complained either of the quality or of the alleged delay in the delivery of the teas which had been urged by him as the ground for his claiming the extension of the time of payment, thereby impliedly admitting that the delivery was in time, and the quality correct. His tender on the 27th for the 28th, and its iteration in the plea with interest from that time, corroborate the sufficiency of the said quality and delivery, and the defendant's own admission that the four months in question ran from the 28th May to the 28th Sept. is of record in the action.

The pleas of the defendant in fact simply offer the issue of his purchase at an absolute credit of 4 months, and plainly and manifestly contradict the ground assumed by him for claiming the extension of the credit limit beyond that fixed by the conditions of sale. He was in that respect in his own wrong all through.

The contestation has become narrowed to the question of the absoluteness of the credit of 4 months from the 28th May. Upon this point the testimony of record must be adverted to for a moment.

The auctioneer, Leeming, says, that sales for sums exceeding $100 are credit sales, to be settled in the mean time by note. Hodgson, the plaintiff's clerk, says, usually everything under $100 is cash, and over that amount is on credit.

Law, one of the plaintiffs, is acquainted with the customary conditions of sales such as that referred to in this case, which are usually cash up to a certain amount, and a term of credit for larger amounts. Up to £25, the customary terms are cash; over that amount they are credit.

This testimony is conclusive that the term of 4 months in this sale was a term of credit.

The authorities are equally conclusive:—

2 Parsons, p. 456-7.—Contracts—"If the goods are sold on credit, that is, if

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it be a part of the contract of sale, that payment shall be made at a future day, there can of course be no suit for the price until that day. This is undeniable both in English and French jurisprudence, because in that simple case, the term is for the benefit of the purchaser, and the old axiom applies *qui a terme ne doit rien.*"

But if a mode or qualification be added to be performed by the buyer, then the benefit is mutual, the buyer obtains his term of credit; and the vendor obtains a mode of assisting himself in the interval.

In this case the agreement was that the buyer should have 4 months' credit from the day of sale upon his furnishing the vendors with satisfactory note.

He obtained his credit, but did not furnish the note. What then was the right of the vendor under the agreement?

Parsons on Contracts—(*loc cit.*) says: "But if it is also a part of the contract that a note shall be given immediately, which is to be payable on that future day, if this be not given, an action can at once be maintained for it—not only because it is a separate promise, but because by the practice of merchants *this note might be made, by the vendor's getting it discounted, the means of present payment.*"

Thus the mutual benefit, the credit on the one side, and the means of present payment on the other, are clearly stated.

Addison on Contracts, p. 240—Maintains the same principle as above enunciated by Parsons, and the text writers and adjudged cases entirely concur in the right of the vendor to maintain an action *to obtain the note.*

Addison, p. 1120—If the goods are sold upon terms, that the purchaser is to give his acceptance at two, three or more months for the price, and the goods are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must sue either on the promise to give the acceptance or wait the termination of the period the bill or note had to run.

4 Term Rep., 1803, p. 146—Mussen vs. Price, may be considered the leading case, in which Lord Ellenborough recorded his dissent from his colleagues, who "*held* that the buyer, in such a case as this cannot be sued in action for goods sold and delivered, but upon the special contract only, and that he could not be sued in that form of action till after the expiration of the term"—and in 3 Boss. & Pull. 1803, p. 582—Dutton vs. Solomonson Lord Alvanley, Ch. J., who entertained the same opinion as Lord Ellenborough, yielded, and followed the rule in Mussen vs. Price, especially knowing that his colleagues in his own Court differed from him. Since that case of Mussen vs. Price, Lord Ellenborough also yielded to those rulings as seen in 9 East., 498, 1808, Hoskins et al., assignees of Deighton, and again in 3 Campbell, 329, Hutchinson vs. Reid, in which he held that until credit expired there was no debt due, 1813. And the current of authorities since 1803 has been all that way in England. Hoskins vs. Duperray, 9 East., 498. Cuthay vs. Murray, 1 Camp., 335. Griffin vs. Longfield, 3 Camp., 254. Joseph vs. Knox, ditto 320, 4 329, 414. Boss. & Pull., p. 330. Brooks & White.

The same has been also held in Upper Canada, 5 U. C. Q. B., Rep., p. 159—

Wakefield vs. Gorrie—in which the Court held that such a purchaser was one unconditionally *on credit*, and could not be treated as a purchaser *for cash* upon his refusal to furnish the note—and could not be sued on common counts before expiry of the time. Now in the case of Mussen vs. Price—the action was for goods in common assumpsit form before the expiry of the time of credit, and the judges objected because the action was brought upon an assumpsit "implied in "law, and not upon an express assumpsit—that it was not an implied contract, "but express, including the terms on which one agreed to buy and the other to "sell, for the non-performance of which the party *had his remedy in damages*; the "vendor's argument going upon an assumption that the giving of the bill was a "condition upon which the credit was to be given—said there was no such con-"dition in the contract—the vendor would not have the full benefit of his con-"tract if he is called upon for the full sum before the expiration of the credit—"but the terms of the contract were also introduced for the benefit of the ven-"dor, *that he might have in his hands an instrument which he could negotiate.*" And in Brooks vs. White, Boss. & Pull., above cited, J. Chamber said the qualifications respecting the mode of payment are for the benefit of the purchaser, and during the time to which they relate, the seller must sue on a special contract.

There is also an American authority which is important:

21 Wendell, p. 90—Hanna vs. Mills & Hooker—In error from Superior Court, N. Y. city in which all the English cases were referred to and commented upon. Mr. Justice Bronsdon, the presiding judge in error, having reviewed them as settled, he thus proceeds: "the right of action is as perfect on a neglect or refusal "to give the bill as it can be after the credit has expired. The *only difference* "between *suing at one time* or *the other relates* to the *form of the remedy*; in "this case the plaintiff must declare specially; in the other he may declare gen-"erally. The *remedy itself is the same in both cases*; the damages are the price "of the goods. The party cannot have two actions for one breach of a single "contract; and the contract is no more broken after the credit expires than it "was the moment the note or bill was wrongfully withheld."

It is undeniable that a sale upon the conditions stated and proved in this case is a sale upon credit; and it is equally undeniable that such credit sale coupled with the agreement by the purchaser to furnish a note for the price of the goods purchased would give immediately rights to the vendor to demand the note.

Technically the common assumpsit form for goods sold is for the price of goods sold, and promised to be paid presently, but neglected, to the vendor's damage—of what? How is it measured? By the price of the goods.

The special assumpsit for non-delivery of a note representing the price of those goods, but neglected or refused to be given, is also to the vendor's damages, in what? How to be measured in that case? Why still by the price of the goods.

In both cases the damage then is the same, namely, the price of the goods as remarked by Mr. Justice Bronsdon, and the only difference is the form of the remedy, as he observes: but though both result in damages established by the price of the goods, the two forms of action are dissimilar in this,—the

Young et al., and Mullin, that would support the common assumpsit could not sustain the special assumpsit, and the proof upon the express contract would show something different from an implied contract.

Now in our practice we are not tied down to the strict niceties of the English forms of action, and sometimes very much to our practical disadvantage, because it becomes necessary to make up the issues by special pleadings which in many cases in fact, do not tender issues upon the action brought, but as it were, make new demands. In this case, for instance, the form of remedy is the common assumpsit form, showing the sale and delivery of the teas for the price named with the implied contract attaching to the purchaser to make present payment. The proof in such a case is necessarily simple, that of the purchase and receipt of 81 boxes of tea for such a value, the law filling in the implied contract. But the special pleas and answer have brought into Court a special agreement, and it is that special contract not the implied assumpsit which is the matter of contract; it is in fact the damage suffered by the non-delivery of the note, which would have furnished the price by means of the discount of the note for money, and that damage is the value of the goods. The case, as appears then in the pleadings, will be more plainly stated colloquially. The plaintiffs say: You, defendant, on the 28th of May, 1862, purchased our teas for the price of $2616.72c., which teas were delivered to you then and there, and the price of which you promised to pay to us presently on demand. The defendant answers: True, I bought the teas for that price, but you agreed to give me a credit of four months from the time of sale, [illegible] cannot ask for the money until that time has expired. The plaintiffs re[illegible] we did agree to give you that credit, but it was on the condition that [illegible]n and there give us a satisfactory note at four months from the date of sa[illegible]hich in commercial usage would have given us the use of the money, by means of its discount, and without interfering with you. You have had our teas in your possession, and thereby enjoyed our capital, and having refused to furnish to us the note or its representative; you have therefore caused the damage of the price of your purchase.

In this state of the pleadings, mere technical forms disappear altogether, and the case is submitted as it in fact is. None of the English or other cases cited above present such a state of pleadings as this case, and to that extent are not strictly applicable upon the question of remedy, or form of action, or of the question of procedure; this case must be taken up and adjudged as it is, in the contestation made up for judicial decision; nor can the respondent complain, because, as before observed, he was in his own wrong in unjustly claiming before action brought an extension beyond the term of credit, and in holding and using the plaintiffs' goods, without affording to them *the means of having in their hands an instrument which they could negotiate* as laid down by the judges in the case of Mussen and Price, and which is corroborated by a similar case under French law. Dalloz, Jurisp. du Roy, 2e partie, 1835, p. 132; Meerman vs. Bettomeyer. A quantity of wine was sold, for which a credit note was to be given; the wine was delivered at once, and the note refused to be given. Action was at once instituted by the vendor against the purchaser. The case went by default against the defendant, and judgment was rendered for the

plaintiff, the vendor. Upon the defendant's appeal, the original judgment was confirmed. The Court of Appeal, holding that the breach to give the note gave immediate right of action to the vendor to sue for the price, upon the ground, "puisqu'il est de principe en matière commerciale que les effets de commerce sons la représentation d'une monnaie réele, surtout entre négociants."

The principle of this French decision is in exact conformity with th[illegible] of the English cases; the note is the representative negotiabl[illegible] the goods sold and delivered, and the amount claimed is the pr[illegible] which becomes the measure of the damage suffered by the plain[illegible] breach of the defendant's special contract to deliver the note when d[illegible]

The decisions in both systems rest upon the commercial convertib[illegible] note into money, and the legal implication that the note was money in a [illegible] mercial sense. Under these circumstances the judgment appealed from cannot be sustained, and the judgment must be in favor of the appellants.

MONDELET, J.—This is an appeal from the judgment rendered by the Superior Court of Montreal (Monk, J.) condemning respondent to pay a certain sum of money, being the amount of a purchase of packages of tea sold to him on 8th May, 1862, at auction, by Jno. Leeming & Co., for plaintiffs. The action was instituted on the 19th September, 1862.

Defendant has pleaded he had a right to 4 months' credit, that he offered the amount by an accepted cheque but without costs: plaintiffs refused.

The Court has declared the offer by a cheque a legal tender.

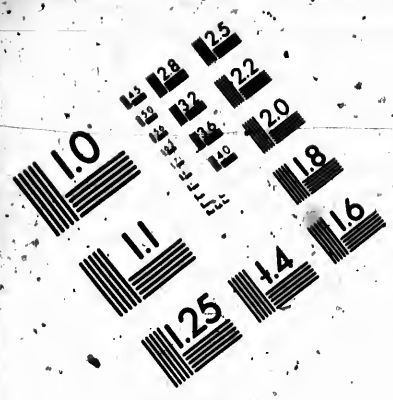
I am of opinion, from the record and evidence, that the judgment of the Court below should be reversed.

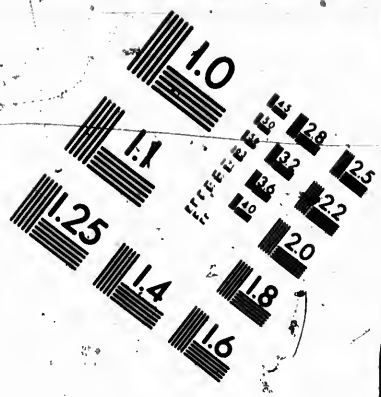
1. The credit of four months was not an absolute credit, but four months' credit on satisfactory paper, &c., which defendant, though bound to give, persisted in refusing, pretending at the time that he was entitled to an *absolute* credit of four months.

2. Whatever may be said as to plaintiffs making no objection to the cheque offered by defendant, still the Court below could not juridically in its judgment declare an offer made by a cheque to be a legal tender.

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

The Court, * * * considering that the said appellants did on the twenty-eighth day of May, one thousand eight hundred and sixty-two, sell and deliver to the respondent the quantity of tea by him in his pleadings in this cause admitted, at and for the price and sum of two thousand six hundred and sixteen dollars and seventy-two cents at a credit of four months from said date, upon the condition of the said respondent furnishing to the said appellants negotiable paper payable at the expiration of the said term of credit: considering that the said appellants had therefore a legal right to demand and have from the respondent at and after the said delivery such negotiable paper payable as aforesaid, for the amount of the said sale, and upon failure thereof by the said respondent, to institute an action at law against him for the immediate recovery of the said sum of money: considering that the said respondent did not comply with the demand of the said appellants to furnish to them the said negoti-





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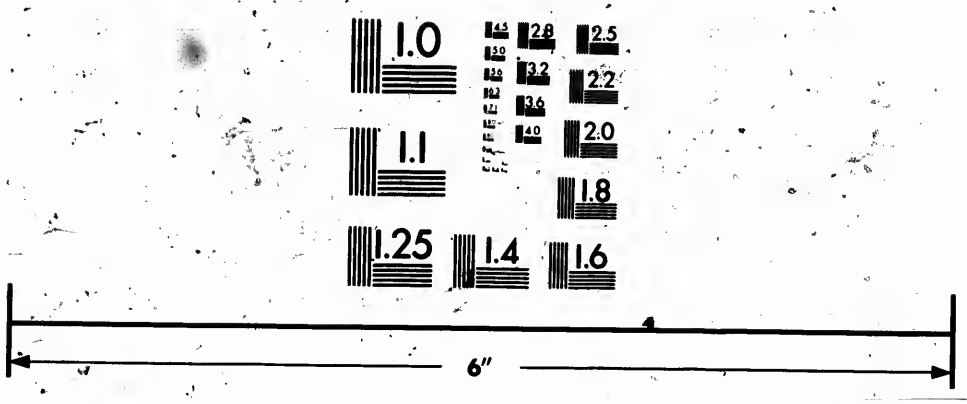

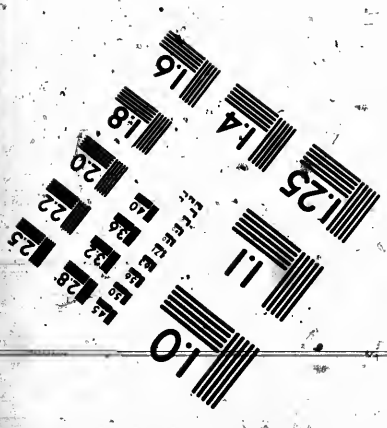

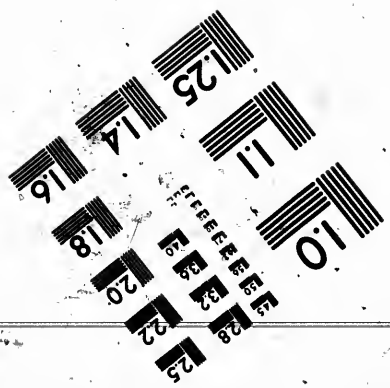

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able paper before the institution of their action in this behalf, and that their said action was not premature as alleged in the pleadings of the respondent; finally considering that the tender made and fyled in this Court by the respondent on the twenty-seventh day of September, one thousand eight hundred and sixty-two, after the institution of the said action against him by the appellants was not sufficient, nor good and valid in law, under the circumstances of the case, the same having been made for the amount of the said purchase with interest thereon from the date of the said tender only, and also less the costs of the said action; considering that in the judgment pronounced by the Superior Court at Montreal on the twenty-fifth day of June, one thousand eight hundred and sixty-three, affirming the sufficiency of the said tender, and condemning the said appellants to pay to the respondent the costs of said suit, there is error,—this Court doth reverse and set aside the said judgment, and proceeding to render the judgment which the Court below ought to have rendered, doth condemn the respondent to pay to the appellants the said sum of two thousand six hundred and sixteen dollars and seventy-two cents the price and value of the said tea so purchased by him as aforesaid, with interest thereon from the nineteenth day of September, one thousand eight hundred and sixty-two, the date of service of process in this cause, and also their costs of suit in the Court below as also all their costs in this Court.

Strachan Bethune, for appellants. Judgment of Court below reversed.
Henry Stuart, Q. C., Counsel.
M. Doherty, for respondent.
R. McKay, Counsel.
(S.B.)

CIRCUIT COURT.

MONTREAL, 19TH DECEMBER, 1863.

Coram MONK, J.

No. 4642.

Reeves vs. *Malhiot.*

HELD:—In an action for $33.25, parol evidence is inadmissible to prove a contract of suretyship.

By this action the plaintiff, a merchant tailor claimed from the defendant the sum of $33.25, being the value of clothes sold to one Captain Maine. The declaration set forth that the goods had been delivered to Captain Maine at the request of the defendant, and on his special undertaking to become responsible for their value.

Defendant pleaded that he happened to be present when the goods were bought, but never became liable in any way to pay for them.

At *Enquete* the plaintiff attempted to prove the contract of suretyship by parol evidence, but was not allowed to do so. The Court held that the contract was not binding between the parties unless there was some writing or memorandum sufficient to constitute a *commencement de preuve par écrit.*

S. Rivard, for plaintiff. Action dismissed.
V. H. Bourgeau, for defendant.
(J. L.M.)

SUPERIOR COURT.

MONTREAL, 31ST MAY, 1861.

Coram MONK, J.

No. 2208.

Chevalt vs. *De Chantal & Thomas* et al., *Opposants.*

HELD:—1st. That assignees, in their sole quality as such, have in Lower Canada and in the present instance no quasi corporate or representative capacity.

2nd. An appointment of assignees as a *mandat*, and on the principal *nul ne peut plaider par procureur* the assignees *as mandataires* cannot sue or maintain an opposition.

3rd. That our Statute in providing for a *cession de biens* does not introduce the technicalities or machinery of the old French Law.

4th. That in the old French law the *datio in solutum* or *abandon*, the *cession de biens* the *contrat d'abandonnement* and the *acte d'atermoiement* were separate and distinct proceedings accompanied by strict legal and judicial formalities.

5th. Under our law no provision has been made for a *cession de biens* in the proper and precise signification of the proceeding as understood and practised in France.

6th. That a deed of assignment whereby the estate of the debtor is transferred in judgment and vests absolutely in the creditors to the absolute discharge of the debtor, is a *datio in solutum*, and equivalent to a sale.

This case arose upon the contestation of an opposition fyled by Henry Thomas and Jacques Grenier, Esqs., as assignees acting under Notarial deed of cession executed by the defendant, Madam DeChantal, *marchande publique*, on the 19th July, 1860.

In the opposition the quality of the opposants was alleged as follows:

"Henry Thomas and Jacques Grenier, both of the city and district of Montreal, assignees, duly elected and acting for the creditors of the defendants under notarial deed," &c., &c.

The several clauses of the deed were then set up.

It was then alleged "That under and by virtue of the said deed of cession the said opposants as syndics assignees did take possession of and became duly invested with the goods and merchandise of the said Dame DeChantal, and did enter upon their duties as such assignees for the benefit of all the creditors of the said Dame E. DeChantal."

It is then alleged that the effects seized in this cause were part of the goods ceded by the deed of cession of the 19th of July, 1860, and that, at the time of the seizure, the opposants were in possession of them as such syndics.

It is then alleged in effect that the judgment obtained by the plaintiff in this case was fraudulent.

The plaintiff contesting this opposition set up that the opposants had alleged no sufficient quality, and that the quality of syndics or assignees did not justify their intervention as opposants.

That the opposants as *syndics et séquestres ou procureurs* named by the creditors of the defendant were incapable in law of maintaining their opposition.

Then followed allegations in support of the pretensions of the plaintiff's claims, the judgment maintaining which the opposants had urged to be fraudulent, and which the plaintiff contesting specially denied. And on the toher hand alleged that the deed of cession of the 19th July, 1860, was the result of a

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fraudulent attempt by the defendant to avoid payment of the judgment. That moreover neither of the opposants, although well aware of the issue of the writ of *saisie arrêt* before judgment, at the time at which it was issued had intervened or contested the action of the plaintiff. And that the effects seized under this writ were not, when seized, in the possession of the opposants as alleged, but in the shop and custody of the defendant.

That the said deed of cession was "entaché de fraude et a été fait en fraude des droits du dit contestant," and that in fact it had never been completely an fully executed, inasmuch as the effects ceded had never passed from the possession of the defendant to that of the opposants.

The contestant also pleaded a general denial.

The deed of the 19th July, 1860, upon which the opposition was based, after naming the defendant, Madame DeChantal, her husband, and a number of creditors as present and parties to the deed, proceeded to state that, "Dame E. DeChantal not being able to pay" "ses dits créanciers, leurs crédits respectifs, dont les montants sont placés vis-à-vis leurs noms respectifs dans la liste à la cédule marquée de la lettre M, annexée aux présentes, après avoir été signée et paraphée par les parties et notaires *ne varietur* pour enfaire partie, mais offre de leur faire une cession de toutes ses marchandises et crédits qu'elle a actuellement en mais, mais à condition que ses dits créanciers lui donnent une quittance et décharge finale du montant en entier de leurs dites créances respectives et aux autres conditions ci-après mentionnées, ce qui est accepté de la part des dits creanciers.

C'est pourquoi ces présentes font foi que la dite Dame Plamondon (De Chantal) autorisée comme susdit, a par ces présentes volontairement cédé, quitté, transporté et abandonné dès maintenant et à toujours à ses dits créanciers ce acceptant, toutes ses marchandises, fonds [illegible] magasin, effets et objets de commerce qu'elle a actuellement en mains, dans [illegible] magasin ou ailleurs, tel que plus complètement mentionné et détaillé dans l'inventaire d'iceux produit par le dite Dame Plamondon et remis à l'instant aux dits créanciers sans aucune réserve ni exception quelconque;" after mentioning other effects assigned such as the case of her house and shop, accounts bills, obligations, &c., the deed proceeds thus:

"La présente cession est ainsi faite pour et à la charge par les dits créanciers de payer toutes les dettes privilégiées de la dite Dame Plamondon, savoir: à John Tiffin, écuyer, pour loyer de la dite maison et magasin, à devenir échu le premier mai prochain, 1861; pour loyer la somme de cent vingt-cinq livres, cours d'Halifax, ensemble les taxes et cotisations municipales; aux commis de la dite Dame Plamondon, leurs gages qu'ils ont droit d'exiger en loi; à Jobin et Mathieu, notaires, deux louis et sept chelins et demi; au nommé Allard, boulanger, pour pain, huit louis six deniers.

Et en outre, pour par la dite Dame Plamondon demeurer quitte et dûment déchargée envers ses dits créanciers du montant en entier de leurs dites créances respectives, lesquels dits créanciers au moyen des présentes donnent quittance à la dite Dame Plamondon à toutes fins que de droit.

Et pour exécuter la présente cession, les dits créanciers nomment comme syndics et séquestres et procureurs les dits sieurs Henry Thomas et Jacques Gre-

nier, acceptant, auxquels ils donnent pouvoir de faire de pour eux et en leurs noms respectivement prendre possession des dites marchandises et crédits, en faire la vente soit à crédit ou argent comptant, par vente publique ou vente privée, en bloc ou en partie, comme bon leur semblera pour le plus grand avantage des dits créanciers; recevoir les dits crédits, en donner quittance, intenter toutes poursuites, obtenir jugement, les faire mettre à exécution, les vendre en bloc ou en partie comme susdit et comme bon leur semblera, et sur le produit de la dite vente de marchandises et crédits ou perceptions des dits crédits, payer les dites dettes privilégiées et la balance à partager entre tous les dits créanciers au marc la livre, et en proportion de leurs dites créances respectives; s'engageant les dits syndics de faire et régler le tout avec diligence et ponctualité pour l'avantage des dits créanciers.

Dont acte fait et passé, etc., etc.

This deed was signed by Madame DeChantal, her husband, Jacques Grenier, A. Tellier, Adolphe Roy et Cie., Henry Thomas and eight other creditors, some using the names of their firms and some their individual signature.

The list or schedule referred to in the deed comprised the names of A. McFarlane, Grenier, Martin, Scott, Bray & Co., Lamothe, McGregor, Thomas Thibaudeau & Cie., and others; and was signed in a similar manner to the deed, viz., in some instances the names of the firms were employed, in others one member of the firm signed his own individual name.

MONK, J.—This is an opposition by assignees to the seizure and sale of Bankrupt Estate by a creditor not a party to the deed of transfer and cession. On the 4th September last, the plaintiff obtained judgment against the defendant, a *marchande publique*, for £137. 15. 1 and costs upon her confession. In instituting that action the plaintiff had taken out a *saisie arrêt*, and seized all the goods now advertised for sale, and the sale of which is now opposed.

The facts of the case appear to be briefly as follows: On the 13th February, 1860, the plaintiff engaged with the defendant as her clerk at the rate of £150 per annum from the first day of May, 1860, to the first day of May, 1861. In July, 1860, she became a bankrupt, and on the 19th July made a *cession* or *abandon* of all her stock in trade or estate to her creditors. On the 24th July plaintiff took out a writ of *saisie arrêt*, and seized all the stock thus ceded, and still in the old store. There was then due £12. 15. 1, being the balance of salary to the first day of July when he had ceased to be in the defendant's employ. And moreover there was to become due a further sum of £125. 0. 0 for salary to accrue between the 1st day of July, 1860, and the first day of May, 1861, and during which he alleged he was out of employ. Madame de Chantal confessed a judgment for the full amount, that is for the sum of £137. 15. 1. Plaintiff then took out execution against the goods already seized; and the opposants as assignees, in that capacity alone have fyled the present opposition, claiming the goods: setting forth the transfer to the creditors: alleging that the judgment of the 4th September, 1860, obtained upon Madame De Chantal's confession was fraudulent, and pretending that the judgment should have been for £12. 15. 1 only; and by their special answer to plaintiff's contestation of their opposition they offer that amount together with £37. 0. 0, making together

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£50. 5. 1 for three months' salary in addition to what was actually due, which they pretend they had offered before the institution of the action.

The plaintiff by his contestation of the opposition has raised in the first place the question of law whether the opposants have the right to come into the record in their quality as assignees or not: he denies that right as they do not appear as creditors, but in their capacity of assignees only. It appears by the schedule attached to the deed of assignment that the defendant, Madame de Chantal, was indebted to the firm of Thomas Thibeaudeau and company in the sum of £226. 2. 1, and to the firm of Grenier and Martin in the sum of £201. 9. 8, but it does not appear that they are or were individual creditors of the defendant; at all events they do not come before the Court as such, but simply as assignees under and by virtue of the deed of assignment, and as representing their firms and all the creditors who signed the deed. It does not appear that all the creditors signed the deed: and certainly the plaintiff did not. He alleges moreover that it is fraudulent. The first question to be considered then is the point of law thus raised by the plaintiff.—In their capacity of assignees have the opposants any quality to plead and be impleaded in courts of law under the act of cession produced; and the Court is of opinion that this objection in law is well founded. In the first place these opposants are not even in their individual names creditors of the defendant. Thomas Thibeaudeau and Company and Grenier and Martin are: the firms, but not the individuals are creditors. This may indeed be something more than an ordinary *mandat*, but as these present themselves here before the Court they can scarcely be regarded as *Procuratores in rem suam*. The *mandat* is not an essential condition of the contract, but a means of effecting its execution by the creditors. Yet it is a *mandat*, and the law, "Premium Statuamus, *cui cumque* omnium bonorum administratio aut omnium actionum potestas permissa est, etiam cum, *quâvis ex causâ nomine Domini* pecunias exigere posse, et rem in judicium deducere sine alio speciali mandato." It must be done *nomine Domini*, for *nul de peut plaider par procureur*, and there is nothing in our law which gives a corporate or a *quasi* corporate or representative capacity to assignees named as these have been; they have no commission or authority from any Court—it is essentially a private affair, and strictly speaking they can scarcely be viewed as assignees notwithstanding the provisions of the statute in regard to the *cession de biens* in cases where *saisie arrêt* or *capias* may arise. The Court cannot adopt the reasoning of the opposant's counsel.

As, however, this is a question of some practical importance to the commercial community, and has been argued with considerable ingenuity and much earnestness on both sides, it is proper that the Court should carefully weigh the arguments, and endeavour to lay before the council the reasoning upon which the judgment about to be rendered rests.

It has been argued by the opposants that our Statute in relation to writs of *saisie arrêt* before judgment and *capias ad respondendum* having made it compulsory upon insolvent debtors, in order to avoid seizure to their property and personal restraint, to make a *cession de biens* for the benefit of their creditors, has at the same time, and by implication so to speak, created all the machinery ne-

cessary to carry into full effect that compulsory provision of the law. To impose the obligation of making a *cession de biens* and to refuse the means of carrying it into effect is absurd, and for a Court of Justice to lay claims to such a proposition is next to preposterous. A *cession de biens* necessarily supposes the appointment of assignees, a *direction* in fact, and as Courts of law are bound to recognize and give effect to the *cession de biens* itself they must also recognize the representative capacity of the assignees or syndics who are an essential part of the cession and absolutely necessary for the administration of the property assigned: that to make a large body of creditors parties to every writ and every deed where the interests of the creditors are involved would be a perversion of commen-sense, and amount practically to flat refusal to give effect to the Statute. Reference was also made to the old law of France in similar or analogous cases to show that in refusing to recognize the capacity of assignees as they present themselves in this case would be a plain contravention of the common law. These arguments on behalf of the assignees were sustained by ingenious and even cogent reasoning. And the Court is bound to admit that they merit very serious consideration. It will be seen presently how far this pretension will bear the rigid application of those principles from which this Court should not depart, and to which it should, to the best of its ability, scrupulously adhere not only in cases like the present but in all instances when the principles of law or of procedure are involved.

It may not be amiss here to look a little into the old law of France in regard to transactions between insolvent debtors and their creditors, both before and after the *ordonnance de commerce*.

The *datio in solutum* or *abandon*, the *cession de biens*, the abandonment the *acte d'atermoiement*, were separate and distinct proceedings, and were all recognized by the tribunals of France. They comprehended in those times nearly all, if not all, the different modes of settlement of the amicable or forced adjustment and liquidation of Bankrupt estates.

Let us look now at the deed under consideration, and ascertain to which of them we can assimilate it.

There are 19 creditors on the schedule; the plaintiff is not a party to the deed. Are these all the creditors? We cannot say. The execution of the act is extremely irregular; several of the creditors have not signed or been represented; the individual name of one partner only is there, and he does not appear as acting for the firm. Probably the whole instrument would turn out to be a nullity, if strictly looked into. But let us assume, for the sake of argument, that it is valid in form and execution. After setting forth the insolvency Madame De Chantal *cède, quitte, transporte, abandonne, à ses créanciers* all her estate, debts and effects, upon condition that the creditors should pay her debts, it being well understood that the debts mentioned in the schedule are those which they bind themselves to pay; and upon the condition, moreover, that they grant her a discharge from all liability, which they do by the deed. And she vests the property upon these conditions, and for these purposes absolutely in the creditors, parties to the deed. The property thus vesting in the creditors, the deed further provides: " pour exécuter la présente cession les dits

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créanciers nomment comme syndics et séquestres et procureurs les dits sieurs Henry Thomas et Jacques Grenier ce acceptant, auxquels ils donnent pouvoir de pour eux et en *leurs noms respectivement* prendre possession des dits marchandises et crédits, en faire la vente," etc., then follows a general power in the usual form, with directions how the proceeds shall be divided when the estate is realized.

Now what would have been the effect and character of this act in France, even under the *ordonnance de commerce*, which never was law in this country, but assuming it it to have been declaratory of pre-existing law? It would not have been regarded as an *acte d'abandonnement*, nor a *cession de biens*, because the *cession de biens*, a proceeding which was derived from the Roman law, and which had been in operation with more or less efficacy in France, through all the violence and anarchy of the middle ages, and regulated from time to time by the ordonnances of the French kings, was a judicial act, accompanied by strict, legal and judicial formalities. To have the effect of relieving the bankrupt estate from seizure and the person of the insolvent from *contrainte par corps*, these formalities had to be regularly observed, every precaution was taken to guard against fraud and surprise. Not only is the *acte* under consideration not *cessions de biens*, but our law has made no provision whatever for a *cession de biens*, in the proper and precise signification of the proceeding as understood and practised in France; and it is idle to contend that there is under our law, statutory or otherwise, any means for parties to enter into and to give legal effect to what was technically known as the *cession de biens* in that country. To say or assume that because the statute has made use of the words *cession de biens* for the benefit of creditors, that therefore it has by inference, and of necessity, introduced the whole body of the old French law and jurisprudence respecting the *cession de biens*, would be going very far; indeed we hold that it would be assuming too much, and to this extent we must go if we have the *cession de biens* as contended for by the opposants.

It cannot be considered as a *contrat d'abandonnement* as it was technically understood in France "parce que d'abord le contrat en privant celui par le fait "de la possession et de la puissance de tels biens ne lui en donne pas la propriété "laquelle ne cesse pas de résider sur tutelle."

2. "Parcequ'il ne produit point la libération au débiteur et qu'il est seulement un moyen d'y parvenir, le seul effet immédiat du contrat d'abandonnement étant de transferer la possession des biens du débiteur à ses créanciers."

We come then necessarily to the conclusion that this deed is in fact an *abandonnement datio in solutum dation en paiement*. The property is transferred in judgment, and the debtor is absolutely discharged. The direct consequence of this, as before stated, is that the estate vests absolutely in the creditors—the debtor in point of fact is the vendor, and the creditors are the purchasers: *dare in solutum est vendere* is the well-known maxim of the law. If the property then vests in the creditors in this case—what are the parties calling themselves, and who are in reality, the assignees' *agents*, *procureurs*, *mandataires*, nothing more and nothing less: and what function or capacity have they as such to plead and be impleaded in this Court? Why, simply none. I can imagine a deed of assign-

ment to be so expressed, and to contain such provisions as would enable the assignees or parties holding for the benefit of creditors to act in all cases, but assuredly this is not one of that kind. This is a mandat by the creditors to Thomas and Grenier, and no more—*sive rogo, sive volo, sive mando, sive alio quocumque verbo, scripserit mandati actio est.* Here we have gratuitous performances of the duty and accountability assumed; essential marks and conditions of the *contrat de mandat*, apart from those strict principles of law, which, in the opinion of the Court disposing of this case, it would be easy to point out the immensurable inconvenience which would result from recognizing assignees such as the present in that capacity in Court of law without the existence of any precautions and safeguards regulating their appointment.

Leblanc & Cassidy, for plaintiffs.

Laflamme, Laflamme & Daly, for opposants.

Leblanc & Cassidy, for plaintiffs contesting opposition.

(J. G. K. H.)

MONTREAL, 31 DECEMBRE 1863.

Coram LORANGER, J.

No. 1695.

Guyon dit Lemoine vs. *Lionais.*

FAITS ET ARTICLES—VIVA VOCE.

JUGE:—Que dans certaines circonstances particulières il peut être permis à une partie, assignée à répondre *viva voce* à des faits et articles, de lire des réponses préparées d'avance.

Le défendeur ayant été assigné à répondre *vivâ voce* à des interrogatoires sur faits et articles, il était procédé à prendre ses réponses, lorsque le 26 décembre 1863, l'Hon. Juge Loranger, alors siégeant, interrompit la réponse que le défendeur avait commencé à donner au 28me interrogatoire additionnel, par l'interlocutoire suivant:

"L'attention du juge président ayant été attirée sur le fait que le défendeur lit d'un papier rédigé d'avance et qu'il tient en main les réponses aux interrogatoires sur faits et articles qui lui sont proposés, et le dit juge présidant ayant plusieurs fois notifié au dit défendeur l'illégalité de cette manière de procéder, l'informant qu'il ne peut se servir de notes ou référer à des documents que pour aider et rafraîchir sa mémoire, sur des dates ou circonstances particulières, qui nécessitent une référence particulière, l'interrogatoire vingt-huit lui est proposé, et ayant répondu quelques mots sans paraître lire du papier rédigé d'avance, il recommence cette lecture en continuant sa réponse à l'interrogatoire; la cour refuse d'entrer la continuation de sa réponse et suspend l'interrogatoire à l'effet d'aviser sur le prodédé à adopter en pareil cas."

Le 31 décembre 1851, l'interlocutoire suivant fut rendu sur cet incident:

"La cour ayant repris pour le reconsidérer, à l'effet de l'amender ou d'en assurer l'exécution, par voies additionnelles, suivant le cas, l'ordre par elle donné à l'enquête, le 25 décembre courant; considérant le nombre des interrogatoires sur faits et articles et des interrogatoires supplémentaires proposés au défendeur tant ceux auxquels il a déjà répondu que ceux auxquels il a encore à répondre,

Guyon dit Lemoine vs. Lionais.

la longueur démesurée de quelques uns, le rapport éloigné d'un grand nombre avec les faits en contestation, la multiplicité des faits et l'éloignement des époques sur lesquelles il est interrogé ; appréciant les difficultés, presque l'impossibilité de répondre, de mémoire, même avec l'aide de notes de documents auxquels congé lui a été donné de référer par l'ordre en question, et usant du pouvoir discrétionnel inhérant à la juridiction du tribunal, en semblable cas, dans l'intérêt bien entendu de la justice et la recherche éclairée de la vérité, sans néanmoins déroger à la règle générale introduite dans la manière de recevoir les réponses sur faits et articles, telle que consignée dans cet ordre, mais en déviant par exception spéciale dans la présente espèce, pour les raisons ci-dessus énoncées, a rescindé et rescinde le dit ordre du 26 décembre courant, et dit et adjuge qu'en répondant à l'interrogatoire 28 et aux suivants, le défendeur fera usage de tels documents et papiers qu'il avisera." *

J. R. Fleming, pour le demandeur.

Leblanc & Cassidy, pour le défendeur.

(J. D.)

MONTREAL, 28 MAI 1859.

Coram CHARLES MONDELET, J.

No. 1953.

Lawrence Moss vs. *William Douglass et al.*

FAITS ET ARTICLES—VIVA VOCE.

JUGE :—Qu'une partie assignée à répondre *viva voce* à des faits et articles, ne peut consulter des notes écrites que pour citer des dates ou des chiffres, et doit être empêchée de voir ces notes pour tout autre objet.

Motion de la part du demandeur qu'il lui soit permis de répondre *de novo* à quelques uns des interrogatoires sur faits et articles à lui soumis le 4 mai 1859, et de substituer aux réponses qu'il a faites, ce jour-là, d'autres réponses, contenues dans la motion ;

Cette motion est appuyée d'un affidavit du demandeur, dans lequel il allègue, qu'en conséquence des discussions fréquentes, qui avaient lieu à l'enquête, entre les avocats dans la cause, des conversations qui avaient lieu entre les spectateurs et du bruit qui se faisait dans l'appartement, par suite des enquêtes faites dans d'autres causes, le demandeur était devenu confus et embarrassé, et son attention avait été distraite ; que la confusion dans laquelle il avait été ainsi jeté l'a empêché de comprendre les interrogatoires auxquels il demande à répondre de nouveau ; que, par suite des interruptions fréquentes de l'avocat des défendeurs, ayant pour objet d'empêcher le déposant de consulter un projet de réponses qu'il avait apporté avec lui, il a été rendu incapable de recueillir ses idées et de répondre pertinemment aux interrogatoires en question ; que le déposant a reçu la permission de l'Hon. Juge, présidant à l'enquête, l'Hon. C. Mondelet, de référer aux réponses qu'il avait préparés, pour rafraîchir sa mémoire, mais seulement quant aux chiffres et aux dates, et que quand il les consultait, même pour cela, il était constamment troublé par l'avocat des défendeurs, qui l'empêchait

* Sur cette question, voir JURIST 4 : p. 127 ; *Id.* 7, p. 28 ; *Id.* 8, p. 91.

effectivement de la faire ; que, vû ces raisons, il demande à substituer aux réponses faites celles contenues dans l'affidavit et la motion. Moss vs. Douglas et al.

Motion rejetée avec dépens.*

John Bleakley, pour le demandeur.
R. & G. Laflamme, pour défendeurs.
(J. D.)

MONTREAL, 30 MARS 1864.

Coram BERTHELOT J.

No. 2045.

Taliaferri vs. Dorion et al.

EXCEPTION A LA FORME—RAISON SOCIALE.

JUGE:—Que des personnes, ci-devant en société, ne peuvent être poursuivies comme associées, quoique leur responsabilité n'ait pas été changée par la dissolution de la société ; et que leur droit d'être poursuivies dans leurs qualités propres est suffisant pour faire débouter l'action, sur une exception à la forme.

Les défendeurs, qui avaient fait affaires en société sous le nom de "Dorion et frère," dissolvent leur société et enrégistrent la déclaration de dissolution, le 27 mars 1863. Le même jour une nouvelle société est formée entre les mêmes frères et un tiers, sous le nom de Dorion et Cie. La nouvelle société fait enrégistrer sa déclaration et s'établit au même endroit, en changeant les enseignes. Le 10 avril suivant, 1863, le demandeur prétendant que les défendeurs (Dorion et frère) détiennent des objets à lui appartenant, prend une saisie-revendication contre eux, et les désigne comme étant encore en société.

De là exception à la forme, fondée sur le fait que les défendeurs ne sont plus en société et sont mal assignés.

Le demandeur répond qu'en admettant que tous les allégués de la déclaration fussent vrais, la responsabilité des défendeurs étant la même, soit qu'ils fussent encore en société ou non, il était indifférent qu'ils fussent assignés comme associés ou comme ci-devant associés. Ils se trouvaient dans la position d'un homme qui ayant été commerçant, puis ayant cessé de l'être, se plaindrait d'avoir été assigné comme commerçant.

Per Curiam.—Ce n'est pas le moment pour la cour de déterminer en quoi la dissolution de la société peut affecter la responsabilité des défendeurs. Ils sont assignés comme associés ; ils ne le sont plus. Ils ont droit d'être amenés ici en leurs qualités propres.

Exception maintenue.
Action déboutée.

Doutre et Doutre, pour le demandeur.
Moreau, Ouimet et Chapleau, pour les défendeurs.
(J. D.)

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* Vide 7 L. C. Jurist, p. 28, Fenn vs. Bowker, et 4 L. C. Jurist, p. 127, Coleman & Fairbairn ; 7 L. C. Jurist, p. 294, Guyon dit Lemoine vs. Lionais.

MONTREAL, 24 MARS, 1864.

Coram SMITH, J.

No. 799.

Séguin de la Salle vs. *Bergevin**

BILLET NOTARIE PRESCRIPTIBLE PAR 5 ANS.

JUGE:—Que les billets à ordre faits devants notaires sont prescriptibles par 5 ans.

Action portée pour le recouvrement de la balance de deux billets, consentis devant notaires, par le nommé Lormand, en faveur de feu Ernest de Boullenois, en son vivant l'époux de la demanderesse, et cautionnés par le défendeur, sous la clause solidaire.

Le premier de ces billets est du 24 juillet 1854, pour £25, payables dans deux mois de sa date au dit Ernest de Boullenois *ou à son ordre*; le second est du 8 janvier 1855, pour £26.5.0, payables le 8 avril suivant au dit Ernest de Boullenois *ou à son ordre*.

Exception de prescription de 5 ans, opposée à l'action, fondée sur le statut provincial (Stat. Ref. du B. C., ch. 64).

Per Curiam.—Il y a diversité d'opinion entre les juges sur cette question. J'ai déjà, sous plusieurs formes, assimilé ces billets aux billets promissoires, et jusqu'à ce que la cour d'appel ait prononcé, je ne vois aucune raison de changer d'opinion. La prescription de cinq ans s'applique à la créance de la demanderesse, et cette action doit, en conséquence, être déboutée.

Action renvoyée.†

D. Girouard, pour la demanderesse.

Doutre et Doutre, pour le défendeur.

(J. D.)

MONTREAL, 30TH JUNE, 1863.

Coram SMITH, J.

No. 1042.

Bienvenu vs. *Côté*.

HELD:—That no damages can be claimed by reason of the abatement of a public nuisance.

The plaintiff sued *in forma pauperis*, and her action claimed the sum of $204.86 by way of damages for the destruction of a shanty belonging to her in which she had been carrying on a fruit trade, and for the articles of furniture which she had put in said shanty.

The facts of the case were these:

The plaintiff had erected a wooden shanty, on a lot of ground in the city of Montreal, belonging to the defendant, and which lot of ground he had rented to another person.

The defendant having been duly notified by the proper officer of the corporation of Montreal to remove that shanty which had been so erected contrary to that bye-law of the corporation prohibiting the erection of wooden buildings within the limits of the city, called upon the plaintiff to demolish and take away

* Cette cause est maintenant pendante en appel.

† Vide 7 L. C. Jurist, pp. 289 et 339.

her shanty. She promised to do so, but always neglected to conform herself to the requirements of the bye-law.

Bienvenu vs. Coté.

About the 10th November, 1862, the plaintiff having previously abandoned the shanty, but having left, however, a small quantity of furniture in it, the defendant, who was liable to a penalty, as the owner of the lot, thought proper to demolish it, and the boards and furniture were scattered about; so as to abate the nuisance.

Thereupon the plaintiff brought an action against the defendant for $84.86 for the value of the shanty and furniture, and $120 for damages in her trade.

The defendant specially pleaded as follows:—

"Que la dite demanderesse a usurpé et empiété sur le terrain du défendeur dont il est question en la dite déclaration, et y a établi un *shanty* contrairement aux lois de police en force en la cité de Montréal, dans le district de Montréal, et y a érigé ce *shanty* en bois, en violation des lois municipales et de police en force en la dite cité de Montréal, et y a sciemment et frauduleusement, et par cette voie de fait causé au défendeur des dommages considérables en usurpant ainsi sa propriété et en y érigeant et y causant une nuisance publique; et par telle voie de fait elle a exposé le défendeur a des poursuites pénales qui pouvaient être dirigées contre lui par la corporation de la dite cité de Montréal, tant et aussi longuement que telle nuisance publique existait sur le terrain du défendeur;

Que la dite demanderesse après avoir ainsi commis telle voie de fait et avoir érigé une nuisance publique sur le terrain du défendeur, a été notifiée à diverses reprises de faire disparaître telle nuisance publique, et ce tant de la part du dit défendeur que de la corporation de Montréal et a souvent promis de l'abattre et de la faire cesser; mais a toujours néanmoins négligé de ce faire, au grand dommage du défendeur, qui se trouvant responsable de telle nuisance publique comme propriétaire du terrain sur lequel tel *shanty* qui était une nuisance publique, avait été construit a été notifié par Jean Baptiste Dubuc, inspecteur du département du feu de la dite corporation le vingt-sept octobre dernier de faire abattre et disparaître tel *shanty* sous dix jours et à défaut de ce faire, de payer la pénalité fixée par la loi en pareil cas.

Que la dite demanderesse a souvent reconnu et avoué qu'elle avait usurpé le terrain du défendeur et commis une voie de fait et érigé sur le dit terrain une nuisance publique, et a souvent promis de se conformer aux règlements de la dite corporation de la dite cité de Montréal en abattant la dite bâtisse sans délai, mais néanmoins a toujours négligé de ce faire, quoique duement requise et notifiée;

Que par suite de la mauvaise foi de la dite demanderesse et par son fait et la contravention par elle ainsi apportée aux lois du pays et aux lois municipales et de police de la dite cité de Montréal, elle ne peut en loi réclamer aucun dommage à l'encontre du défendeur, qui était tenu de se conformer aux dites lois, et qui a dû s'y soumettre sous peine de graves amendes et de pénalités, et même d'emprisonnement."

The defendant relied on the following authority: "It being admitted, then, "that there are occasions when there is something to abate, it may be remark-

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"ed, that any person may abate a public nuisance, * and that it is not necessary "to shew upon a justification of such an abatement, that as little damage was "done as might be."†

The judgment of the Court is as follows: "La Cour, après avoir entendu les "parties par leurs avocats sur le mérite de cette cause, examiné la procédure, "pièces produites et le témoignage, et avoir sur le tout délibéré, maintient l'ex-"ception plaidée par le défendeur à cette action et déboute cette action, mais "sans frais."

Action dismissed.

C. Archambault, attorney for plaintiff.
LaFrenaye & Armstrong, attorneys for defendant.
(P. R. L.)

COURT OF QUEEN'S BENCH.

MONTREAL, MARCH, 1864.

Coram DUVAL, CH. J., MEREDITH, J., MONDELET, J., BADGLEY, J.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

JOHN HEUGH et al.,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

JOHN ROSS et al.,
(*Defendants in the Court below,*)
RESPONDENTS.

HELD:—The omission of the words "before us" in the Jurat of an affidavit for an attachment against goods sworn to before the Prothonotaries of the Superior Court for the District of Montreal, is a fatal irregularity, and a writ of attachment before judgment issued on such an affidavit will be quashed upon motion.

This was an appeal from a judgment rendered in the Superior Court for the District of Montreal.

The action had commenced by a writ of *saisie arrêt* before judgment issued on an affidavit, of which the following are the essential portions:—

"Patrick John Traquair, of the city of Montreal, merchant, being duly sworn on the Holy Evangelists, deposeth and saith: that John Ross and George Templeton, both of the City of Montreal, merchants' co-partners, carrying on business at Montreal aforesaid, under the name, style, and firm of Ross & Templeton, are justly and truly personally indebted to John Heugh et al., plaintiffs, in a sum exceeding forty dollars, currency, to wit, in the sum of £1021 0 4 sterling, for (here is set up the ground of debt at length), then follows: "That the deponent is the agent and attorney, duly appointed, of the said plaintiffs, and hath been credibly informed and hath reason to believe, and doth verily and in his conscience believe, that the said defendants are immediately about to secrete their estate, debts and effects, and to make away with the same with intent to defraud their creditors, and especially the said plaintiffs, and that without the

*1 Salk. 458. Cro. Car. 184. 16 Vin. ab. Nuisance W. 8.
† Hawkins, C. 75, S. 12.

benefit of a writ of *saisie arrêt* to seize and attach the goods, credits, and effects of the said defendants, in their possession, the said plaintiffs may be deprived of their remedy and may lose their debt and sustain damage; and deponent hath signed."

Sworn and acknowledged at Montreal, this 28th day of October, 1862. (Signed,)

(Signed,)
P. J. TRAQUAIR.

MONK, COFFIN & PAPINEAU,
P. S. C.

Heig't et al., and Ro et al.

On the 17th November, 1862, the defendants, by their counsel, moved that the writ of attachment, *saisie arrêt*, and the seizure and attachment made thereunder, and all the proceedings taken under the said writ be quashed, set aside, and declared null and void with costs. The principal reason set forth in the motion was the irregularity in the jurat of the affidavit, viz., the omission therein of the words "before us."

The judgment of the Court below was as follows: "The Court, having heard the parties by their Counsel upon the motion of the defendants of the 17th of November, instant, that for the reasons set forth in said motion, the writ of attachment, *saisie arrêt*, in this cause issued, and the seizure and attachment made thereunder, and all the proceedings of the sheriff or his bailiff under such writ, or in respect of such seizure and attachment, be quashed, set aside and declared null and void with costs; having examined the proceedings, and the affidavit fyled in the said cause for the obtaining of the writ of *saisie arrêt* issued in this cause and deliberated, doth grant the said motion with costs, in consequence doth quash, set aside, vacate and declare null and void the said writ of attachment, *saisie arrêt* in this cause issued, and the seizure and attachment made thereunder, and all proceedings of the sheriff or his bailiff under such writ or in respect of such seizure and attachment."

Robertson, A., for appellants, submitted: "The only point upon which the judgment in the Court below was based, as stated by the learned Judge in rendering the judgment, was that in the *jurat* the words "before us" should have been inserted. The sole authority cited was the English case of Graham vs. Ingleby, (1 Exchequer Reports, p. 651) wherein affidavit signed by a *Commissioner* without the words "before me" was declared, during the argument, to be fatal. The point decided arose under the statute 4 Anne, c. 16, sec. 11, which provides, "that no dilatory plea shall be received, unless the party offering such "plea do by affidavit prove the truth thereof," but the plaintiff was held to have waived this by joining issue, so that the formality of the *jurat* was not the point decided. The *dictum*, even if available as a precedent here, which it is respectfully submitted it cannot be, is not applicable to the case of the Prothonotary of the Court, and to an affidavit taken under our Provincial Statute. A more reasonable rule is laid down (4 Ad. and Ell. p. 611) where it is said, "the general rule is, that where a duty is performed by a public officer he is "presumed to have discharged it rightly." The Court will give credit to *its own officers* that they have observed all proper forms in taking the affidavit, (7 Dow and Ry., p. 514) where Abbott, C. J., is reported to have said, "we

Heugh et al. and Ross et al

"may trust the certificate of our own officer, that the deponent was sworn to "the truth of the affidavit," and in the same case (4 B. and C. p. 360,) "I "think the *jurat* contains sufficient matter from which *the Court may reason-* "*ably infer* that this affidavit has been duly sworn." It has been the constant practice for the prothonotary of the Superior Court at Montreal to take not merely affidavits but depositions in causes at Enquête, in the way done in the case now in appeal.

The Court will not presume the affidavit that the officer of the Court certified, an affidavit not sworn before him, nor indeed would the words "before us" be in strictness applicable to a case where one of three officers alone receives an affidavit which is sworn *before him*, although certified by the three officers constituting the prothonotary of the Court.

Total number of depositions examined in 28 causes in 1862 and 1863, taken at random, in which the words "before us" or "before me" were not found		286
Total with the words "before us" in 1862	27	
" " " in 1863	34	
	—	61
Total with words "before us" struck out in 1862	19	
" " " in 1863	4	
	—	23
	—	84

Out of twenty affidavits for *capias* and attachment before judgment, all sworn before the prothonotary of the Court, the following was the result:

Number with the words "before us" in *Jurat*	11
Number with the words "before me" in *Jurat*	5
Number without either the words "before us" or "before me"	4
	— 20

As well might it be pretended that the initials "P. S. C." constantly used in practice might mean something else than prothonotary of the Superior Court. Even in England, where technical accuracy is insisted upon with a strictness unknown here, and which is repugnant to our system, an affidavit before a 'Comr." is held sufficient without giving the word in full or adding words or initials to shew of what Court he is a Commissioner. (7 Dur. & E. Term Rep. p. 451; 4 C. B. p. 321); and in case of an affidavit sworn before a Judge the words "before me" are not held to be necessary, (13 Mee. and W. p. 519,) the Court recognizing the signature of one of its members, as in this case it will recognize and has constantly recognized the signature of the prothonotary.

The other objection raised in the motion, but which was noticed by the judge, namely, that without the benefit of an attachment the plaintiffs *may* lose, instead of *will* lose their debt, has never been brought before this Court, so far as can be gathered from our reports. It is an objection which has been decided upon adversely to the respondents' pretensions in the case of Shaw vs. McConnell, before C. J. Bowen, and Justices Duval and Meredith, (4 L. C. Rep., p. 49). Even in the case of a *capias* it was held (6 L. C. Report, p. 32) "that it was not necessary to make oath that the plaintiff "without the benefit of a writ of

capias ad respondendum against the body of "the defendant, may be deprived of his remedy."

It has been thought necessary, from the amount involved in the cause, and for other reasons not now of record, to bring the judgment under the notice of this Court in order to test the sufficiency of the affidavit, and to have it decided whether the strict technical rule as laid down in the English case cited, and which refers to commissioners named under the English statute (29 Chs. II., c. 23) can reasonably be insisted upon under our jurisprudence as based upon our statutes.

MEREDITH, J., *Dissentiens.*—This case is distinguishable from the English case of Graham & Ingleby, * cited in support of the judgment of the Court below, because, in that case, the affidavit was taken before a commissioner; whereas, in the present case, the affidavit was taken before the prothonotary; who, under our law, had exactly the same powers as a judge, with respect to the taking of the affidavit in question.

The fact that the power in question, which formerly was vested exclusively in the judges, is now vested concurrently in the Judges and Prothonotaries, is of great importance with respect to the English precedents which have been cited; because it is certain, under the English decisions,† and was admitted by the Counsel, and the Bench, in Graham & Ingleby,‡ that an affidavit, taken before a judge, could not be held bad on account of the jurat not containing the words "before me."

Bearing in mind then, as we must do, that, as to the matter under consideration the Prothonotary has exactly the same power as a judge, it would be unreasonable to say that a *jurat* in certain words, would be good, if written by a judge, but bad if written by a prothonotary, having, as to the taking of the affidavit, the same power as a judge.

Passing now from the English precedents which have been cited, and viewing the case according to the general principles of our own law, it seems to me that the maxim "*Omnia præsumuntur rite et sollennitir esse acta,*" is applicable in the present instance; and that we must presume that the affidavit, which the Prothonotary has certified as having been "sworn and acknowledged," was so sworn and acknowledged before himself; as otherwise he could not legally have certified it as he has done.

Indeed it seems to me that it would be as reasonable to object to a *jurat*, for not stating expressly *by whom* the affidavit or deposition was sworn, as for not stating *before whom* it was sworn; and yet, I believe, it has never been contended in our Courts that a jurat could be held bad for not expressly mentioning, *in the jurat itself by whom* the affidavit was made.

Although not expressly mentioned in the jurat, it is rightly presumed that the oath, certified in the jurat to have been taken, was so taken by the deponent mentioned in the body of the affidavit or deposition to which the jurat is

* Welsbey, Harlstone and Gordon, 651.

† 13 Meeson and Welsbey, p. 519. Empy and King.

‡ 1st Welsbey, H. & G., pp. 653, 655.

Hough et al., and Rose et al.

attached; and in like manner it is to be presumed that the oath, certified in the jurat to have been taken, was administered by the officer signing the jurat.

It has, however, been said that the supposed defect in the jurat would make it impossible to convict of perjury the person making the affidavit, even if it were false. But I do not see that the form of the jurat could be material in a prosecution for perjury. If the officer could prove that the oath was properly administered, that would suffice although the form of the jurat might be defective; and if the prothonotary could not prove that the jurat was properly administered, the fact of his having made a good jurat would not help the case.

For these reasons, I am of opinion that the judgments of the Court below setting aside the attachment, on the ground of irregularity in the jurat of the affidavit, ought to be reversed.

BADGLEY, J.—This difficulty arises from an alleged omission in the *jurat* of the affidavit taken by the prothonotary of the Superior Court for the issue of the attachment in this cause. The omission complained of is the want of the words *before us* above the signature of the officer. The affidavit was taken by the prothonotary under the authority of the 46th section of the Cons. St. of L. C. cap. 83, which enacts that no process of attachment shall issue except there be proof on oath made before a judge of the Superior Court, or before the prothonotary of the Superior Court, or before a clerk of the Circuit Court. This section gives authority to the prothonotary or clerk aforesaid, which neither had otherwise to take the affidavit required in such case: to that extent only has a statutory change in the law been made, and the affidavit being duly taken before either officer, the writ issues of course.

In the same manner under the 53d section, a commissioner to take affidavits, etc., having first previously received before him the oath or affidavit required to be made, may issue his warrant, etc. In all this there is really no more judicial power given to the prothonotary or clerk than to the commissioner, and the taking of the affidavit, whether by the prothonotary, clerk or commissioner, is merely ministerial, and thereupon the attachment issues of course.

Our affidavit has been borrowed from English precedent, and the rulings upon the question which prevail in England may be safely adopted as our legal guide here. Now to the affidavit itself there are two persons, the one who swears to the contents, and the other the judge, officer or commissioner before whom it is taken.

The act of the receiver of the affidavit is a very important part of it, and should be perfect in shewing both *the jurisdiction of the party administering the oath and also in certifying that it had been administered before him.* As regards himself the knowledge of his jurisdiction is personal or self-contained; as regards others, that knowledge can only be communicated in the certificate which he gives officially of the affidavit having been taken before him by the authentication under his official signature shewing that the oath or affidavit was so taken before him. In 1 New Sessions cases, p. 370, Regina *vs.* Inhabitants of Bloxham, Mr. Justice Coleridge held "that the omission was not an irregularity simply; but went clearly to the jurisdiction of the commissioner, being of the

very essence of the swearing;" and Mr. Justice Wightman said, affidavits must be sworn before a person authorized to take them, the jurisdiction must appear on the face of the affidavit. Hough et al., and Rose et al.

In 2 New Sessions cases p. 346, Regina *vs.* Inhabitants of Wooking, it was held that the jurat without the words *before me* was bad. Indeed an affidavit without these words in no way indicates its having been actually taken before the officer.

In England this preciseness is not required in affidavits taken before judges. It is usual to uphold affidavits signed by judges there without those words, because by the common law, judges are always considered *in curia*, and as acting in this respect judicially. No statutory authority is required by them to receive or take affidavits; and the Chief Baron in 13 Mees. and W. p. 519 said, "although in the case of an affidavit sworn before a commissioner, the omission of the words *before me* may be objectionable, we think it is not so here: this form of jurat has been invariably used, and we are unwilling to question its validity. And Baron Parke said, "the form of the jurat is in conformity with the invariable practice." In that case the jurat was *sworn at my chambers*, etc.

The common law has attributed to the judges in England as our law does here to our judges power and jurisdiction in legal proceedings to take affidavits independent of statutory authority, and the practice of courts has recognized their official signatures as assurances that those legal documents were taken before them.

Apart from the judge, no person or officer has legal authority to take affidavits and to administer oaths in civil matters, except by statute, and therefore prothonotaries, clerks of Court, and commissioners appointed to take affidavits are in the same category in this respect, and cannot take affidavits without that power be given to them by law. In these offices, the duty in this respect is not a judicial office, the Court practice, which recognizes the judge's signature, does not extend to them; and when they shall have administered the oath it is essential that their delegated jurisdiction should be shown expressly in their jurat under their official signature, to have been exercised before them.

It was observed in England, in one of the cases in this connection as follows: "Now there is no rule more wholesome and proper than that the jurat of an officer should state that which is essential to its validity, namely, that the affidavit was taken before a party who had proper authority to administer the oath, and did do so; without these there is a defect of jurisdiction, etc.

It has been observed that the power to take the affidavit given to the prothonotary is not judicial, and in taking it he is no more assimilated to the judge than the commissioner who is empowered not only to take affidavits, but also himself to issue the warrant of attachment, and yet in the case of the latter, his omission in this respect would unquestionably be fatal to the affidavit; why not equally so in the case of the prothonotary?

The necessity of showing substantially in affidavits not taken before the judges of the Court that they were taken before the proper authority has been settled in England. The signature of the judge to the jurat is conclusive there by the practice of the Courts, but the current of authorities does not equally recognize

Heugh et al., and Rose et al.

the signature of other delegated officials to affidavits, as sufficient to conclude the fact that they were taken before them unless by their jurat they certify the fact. It is not alone *the perjury of the person making the affidavit* that is to be considered, but also the *misfeasance of the official delegate certifying to what might not have been done before himself.*

The appellants in their factum have labored to show a Court practice here contrary to the necessity of using the words in question, but their legal statistics are clearly against themselves. They have given the following:

Total number of depositions examined in 28 causes in 1862 and 1863, taken at random in which the words "before us" or "before me" were not found.....	286
Total with the words "before us" in 1862.....	27
" " " " " " 1863.....	34
	—61
Total with the words "before us" struck out in 1862.....	19
" " " " " " " " 1863.....	4
	—23
	84

Out of twenty affidavits for capias and attachment before judgment, all sworn before the prothonotary of the Court, the following was the result:

Number with the words "before us" in jurat.....	11
Number with the words "before me" in jurat.....	5
Number without either the words "before us" or "before me" in jurat.....	4
	—20

Now the depositions above referred to cannot be taken into account at all, in this controversy, because they are all taken, or presumed to be taken, in open Court in the presence of the judge, and as a portion of the judicial proceedings in the record of the pending cause; therefore, as regards them the practice of the Courts has invariably sustained them as judicial proceedings, and in conformity with the invariable practice independent of the addition or omission of the words "before us."

But the affidavits above referred to are more legitimate examples in this controversy, and yet of the above number of 20 given, 16 had the words "before me" or "before us" inserted, and only four were without them. As mere practice cases, therefore, the figures are strongly against the pretensions of the appellants, as four-fifths to one-fifth.

The appeal, therefore, under these circumstances should not be maintained.

Judgment confirmed.

A. & W. Robertson, for appellants.

Rose & Ritchie, for respondents.

(J. L. M.)

MONTREAL, 9TH MARCH, 1864.

Coram DUVAL, J., MEREDITH, J., MONDELET, J., BADGLEY, J.

HERMAN DANZIGER,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

JAMES HENRY RITCHIE et ux.,

(*Defendants in the Court below,*)

RESPONDENTS.

HELD:—1st. A married woman is not liable for the price of goods, not being necessaries of life, bought by her without the authorization of her husband.

2nd. Promissory notes signed by a married woman without the authority of her husband are null.

3rd. There is no legal separation as to property between husband and wife until the judgment pronouncing such separation has been followed by execution.

This was an appeal from the following judgment rendered by the Superior Court at Montreal, the Hon. Mr. Assistant Justice Monk, presiding, on the 20th May, 1863:—

"The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings, proof of record, and having deliberated, considering that the plaintiff hath not established in evidence the allegations of his declaration in this cause fyled, and more particularly that the defendant Marguerite Labelle was legally liable and indebted to the said plaintiff as by him alleged in his said declaration—doth dismiss the action of the plaintiff with costs *distraits* in favor of Messieurs Doutre & Daoust, the attorneys of the said defendants."

The action was instituted before the Superior Court for the district of Montreal, for the recovery of the sum of $601.11, which the plaintiff alleged to be due to him in virtue of an account of goods sold and delivered, and of two promissory notes made in the following terms:—

MONTREAL, April 12th, 1860.

On demand for value received, I promise to pay to the order of myself at the Bank of Montreal, the sum of three hundred and thirty-six dollars $\frac{96}{100}$ with interest.

MARGUERITE LABELLE.

MONTREAL, April 23rd, 1861.

On demand for value received, I promise to pay to the order of myself at the Bank of Montreal, in Montreal, the sum of one hundred and fifty dollars and ninety-six cents with interest.

MARGUERITE LABELLE.

These two promissory notes were respectively endorsed by the said Marguerite Labelle, and delivered to the plaintiff in the Court below, who, in his declation, alleged:

That the said Marguerite Labelle was the widow of Patrick Foley, in his lifetime of Montreal, gentleman, from whom she was separated as to property.

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That on the 17th of August, 1862, the said Marguerite Labelle married James Henry Ritchie (one of the appellants) in the State of New York, one of the United States of America, but with the intention of returning to Montreal to live with her husband, and that, in fact, they did return to Montreal and lived there.

That there was no contract of marriage, and, consequently, a community of property between them.

That before the said Marguerite Labelle had thus contracted a second marriage, she was a *marchande publique*, and as such indebted to the appellant in the sum of $611.11 the amount of the notes mentioned above with accrued interest, and in the sum of $45.30, being the balance of an account for goods sold and delivered to her, and which sums the appellant had the right to have and receive from the defendants (respondent's) as being *commune en biens*.

The defendants pleaded that the said Marguerite Labelle had never been *marchande publique*, and was not so at the times the said promissory notes were signed; and that at those times she was under the power of her first husband, the said Patrick Foley; that the latter had never authorized her to sign the said notes or to buy the goods for which the said notes were given; that she had never contracted any valid and legal engagement with the appellant; and that consequently the defendants (respondents) owed nothing to the plaintiff (appellant). The defendants further pleaded the general issue.

At Enquête the appellant failed in his attempt to prove that the said Marguerite Labelle was a *marchande publique* at the time when she signed the promissory notes on which the action was based. The account and the notes were proved or admitted.

There was proof of a judgment pronouncing the separation as to property between Marguerite Labelle and her husband, but no proof that the judgment had been followed by execution.

Cassidy, for appellant—1o. Marguerite Labelle, une des intimés, séparée judiciairement quant aux biens d'avec son premier mari, a consenti valablement les deux billets promissoires dont il est question, aucune autorisation ne lui était nécessaire à cette fin. En agissant de la sorte, elle n'a fait qu'un acte d'administration. Par la loi elle s'est valablement engagée et obligée jusqu'à concurrence de la valeur de ses biens meubles et du revenu de ses immeubles. La preuve constate que ses biens meubles étaient d'une valeur d'environ mille piastres, lorsqu'elle consentit les deux billets. Voir le témoignage de Malo et de Cotchendler. Et à-part cela, il est en preuve qu'elle était en possession de sommes de deniers assez considérables, provenant de la vente de certains biens immeubles. Voir les pièces 13 et 14 du dossier. Elle a reçu valeur pour consentir ces billets.

2o. En signant ces deux billets à ordre, Marguerite Labelle a fait, par là même, un acte de commerce par lequel elle est devenue légalement obligée. Aucun autorisation ne lui était nécessaire pour faire cet acte de commerce. Les intimés n'ont pas répudié cet acte. Ils n'ont point fait voir que la cause pour laquelle elle avait consenti ces deux billets, n'était pas d'un caractère commercial. Ils n'ont point montré de présomption légale qui fesait présumer commercial l'en-

gagement pris par la personne qui signa ces deux billets, et en laissant subsister cette présomption, ils ne pouvaient en loi se prévaloir du défaut d'autorisation : supposant que la femme séparée doive être autorisée pour s'engager par rapport à un fait non commercial, il n'est pas nécessaire à tout évènement qu'elle soit autorisée pour fait de commerce.

La cour de première instance aurait dû condamner les intimés à lui payer quarante cinq piastres et trente centins, balance de son compte pour marchandises vendues à la dite Marguerite Labelle. Ces marchandises lui ont été vendues pour son usage personnel, elle en a profité. Rien au contraire n'est prétendu par les intimés; qui ont reconnu ce compte par une admission qui se trouve au dossier. Prétendre qu'elle aurait dû être autorisée pour acheter ces marchandises dont la valeur totale ne s'est élevée qu'à deux cent douze piastres et trente centins, c'est nier à la femme séparée le droit d'administrer ses biens.

L'appelant se croit fondé à demander une condamnation pour le total de sa créance.

Il est évident que l'appelant fait reposer toutes ses prétentions sur le fait supposé que, lors de la souscription des billets et lors de la fourniture des marchandises, l'intimée, Marguerite Labelle, était séparée de biens de Patrick Foley, son premier mari, et que, comme femme séparée, de biens, elle pouvait s'obliger envers l'appelant sans qu'il fût besoin d'autorisation. Supposé même qu'il y eût eu séparation de biens réelle et effective, ce qui n'appert pas au dossier, l'appelant devait encore succomber sur ce point; car, bien que la femme séparée de biens puisse faire des actes de simple administration et exercer ses actions mobilières, elle ne peut, sans y être autorisée de son mari ou du juge, s'engager dans des transactions du genre de celle dont il s'agit en cette instance, à moins d'être marchande publique, et il est constant que l'intimée ne l'était pas.

S'il est vrai que la femme séparée ne peut aliéner ses biens sans autorisation, il l'est également qu'elle ne peut faire aucun de ces actes qui sont de nature à entraîner une aliénation forcée.

Or, dans le cas présent, il est incontestable que la souscription de billets et l'achat de marchandises faits par l'intimée produiraient ce résultat, si l'appelant obtenait gain de cause. La sollicitude dont la loi entoure la femme pour la prémunir contre les conséquences de ses propres actes, dans l'intérêt de la famille et de la société, deviendrait inutile, et la loi elle-même serait mise au défi. Les intimés se flattent donc que ce tribunal ne sanctionnerait pas une telle doctrine par le jugement qu'il est appelé à prononcer.

Mais il est superflu de combattre plus longuement des prétentions qui ne reposent que sur un fait hypothétique. L'intimée n'était pas séparée de biens de son premier mari; elle n'était pas marchande publique, et le tribunal de première instance a appliqué avec discernement la loi du pays en déclarant l'appelant non recevable dans sa demande.

Les intimés n'ont aucun doute que cette cour ne consacre les mêmes principes et ne soit de la même opinion.

DUVAL, J.—S'il était prouvé que la femme s'est engagée pour les besoins ordinaires de la vie, la cour serait disposée à maintenir cet appel. Un mari qui

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condamne sa femme est censé lui donner procuration pour faire les actes nécessaires à la vie, quand même il n'y aurait pas séparation de biens. Mais ici rien ne constate la valeur fournie pour les billets consentis par la femme. Par leur montant, les billets constitueraient une aliénation plutôt qu'une administration. Et, s'il faut juger de la considération donnée pour ces billets par le compte produit, il ne paraîtrait pas que cette dette aurait été contractée pour des nécessités de la vie. En effet ce compte ne contient pas moins de quatre montres et un article de pelleterie de $75 de valeur. Le reste ressemble un peu à cela. Ce ne sont pas là des nécessités; c'est un luxe fou, s'il n'y a pas de commerce; et il ne paraît pas qu'il y ait eu commerce. Du moins, s'il y a eu commerce, il était d'un caractère à indiquer à l'appelant qu'il n'était pas prudent ni licite pour lui d'y contribuer.

MONDELET, J.—Le jugement dont est appel est à mon avis d'une parfaite exactitude.

Il n'y a aucune preuve que cette femme fût marchande publique, séparée légalement de biens de son mari, et qu'elle eut la moindre autorité de s'obliger.

Indépendamment de ces raisons il suffit de jeter un coup-d'œil sur le compte dont l'appelant réclame la balance. Les effets vendus sont évidemment de la sorte qu'une femme vivant de prostitution comme il paraît qu'elle le faisait est dans le cas d'acheter. J'approuve le jugement dans tous les rapports et je n'hésite aucunement à dire qu'il être doit confirmé.

Judgement confirmed.

Leblanc & Cassidy, for appellant.
Doutre & Daoust, for respondents.
(J. L. M.)

MONTREAL, 31st MAY, 1860.

Coram SIR L. H. LAFONTAINE, BART., C. J., AYLWIN, J., DUVAL, J., MONDELET, A. J., BADGLEY, A. J.

In appeal from the Superior Court, District of Montreal.

FRANCIS XAVIER DESJARDINS,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

LA BANQUE DU PEUPLE,
(*Defendant in the Court below,*)
RESPONDENT.

ADJUDICATAIRE—DEFICIENCY IN CONTENTS—RECOURSE.

HELD:—1o. That an *adjudicataire* who buys at a sheriff's sale a fief described in the sheriff's advertisement as containing 400 arpents, whereas it only contained 188 arpents, has an action against the plaintiff, to whom the proceeds of the sale went as mortgage creditor to recover from the latter the excess of the price.

2o. That the defendant whose land had been so sold, and the sheriff, need not be put into the cause, to recover such excess of price.

3o. That the action has been brought in a reasonable time, and could not be barred by any prescription short of ten years.

The pleadings in the case fully appear in the report: 3 L. C. Jurist, 75 of the judgment in the Court below.

LAFONTAINE, C. J., after stating the pleadings:

Un arpenteur a été nommé, du consentement des parties, pour constater le défaut de contenance. Cet arpenteur a rapporté que le déficit était plus grand que celui allégué dans la déclaration du demandeur, le terrain possédé par lui ne contenant réellement que 179 arpents et 67 perches en superficie. Quoiqu'il en puisse être, le demandeur est lié par l'énoncé de sa déclaration.

La terre était en bois debout; il était très-difficile à un étranger d'en connaître l'étendue ou la contenance. La banque l'a fait saisir et annoncer en vente comme contenant 400 arpents. Selon la déclaration du demandeur, elle n'en contient réellement que 188, ce qui fait un déficit de 212 arpents; ce déficit est même prouvé être plus grand. Dans tous les cas, un déficit de 212 arpents est assez considérable pour qu'il soit raisonnable et juste que l'adjudicataire ait en pareil cas droit d'action. On lit, aux *observations* sur Du Perrier t. 2, p. 337: "Si la vente commence par l'expression de la quantité et étendue du fonds vendu, avant qu'il soit fait mention des confins et limites, la vente est censée faite *ad mensuram, non ad corpus;* et par conséquent le vendeur est tenu de suppléer ce qui peut manquer à cette quantité."

Il ne s'agit pas ici d'une action révocatoire. Le demandeur tient à son acquisition pour la quantité de terrain qu'on lui a livrée. Ce dont il se plaint, c'est qu'on ne lui a pas livré tout le terrain promis, qu'on a voulu lui vendre et qu'il a voulu acheter. Par suite de l'erreur ainsi commise, constatée par le défaut de contenance, il se trouve avoir payé ce qu'il n'aurait pas dû payer, et la banque se trouve avoir reçu, à son préjudice, ce qu'elle n'aurait pas dû recevoir, ce qu'elle n'avait pas le droit de recevoir. Ainsi, le demandeur est bien fondé à répéter d'elle ce qu'elle a ainsi reçue indument. La proposition exacte de la quantité du *déficit* allégué dans le prix payé, £1100, est de $583, la somme précise réclamée par l'action. Je crois que le demandeur aurait dû avoir jugement pour cette somme, sans aucune déduction. La valeur des prétendues bâtisses est prouvée être nulle; cette valeur n'équivaut pas même au coût des réparations que le demandeur y a faites. La traverse de l'île Perrot à Vaudreuil n'a pas fait, et ne pouvait pas faire partie de la vente. Les profits minimes qu'il est établi que le demandeur a pu faire, depuis son acquisition, par la vente du bois et d'une partie du terrain au Grand-Tronc, n'ont rien à faire à la question. Eût-il fait des milliers de louis par ce moyen, cela n'affecterait en rien la créance que lui donne le défaut de contenance de la chose qu'on lui a vendue. Je ne trouve non plus aucune force dans l'exception de l'intimée, que, n'ayant pas reçu promptement avis du défaut de contenance, elle a été portée à renoncer au privilège qu'elle avait sur les parts en banque de Donegani, et à accepter le transport du cessionnaire. Avant d'accepter ce transport, elle a été payée par le cessionnaire de la balance que lui devait son débiteur. Elle n'a donc rien perdu. Il reste la conclusion de la dernière exception de l'intimée, par laquelle elle demande une expertise. Elle veut qu'on lui permette de faire estimer une chose qui n'existe pas. Ce serait, il faut l'avouer, un peu trop difficile. Il n'y a pas lieu à expertise.

L'intimée, tenue personnellement au remboursement envers le demandeur, car il n'y a pas de prescription, (il y aurait peut-être tout au plus celle de dix ans),

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avait un recours en garantie, ou un recours contre quelqu'un. Si elle n'a pas jugé à propos d'intenter son action récursoire pour le faire juger conjointement avec l'action du demandeur, elle pourra l'intenter plus tard.

Il est à remarquer de plus que, dans une de ses exceptions, l'intimée dit que, aussitôt après la vente, l'appelant avait pris possession du terrain, et que, *peu de temps après*, il l'avait fait chaîner et mesurer pour le diviser en lots et en disposer. Elle prouve le fait, et elle prouve que cela a eu lieu en janvier 1857. C'est ce qu'elle appelle elle-même *peu de temps après*. C'est donc, suivant elle, dans un délai raisonnable que ce mesurage a eu lieu. Elle n'est donc pas fondée à s'en plaindre aujourd'hui.

C'est quelques mois après, et après une longue maladie souffert par le demandeur, que celui-ci a informé la banque du défaut constaté dans la contenance. Il me semble que, dans ce cas, l'avis a été donné dans un temps raisonnable.

MONDELET, A. J.—L'appelant, demandeur en cour de première instance, se pourvut contre la Banque du Peuple, pour se faire rembourser par elle, de la somme de £583, avec intérêt du 8 novembre 1853, représentant la valeur d'un déficit dans la contenance d'une propriété adjugée à l'appelant, le 18 octobre 1853, sur une saisie et vente par autorité de justice, dans une cause dans laquelle la Banque du Peuple était demanderesse, contre John Donegani.

L'action était fondée sur ce que le shérif lui avait vendu et adjugé, et lui avait fait un contrat le 8 novembre 1853, d'une terre vendue sur un *venditioni exponas*, savoir: "Un terre en fief, relevant à foi et hommage, située à l'extrémité de l'isle Perrot, sur le côté opposé à Vaudreuil, contenant quatre cents arpens, c'est-à-dire tout ce qui peut se trouver dans les limites suivantes, à partir de la ligne de Jean Moreau au sud-ouest; suivant le bras de la rivière séparant la dite isle Perrot de l'isle de Montréal, et s'étendant vers le nord-est au terrain des représentants Janisse, de là, allant dans une direction sud-est, le long de la ligne des représentants Janisse, jusqu'à l'intersection de la ligne avec celle de Joseph Lalande, avec une maison, bangar et autres bâtisses dessus construites."

L'appelant alléguait qu'il avait payé £1100 pour les 400 arpents, et que sur mesurage, il ne s'en trouvait que 188 en superficie. Que l'intimée avait été colloquée pour la somme de £20,9381.9½, à elle adjugée, laquelle somme comprenait celle de £1100, prix du fief en question. Desjardins alléguait de plus que c'est par erreur qu'il a payé £1100, et dans l'ignorance du *déficit* dans la contenance, et il réclame £583 représentant la valeur de ce *déficit*.

L'intimée a opposé une *défense en droit*, prétendant que le demandeur ne faisait pas apparaître un droit d'action: qu'il n'y a pas telle action, et que Donegani eût dû être en cause.

La défense en droit fut déboutée, attendu que le demandeur alléguait que la vente du shérif avait été faite par le contenu et non comme d'un corps certain.

Il y eut aussi une réponse en droit aux exceptions péremptoires, qui subit le même sort, la Cour ordonnant, avant faire droit, preuve respective.

L'examen de cette cause me conduit au résultat qui suit:

1o. L'action n'en est pas une révocatoire; par conséquent la prétention de

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l'intimée que Donegani et le shérif auraient dû être mis en cause, est sans fondement.

2o. Il n'y a pas de prescriptions quant à cette action par l'ancien droit, bien que le code se montre, peut-être, moins favorable aux prétentions du demandeur.

Les prescriptions sont de droit étroit, et la cour ne les crée pas.

3o. Par suite de ce qui précède, que la Banque du Peuple perde ou gagne moins à cela, il n'importe. La question est de savoir si elle a reçu plus qu'elle n'avait droit de recevoir. Elle ne peut, plus que qui ce soit, s'enrichir aux dépens d'autrui——et assurément qu'il est de droit, que celui qui se plaint du *déficit* peut être et doit être reçu à se faire rembourser contre les créanciers qui ont été colloqués.

4o. Si l'intimée, qui a excipé du droit d'autrui, voulait faire rejaillir sur Donegani et le shérif, la condamnation de restitution, c'était à elle à demander à les appeler en cause.

5o. Quant à la question du contenu et des limites, il me paraît évident, que la vente a été d'une étendue de 400 arpens et non d'un corps certain, et qu'attendu le *déficit* qui ne laisse à Desjardins que 188 arpents, qui représentent les £583, dont toutefois il faut déduire £40 pour autant qu'est établie la valeur des propriétés, le jugement de la cour de première instance, qui est basé sur le faux principe qu'il n'y a pas en loi une telle action, sans que Donegani et le shérif soient mis en cause, doit être renversé, et la Banque du Peuple, condamnée à payer [illegible] à Desjardins £543, avec intérêt du 8 novembre 1853, date du contrat du shérif.

BADGLEY, J.—The facts have been stated at length by the chief Justice, and are briefly as follows: The respondent, a judgment creditor of Mr. Donegani, caused his property to be taken in execution under fi. fa. de terris; amongst the property seized was the lot of land which has given occasion to this contestation. The lot was seized and advertised at the suit of the respondent, as of the extent of 400 arpents, and adjudged as such to the appellant for £1,100, which he paid to the sheriff, and which, with the proceeds of the other property of the debtor, was returned into the Superior Court for distribution. By the judgment of distribution of that Court, the respondent as mortgagee and residuary creditor of the debtor was collocated for a considerable sum of money, including the amount of the above purchase. Subsequently the appellant, adjudicataire of the lot, discovered that he had been deceived in the extent of his purchase, and that the lot contained only 188 arpents instead of the 400 adjudged. He had paid the price of 400 arpents which the respondent or residuary collocated creditor had received in toto, whilst he had obtained possession of 188 arpents only, and which upon the calculated rate of his purchase amounted only to £517 0 0, the excess being £583. He directed his action, therefore, against the recipient of the full amount for the repetition of the excess received, and for which he had received no consideration whatever. The action thus explained is simple in its character, and it may be at once observed that no difficulty exists as to these facts. The appellant has no desire to interfere between the creditor and the

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debtor, as to the proceeds of the actual lot sold, he only claims to be restored the amount which he paid by error for what he did not receive; and which was not in fact in existence, when adjudged to him by the decret at the suit of the respondent.

The action is direct against the respondent, the receiving creditor of the proceeds of the debtor's property, actually sold at their suit, and claims from them the restitution of the excess paid to and appropriated by them, for property which had no existence whatever, and which excess they could not hold under the legal fiction that it represented their debtor's property. That in such case the direct action has been properly brought against the recipient of the excess is attested by authority; two or three citations will suffice.

Guyot Rép. Vo. Adjudicataire, p. 169. "D'autres croient que les créanciers colloqués recevant les deniers seraient obligés de rendre à l'adjudicataire ce qu'ils auraient touché jusqu'à la concurrence de la somme fixée pour l'indemnité, et cette dernière opinion doit être préférée. Il est juste que ceux qui ont fait vendre un bien en justice pour être payé de ce qui leur était dû, et qui en ont touché le prix, fassent jouir l'adjudicataire ou qu'ils lui restituent ce qu'ils en ont touché."—Pothier, Proc. Civ., p. 227. "Par notre jurisprudence on donne cette répétition contre les créanciers qui ont touché à l'ordre, et lorsque l'action n'a été que pour partie et n'y a répétition que pour la partie du prix, ce sont les derniers recevants à l'ordre qui sont seuls tenus de cette répétition du prix." 1 Duvergier, p. 417, No. 346. "Pourra-t-il forcer les créanciers entre les mains desquels le prix aura été versé à le lui restituer, non pas comme exerçant l'action en garantie, mais comme réclamant ce qu'il a payé par erreur. La plupart des auteurs pensent que la restitution peut être exigée, etc." See also 1 Troplong, vente, No. 432, pp. 549, 550, who cites Poth. Proc. Civ., also No. 498, p. 629; 10 Poullain du Parc, p. 655, No. 55, etc., etc.

This concurrence of legal opinion, which is nothing but the plainest equity and honesty, in support of the direct action against the receiving creditor the last in the collocation order establishes this point, and the reason upon which it is founded is so plain and manifest as to remove all doubt upon the subject. Why is the receiving creditor liable to refund to the paying purchaser, because "l'adjudicataire n'était débiteur du prix envers les creanciers qu'à cause de l'immeuble dont il croyait avoir acquis la propriété, du moment où il est évincé de cet immeuble, il est démontré que l'opinion de sa dette envers les créanciers du saisi et le paiement qu'il en avait fait n'étaient fondés que sur une erreur, et par cela même il est autorisé à répéter les deniers des mains de ceux à qui il les a payés." Lorsqu'une personne, qui par erreur se croyait débitrice, a acquitté une dette, elle a le droit de répétition contre le créancier."

The relative positions of the receiving creditor and paying adjudicataire with reference to land adjudged by the sheriff which could not be put into the possession of the latter from the simple fact of its non-existence, is that of a vendor and vendee, the sheriff acting only as official salesman for the former. In this case the vendor has been put in possession of the adjudged lot which has been established by measurement to contain only 188 arpents instead of the 400 arpents advertised and judged, and the respondent, the seizing and last colloca-

ted Creditor, has received and appropriated his £1100, which he in good faith, but by error, paid for the advertised 400 arpents, of which only 188 had existence, and for which, as their debtor's property, they should have received only £517 as its estimated value according to the full price paid for the full lot. This is a distinct *condiction* between the payee and the payee, in which the debtor, Mr. Donegani, can have no interest unless he could be compelled to make the 188 arpents actually transferred, increase to 400 actually sold. Had he been made a party to the suit, what could have been required of him, what judgment could have been rendered against him? Not to increase the particular lot sold, which was impossible; not to repay to the purchaser the excess over-paid for land, which was not his, and which in fact did not exist, and which excess, moreover, he had not received, what was his guarantee under these circumstances? Possibly to his creditor, but certainly in no way to the purchaser of non-existing property, the adjudicataire whose money had been received by the respondent as the representative of the debtor's property, which did not exist. The respondent holds this money without title, it does not represent any right or property of the debtor, and has been paid by error by the appellant. It is not a question of *garantie*, nor has the plaintiff been barred by time from bringing his cause before the Court. Considering the case simply as it is, a demand against the respondent for receiving money by error paid to him, and representative of no value whatever, or of any property of the debtor, and that it is held by the respondent for the use and benefit of the appellant, common honesty and justice require that the judgment of the Superior Court should be set aside and concurring with the chief-justice the appeal in this case must be maintained.

AYLWIN, J., *dissentiens*.—The defendant, Donegani, should have been in the cause. The action is not rightly brought against the Bank alone. The action should have been a special one. Furthermore this was a sale *per aversionem a corpus certum*, it was ager limitatus, and the appellant bought what he saw. There is another matter. The Bank was the last creditor to be paid, and only received a portion of the money on giving security, and yet here the condemnation is absolute.

DUVAL, J., *dissentiens*.—The action ought to have been against Donegani in the first instance. The *adjudicataire* has nothing to do with the distribution of the moneys. When the court has the money, it belongs to the creditors of the defendant. We are now doing away with the report of distribution without the presence of the defendant, though his estate is diminished so much. Vide 5 Proudhon: Usufruit. No. 2236.

The *considérants* of the judgment in appeal were as follows:

1°. Considérant qu'en l'année 1853, l'appelant s'est rendu adjudicataire, à un décrêt forcé poursuivi par l'intimée sur John Donegani, d'un certain fief situé à l'extrémité ouest de l'île Perrot, district de Montréal, et désigné dans les annonces du shérif comme suit, savoir: "une terre en fief, relevant à foi et hommage, située à l'extrémité ouest de l'île Perrot, sur le côté opposé à Vaudreuil, contenant quatre cents arpents, c'est-à-dire tout ce qui peut se trouver dans les limites suivantes, à partir de la ligne de Jean Moreau au sud-ouest, suivant le biais de la rivière, séparant la dite île Perrot de l'île de Montréal, et

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s'étendant vers le nord-est au terrain des représentants Janisse ; de là allant dans une direction sud-est, le long de la ligne des dits représentants Janisse, jusqu'à l'intersection de la dite ligne avec celle de Joseph Lalonde ;"

Que la dite adjudication a été faite pour le prix de £1100 courant, que l'appelant a payé et déposé entre les mains du dit shérif, et qui, sur jugement de distribution, a été, le 26 juin 1854, payé à l'intimée créancière du dit Donegani ;

2o. Considérant que le dit fief, au lieu de contenir quatre cents arpents n'en contenait, lors de la saisie et de la dite adjudication d'icelui, que cent quatre-vingt huit tout au plus ; qu'ainsi induit en erreur quant à la contenance, l'appelant a été porté à enchérir jusqu'à la somme de £1100 dit cours et qu'en payant cette somme, l'appelant se trouve avoir payé de trop, indûment et sans cause, une somme, de £583 dit cours, dont l'intimée a profité et dont partant il a le droit de lui demander le remboursement avec l'intérêt sur icelle, à compter du 26 juin 1854 ;

3o. Considérant que, par conséquent, il y en a mal jugé dans le jugement dont est appel, en ce qu'il a débouté l'appelant de son action ;

4o. Considérant, de plus, que le 18 octobre 1858, Damasse Douaire Bondy, écuyer, avocat, est intervenu dans l'instance alors pendante entre les parties en la cour supérieure, concluant, par sa requête en intervention, à ce que la dite somme de £583 dit cours, réclamée en cette cause par le dit F. Desjardins, l'appelant, lui fut payée, vû que cette dite somme lui avait été cédée et transportée par le dit Desjardins, par acte du 5 décembre 1857, passé devant M. Labadie et son confrère, notaires, le dit transport duement signifié à l'intimée le 7e jour du dit mois de décembre ; que les parties demanderesse et défenderesse à cette action ont déclaré qu'ils ne contestaient pas la dite intervention, et ont demandé acte de cette déclaratton ; que, par conséquent, il y a lieu de faire droit sur les conclusions de la dite requête en intervention ;

Infirme le susdit jugement dont est appel, savoir le jugement rendu le 31 décembre 1858 par la cour supérieure, siégeant à Montréal, avec dépens, sur le présent appel, contre l'intimée, au profit du dit appelant, et cette cour, procédant à rendre jugement que la dit cour supérieure aurait dû rendre, déclare le dit Damasse Deuaire Bondy recevable dans son intervention, et joignant le fond de la dite intervention à l'instance principale, pour être statué ensemble sur le tout, condamne la défenderesse intimée à payer au dit Damasse Douaire Bondy, pour les causes énoncées dans la déclaration et la requête en intervention, la susdite somme de £583 dit cours, avec l'intérêt légal sur icelle à compter du dit jour, 26 juin 1853,——laquelle dite somme le dit Dasjardins avait, pour les susdites causes, le droit de répéter de la défenderesse intimée, condamne cette dernière à payer au demandeur appelant les dépens sur l'action en la dite cour supérieure, mais condamne le dit demandeur, appelant, à payer du dit Douaire Bondy les dépens sur sa dite intervention ; enfin ordonne que le ossier soit remis à la dite cour supérieure, siégeant à Montréal.

Judgment reversed.

AYLWIN & DUVAL, Justices, dissenting.

R. & G. Laflamme, for appellant.

Cherrier, Dorion & Dorion, for respondent.

(F.W.T.)

COURT OF QUEEN'S BENCH.

MONTREAL, 2ND MARCH, 1863.

IN CHAMBERS.

Coram S. C. MONK, A. J.

Ex Parte PETER COOPER *et qualité*,

Petitioner for Writ of Habeas Corpus;

AND

JOHN E. TANNER,

Defendant.

MINOR—CUSTODY.

HELD:—That a minor aged upwards of 16 years has a right to choose the person with whom she will reside.

The petitioner in his petition fyled the 17th Feb., 1863, made the following statement:

"That on the sixth day of August, 1858, your petitioner was duly appointed tutor by *acte d'avis de parents et amis*, homologated before Messrs. Monk, Coffin, and Papineau, Prothonotary of the Superior Court, District of Montreal, on the said sixth day of August, to the said Jane Shaw, then of about the age of thirteen years, and the daughter of the late Frederick Shaw, and of the late Jane Cooper, his wife, both of whom departed this life previous to the said sixth of August, leaving issue of their marriage the said minor, Jane Shaw, as appears by the *acte de tutelle*, an authentic copy of which is hereunto annexed, and which was, on the 17th of February, 1863, duly enregistered in the registry office for the County of Montreal, the County in which the said City of Montreal is situated.

That your petitioner, who is the uncle of the said minor, with a view of giving to the said minor a suitable education, placed her under the care and tuition of the Misses McIntosh of the said City of Montreal, who keep and conduct a most respectable female academy, in Montreal aforesaid, and with whom the said Jane Shaw has also resided as a boarder during a period of about two years.

That on or about the 24th of December last, said Jane Shaw left the house of the said Misses McIntosh, for the purpose of attending upon Margaret Shaw, her sister, who was then in ill health, and who has since, to wit, on or about the 3rd of February instant, at Montreal aforesaid, died.

Your petitioner further alleges that said late Margaret Shaw was the wife of John Emmanuel Tanner, also of Montreal, Minister of the Evangelical Church, Montreal, and that the said minor, by the death of petitioner's brother, hath become entitled to a very large amount of real and personal property.

That since the death and burial of her said sister, she, the said Jane Shaw, hath continued to reside with the said John Emmanuel Tanner, at Montreal

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aforesaid, and she is now in the custody and possession and under the control of the said Tanner, who detains, harbours, and keeps the said minor without any legal right, warrant, or authority whatsoever, and against the will of her uncle and tutor.

That your petitioner, being the uncle and legal tutor as aforesaid, of the said minor, hath a right to obtain the custody and possession of the said minor, and to have her placed under his care and protection.

Wherefore your petitioner prays justice in the premises, and that your Honours, or one of you, will order that a writ of *Habeas Corpus* do issue in due course of law, directed to the said John Emmanuel Tanner, and returnable before your Honours, or one of you, without delay, commanding the said John Emmanuel Tanner to have the said Jane Shaw, the aforesaid minor, so detained by the said John Emmanuel Tanner, before your Honours, or any one of you, without delay with the cause of her detention, and further prays that the said minor may be released from her present illegal detention and be given up and restored to your petitioner, her uncle, tutor, and legal guardian as aforesaid, and such other and further proceedings had as law and justice may require."

Upon this petition, which was sworn to, Samuel Cornwallis Monk, Esquire, Assistant Judge of the Superior Court, to whom the same was presented, under Cap. 95 of the Consolidated Statutes of Lower Canada, ordered the issue of a writ of *Habeas Corpus* addressed to the defendant, and containing the following order: "We command you that you have the body of Jane Shaw, minor child, the lawful issue of the marriage of the late Frederick Shaw, and the late Jane Cooper his wife, detained in your custody (as it is said) under safe and secure conduct together with the cause of her capture and detention by whatsoever name the said Jane Shaw be called in the same; before the Honorable Samuel Cornwallis Monk, one of our Assistant Justices of our Superior Court, for Lower Canada, at his Chambers in the Court House, in our City of Montreal, immediately after the receipt of this writ, to do and undergo all and singular those things which our said Justice shall then and there consider of her in this behalf, and have you then and there this writ."

To this writ the defendant Tanner made the following answer under oath:

"The said John Emmanuel Tanner, in answer to the writ of *Habeas Corpus* served upon him, returns that he does not detain the said Jane Shaw in his custody, nor is the said Jane Shaw confined or restrained of her liberty.

"That the said Jane Shaw is at present here in Court, and can answer for herself, being of mature years, namely, being aged seventeen years and nine months.

"That the said Jane Shaw is sister of the said John Emmanuel Tanner's late wife, Dame Margaret Shaw, who departed this life on the second day of February instant (1863).

"That the said John Emmanuel Tanner, and his said late wife, about two years ago presented a petition for annulling the appointment of the said Peter Cooper as tutor of the said Jane Shaw, for grounds set forth in the said petition, and the said petition is still pending and undetermined; and the said Jane Shaw has made option to live with the said John Emmanuel Tanner and his wife, and the

said Peter Cooper is an unfit person from his habits and character, and from the litigation in which he has been engaged with his said niece, the said Jane Shaw, to have the custody of the person of the said Jane Shaw, who is moreover of sufficiently advanced age and mature understanding to make option of her place of abode."

The parties were heard in Chambers, and the minor attended, and was examined privately and apart by the Judge.

The following was the judgment:

"Having seen the return made to the annexed writ by John Emmanuel Tanner, of the City of Montreal, Minister of the Evangelical Church, Montreal, I do order that the said return be fyled, and having read the said return, and heard the parties, the said John Emmanuel Tanner and the said Peter Cooper, by their Counsel (and moreover having personally examined the minor, Jane Shaw, by herself apart,) considering that proceedings have been taken in the interests of the said minor, Jane Shaw, by her said late sister Dame Margaret Shaw, in the Superior Court, Montreal, to annul and set aside the nomination of the said Peter Cooper as tutor to the said minor, which proceedings are still pending and undetermined; considering also that the said minor is aged upwards of sixteen years, and is capable of exercising a sound discretion, and it appearing that she is not under any illegal or improper restraint, it is adjudged and declared that the return of the said John Emmanuel Tanner to the said writ is sufficient, and is hereby maintained, and that the petitioner take nothing by the petition, and it is further ordered that the said minor, Jane Shaw, be allowed, and she is hereby allowed to choose the person with whom she will reside.

B. Devlin, for petitioner.

F. W. Torrance, for defendant.

(F.W.T.) Petition dismissed.

NOTE OF EDITOR.

The *London Times* publishes the following from the letter of its Dublin Correspondent who writes under date 27th June, 1863: "The Court of Queen's Bench gave judgment this day in an important *Habeas Corpus* case, which came before them on an application by William Connor, to have his son, who is at present an inmate of the "Bird's Nest" at Kingston, delivered into his custody. The question in the case was narrowed to the point whether the boy, being admitted over 14 years of age, was entitled to choose his domicile irrespective of the wishes of his father. The Chief Justice, Mr. Justice Hayes, and Mr. Justice Fitzgerald, held that 14 years of age was the period when the boy should be regarded as having the right to exercise his will against the wish of his father. Mr. Justice O'Brien dissented, and held that 16 years was the period when the boy should be taken as emancipated from the authority of the father as regards his domicile."

Vide:—Forsyth, Custody of Infants, p. 106.

" :— Hurd, Writ of *Habeas Corpus*, pp. 527-536.

MONTREAL, 19 JUIN, 1832.

Coram REID, C. J., PYKE, J., ROLLAND, J.

No. 1233.

Smith et al., vs. *Porteous.*

CAUTIONNEMENT—DELAI AU DEBITEUR PRINCIPAL.

JUGE:—Que le délai accordé au débiteur principal pour acquitter son obligation, sans le consentement de sa caution, ne libère pas la caution.

Cette action fut portée par William Smith, écuier, avocat de Québec et autres, contre John Porteous, écuier, Marchand de Montréal.

La déclaration contient en substance ce qui suit:

Le 1er février 1822, par obligation reçue à Montréal devant Mtre. Bedouin et son confrère, notaires, Alexander Reid se reconnut endetté envers Elizabeth Mittleberger en sa qualité de tutrice dûment nommée à ses enfants mineurs, en une somme de £400. 0s. 0d. courant qu'il promit de payer dans les cinq ans à compter de la date du dit acte avec intérêt.

Pour assurer le paiement de la dite somme de £400. 0s. 0d. courant, John Porteous, le défendeur, intervint à l'acte et se porta caution pour le dit Alexander Reid envers la dite Elizabeth Mittleberger, ce acceptant, en sa dite qualité, s'engageant dans le cas où le dit Alexander Reid deviendrait insolvable, à payer la dite somme ou partie d'icelle personnellement et comme principal obligé.

Un billet de £100. 0s. 0d. courant, signé par le dit Alexander Reid, et endossé par le défendeur en faveur des demandeurs, avait été protesté à défaut de paiement.

Une action fut intentée contre le dit Alexander Reid pour le recouvrement des sommes sus-mentionnées, montant de l'obligation et du billet, en octobre 1829. Jugement fut obtenu et exécuté.

Le discussion d'Alexander Reid n'ayant produit qu'un retour de carence, les demandeurs sont bien fondés à intenter la présente poursuite contre John Porteous, fidéjusseur d'Alexander Reid.

Le défendeur, pour exception péremptoire en droit à cette action, allégua:

Qu'après la passation de l'acte notarié mentionné en la déclaration, et avant que la somme que le dit Alexander Reid, s'était obligé de payer par le dit acte fut devenue due, la dite Elizabeth Mittleberger, ès-qualité avait, à l'insu et sans le consentement du défendeur, prolongé le terme du paiement du capital et des intérêts de la dite obligation.

Que durant la prorogation du terme ainsi accordé au dit Alexander Reid, à l'insu et sans le consentement du défendeur, le dit Alexander Reid est devenu insolvable et en déconfiture, ce qui par les lois de la Province, rend nulle l'obligation principale du dit Alexander Reid, et la prétendue obligation du défendeur, comme caution, et que par là, le défendeur se trouvait déchargé de son obligation.

Des répliques générales complètent la procédure.

La question qui s'élevait dans cette instance, était de savoir si la prorogation

du terme de paiement d'une obligation, accordée au principal obligé, à l'insu et sans le consentement du fidéjusseur, libère la caution.*

Les demandeurs citerant pour la négative:
Pothier—Traité des obligations, No. 406.
Basnage—Hyp. part. II ch. 7.
Despeisses—Vol. 1er. part. II, tit, II, sect. III, No. 8, p. 671.
Lapeyrère—Vol. 1er Voir cautionnement, p. 120.
On peut ajouter dans ce sens.
Troplong—Voir Cautionnement, ch. 3, p. 527, No. 575.
Dallos—P. 361, Vo. caution, §16, No. 235.
Le défendeur appuya sa défense sur les autorités suivantes.
Nouveau Denizart, §III, No. 5, pages 322 et 323. Observations sur la coutume de Bretagne.
Argou—Vol. 2, p. 371 et 372.
Lacombe—Vo. caution, sect: 5, No. 1.
N. B.—Cette dernière autorité n'est pas applicable au cas actuel, le défendeur n'ayant pas allégué long délai, ni aucun délai déterminé. (Note du Juge Rolland.)
A ces autorités, on pourrait joindre celles de Guyot, Rép. de Jurisprudence, Vo caution, p. 235 et de Bourjon, vol, II, p. 436, No. 21.

Le 19 juin 1832, jugement fut rendu condamnant le défendeur à payer le montant de l'action.

Jugement pour le demandeur.

Ogden et Buchanan, pour les demandeurs.
Sewell et Griffin, pour le défendeur.
(D. H. S.)

COUR SUPERIEURE.

MONTREAL, 30 AVRIL, 1864.

Coram MONK, J.

No. 1035.

Ducharme vs. *Morison et al.*

JUGE:—Que les Syndics pour la construction des églises, etc., élus avant la passation du chapitre 18, des statuts refondus pour le Bas-Canada, (section 21), ne forment pas une corporation.

Le Demandeur réclamait la somme de £166. 15s. 10, balance due en vertu d'un certain marché qu'il avait passé avec les défendeurs comme Syndics pour

* Cette question a été décidée à Québec, par la Cour du Banc de la Reine en Avril 1848, dans un cause de St. Aubin contre Fortin. La majorité de la Cour composée des honorables juges Bowen, Panet et Bédard, décida contre l'opinion du juge en chef Stuart: "Que l'extension du délai accordée au débiteur principal par le créancier "opère novation, quant à la caution et la libère." (Vid: Revue de législation et de jurisprudence. Vol. 3, p. 293.)

L'Honorable Juge Rolland base son jugement sur ce principe que la caution peut, nonobstant la prolongation du délai, exercer son recours contre le débiteur.

Autres autorités à consulter:
Domat. L. III, tit. IV. Sect. III, No. 3, p. 226.
Ferrière—Dict. de droit. Vo. caution, p. 257.
Instructions sur les conventions—p. 299 et 304.
Rép—Vo caution. P. 774, art. de Merlin,
Vinnius—Liv. II, ch. 42.
D'Argentré—Coutume de Bretagne, art. 208.
Note.—L'opinion consacrée par le jugement ci-dessus, professée par un grand nombre des anciens jurisconsultes a été adoptée par les commentateurs modernes les plus distingués, et est passée de Pothier à l'article 2039 du Code Civil.
(D. H. S.)

Ducharme vs. Morison et al.

la construction d'une église et sacristie en la paroisse de St. Gabriel de Brandon, le 29 mars, 1855, Mtre. Chalut, N. P.

Il concluait contre les défendeurs au nombre de sept, à ce qu'ils fussent condamnés à lui payer cette somme, "en leurs qualités de Syndics légalement nommés pour surveiller la construction d'une église dans la paroisse de St.Gabriel "de Brandon."

Les défendeurs plaidèrent une défense au fonds en droit par laquelle ils prétendaient: 1o. "que d'après les lois du pays et les allégués de la déclaration, il "appert que les défendeurs ne peuvent être condamnés individuellement, mais "seulement comme corps incorporé. 2o. que par les lois du pays, les défendeurs "sont incorporés sous le nom de "les Syndics de la paroisse de St. Gabriel de "Brandon," et constituent, sous ce nom, un corps politique et incorporé, et par-"tant aucune condamnation ne peut être prononcée contre eux que suivant la loi "créant telle corporation."

A l'audition sur cette défense au fonds en droit, LaFrenaye pour les défendeurs; soutint, que quoique les Syndics eussent été élus longtemps avant la refonte des statuts, néanmoins, comme la section 21 du chapitre 18 des statuts Ref. du Bas-Canada, parle des Syndics *élus* en vertu du *présent* acte et non pas seulement de ceux qui *seront élus* par la suite; il était évident que depuis la passation de cette loi, tous tels Syndics formaient une corporation.*

Le mot "présent;" suivant le chap. 1, des status refondus du Bas-Canada, section 13, sous-section 4, étant censé se rapporter à l'acte en entier et non à la la section uniquement.

Les actions 7 et 9 du même chapitre, déclarent que les dispositions des statuts refondus prévaudront en ce qui regarde toutes les transactions, matières et choses subséquentes à l'époque où ces statuts refondus entreront en force. Merlin, Rép. vo. Effet rétroactif. "Ce n'est pas rétroagir que de subordonner à l'avenir, "l'exercice de droits résultant de lois antérieurs à telles formalités, à telles di-"ligences, à telles conditions qu'il plaît à la loi nouvelle d'imposer." La nécessité d'incorporer ces Syndics est apparente lorsque l'on voit que par la 20me section du chapitre 18, s'il y a une vacance, elle doit être remplie; or, que deviendra l'exercice de l'action du créancier pendant cette vacance, et si elle est intentée durant cette vacance, comment pourra-t-il procéder ensuite contre le remplaçant *eo nomine?*

R. Roy—La clause 21, du chapitre 18, des status refondus du Bas-Canada, invoquée par les défendeurs, et promulguant l'incorporation des Syndics *élus en vertu du présent acte*, n'est pas applicable aux défendeurs qui ont été nommés en 1854, et dont les fonctions sont depuis longtemps à peu près terminées. En effet, cette clause est un amendement introduit dans la loi en 1860 et les termes, *en vertu du présent acte*, veulent dire du présent acte d'amendement; cela ressort davantage des sous-sections de la dite clause, où il est pourvu à la manière dont les Syndics procèderont à faire confirmer leur élection, à élire un

* Ch. 18, sec. 21, "Les Syndics *élus* en vertu du *présent* acte pour une localité, seront connus et désignés sous le nom de "Les Syndics de la Paroisse; ou de la mission de.....(en ajoutant le nom de la localité), et constitueront sous ce nom, un "corps politique et incorporé."

président à préparer un rôle de cotisation, etc., formalités que ne sauraient remplir des Syndics élus plusieurs années auparavant, et qui ont accompli l'objet pour lequel ils ont été nommés.

Les Syndics ont été élus en vertu de 2 Vict. Ch. 29, §9 et 10.

Par la clause 9, du chapitre 1er, des statuts ref. du Bas-Canada, il est statué que *si par les statuts refondus, il est innové à quelqu'ancien statut, cette innovation ne pourra affecter que les transaction, choses, etc., à venir, mais en ce qui concerne les transactions chose, etc, antérieures au dit cas, les provisions du statut rappelé auront force et vigueur.*

Maintenant, à l'argument tiré du cas supposé du décès d'un des Syndics, la réponse est que le créancier n'aurait qu'à mettre en cause le remplaçant ès qualité, que les paroissiens sont requis de nommer par le 20me clause du dit chap. 18.

La cour, après délibéré, a adopté les moyens du demandeur et débouté la *défense en droit.*

Défense en droit renvoyée.

R. Roy, avocat du demandeur.
Lafrenage et Armstrong, avocats des défendeurs.
(P. R. L.)

MONTREAL, 20 AVRIL, 1864.

Coram LORANGER, J.

EN CHAMBRE.

No. 101.

EXPARTE PELLETIER,

AND *Requérant l'opposition de Scellés.*

TURCOT,

Opposant.

JUGE :—Que sur l'opposition faite par une partie à l'opposition de scellés, et sur l'exposé d'un conflit de titres entre l'impétrant et l'opposant, les parties seront renvoyées au principal à l'audience, pour se pourvoir, si elles le jugent à propos.

Le requérant présenta le 1er mars, 1864, une requête aux Honorables Juges de la Cour Supérieure pour le Bas-Canada, siégeant dans le District de Montréal, exposant que par le testament solennel de feu Joseph Augustin Cardinal, en date du 25 janvier, 1864, Mtre. Montreuil, N. P., et son codicile du 28 janvier, 1864 ; il avait été nommé un des exécuteurs testamentaires et administrateurs de ce dernier, et que vû qu'il y avait lieu de craindre le détournement des biens mobiliers de la dite succession qui étaient dans la maison mortuaire, il requérait l'apposition de scellés sur les biens, meubles, effets et papiers de la dite succession, et priait le Juge de commettre la personne de Louis S. Martin, Notaire, de Montréal, pour apposer le dit scellé et agir comme commissaire.

Cette requête ayant été assermentée, le permis de faire apposer le scellé, etc., fut donné par l'Honorable Juge Loranger.

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Le deux mars, 1864, l'impétrant ayant comparu devant le commissaire, et l'ayant requis de procéder à l'apposition des scellés, ce dernier se rendit avec deux témoins à la maison du défunt, où étant arrivés, ils rencontrèrent Séraphin Turcot, qui déclara qu'il se refusait à l'apposition des scellés, nonobstant la dite ordonnance.

Sur cet obstacle et vu que la maison où était décédé le dit Joseph Augustin Cardinal avait deux issues, le commissaire a établi à la porte d'entrée et à la porte de sortie, donnant vue sur la cour, deux gardiens, et ensuite il se transporta devant le Juge qui octroya l'ordonnance suivante : Vu notre ordonnance en date du 1er mars courant les acte et procès-verbal du commissaire au scellé qui y sont annexés, et ouï le dit commissaire sur son référé ce jour, ordonnons au dit Seraphin Turcot, tuteur mentionné au dit procès-verbal de comparaître devant nous, au Palais de Justice, en notre chambre, à dix heures et demie du matin, le 4 de mars courant, pour donner les raisons de son opposition à notre dite ordonnance, et voir ordonner ce que de droit, et sera la présente ordonnance signifiée au dit Séraphin Turcot, à la diligence de l'impétrant Amable Adolphe Pelletier, exécuteur testamentaire de Joseph Augustin Cardinal. Car si, mandons, etc., à Montréal ce 3 mars, 1864.

Sur la signification de cette ordonnance, le dit Séraphin Turcot fit une opposition écrite et qu'il produisit devant le Juge le 7 de mars, par laquelle il alléguait que le dit feu Joseph Augustin Cardinal, avait fait un testament solennel le 11 février, 1864, Mtre. Labranche, N. P., et l'avait nommé son exécuteur testamentaire, et avait révoqué tous autres testaments. Que le jour auquel le commissaire s'était rendu en la maison, la vente de meubles devait avoir lieu suivant les annonces données par le dit Turcot. Qu'en s'opposant à l'apposition des scellés, il avait eu droit de le faire et était de bonne foi en le faisant, et il concluait à ce que son opposition fut déclarée valable et que l'impétrant fut déclaré n'avoir aucune qualité ni aucun droit pour demander l'apposition de scellés—cette opposition fut assermentée.

Le requérant répondit spécialement à cette opposition, en alléguant que le testament du 11 février invoqué par l'opposant était nul, comme ayant été fait à une époque où le défunt n'avait plus l'exercice de ses facultés mentales, et demanda que l'apposition de scellés eut son cours suivant la loi pour la conservation des droits de toutes les parties.

Rainville, pour l'opposant, soumit les propositions suivantes :

1o. L'opposant avait-il droit de s'opposer à l'apposition des scellés ?

Si l'officier, dit Pigeau, vol. 2, p. 284, étant entré, il se présente quelqu'un qui s'oppose à l'apposition des scellés, soit de fait, soit par une simple déclaration motivée ou non, il doit en faire mention ; et, s'il n'a pas caractère pour décider, il doit en référer au juge.

2o. Le requérant avait-il qualité pour demander l'apposition des scellés ?

Non, le testament en vertu duquel il agissait, était révoqué par celui qui nommait l'opposant exécuteur.

3o. La seule allégation de la part du réquérant dans sa contestation de l'opposition, que le testament du 11 février, 1854, en vertu duquel agissait l'opposant est nul, est-elle suffisante pour faire suspendre l'exécution de ce testament ?

Non, il faut l'inscription de faux, suivant Bourjon, vol, 2, p. 379, No. 3. (5e partie des Testaments, ch. 12), qui dit, s'il y a une inscription de faux contre le testament authentique, l'exécution du testament est en suspens.

Cependant, Ferrière, Grande Coutume, art. 297, No. 49; vol. 3, p. 433, est d'opinion contraire. "Il faut observer, dit-il, que quant à l'exécution du testament, il y a une grande différence entre un testament par devant notaires et celui qui est olographe; en ce que le testament reçu par devant notaires au cas qu'il soit contesté est *exécuté par provision*, quoiqu'il soit *argué* de faux, comme il a été jugé par arrêt, du 20 octobre, 1560."

4o. Le commissaire s'est-il présenté à temps pour apposer les scellés?

Non car les meubles sur lesquels il voulait apposer les scellés étaient inventoriés, ainsi qu'il appert par une copie de l'inventaire. Et dit Pigeau, vol. 2, p. 271; lorsque l'inventaire est commencé, on ne peut faire mettre le scellé que sur les meubles qui ne sont pas inventoriés. Denisart, vo scellé, Nos. 74 et 75, va même jusqu'à dire, que, si l'inventaire est commencé, on ne peut plus faire mettre le scellé, et il atteste que l'usage y est conforme.

Après audition des parties et du commissaire sur appointement à cet effet, l'ordonnance provisoire suivante fut rendue: Ayant repris notre ordonnance du premier mars, 1864, ordonnant l'apposition du scellé sur les biens mobiliers composant la succession de feu Joseph Augustin Cardinal, et commettant Louis S. Martin, comme commissaire, aussi celle du trois du même mois de mars de la même année, rendu sur le référé du dit commissaire, dénonçant l'opposition faite à l'exécution de notre première ordonnance par Séraphin Turcot, en sa qualité de Tuteur aux enfants mineurs du dit Joseph Augustin Cardinal, cette seconde ordonnance ayant enjoint au dit Séraphin Turcot de fair valoir les causes de son opposition.

Ayant entendu le dit Séraphin Turcot et pris connaisance de ses moyens d'opposition produits devant nous, ayant également entendu l'impétrant Amable Adolphe Pelletier, en réponse au dits moyens d'opposition et pris connaissance de sa réponse écrite, le dit Séraphin Turcot et le dit Amable Adolphe Pelletier, représenté par avocats, ayant également entendu le commissaire au scellé, le dit Louis S. Martin, ayant examiné les pièces et productions des parties et la procédure faite sur la présente demande en apposition de scellé et opposition à icelle, et sur le tout après avoir murement délibéré; Renvoyons au principal les parties à l'audience pour se pourvoir, si elles le jugent à propos, contre chacun des deux testaments et codicile du dit Joseph Augustin Cardinal, produits l'un, par le dit Amable Adolphe Pelletier, c'est-à-dire, le testament du 15 janvier, 1864, reçu devant Mtre. Montreuil, et le codicile du 28 janvier de la même année, reçu devant le même notaire, et l'autre produit par le dit Séraphin Turcot, c'est-à-dire, le testament reçu le onze février, 1864, par La Branche, Notaire, et par provision ordonnons, sans prejudicier au principal, que vû qu'il appert que le dit Séraphin Turcot a vendu les biens mobiliers de la dite succession, les sommes provenant de cette vente, seront par lui déposées à ses risque et péril et sous sa responsabilité dans une banque incorporée de cette cité pour y demeurer ainsi en dépot, jusqu'à ce que jugement en dernier ressort soit rendu sur la validité de l'un ou l'autre testament et codicile; le dites sommes de-

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vant être retirées par les personnes que le dit jugement déclarera avoir droit à icelles, frais réserves. Car si, mandons, etc.

(Signé,)

T. J. J. LORANGER,
J. C. S.

Montréal, 20 avril 1864.

Ordonnance provisoire renvoyant les parties au principal, à l'audience.

Lafrenaye & Armstrong, avocats de l'Impétrant.

Rainville, avocat de l'Opposant.

(P. R. L.)

MONTREAL, 31st MAY, 1864.

Coram BERTHELOT, J.

No. 2123.

Massue vs. *Crebassa*.

HELD:—That a *contrainte par corps* may issue upon the return of the sheriff against a debtor refusing to open his doors to the Sheriff charged with a writ of execution against him for the purpose of effecting the sale of his goods and chattels.

On the 28th April, 1864, the sheriff of the District of Richelieu, to whom a writ of *Pluries Pluries Venditioni Exponas de Bonis* had been addressed on the 31st March, 1864, from the Superior Court in Montreal, made a return of *rébellion à justice*, committed by the defendant on the 18th May, 1864. The plaintiff, having previously given notice to the defendant, moved the Superior Court, at Montreal, as follows:

Motion:—On behalf of the said plaintiff that, inasmuch as it appears by the return of Pierre Rémi Chevallier, Esquire, sheriff of the district of Richelieu, to the writ of Pluries Pluries Venditioni Exponas de Bonis in this cause issued from this Honorable Court, on the thirty-first day of March last past, against the goods and chattels of the said defendant, that on the twenty-eighth day of April last past, at the hour of ten of the clock in the forenoon, the said sheriff then and there charged with the execution of the said writ, proceeded to the domicile of the said defendant, in the town of Sorel, in the district of Richelieu, according to law, to put in execution the said writ, and to sell and dispose of, by virtue of the said writ, the goods and chattels of the said defendant, where being and finding the doors of the said domicile locked in order to prevent admission thereto, he, the said sheriff, demanded of the said defendant to open the doors of the said domicile, and to permit him the said sheriff to enter therein in order to proceed to and effect the sale of the said goods and chattels duly seized and taken in execution, but could not proceed to nor effect the sale of the same, and was prevented and stopped from so doing, and was then and there opposed from so doing by the said defendant himself in person, who then and there opposed the sale thereof by shutting up his house and refusing admittance thereto to the said sheriff, and then and there positively refused to open his doors, and then and there persisted in his said refusal, although repeatedly requested and ordered so to do; as the whole more fully appears by the said return; an execution to go

against the person of the said defendant, and *contrainte par corps* do issue directed to the sheriff of the district of Richelieu against the person of the said defendant to be taken and him detained in prison, to wit: in the common jail of the district of Richelieu, until the said defendant shall have satisfied the judgment in this cause rendered, in principal, interest and costs and subsequent costs, and also the costs of these presents; unless cause to the contrary be by him shown on the twenty-seventh day of May instant, at half past ten of the clock in the forenoon sitting the Court.

The motion having been granted on the 19th May, a rule *nisi* was served upon the defendant, on the 21st May, at Sorel, a distance of forty-five miles from Montreal, returnable on the 27th May.

La Fresnaye, for the plaintiff, prayed that the rule be made absolute, and relied on the Consolidated Statutes of Lower Canada, chapter 83, sections 143 and 144, and also on section 141 with respect to the common jail, where the defendant was to be imprisoned, it being the prison of the district where the party resides, and not the district from whence the writ of *contrainte par corps* or *capias ad satisfaciendum* was to issue.

He contended that the *édit d'Amboise sur la rébellion à justice*, of 1572, art. 4, and the ordonnance of 1667, tit. 19, tit. 23, art. 5, and tit. 27, art. 7, were superseded by the statutory enactments contained in chap. 83, of the Cons. Statutes of Lower Canada, sec. 143, 144 and 145; and that the *voie extraordinaire* under the ordinance of 1670, title 10, art. 6, could not be put in force in this country; and that the proceedings adopted in France, which were participating as well from the old French criminal procedure as from the municipal law, could not be followed in Lower Canada. *Vide* 1 vol. Revue de Législation de Létourneux, p. 160. 1 Jousse. ord. 1667, p. 248.

The return of the sheriff, a public officer recognized by law, is not in such cases as the present one *traversable*, but the party is driven to his action against him for a false return. Bacon's Abridgment vo. Rescue, letter E, § 3.*

In 4 Burr. p. 2129, Rex vs. Elkins, it is stated, that the Court immediately proceeded to punish the rescuer, *without* going through the ordinary course of his being examined upon interrogatories, as no *denial* by him upon such examination could excuse him after having been *returned* "guilty of a rescue," by *the sheriff*. The Court were of this opinion: they said "it would be giving an "opportunity to traverse the return, which in case of a rescue *returned*, could "not be allowed." According to all the authorities, the return of *rescous* is not traversable, Barnes 149. The sheriff's return of a rescue is of itself a conviction of a rescue. 3 Starkie, p. 1357, part. 4: 11 East. 297.

In 2 Salk, p. 586, we find an authority to this effect: "The rescue must be "returned upon the *writ*, and the motion and attachment *founded* upon that; but "it is never the course to grant it upon affidavits; and the reason given for "this course is to be found in Bacon's Abridgment vo. Rescue, Letter C..... "that it hath been found by experience, that officers will often take upon them

* "Rescue is the taking away and setting at liberty against law a distress taken for rent," &c., &c. Bacon's abridg. vo. Rescue, letter A.

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"to swear a *rescous*, where they will not venture to return one," so as to avoid being sued for a false return.

In 3 Bulst., 201, the doctrine is laid down that "a rescuer shall be doubly "punished, for upon the *return* of the sheriff he shall be fined to the king, and "an attachment shall *issue out* against him."

The well established doctrine is that, 1o. the *return* of the sheriff is not *traversable*; 2o. that the motion and attachment must be *founded* upon that return; 3o. that the party grieved is not *concluded* from bringing his action for the false return, if it were so. Cro. Eliz. 780, 16. The Lady Russel and Woods case. Dyer, 212, 2 Jones, 39, 1 Ventris 224, 2 Ventris, 175, Comb. 295. Rex & Regina *vs.* Howe *et al.* Such a proceeding has already been sanctioned by our Courts in the case of Laframboise vs. Mercure. 5 L. C. Reports, p. 168.

The power of issuing this *contrainte par corps* has been given to "every "judge of every such Court.....in vacation, *at chambers*," &c.....and is a conclusive fact that the *return* in such cases is not *traversable*.

The defendant made default. But Kerr, as amic. cur., urged, 1o: That the delay of the service of the rule was too short. 2o: That the power to be given to the sheriff to imprison the defendant in his own district only, was contrary to the provisions of the statute which gives power to the sheriff to convey such person to the prison of the District wherein such person is arrested. 3o: That the rule should have enunciated the different sums for which the writ of *contrainte par corps* was to issue.

Curia advisare vult.

On the 31st May, 1864, the judgment of the Court was, that the rule be made absolute for the arrest of the defendant, until he satisfies the several amounts due under and by virtue of the judgment, and enumerated in the judgment of the Court.*

Rule absolute.

LaFrenaye & Armstrong, attorneys for plaintiff.
(P.R.L.)

MONTREAL, 1st APRIL, 1864.

Coram SMITH, J.

No. 85.

Easton vs. *Court et al.*

HELD:—Minors as well as their tutor are directly liable to a notary, for the price of an account of the gestion of their tutor rendered by him, although it was the tutor who employed the notary.

This action was brought by a notary for the price of a tutor's and executor's account made at the request of the late John Smith, Esq., late of the city of Montreal, Merchant.

The late John Smith was executor to the last will of the late William Smith, and was also tutor to his minor children. The action was brought against the estate of the late John Smith for the whole amount due, and against the heirs

* Vide 2 L. C. Jurist, p.p. 270-280, 3 L. C. Jurist, p. 118

of the late William Smith for the whole amount payable by each in their respective proportions, according to their shares in the estate.

The counsel for the tutor's estate did not deny the claim, but left the plaintiff to prove the value of the work done. The counsel for the heirs Smith fyled several pleas contesting the value of the work, and setting up that the account had not been prepared for them, or in their interest, or by their orders, and that they could not be liable to the plaintiff.

Issue was joined, and proof of value made.

At argument the counsel for the heirs contended that as it was the tutor who gave instructions to the notary, he alone was liable. The tutor might have a claim against the heirs for money he had paid for them, but where, as in this case, there was no privity of contract between the heirs and the notary, there could be no direct action by the notary against the heirs.

It was also contended that the account was incorrect, and not made in the interest of the heirs.

The Court, in giving judgment, remarked that the price claimed had been proved, some witnesses having valued the account at a much larger sum than the plaintiff had done. The account, although ordered by the tutor, was made for the benefit of the heirs, and judgment must go as claimed.

The judgment was *motivé* as follows:

The Court, having heard the plaintiff and the said several defendants upon the merits of the issues raised by the several and respective pleas, one by the said James Court in his said capacity, and the other by the other defendants in their said names and capacities, having examined the proceedings, proof of record and deliberated, considering that the said plaintiff hath fully established the material allegations of his said action, and that he is entitled to recover from the said defendants in their names and capacities and as heirs at law of the said late William Smith their *pro tanto* share of the sum of four hundred and forty-nine dollars and sixty-two and one half cents currency, the amount established to be due to the plaintiff, for the matters and things set forth in his declaration in this cause, and from the said defendant, James Court, as curator to the said vacant estate of the said late John Smith, the whole amount of the said claim; and further, considering that the said defendants have failed to shew any just reason or any reason in law by which the conclusions of the said plaintiff's action should not be granted: The Court doth condemn the said defendant, James Court, in his said capacity, to pay to the said plaintiff the said sum of four hundred and forty-nine dollars and sixty-two cents, current money of this Province of Canada, being the amount of the said plaintiff's account fyled in this cause as his exhibit number two, for the work and labour done and performed for the heirs of the said late William Smith, and of the estate of the said late John Smith; and the Court doth condemn the said defendant, Janet Colquhoun Smith, the wife of William Osborne Smith, to pay to the said plaintiff the sum of $49.96, currency, as her share in the said sum of $449.62 as one of the heirs of the said late William Smith; and the Court doth condemn the said defendant, John Smith, to pay to the said plaintiff the sum of $49.96, currency, as his share in the said sum of $449.62 as one of the heirs of the said late

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William Smith; and the Court doth condemn the said defendant, William Smith, as well in his own name as one of the heirs of the said late William Smith, as in his capacity of tutor to Walter Sutherland Smith, James Smith, and Margaret Helen Smith, his brothers and sister, also three of the heirs of the said late William Smith, the sum of $199.84, currency, being for his own and said three minors shares in the said sum of $449.62; and the Court doth condemn the said defendant, Lillias Scott Smith, to pay to the said plaintiff the sum of $49.96, currency, as her share in the said sum of $449.62½ as one of the heirs of the said late William Smith; and the Court doth condemn the said defendant, Jane Smith, to pay the said plaintiff the sum of $49.96, currency, as her share in the said sum of $449.62, as one of the heirs of the said late William Smith; and the Court doth condemn the said defendant, Elizabeth Ure Smith, to pay to the said plaintiff the sum of $49.96, currency, as her share in the said sum of $449.62 as one of the heirs of the said late William Smith; and the Court doth condemn the said defendant, James Court, in his said capacity, to pay the costs of this action, and doth condemn the other defendants to pay said costs in their several proportions of condemnation; of which costs distraction is awarded to John L. Morris, Esq., the attorney of the said plaintiff."

Judgment for plaintiff,

J. L. Morris, for plaintiff.
Abbott & Dorman, for defendants, Smith.
Cross & Lunn, for defendant, Court.
(J.L.M.)

MONTREAL, 31st DECEMBER, 1863.

Coram SMITH, J.

No. 2604.

Beaudry vs. *Ouimette.*

HELD:—1st. A declaration that the plaintiff intends to make use of the defendant's evidence, fyled after the defendant's enquête is closed, is fyled too late according to law, and will be struck from the fyles of the Court, on the defendant's motion to that effect.

2nd. If it be shown that a paper fyled in a cause was ante-dated, and in reality fyled on a different day from its date, and after the proper delay, it will be struck from the fyles of the Court on motion to that effect, and it is not necessary to inscribe *en faux* against the plumitif or register of papers fyled.

In this case the judgment was rendered on the following motion: "Motion des defendeurs qu'attendu qu'il appert par les affidavits produits et ci annexés que le papier ou document filé en cette cause daté du six Avril dernier et filé comme de ce jour là, intitulé, "Declaration du demandeur au sujeet des dépositions des defendeurs et produit par le demandeur a été erronement et illegalement introduit au dossier, comme y ayant été illegalement et erronément introduit, attendu que le dit document n'a jamais été produit le six Avril dernier mais seulement le vingt cinq Novembre dernier après l'inscription de cette cause, au merite, et à l'encontre de la loi et du Statut, et attendu que ce même document a été entré dans le plumitif du Protonotaire de cette cour, comme filé du six Avril dernier ce qui n'est pas le cas, puisque la dite entrée n'a été faite

que le vingt cinq Novembre dernier, après l'inscription au mérite de cette cause, par le demandeur, la dite entrée au dit plumitif, soit en conséquence déclarée avoir été faite illégalement, erronément et avoir été antidatée, et qu'icelle soit rayée et biffée par ordre de cette cour le tout avec dépens contre qui il appartiendra."

Per Curiam.—In this case a motion was made on the part of the defendant that a paper fyled by the plaintiff containing a declaration that he intended to avail himself of the evidence of the defendant, be struck from the fyles of the Court, as it had been fyled at a time when the plaintiff had no right to fyle it. The *enquête* had been closed, and the plaintiff subsequently fyled a paper which he ought to have fyled at the closing of the enquête. It appeared that the prothonotary had fyled it, after some explanations had passed between the parties, and ante-dated it as though fyled at the proper time. The question was, had this paper been properly fyled? The statute laid it down that where a party in a cause had been examined by any other party in the same cause, the evidence may be made available to the party obtaining it, provided he declares his intention at the close of his enquête, to avail himself of such evidence. This rule was positive, and formed part of our code of procedure. The Court, in some cases, allowed a party, on showing cause, to fyle a paper after the time. There was nothing, however, to justify the Court in allowing it to be done here. But had the Court any authority to touch this paper? The plaintiff maintained the negative, and said the only way to get rid of it was by inscribing *en faux* against the plumitiff. But the plumitiff was only a register of the acts of the prothonotary done from day to day. The error in the plumitiff was occasioned by the error in the record; and when the error in the record was rectified, the error in the plumitiff would also be rectified. The Court, therefore, felt itself bound to reject this paper from the record, and it must be struck from the fyles.

Motion granted.

Rouer Roy, for plaintiff.

P. Morcau, for defendant.

(J. L. M.)

MONTREAL, 1st APRIL, 1864.

Coram SMITH, J.

No. 2604.

Beaudry vs. *Ouimette.*

HELD:—A plaintiff in a cause, on special motion to that effect, at any time before judgment, may fyle a declaration that he intends to make use of the evidence of the defendant.

Per Curiam.—In this cause two motions were made, one to discharge the *deliberé*, the other that plaintiff be allowed to fyle a declaration that he intends to avail himself of the defendant's evidence. The motions will be granted, because the evidence sought to be made use of is that of the defendant himself, and it is a principle of the French law that a defendant's evidence can be taken at any time.

Rouer Roy, for plaintiff.

J. A. Chapleau, for defendant.

(J. L. M.)

MONTREAL, 30 AVRIL, 1864.

Coram SMITH, J.

No. 2068.

Collete vs. *Lefebvre* et *Mayrand* et *Olivier Lefebvre* :

Opposants.

JUGE: 1ère. Que la valeur d'une rente viagère ne doit pas être capitalisée en la multipliant par dix ans ; mais doit être réglée sur la valeur de la vie du donateur.*

2ème. Que cette évaluation sera faite par la cour sur les calculs des compagnies d'assurance sur la vie et sans expertise.

3ème. Que par suite de cette réduction de la créance de l'opposant, il sera condamné aux frais.

Sur le produit de la vente des biens-immeubles du défendeur, l'opposant Olivier Lefèbvre, réclamait comme cessionnaire de sa mère, rentière, certains arrérages d'une rente viagère dûs par le défendeur en vertu de l'acte de donation qu'elle avait fait au défendeur, et qui avait été dûment enregistré, et au paiement desquels arrérages ces biens-immeubles étaient hypothéqués, et de plus la valeur de cette rente capitalisée pour une période de dix années. Dans son opposition il alléguait spécialement que la rentière était dans des conditions de vie telles qu'elle pouvait encore vivre dix ans, et que sa santé lui assurait une existence de dix ans à venir.

L'autre opposant Mayrand contesta cette opposition sur plusieurs points, et entr'autres sur le principe que le capital de cette rente devait être réduit à sept ans et pas davantage, par suite du grand âge de la rentière.

A l'enquête, il fut prouvé que la rentière était âgée de 78 ans, et qu'elle jouissait d'une bonne santé, n'ayant jamais été malade.

Il fut prouvé par un medecin qui avait fait un examen attentif de la personne de la rentière, que suivant le résultat de ses observations, elle pouvait vivre bien au-delà de dix ans, et que telle était son opinion comme médecin.

Les calculs faits par les compagnies d'assurance sur la vie ne furent point produits.

Deux des témoins du contestant Mayrand ; tous deux cultivateurs, déclarèrent que suivant leur opinion, la rentière ne pouvait pas vivre encore dix ans.

Sur cette preuve, la cause fut soumise pour audition.

L'opposant, Olivier Lefèbvre, prétendit que le témoignage du médecin devait nécessairement servir de bâse au jugement de la cour, et que par son jugement elle devait suivre l'opinion bien arrêtée du médecin, et non pas les calculs qui ont été faits sur la valeur de la vie humaine par les compagnies d'assurance sur la vie, qui ne doivent être suivis qu'en l'absence d'une preuve positive et certaine, telle que celle qui avait été administrée en la presente cause.

Par son jugement sur cette contestation, la cour a adopté les calculs et a motivé son jugement comme suit:

La cour, après avoir entendu les opposants Olivier Lefèbvre et Léandre Mayrand par leurs avocats respectifs, tant sur le mérite de l'opposition du dit Olivier Lefèbvre que sur la contestation faite par le dit Léandre Mayrand à la dite

(*) *Vide.* 1. L. C. Reports p. 84. Desbarats *vs.* La Fabrique de Quebec—où cette valeur fut constatée par experts.

opposition du dit Olivier Lefèbvre, et au projet de collocation préparé en cette cause par le protonotaire de cette cour, en autant que le dit opposant Olivier Lefèbvre est concerné et particulièrement le cinquième item du dit rapport; examiné la procédure et la preuve produite de part et d'autre, et considérant qu'il est établi par la preuve en cette cause que la valeur de la moitié de la rente et pension viagère, payable au dit opposant Olivier Lefèbvre, comme étant aux droits de Dame Marie Louise Tremblay, n'excède pas le somme de $100 par an; considérant aussi que le dit opposant Olivier Lefèbvre, n'a pas droit de réclamer plus que quatre années d'arrérages de la moitié de la dite rente et pension, et que le dit opposant Olivier Lefèbvre est mal fondé en réclamant plus, et de capitaliser la dite rente viagère pour les temps et espace de dix ans, et que vû l'âge avancé de la dite Dame Marie Louise Tremblay ainsi qu'établi par la preuve, la dite rente ne devrait être capitalisée que pour les temps et espace de sept ans; la Cour maintient la dite contestation avec dépens contre le dit opposant Olivier Lefèbvre, et ordonne que le dit projet ou rapport de distribution soit amendé, changé et réformé, de manière à ce que le dit opposant Olivier Lefèbvre ne soit colloqué que pour la somme de deux cent soixante et quinze louis cours actuel, c'est-à-dire; la somme de cent soixante et quinze louis montant capitalisé pour sept ans de la moitié de la dite rente, au taux de £25 par an, et la somme de cent louis pour quatre années d'arrérages d'icelle, et ordonne que la balance restant sur les deniers prélevés soit divisée entre les opposants en cette cause et créanciers hypothécaires nommés au certificat du Régistrateur suivant leurs droits respectifs.

Collette vs. Lefebvre.

Contestation maintenue avec dépens.

Lafrenaye et Armstrong, avocats de l'opposant Lefèbvre.
Dorion et Dorion, avocats de l'opposant Mayrand.

(P. R. L.)

MONTREAL, 27th MAY, 1864.

Coram MONK, J.

No. 1179.

Voss et al. vs. *Coffin.*

HELD:—That when a cause is inscribed for enquête and hearing at the same time IN TERM, eight clear days' notice of inscription is necessary.*

Upon this cause being called from the role des enquêtes for proof in the second division of the Superior Court on the 25th May, 1864, the defendant objected

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* *Vide* 8 L. C. Jurist, p. 12, Kent et al. vs. Cranwill, in which case the judgment is as follows:

This cause being called from the role de droit for enquête generally, and hearing on the merits, the parties are heard by their counsel before the Court on an objection of the said defendant to the sufficiency of the notice of the inscription, and the Court having examined the proceedings and deliberated, doth declare the said notice of inscription to be insufficient, there not being *eight clear days* as required by law between the service of said notice and the day fixed in the inscription for enquête and hearing, and the Court doth discharge the said inscription upon the role de droit. Vide, also, 5 L. C. Jurist, p. 43.

Voss et al. vs. Coffin.

to the notice of inscription which had been served on the 20th May, and relied on the practice of the Court as established in the case of Kent vs. Cranwill, requiring eight clear days' notice in term.

Per Curiam.—The delay between the service of the notice and the day fixed for the enquête is too short, and the inscription is therefore discharged.

Doutre & Doutre, attorneys for plaintiff.

Lafrenaye & Armstrong, attorneys for defendant.

(P. R. L.)

MONTREAL, 31st MAY, 1864.

Coram SMITH, J.

No. 2383.

THE HONORABLE A. A. DORION, ATTORNEY GENERAL *pro Regina*, INFORMANT

vs.

ONE BOX CONTAINING JEWELLERY,

AND

ROTHSTEIN, CLAIMANT.

HELD :—1. That the *onus probandi* in cases of forfeiture of imported goods, by way of information, lies on the claimant.

2. That in such cases the Superior Court has jurisdiction *quoad* such forfeiture, irrespectively of the value of the goods.*

Information exhibited and fyled on the 7th July, 1863, by which it was alleged *inter alia*, "that on or about the 27th March last past, there was imported and brought into the said Province, to wit, into the port of Montreal, in the said district of Montreal, a box containing a quantity of jewellery, to wit:" &c., &c.

"That the said jewellery and other articles above enumerated were all of foreign manufacture, were goods liable to the payment of duty, and had been imported as aforesaid by land from the United States of America into this Province, and were of the value of at least two hundred dollars; that the same were carried past the Custom House in said port, on or about the day last mentioned, and without any entry thereof having been made at said Custom House, and without having been submitted to the examination of the proper officers, and without paying the duties imposed upon the same, and a permit given accordingly, contrary to the statute."....

Forfeiture alleged.....Conclusions for the forfeiture of the goods.

On the 2nd September, 1863, M. Rothstein appeared by his attorney, and claimed the goods and articles set forth in the information, and his claim was substantiated on oath; that at the time of the seizure he was and now is the true and lawful owner thereof. He also gave the requisite security on that day.

The plaintiff by his pleas raised the following question: "and the said claim-

* Con. St. of Canada, chap. 17, sec. 10, sul sec. 2, sec. 73, 84 and 85.

ant specially and expressly denies that the said goods were imported into this Province as alleged in the said information, or that the same were in any way subject to the control of the customs authorities, either before or at the time of the said seizure, nor are they so now."

Attorney-Gen'l vs. Rothstein.

On the 6th November, 1863, the cause being called from the *Rôle des Enquêtes* for proof, no proof was adduced on the part of the informant, and on the 7th November an order was given as follows: "qu'il est ordonné au dit M. Rothstein de procéder à l'enquête le 24 de novembre courant sur la contestation par lui soulevée,"—per Berthelot, J. At the hearing two questions were submitted to the consideration of the Court. 1st. That no proof having been adduced on the part of the informant, the facts alleged in the information had not been proved, and that in the absence of any proof whatever to establish the material allegations of said information, it ought to be dismissed. 2nd. That the value of the goods having been alleged in the information to be of £50, the Superior Court had no jurisdiction over the case.

Per Curiam.—The *onus probandi* lies on the claimant who has made no proof of his plea.

The forfeiture demanded is sufficient to give jurisdiction to this Court, and the allegation of the value of the goods is a mere surplusage.

Forfeiture maintained.

The judgment of the Court is as follows:

The Court, having heard the Attorney General on behalf of Our Sovereign Lady the Queen upon the merits of this cause, the said Meyer Rothstein, claimant, not having appeared at the said hearing, examined the record and proceedings in this cause and deliberated, doth adjudge and condemn, as forfeited in pursuance of the statute in such case made and provided, the jewellery and other articles enumerated in the information in this cause as follows, to wit: a box containing a quantity of jewellery, to wit: &c., &c., &c.

And the Court doth dismiss the contestation by the said claimant with costs.

Dorion, Attorney General, *pro Regina.*

Devlin, attorney for claimant.

(P. R. L.)

MONTREAL, 30 MARS, 1864.

Coram BERTHELOT, J.

No. 844.

Comte vs. *Garceau.*

JUGE:—Que la demande en adhésion, accompagnée d'une demande subsidiaire de dommages, est susceptible d'un procès par jurés.

Le demandeur avait porté une demande en adhésion,* contre le défendeur, son beau-père, chez lequel s'était retirée la femme du demandeur, et de plus, réclamait des dommages. La déclaration du demandeur contient les conclusions suivantes:

* Vide Guyot, Rép. Vo. adhésion.

Comte vs. Garceau.

" C'est pourquoi le dit demandeur conclut à ce que le dit défendeur soit con-
" damné à rendre et renvoyer au dit demandeur, sa dite épouse, sous tel délai
" qu'il plaira à cette honorable cour de fixer, et à ce qu'à défaut par le dit dé-
" fendeur de se faire dedans tel délai et icelui délai passé, à ce que par le même
" jugement et sans qu'il en soit besoin d'autre, le dit défendeur soit autorisé de
" prendre et d'aller chercher sa dite épouse chez le dit défendeur par toutes les
" voies et contraintes que de droit, et suivant le cours de la loi, à ce qu'il soit
" fait défenses et inhibitions au dit défendeur de retirer chez lui la dite épouse
" du demandeur sous toutes les peines de droit, enfin à ce que pour les dites cau-
" ses, le dit défendeur soit condamné à lui payer pour dommages la somme de
" £60 courant avec interêt et dépens." Le défendeur plaida à cette action qu'il était bien fondé à retenir sa fille, la femme du demandeur, chez lui, par suite des sévices exercés sur elle par ce dernier, et il s'en rapporta au pays par les conclusions de ses défenses.

Le demandeur fit motion le 21 mars, 1864, pour faire rejeter cette partie des conclusions des défenses, qui demandait un procès par jurés, sur le principe que la présente action n'en est pas susceptible.

A l'appui de sa motion, le demandeur cita la cause de Clarke, vs. McGrath, 1 vol. L. C., Jurist, p. 5.*

Per Curiam.—Cette cause est susceptible d'un procès par jurés. La motion du demandeur est en conséquence renvoyée. La cour, après avoir entendu les parties par leur avocats sur la motion du demandeur du 21 mars courant, que cette partie des conclusions de la défense plaidée et produite en cette cause par le dit défendeur, par laquelle il conclut à ce qu'il lui soit donné acte de la déclaration qu'il y fait comme quoi il s'en rapporte au pays pour la décision de cette cause, soit déclarée irrégulière et illégale et mise de côté, et enfin à ce que l'option faite par le dit défendeur de s'en rapporter au pays, soit déclarée irrégulière, illégale et nulle, et mise au néant, le tout avec dépens, après avoir examiné la procédure et avoir délibéré, a rejetté et rejette la dite motion.

Procès par jurés ordonné.

Lafrenage et Armstrong, avocats du demandeur.

Leblanc, Cassidy et Leblanc, avocats du défendeur.

(P. R. L.)

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*Procès par jurés admis.
4 L. C. Reports, p. 383.
5 L. C. Reports, p. 406.
13 L. C. Reports, p. 79.
5 L. C. Jurist, p. 115.
6 L. C. Jurist, p. 322.
Procès par jurés refusé.
1 vol. L. C. Jurist, p. 5, Clarke vs. McGrath.
1 vol. L. C. Jurist, p. 290, Durocher vs. Meunier.
2 L. C. Jurist, p. 283, Abbott et al., vs. Meikleham.
3 L. C. Jurist, p. 229, Fawcett et al., vs. Thompson.
5 L. C. Jurist, p. 330.
6 L. C. Jurist, p. 75, Mann et al., vs. Lambe.
6 L. C. Jurist, p. 320, Whishaw vs. Gilmour.

MONTREAL, 31 MAI, 1864.

Coram MONK, J.

No. 2203.

Lamoureux vs. *Boisseau.*

JUGE:—Que le signification d'une règle pour interrogatoires sur faits et articles faite au greffe pour une partie absente, est insuffisante.*

La règle pour interroger le demandeur qui est absent de la province, ayant été signifiée au greffe, et le 27 mai 1864, le demandeur ayant été appelé pour y répondre et ayant fait défaut, le défendeur fit motion que les interrogatoires fussent tenus *pro confessis.*

Per curiam.—La cour refère aux précédents de cette cour sur ce point, et en conséquence rejette la motion du défendeur. Take nothing by motion.

C. Archambault, avocat du demandeur.

Leblanc et Cassidy, avocats du défendeur.

(P. R. L.)

MONTREAL, 31 MAI, 1864.

Coram MONK, J.

No. 2179.

Les Curé et Marguilliers de L'Œuvre et Fabrique de la Paroisse de Ville-Marie de Montreal vs. *Minier dit Lagasse.*

JUGE:—Que la prescription de cinq ans ne s'applique pas à la location des bancs d'église.

La défenderesse étant poursuivie en cette cause par une demande rapportable le 28 janvier, 1861, pour le loyer d'un banc dans l'église paroissiale de Montréal pour l'année expirée le 1er juillet, 1848, plaida la prescription de cinq ans.

Les demandeurs répondirent spécialement qu'il n'existe pas de prescription de cinq ans contre les rentes de bancs ou loyers de bancs d'église, mais que ces sortes de créance ne sont prescrites que par trente ans.

Jetté, pour les demandeurs, cita le texte de l'ordonnance de 1629, qui ne s'applique "qu'aux loyers de maisons et prix des baux à fermes," † et prétendit que ces dispositions ne pouvait pas être étendues au-delà; qu'en France, comme la location des chaises dans les églises, n'est que temporaire et non pas annuelle comme pour les bancs des églises dans le Bas-Canada, la question n'y a pas été soulevée. *LaFrenaye*, pour la défenderesse, s'appuya sur un précédent de la cour, où cette prescription fut maintenue. La cause no. 4301 de la même fabrique vs. Papineau, jugement, février 1860, Badgley, J.

Per Curiam.—Nonobstant cette décision, la cour est d'opinion qu'une telle prescription n'existe pas en loi, et que le texte de l'ordonnance ne saurait s'étendre au cas qui a été soumis en cette cause. Jugement pour les demandeurs.

Lesage et Jetté, avocats des demandeurs.

LaFrenaye, avocat de la défenderesse.

(P. R. L.)

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* Vide ch 83, sec. 64. S. R. B. C. 7 L. C. Jurist, p. 297. Fenn vs. Bowker.

† Ord. de 1629, art 142: "Les loyers de maisons et prix des baux à fermes, ne pourront être demandés cinq ans après les baux expirés."

MONTREAL, 23 MAI, 1864.

Coram MONK, J.

No. 1171.

Erickson vs. *Thomas.*

JUGE:—Que la femme séparée de biens a le pouvoir d'ester en jugement sans l'assistance de son mari quant aux actions qui concernent l'administration de ses biens. (*)

La demanderesse poursuivait en cette cause pour le recouvrement d'une somme de $99.41, étant le montant d'un compte courant que le défendeur lui devait comme marchande publique et de plus comme séparée de biens de son mari.

Elle s'était portée seule demanderesse sans être assistée de son mari.

Le défendeur plaida une exception à la forme, par laquelle il prétendit qu'elle ne pouvait pas ester en jugement seule et sans l'assistance de son mari; comme suit: " that the said Plaintiff is not assisted in this cause by her husband or by him authorized to institute this action, that said husband of Plaintiff should have been a party to this cause to authorize and assist his said wife."

Per Curiam.—La femme séparée de biens, et dont la séparation est dûment exécutée, a le droit de porter seule, les actions mobilières et qui regardent l'administration de ses biens. Exception à la forme renvoyée.

Lafrenaye et Armstrong, avocats de la demanderesse.

Perkins et Stephens, avocats du défendeur.

(P. R. L.)

MONTREAL, 30 MARS, 1864.

Coram LORANGER, J.

No. 1787.

Rodden vs. *Ollier & Baulne et al., T. S.*

SAISIE ARRET—AVANT JUGEMENT.

JUGE:—Que la saisie-arrêt avant jugement peut être attaquée par une défense au fonds.

Per Curiam.—La question se présente sur une motion faite par le demandeur pour faire rejeter une défense au mérite, qui n'attaque pas l'action elle-même, mais la saisie seulement. Le défendeur, qui parait reconnaître qu'il est endetté envers le Demendeur pour la somme réclamée, conteste le droit du demandeur de prendre une saisie-arrêt; il allègue qu'il n'y avait aucune cause pour cela; qu'il n'était ni sur le point de laisser la province, ni à la veille de dissiper ou receler ses effets. Le demandeur conteste au défendeur le droit d'attaquer la saisie-arrêt autrement que par une exception à la forme; et il cite, à l'appui de cette prétention, un jugement de la cour d'appel (Molson et Leslie),* qui a maintenu une exception à la forme, dont le but était le même que celui de la défense faite en cette cause. Si la cour d'appel n'avait pas décidé en ce sens, il y aurait lieu à discuter si l'exception à la forme est bien un mode acceptable de lier contestation avec le demandeur sur l'un des principaux allégués de sa déclaration; mais nous devons considérer ce point comme réglé. Toute-

(*) Pothier. Traité de la puissance du mari No. 61. Code civil du Bas-Canada (projet) livre 5, du mariage, ch. 6. No. 63. 9 Acte de notoriété pp. 63 et 130.

* 12 L. C. Reports p. 265. Vide 14 L. C. R. p. 103, 8 L. C. Jurist p. 42.

fois ce jugement ne règle pas la question soulevée en cette cause. De ce que la cour d'appel a décidé que la saisie-arrêt pouvait être attaquée par une exception à la forme, il ne s'en suit pas qu'elle ne puisse l'être par une défense au mérite. Un mode n'exclut pas l'autre, et comme celui qu'a adopté le défendeur semble, tout au moins, aussi rationnel que l'autre, la motion doit être rejetée.

Roddon vs. Ollier.

Snowdon et Gairdner, pour le demandeur.

Doutre et Doutre, pour le Défendeur.

Motion rejetée.

(J. D.)

MONTREAL.

Coram MONK, J. A.

No. 1967.

Doutre vs. *Trudeau et Fontaine, T. S.*

FEMME SEPAREE—JUGEMENT D'EXPEDIENCE ET TIERS.

JUGE:—1o. Qu'un jugement en séparation de biens, qui détermine les reprises matrimoniales de la femme, n'est qu'un jugement d'expédience, que les tiers peuvent attaquer.

2o. Que la saisie-arrêt, entre les mains de la femme séparée, est une voie régulière de faire rendre à la femme ce qu'un tel jugement lui accorde illégalement.

3o. Qu'il n'est pas nécessaire d'une expertise pour constater ce que la femme reçoit illégalement par un tel jugement, quand la preuve est faite autrement d'une manière satisfaisante.

Le demandeur ayant obtenu jugement contre le défendeur pour une somme de $183 et ne pouvant l'exécuter, vu que les biens du défendeur venaient d'être vendus à la poursuite de sa femme, il fit signifier une saisie-arrêt, après jugement, entre les mains de cette dernière, qui répondit ne rien avoir appartenant à son mari et ne rien lui devoir.

Le demandeur contesta cette déclaration et allégua, comme moyens de contestation, que la tiers-saisie venait d'être séparée de biens d'avec le défendeur, son mari; que par le jugement homologuant le rapport de practicien qui établissait les reprises de la tiers-saisie, cette dernière avait obtenu de reprendre certains immeubles qui lui étaient propres; qu'en faisant l'état des reprises en question, le practicien n'avait tenu et fait rendre à la femme aucun compte des améliorations faites sur ces propres durant le mariage; qu'il était de fait que, durant le mariage, il avait été fait des améliorations considérables sur ces propres et pour une somme d'au moins seize cents dollars, et beaucoup plus considérable que ne l'était la créance du demandeur; la tiers-saisie devait au défendeur la valeur de ces améliorations, et qu'en conséquence, le demandeur était bien fondé à demander qu'elle fût condamnée à payer au demandeur le montant de sa créance, en principal, intérêt et frais. La tiers-saisie répondit qu'il n'avait été fait que des changements sans importance sur ces immeubles, durant leur mariage et que leur valeur n'en avait pas été augmentée.

A l'enquête le demandeur prouva à peu près le chiffre par lui allégué comme étant la valeur des améliorations.

La tiers-saisie s'efforça de diminuer l'effet de cette preuve, mais il résulta que d'après ses propes témoins, les améliorations faites valaient au moins $600.

A l'argument la tiers-saisie prétendit que les faits en contestation ne pouvaient êtres déterminés que par une expertise.

Doutre vs. Trudeau.

Per Curiam.—Le procédé adopté en cette cause, pour corriger l'abus si fréquent de passer les biens du mari dans les mains de la femme, pour les soustraire à l'action des créanciers du mari, est rationnel et conduit directement au but. Une expertise aurait peut-être été nécessaire, si la créance du demandeur eut menacé d'absorber plus que la tiers saisie a prouvé elle-même avoir repris d'améliorations avec ses propes, mais d'après sa propre preuve, elle est endettée envers son mari en une somme beaucoup plus que suffisante pour payer la créance du demandeur, en principal, intérêt et frais. Jugement pour le demandeur.

Doutre et Daoust, pour le demandeur.

Carter, Pominville et Betournay, pour la T. S.

(J. D.)

MONTREAL, 27 NOVEMBRE, 1863.

Coram BERTHELOT, J. (En chambre.)

No. 1068.

Renaud vs. *Ferland.*

JUGE :—Qu'une action en expulsion basée sur le non-paiement du loyer, d'après les stipulations du bail ne peut être maintenue lorsqu'avant la prononciation du jugement, le défendeur offre le montant de la dette et des frais encourus jusqu'alors.

Le demandeur poursuivait le défendeur pour un mois de loyer, en vertu des dispositions du statut des locateurs et locataires, et concluait à la résiliation du bail et à l'expulsion du défendeur.

Le défendeur par sa défense alléguait qu'il n'avait jamais refusé de payer son loyer, qu'il avait toujours été prêt et qu'il était encore prêt à le payer; et il offrait avec sa défense le montant de la dette et des frais encourus jusqu'alors, en demandant acte de la déclaration qu'il faisait.

Le demandeur dans ses réponses disait que les offres faites par le défendeur ne pouvaient avoir l'effet d'empêcher le demandeur d'obtenir la résiliation du bail entre les parties et l'expulsion du défendeur des lieux loués, parce que le défendeur n'avait pas payé suivant les termes de son bail, c'est-à-dire le premier du mois.

A l'audition, le demandeur, à l'appui de sa demande, cita le chapitre xl des statuts refondus du Bas-Canada, sect. 1, no. 4 : "Le locateur ou propriétaire aura droit d'action en vertu de cet acte pour recouvrer possession de la propriété louée, dans tous les cas où il y a cause pour rescinder le bail, et quand le locataire demeure en possession des lieux loués.....sans payer le loyer suivant les stipulations du bail....." Et alléguant que le défendeur n'avait pas payé au terme convenu dans le bail, c'est-à-dire le premier du mois, il dit que le défendeur avait par ce retard, suivant les dispositions du statut, donné au demandeur une cause d'action pour faire résilier le bail et pour rentrer en possession des lieux loués.

Le défendeur au contraire prétendit que cette clause du statut n'était qu'une clause comminatoire, qui ne devait pas être interprétée rigoureusement; et que du moment que le défendeur offrait de payer le montant de la dette et des frais, il n'y avait plus contre lui de cause d'action pour faire rescinder le bail.

La cour, en donnant le jugement, dit qu'il y aurait de l'inhumanité à expulser un locataire pour le seul motif d'avoir négligé pendant quelques jours de payer son loyer, surtout quand il offrait le montant de sa dette et des frais encourus. Pour cette considération, la cour déboute l'action du demandeur quant à la demande en résiliation et en expulsion, et déclare les offres valables, sans dépens.

Jugement pour le défendeur.*

Sénécal, Ryan et De Bellefeuille, pour le demandeur.

J. Duhamel, pour le défendeur.

(E. L. DE B.)

Renaud vs. Verland.

LACHUTE, 25TH MAY, 1864.

Coram LAFONTAINE, J.

No. 961.

Stalker vs. *Hammond*.

HELD:—That a motion for security for costs will be granted if more than four days after the return of the action the plaintiff leaves his domicile in Lower Canada, and resides in the United States, and although more than two months since the return may have elapsed before any notice of motion was given, provided that the motion is made on the first day of the term next after the discovery by the defendant of this change of residence, and that these facts are established by affidavit.

This case was returned on the fourth of January, 1864. About the end of February the plaintiff left his residence in Chatham, C. E., and established himself in business in the State of Michigan.

On the 25th May the defendant moved for security of costs, and filed affidavits establishing the facts, notice of motion having been served on the 23rd of May.

Benjamin, for the plaintiff, resisted, relying on the 62nd Rule of Practice, requiring every application for security for costs to be made within four days after appearance.

Houghton, for defendant moving, argued that the Statute (Consol. Stats., L. C., page 726) permitted every defendant to demand security for costs in all actions *prosecuted* by any person residing without Lower Canada. It did not restrict this protection to actions *instituted* by plaintiffs residing abroad, and in the present instance a plaintiff residing abroad was prosecuting an action against a defendant here. As far therefore as the statute went the defendant was clearly entitled to his motion. As to the 62nd Rule of Practice it was made in virtue of powers granted by Statute, (Consol. Stats. page 752 & 754); but these very Statutes, page 753 sec. 4, provide that no rule of practice shall be contrary to or inconsistent with any act of law in force in Lower Canada.

If then the Rule of Practice cited were to be construed to defeat the defendant's right to security for costs, it would not be only inconsistent with but

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* Ce jugement paraît être conforme à l'interprétation faite par les commissaires pour la codification des lois du Bas-Canada, du statut des locateurs et locataires. On lit en effet à la page 84 du quatrième cahier du projet du Code, art. 22 *a*, ce qui suit: "*Le jugement qui résilie le bail est rendu de suite dans qu'il soit accordé aucun délai pour le paiement. Néamoins le locataire peut, en tout temps avant la prononciation du jugement, payer le loyer avec l'intérêt et les frais de poursuite, et éviter ainsi la résiliation.*"

Stalker vs. Hammond.

directly contrary to the Statute which allows security to be demanded whenever a plaintiff residing abroad is prosecuting an action in Lower Canada. Due diligence, moreover, had been used; the plaintiff left his domicile here in February, and the defendant now moved on the first day of the following term. Previously he could not have moved, for the plaintiff was described in the declaration as resident here, and did in fact continue to reside here for six weeks after the return. The 58th rule of practice also refers to two motions for security, one mentions the case where the plaintiff is stated in the declaration to be resident without Lower Canada—and one where no such mention is made. The 62nd rule must necessarily apply to the first of these cases, otherwise the ends of justice might easily be defeated. Such an application of the rule as that sought by the plaintiff in this case is also opposed to the common law. Vide Denisart vo. *Cautio Judicatum Solvi*. "La caution *Judicatum Solvi* peut se demander en tout état de cause principale."

Mr. Houghton also cited the cases of Perry vs. The St. Lawrence Grain Elevating and Storage Company, 5 Jurist, page 252, and the cases therein mentioned.

Motion granted.

L. N. Benjamin, for plaintiff.
J. G. K. Houghton, for defendant.
(J.G.K.H.)

MONTREAL, 15th MARCH, 1864.

Coram LORANGER, J.

No. 878.

Scantlion vs. *Barthe*.

HELD:—That if a certified copy of plaintiff's declaration be not served upon a defendant, the action may be dismissed on an *exception à la forme*; and although the bailiff has returned that he served a true certified copy of the declaration on the defendant, it is not necessary to inscribe *en faux* against his return if it be apparent from the copy admitted by the plaintiff's attorney to be the copy served, that said copy never was certified.

In this case, an ordinary action for goods sold and delivered, the defendant fyled an *exception à la forme*, the principal ground of which was that a true and certified copy of the plaintiff's declaration had never been served upon the defendant. The bailiff made his return upon the writ in the usual way, viz., that he had served a true certified copy of the writ and declaration upon the defendant.

A copy of a declaration was produced by the defendant and admitted by the plaintiff's attorney to be the one served. There was no certificate by the plaintiff's attorneys that it was a true copy.

Plaintiff's counsel contended that the bailiff's return was the only thing to be looked at. It appeared from it that a true copy had been served. If defendant denied that he had been properly served, he should have inscribed *en faux* against the bailiff's return, but it was impossible to raise the question by an *exception à la forme*,

Scantlion vs. Barthe.

Per Curiam.—The question can be raised by an *exception à la forme*. It is quite clear by the copy admitted by the plaintiff's attorney to be the one served that it never was certified. There is no need of further proof; it would be useless trouble and expense to inscribe against the bailiff's return. The law requires that a true and certified copy of the declaration shall be served upon the defendant. Here the copy was not certified; there was no service in law at all.

Exception maintained.

Perkins & Stephens, for plaintiff.
Lafrenaye & Armstrong, for defendant.
(J.L.M.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9TH JUNE, 1860.

Coram LAFONTAINE, C. J., AYLWIN, J., DUVAL, J., BADGLEY, J., MONK, J.

In Appeal from the Superior Court, District of Montreal.

JOHN CARDEN *et al.*,

(*Plaintiffs in the Court below,*)

APPELLANTS;

AND

EDWARD FINLEY *et al.*,

(*Defendants in the Court below,*)

RESPONDENTS.

PROMISSORY NOTE—PAYMENT—PAROL TESTIMONY.

HELD:—1st. That to prove the payment of a promissory note, recourse must be had to the laws of England. 2. That the payment of such note may be proved by parol testimony.

The facts of this case fully appear in 3 L. C. Jurist, 232; where the judgment of the Court below (C. Mondelet, J.,) is given.

In appeal, *Cassidy*, for the appellants, argued that the payment of a note made payable to order or bearer was a commercial fact susceptible of being proved by witnesses; that the parol proof made by the plaintiffs of the payment of the sum of $200 was legal; that there could be no doubt as to the sufficiency of this evidence. It was admitted by the respondents that the note in question was the only one which became due by the appellants to Seneca Paige in 1856. Four witnesses knew that about the end of June, 1856, Carden, one of the appellants, paid Paige $200 on account of this note, which was then due about a month. One of the witnesses, called Choinière, said that at the time of this payment it was admitted that this note concerned the three appellants. The payment of these $200 to Paige was as undoubted as the payment of the $57 to the testamentary executors on the same note. The only difficulty in the case had reference to the admissibility of verbal evidence to prove the payment of the note.

Doherty, for the respondents, submitted that the said judgment was correct, and according to law, and that the same ought to be affirmed for the following reasons:

Carden et al. and Finley.

1st. Because the parol evidence so offered by appellants, to prove their alleged payment of said note, was illegal, and properly ruled to be so by said Court.

2nd. Because no notice was ever given to respondents to produce said note, before offering said parol evidence of the contents and payment thereof.

3rd. Because the proof of payment so made by the appellants makes or shows no payment of the note in question. Such proof rather referring to a promissory note made by the plaintiff Carden. And

Because the evidence so adduced by the appellants, even if the same were legal, is wholly insufficient to prove their action or to entitle them to the conclusion thereof. And

Because appellants made no legal proof of the payment of the note by them referred to in their declaration in this cause.

AYLWIN, J., *dissentiens*, would confirm the judgment. The plaintiffs have not called upon the defendants to produce the note. The case is to be regulated by the laws of England, and by those laws he did not think that in the present case parol testimony was admissible. Furthermore, deciding as a juror, he did not believe the story told by the witnesses.

DUVAL, J., thought parol testimony was quite admissible. 1 Greenleaf, § 302.

LAFONTAINE, C. J., said that the law of England should govern the case. The provincial statutes of 1849 and 1851 were positive on the subject, and the honorable judge in the Court below who ruled the contrary was mistaken.

The motifs of the judgment in appeal were as follows:

"The Court, &c., * * * * * *considering* that the appellants, plaintiffs in the Court below, have adduced sufficient legal evidence, that they have paid and satisfied the full amount specified in the promissory note, made by the said plaintiffs, in favour of the late Seneca Paige, as by them alleged, and set forth in their declaration in the Court below, and that by reason of such payment the appellants have a right to demand that the said promissory note be delivered up to them, and *considering* that the respondents as executors of the last will and testament of the late Seneca Paige retain possession of the said promissory note, and unjustly refuse to deliver up the same to the appellants, and that in the judgment pronounced by the Court below, dismissing the action of the appellants, there is error, this Court doth reverse the judgment pronounced, &c., &c."

AYLWIN, J., dissenting.

Judgment reversed.

Leblanc & Cassidy, for appellants.
M. Doherty, for respondents.
(F. W. T.)

COURT OF QUEEN'S BENCH,

MONTREAL, 1st JUNE, 1864.

In Appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., MONK, A. J.

BENJAMIN GRANT,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

THE EQUITABLE FIRE INSURANCE COMPANY,

(*Defendant in the Court below,*)

RESPONDENT.

POLICY—CONSTRUCTION.

HELD:—1o. That the following words in a fire policy, "On the hull and joiner work of the steamer Malakoff, (now in Tate's dock, Montreal,) *navigating the river St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports,* including outfitting in the spring two thousand four hundred dollars; on the engine therein, one thousand six hundred dollars, as per application, No. 17783, filed in this office," describing the subject insured, imported an agreement that the vessel was navigating and to navigate.

2o. That the words must be considered to be a warranty, and the engagement not having been performed, the insurer was discharged.

3o. That in view of the warranty on the face of the policy and the admitted breach of it, the verdict of the jury was of no avail, and the Court must look to the law beyond the verdict and dismiss the action.

4o. That by law and the practice of the Superior Court, the respondent was well founded in moving for judgment in their favor.

This was an appeal from the judgment of the Superior Court, (Badgley, J.) which was fully reported, 8 L. C. Jurist, 13.

The judgment was unanimously confirmed.

MEREDITH, J.—At the argument, and before I had an opportunity of fully considering the terms of the policy, I was under the impression that, in principle, this case was the same as *Grant vs. The Ætna Insurance Company;* and if it were so, it would, doubtless, be our duty in disposing of it, to be guided by the judgment of the Privy Council in that case. But after carefully considering the two policies, it appears to me that there is a material difference between them, and that according to the doctrine laid down in Grant *vs.* The Ætna Company, the judgment now under our consideration ought to be confirmed.

In the Ætna case the policy of insurance described the Malakoff as "now "lying in Tate's dock, Montreal, and intended to navigate the St. Lawrence and "Lakes, from Hamilton to Quebec, principally as a freight boat, and to be laid "up for the winter in a place to be approved by this Company."

The Lords of the Privy Council decided that the words of that policy did not imply a contract to navigate—and that as the appellant did not, after the date of the policy, remove the boat for the purpose of navigation, he was not bound to cause her "to be laid up for winter in a place to be approved of by the com-"pany;" and they therefore held, although the boat was not laid up for winter in a place approved of by the Company, (as we thought the policy required) that the insurers were liable for the loss. But with reference to the words of the policy respecting the navigation of the boat their Lordships observed, "If they

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"import an agreement that the ship shall navigate in the manner described in the "policy—they must be considered a warranty;—and the engagement not having "been performed, whether the engagement *was material or not material*, the in- "surers are discharged."

Their Lordships, in the portion of their judgment just cited, spoke of a warranty with respect to something to be done; but the rule would be the same with respect to the warranty of a fact as existing.*

In the present case the steamer is described, in the policy, dated the 5th August, 1858, and covering the period from the 30th day of June, 1858, until the 30th day of June, 1859, as follows; "The steamer Malakoff (now in Tate's Dock, "Montreal), navigating the river St. Lawrence between Quebec and Hamilton, "stopping at intermediate ports;" and the answer of the Jury to the question, "Was the steamer Malakoff on the 30th day of June, 1858, or at any other period between that date and the 30th day of June, 1859, navigating the St. Lawrence between Quebec and Hamilton," is simply "no."

Here then we have an unqualified negation by the jury of a fact, affirmed in the policy, and therefore according to the doctrine laid down in Grant vs. the Ætna "whether the engagement" (or, in this case, the fact affirmed), be material or not material, the insurers are discharged; that is, provided my view of the meaning of the policy be right.

Under our law it might perhaps be sufficient, if the fact affirmed in the policy were substantially true.† Whereas, the law of England requires the facts affirmed in a policy to be literally true.‡ But as the statement in the present case, as I view it, was not true, either literally or substantially, it is not necessary to determine whether in this respect there is any difference between our law and the law of England.

On the part of the appellant, however, it is contended that the policy must be understood as meaning that the steamer was then in dock, and *intended to navigate*; but I agree with the learned Judge of the Superior Court in thinking that this view cannot be adopted. The description "The steamer Malakoff "navigating the river St. Lawrence, between Quebec and Hamilton, stopping at "intermediate ports" is clear, and hardly, it seems to me, admits of two meanings—and the words "now in Tate's Dock, Montreal," inserted parenthetically, cannot be allowed to negative or neutralize the sense of the main body of the sentence; they simply add a circumstance tending to identify the boat, and to establish where she happened to be when the description was given. As observed by Mr. Justice Badgley, the words "now in Tate's dock" in brackets are only incidental to the main action of the steamer, "navigating the St. Lawrence "and stopping at intermediate ports."

* 1 Arnould § 214, p. 584—1 Phillips, No. 762, p. 430, and cases cited.

† Emérigon, chap. 6, sec. 3; Boulay Paty, Ed. of 1827, vol. 1, p. 163-4; Boudousquié, No. 108, p. 137.

‡ "The distinction according to English law between a warranty and a representation being, that a representation may be satisfied with a substantial and equitable compliance, whereas a warranty requires a strict and literal fulfilment, i. e., what it avers must be *literally true*, what it promises must be exactly performed."—Arnould, vol. 1, 585, and authorities there cited; 1st Phillips, § No. 762, page 430.

I do not fail to bear in mind that the jurors have also found that the policy was not issued by the defendants, at a lower rate of premium than would have been exacted by the defendants if they had known that the Malakoff was *not* navigating the St. Lawrence, but was *laid up* in Tate's Dock.

But in my opinion that matter ought not to have been submitted to the jury. The policy shows the contract between the parties, and the construction of the contract is for the Court, and not for the jury. It is, perhaps, true that the risk from fire may not be greater to a steamer in dock than to a steamer actually navigating—*if equal care be taken of the two.* But a vessel *employed*, is generally a source of profit; whereas a vessel *lying idle*, is usually a cause of expense. And an Insurance Company might therefore reasonably presume that a boat yielding profit, would be more likely to be taken care of than a boat causing loss.

But, be this as it may, by the policy, as I read it, the defendants insured a boat "navigating the St. Lawrence" whereas the boat, in truth, then was *not navigating the St. Lawrence*, but was laid up in dock, during, it is to be observed, the season of navigation.

The main risk, according to the policy, was the risk incident to the *use* of the boat *on the river*, whereas the risk, in reality, was that caused by the boat then being *not in use*, and therefore *not on the river*.

The respondents, therefore, by the policy of Insurance, did not assume the risk to which the appellant attempts to subject them, and consequently they cannot be held liable.

Before leaving this branch of the case I may observe that, although the respondent has drawn our attention to the statements of the witnesses before the jury, I have not thought it right to advert to that proof, because, notwithstanding the changes in our law on this subject, I am of opinion that, on an application such as the present, we are bound by the finding of the jury, as to any facts properly submitted to them.

The object of the Legislature in requiring a special verdict to be returned, upon questions of fact defined by a Judge was, I think, to prevent the jurors from encroaching upon the Province of the Court; but there is nothing in the Statute to show that the Legislature intended to transfer the finding of the facts from the jury to the judge, which could not be done without subverting the system of trial by jury.

I now pass to the consideration of a question which this case presents, and upon which, although argued in Grant *vs.* Ætna Company, the Lords of the Privy Council found it unnecessary to pronounce a decision, namely:—Is it competent to a defendant in a suit to move for judgment *non obstante veredicto*? On this subject, Archbold says: "It seems that the defendant "cannot in any case obtain judgment *non obstante veredicto*, however insufficient "the plaintiff's pleading may be—and that his proper course is to move in arrest "of judgment."

The only authority cited by Archbold in support of this doctrine is the case of Rand and Vaughan* in which Chief Justice Tindal, in adjudicating upon a motion made by a defendant for judgment *non obstante veredicto*, said: "The

* Archbold, 1108.

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motion would perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for the plaintiff on the ground that enough still remains upon the defendant's special plea confessed by the plaintiff's replication, to bar the plaintiff's demand; for we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favor, *non obstante.*" Nine years afterwards, the case of Rand and Vaughan having been cited in the Exchequer-Chamber as shewing that "Tindal, C. J., *thought* that a defendant after verdict against could not have judgment entered in his favor "*non obstante.*"—The learned Chief Justice observed: "I said only that the Court was not aware of any instance," 6th Adolphus and Ellis, N. S., 704.

This much however is certain that, even in England, there are some cases in which a defendant may move for judgment *non obstante veredicto*—for instance in the case of the Queen vs. The Governor of the Darlington Free Grammar school, 6 Ad. and El. N. S. 682, which, however, it is proper to observe, was a case of mandamus—under the Statute 9 Anne, C. 20, Sec. 21. A verdict having been found for the Crown, on all the issues, the Court of Queen's Bench gave judgment for the defendants *non obstante veredicto*, and the judgment so given was afterwards affirmed in the Exchequer Chamber.

That case, as I have already observed, was a case of *mandamus;* but after carefully considering the report, I think that the reasons given, in that case, for allowing the defendant to move for judgment in his favour, *non obstante veredicto* could *under our system* be urged by a defendant in any ordinary case. Moreover it may be inferred from the observations made by Baron Parke, (now Lord Wensleydale,) in the case just cited, that he did not admit the doctrine that a defendant in an ordinary case could not make a motion such as that under consideration.

At one stage of the argument Baron Parke remarked: "If a plaintiff by a bad replication confesses, and does not avoid the matter pleaded, I cannot see why there should not be judgment *non obstante veredicto*, as well as where a defendant makes a default in his plea." And in answer to the question put by Baron Parke: "Is there any authority for saying that that (namely the principle that where there is an express confession, but no avoidance, judgment shall be given for the opposite party) does not apply to the plaintiff's as well as the defendant's pleading? The Counsel for the plaintiff admitted no instance appears in which it has been so held."

The observations of Baron Parke in the case just referred to are deserving of particular attention, not only on account of the great learning and experience of the judge by whom they were made, but also on account of the subject having been fully considered by him, in consequence of the questions submitted to the judges, by the House of Lords, some time previously in the case of *Gwynne* vs. *Burnell.**

It may also be observed that, in the course of the argument to which I have adverted, no observations opposed to the doctrine which Baron Parke seemed inclined to adopt, were made by any of the Judges; and when the judgment was

* 6 Bingham, N. C. 453.

rendered, the Court pronounced no opinion upon the question—whether in ordinary actions the defendant is entitled to a judgment in his favour *non obstante veredicto*.

I may add that in the English reports up to 1861, within my reach, I have not found any case formally deciding the question under consideration. I therefore am inclined to think that the English practice as to the right of a defendant to a judgment *non obstante veredicto* cannot be considered authoritatively settled; whereas the Canadian practice has been settled by several judgments—and even if the English practice were certain, and well established, it would not, it is plain, be binding upon us, the systems of law, of pleading, and of procedure generally, in the two countries, being wholly different.

Independently of the authority of decided cases it appears to me that our Canadian practice upon this point is reasonable.

In order to justify a Court in rendering judgment *non obstante veredicto* two things must, it seems, concur:—first, the facts established by the verdict must be insufficient to warrant a judgment in favour of the party obtaining the verdict; and, secondly, the record must show that facts have been confessed or admitted which justify a judgment against the party in whose favour the verdict was rendered. When such is the state of the Record, the Court may well treat as nugatory the verdict establishing the immaterial facts, and render judgment upon the material facts admitted or confessed.

Under our system the parties in a suit are upon a footing of exact equality; neither party, at any stage of the proceedings, is considered as exclusively *dominus litis*; and, therefore, as we hold that a plaintiff, having in his favour an admission or confession of the material facts, is entitled to a judgment against the defendant, although he may have obtained a verdict in his favour as to immaterial facts; we also hold, that where the defendant has in his favour an admission or confession of facts, establishing a good defence, he is entitled to judgment against the plaintiff, although he may have a verdict in his favour upon facts that are unimportant.

With reference to the case before us, I must say it appears to me questionable whether, considering all the answers of the jurors, and more particularly their answer to the 7th question, it was necessary to style the motion for judgment as being *non obstante veredicto*; but no objection has been raised to the form of the defendant's motion, and I do not think it a matter of importance. Upon the whole, I view the case in the same light in which it appears to have been regarded by Mr. Justice Badgley, in the Superior Court, and therefore think the judgment appealed from ought to be confirmed.

Mackay & Austin, for appellants.

Torrance & Morris, for respondents.

Judgment confirmed.

(T. W. T.)

EDITOR'S NOTE.—In answer to a question put to the Court by Mr. Mackay, Counsel for appellants, as to the opinion entertained by the late C. J. Lafontaine on the appeal, it was stated somewhat hesitatingly by the C. J. Duval, that the opinion of the late Chief Justice was in favour of the appellant before deliberation with his brother justices, but that the members of the Court never conferred on the case in his lifetime. C. J. Duval stated that it was improper to announce what the opinion of the late Chief Justice was before he had deliberated with the other members of this Court.

MONTREAL, 1st JUNE, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J., DRUMMOND, J.

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

AND

DAVID LAURENT ET AL.,
(Defendants in the Court below,)
RESPONDENTS.

LANDLORD—PRIVILEGE—THIRD PARTIES.

HELD:—1o. That a lessor, like an hypothecary creditor, can pursue a third party who holds property subject to his claim for rent without bringing into Court at the same time his debtor.

2o. That a *pianoforte*, belonging to a third party, but proved to have been in the lessee's house as a *meuble meublant*, may be *revendicated* by the landlord, in the hands of the proprietor of the *pianoforte*, by *saisie gagerie par droit de suite* within eight days after its removal from the house.

3o. If the article sought to be revendicated cannot be found, the defendant into whose possession it has been traced will be ordered to restore it to the house from which it has been taken, or to pay the value to the landlord.

The facts and pleadings in this case fully appear in 7 L. C. Jur., 49, where a report of the judgment of the Court below, (Smith, J.,) dismissing the action, is given.

In appeal:

Torrance, for the appellant, complained of the judgment for the following among other reasons:—

He submitted that he had a right to pursue his gage, which the piano was, in the possession of the respondents, who had without his consent secretly removed it from the house where it had been placed as a *meuble meublant*; so far as the appellant was concerned, the respondents had been guilty of a *voie de fait*, and he had a right to demand of them that they should replace the piano in the place from which they had taken it.

The appellant was also entitled to recover damages from the respondents for the injury done to his house in breaking into it in order to get possession of the piano.

The Court below, among other objections to the demand of the appellant, appeared to think that the appellant could have no redress against the respondent, unless he made his own tenant a party to the action. The appellant did not know of any rule of law or equity which required of him to make his tenant a co-defendant with the respondent.

If the interests of the respondents required that the tenant should be made a party to the action in the Court below, it was competent to them to bring the tenant into Court by an action *en garantie*.

In the same Court, *Barnard*, for the respondent, argued in effect as follows:

1st. Before he can seek to render an innocent stranger responsible, the appellant must at least allege, not only that he leased, but that he had the right to lease; the question whether the papers fyled do or do not prove that Mr. Auld was proprietor, and the further question whether Mr. Auld as husband had a

had not the right to lease do not arise, because there was no allegation on the subject which the respondents could have traversed or avoided, the introduction of the papers in question in the record was irregular, and on this ground alone the action was rightly dismissed.

2nd. Supposing the action had been maintained, the respondents would have had to pay the debt of a stranger, while it would be left uncertain whether they could recover from the supposed original debtor. How can a judgment affirming that Berwick or Pradjet owed a certain amount for rent bind them without their having been made parties to the action? If Pradjet had paid Berwick, would it not be clear that the piano could not be responsible for Berwick's rent; and could not Berwick himself have shewn that for some reason or other the appellant's action ought to have been dismissed.

The action under the circumstances had to be dismissed, because there was no one in the record who could properly contradict the essential allegations, upon which alone the action could rest.

3rd. The *sous seing privé* lease cannot bind third parties. The mere occupation would therefore remain, without anything at all upon which to rest an argument that the occupation of Pradjet was the occupation of Berwick. Has it ever been pretended before that the article of a stranger could be made responsible, although the article is proved to have entered the premises long after the party supposed to have been primarily liable had ceased to occupy?

4th. There is more in connection with this point. Whatever may be thought of the present position of Berwick towards Auld, and the absence or presence of some understanding between them, it must be admitted that some other evidence than that of Berwick must be adduced before we accept the assertions that there was a lease *sous seing privé*, that this lease was continued by tacit reconduction, and that Pradjet continued in possession as the *locum tenens* of Berwick. If Berwick's evidence is rejected there only remains the occupation of Pradjet, and the piano has been attached to answer for the occupation not of Pradjet but of Berwick.

5th. Finally the respondents respectfully contend that the law properly understood does not recognize any such privilege as that claimed, whether a piano is or is not properly a *meuble meublant*. The appellant in this case could never possibly either *in truth or in fact* have looked to this piano as to his security for the rent to become due by Berwick, which is the first condition to the existence of any privilege.

After a first argument before four judges, a second and third before five judges, (Lafontaine, C. J.,) and a fourth argument before five judges, (Duval, C. J.,) the Court reversed the judgment of the Court below.

DUVAL, C. J., *dissentiens*, said: This was the exercise of a right against a third person. He was of opinion that the debtor should have been before the Court. It was said that this was a privileged claim, and that the party might proceed at once against the third party as in an hypothecary action, the creditor proceeded against the *tiers détenteur* without calling in the debtor. His Honour believed there was a difference in the cases. The hypothecary action was an action *in rem*; the creditor had a *titre exécutoire*, and he had a right to proceed

John Auld and Laurent et al.

against the thing where he found it, the thing being specially mortgaged to him for the payment of his debt. But in a case like the present, His Honour was clearly of opinion that the debtor should have been called in.

MEREDITH, J., *dissentiens*, thought it only reasonable that the question of the existence of the debt should be discussed in the presence of the debtor, whereas it was disposed of in the present case in his absence. He took the same view as Mr. Justice Duval. He took this opportunity of placing his opinion on record, but considered the practice of the Court now settled on the other side, as there had already been a judgment to the same effect in the case of *Desjardins* and *La Banque du Peuple*.

MONDELET, J.—It seems to me that Auld, the appellant, who had leased a house to Berwick, and who before leaving it sublet it to Pradjet contrary to the prohibition of Auld, has a right to seize *par droit de suite* the pianoforte which though it belonged to Laurent et al., still was and became a gage for the rent, the moment it was placed in the house, and was therein a *meuble meublant*.

I further think that the defendants are bound to replace the piano where they took it improperly by *saisie revendication*.

I don't at all understand the pretensions which respondents say the Court below held out, that Berwick or Pradjet should have been called in the action of plaintiff.

If it were the interest of respondent to have them, he should have applied to the Court to have them called in.

Upon the whole I think the judgment of the Court below should be reversed.

DRUMMOND, J.—Whenever a debt has to be proved, the debtor, as a general rule, should be called into the case in which such proof is required. I would therefore be disposed to affirm the judgment in the Court below, were it not that the main question in this cause is not really the amount due, but whether the plaintiff had, or had not, a privilege upon the piano seized for the payment of his rent.

And entertaining no doubt as to the existence of that privilege for the security of the rent to become due, as well as for whatever amount had accrued at the time of the institution of the action, I am of opinion that the judgment should be reversed with costs, and that the defendant should be ordered to replace the piano on the premises from whence it was taken. As to the damages claimed for injury done to the premises in the removing of the piano I would not grant them, but would reserve to the appellant such recourse as he may have to recover them, after the decision of the action now pending in the Circuit Court, in which the piano was removed from the premises under the authority of justice.

The judgment in appeal was recorded as follows:

The Court, &c., "considering that the piano, which respondents claim as their property, in and by their *défense*, and which, before being removed by respondents, in virtue of the writ of seizure of *revendication* at their suit therefor, was in a certain house belonging to the appellant, number one hundred and forty-one, on St. Antoine street, in the city of Montreal, leased by him to John William Berwick, as in and by said appellant's declaration is alleged and set

forth, and which said piano, being in said house, was by law answerable and security for the payment of the rent of said house; Considering that respondents had no right to remove the said piano from the said house; Considering that the said appellant had in law a lien upon the said piano, for the purpose of seizing it, *par droit de suite, par voie de saisie gagerie*, as and in the way he has done, he hath exercised his legal right; Considering that the said piano was not, on the *process of saisie gagerie, par droit de suite* as aforesaid, found in the possession of the said respondents, who have removed it from the house number one hundred and forty-one aforesaid, and still detain the same; Considering that the said respondents are, in law, bound to restore and convey back to the said house number one hundred and forty one the aforesaid mentioned piano; Considering that in the judgment of the Court below, to wit the judgment of the Circuit Court, for the district of Montreal, of the thirty-first day of December, one thousand eight hundred and sixty-two, dismissing appellant's action, there is error, this Court doth reverse and annul the said judgment; and, proceeding to render the judgment which the said Court below should have rendered, it is hereby ordered that within eight days the said respondents do restore and convey back to the said house number one hundred and forty-one the said piano, such and in the same state and condition as when by them removed therefrom, in order that the same may be sold in due course of law, and the said appellant paid out of the proceeds thereof the said sum of twenty-two pounds ten shillings, by him demanded, as by him claimed for rent due by respondents; and that in default of so doing, the said respondents do and they are hereby adjudged and condemned to pay and satisfy to said appellant the sum of twenty-two pounds ten shillings currency by him claimed from the respondents. And the said respondents are condemned to pay to appellant the costs as well in this Court as in the Court below.

(The Honorable Jean François Joseph Duval, chief justice, and Mr. Justice Meredith, *dissenting*.)

Judgment reversed.

Torrance & Morris, for appellant.

S. Rivard, for respondents.

E. Barnard, counsel.

(F. W. T.)

Authorities cited by Appellant.

Pothier. Louage n. 241, 2. The privilege is on *all the moveables* in the house as *meubles meublans*.

Coutume de Paris, art. 161.

Troplong. Hyp. 1, No. 181.

Aylwin and *Dilloran*, 4 L. C. Reports, 360.

The *engagiste*, as well as the *propriétaire*, has a right of revendication of movables liable to his privilege, and the right is exercised against the party in possession.

Guyot vo. Revendication, p. 619.

Pothier. Procédure Civile, p. 205, P. 4, cap. 2, sect. 4, 2de appen., edition of A. D. 1809.

Troplong. 1 Hyp. p. 239, n. 161, 162.

For forms of proceedings, vide 1 Pigeau Pro. civ., pp. 107–121, A. D. 1787. Liv. 2, P. 1, lit. 2, cap. 4.

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In the parallel case of pursuing the *tier-détenteur* of an immoveable hypothecated for the payment of a debt, the creditor in the ordinary hypothecary action does not make the debtor a co-defendant. The hypothecary creditor simply directs his action against the party in possession. *Fisher* vs. *Ambault* decided in appeal, September, 1862, Montreal. In *Desjardins* vs. *La Banque du Peuple*, not nearly so favourable a case for the plaintiff as the present, the Court of Appeals held that the presence of the debtor was not necessary in the suit. 10 L. C. Rep. 332.

Spoliatus ante omnia restituendus.

The appellant has only exercised a conservatory process, and seeks that the wrong-doer should replace the *meuble* in the plaintiff's house from which he had taken it.

The pleadings of the defendant do not raise the question of the necessity of the debtor being made a co-defendant.

Respondent's Authorities.

1st Proposition.—The tenant ought to have been made a party.

Aylwin vs. Gilloran, 4 L. C. Rep., p. 360.

1. Pigeau p. 654. "Le débiteur doit être appelé parce qu'il peut avoir quelque chose à opposer."

5. Proudhon. Usufruit No. 2238 in fine. "Avant tout, il faut qu'il fasse preuve de sa propre créance, preuve qui ne peut être établie qu'avec son débiteur direct."

Carré et Chauveau, Proc. Civ. p. 32. Brussel's Edition, p. 32.

"Lorsque le droit de revendiquer, se fonde sur une obligation, l'action en thèse générale doit être dirigée contre la personne obligée, car il faut faire juger l'existence de l'obligation.

Merlin Rép. V° Revendication. "Si la chose n'appartient pas au possesseur vous devez faire assigner son bailleur. Il est évident que ce n'est qu'avec le bailleur que la question peut être traitée et jugée."

Merlin Rép. V° Contradicteur. "Un acte est fait sans contradicteur lors qu'il est fait par défaut ou que l'on n'y a point appelé ceux qui auraient eu intérêt de le contredire.

So as to seizures and all judicial proceedings whatever. 1. Ancien Pigeau, 660 for the saisie arrêt. Code de Procédure Napoléon. Art. 563, 565, et 831.

Toulet on above articles.
Carré et Chauveau, No. 1946.
Bioche, V° Saisie Rev.
Do. V° Saisie Arrêt, No. 107, 122.

The denunciation to the tenant was the more indispensable in this case, that the lease is *sous seing privé*, which the respondents submit cannot bind them.

Pothier, Obligation, No. 750. 1 Pigeau, p. 465. Art. 1338, Code Civil Nap., and Commentators. See particularly Favard, cited by Lahaye on this article.

De Vill. & Massé, Contentieux Commercial, V° Nantissement No. 30, 31.

Bryson & Dickson, 3 L. C. Rep., p. 65. 5 L. C. Jur., p. 109. Remarks of Judge Aylwin.

This is a stronger case than that in Bioche V° Saisie Arrêt, No. 122, as Laurent and Laforce have an interest that the lease should not be proved.

The appellant relies, 1st, upon authorities applicable to ordinary cases of revendication, where the plaintiff proceeds either as unquestionable proprietor, or the question is whether the plaintiff or defendant is proprietor. 2nd. Upon the authority of 1 Pigeau, p. 629, 116. But there the plaintiff is executing a judgment, and, though not expressly stated, it is obvious the defendant must be a party to that as well as to every other proceeding in the cause. But, admitting that this authority applies, appellants cannot

invoke it: 1st. Because he has not obtained the order of a judge, and, 2nd, because he has not been satisfied with a proceeding of a purely conservatory nature, but has taken formal conclusions, asking that the seizure should be declared valid in the debtor's absence. This Pigeau, p. 654, distinctly condemns: "La saisie étant faite, si on veut poursuivre, il faut la dénoncer au débiteur parce qu'il peut avoir quelque chose à opposer."

2ND PROPOSITION.—2nd. If the authorities above cited to establish that a *sous seing privé* cannot be opposed to a third party apply, then there is no claim proved, and therefore no privilege can exist. The appellant cannot fall back on occupation, and invoke the 16th clause of the lessors' and lessees' act, for he has not specially set up that he was proprietor of the premises occupied.

And moreover this 16th clause, it is submitted, does not mean that whoever occupies a week or a month must occupy a year. Here Berwick occupied and paid up to the 1st Nov. There was an end to his occupation. In the absence of lease Pradjet cannot be connected with Berwick, and therefore it was not Berwick's but Pradjet's occupation alone [illegible] support the action.

3rd [illegible]—3rd. But all the appellant's proceedings would have been regular, that [illegible] circumstances the law denies him the privilege he seeks to exercise.

[illegible] and Hyp. No. 122, after explaining the [illegible] landlord's privilege [illegible]:

1st. "Sur la croyance du locateur que tous les meubles apportés dans sa maison appartenait au locataire. 2nd. Sur l'assentiment tacite ou réel du propriétaire qui en laissant entrer ses meubles dans la maison louée les a soumis au privilége du locateur" adds: "Si la réalité des faits est contraire à ces suppositions, le privilége du locateur ne tiendra pas parcequ'il n'aura pas sa raison d'être."

It is therefore agreed that the privilege does not extend to goods kept in cupboards, &c. "*Not in evidence.*" 2. To goods stolen or lost. 3. To goods which the landlord might have known belonged to third parties. As those sent to workshops to be repaired, &c., as those of boys at College, Rec. Pér. 26, 2, 57. Those consigned to a commission merchant, Rec. Pér. 26, 1, 218. To goods introduced in rooms let as furnished rooms, Rec. Pér. The reasons given for refusing the privilege in the following cases are:—

In Rec. Pér. 42, 2, 236 V° privilége "parce que le tableau appartenant à Girardeau n'avait pu servir de gage."

Do.—In Rec. Pér. 29, 2, 128 "parce que le piano n'était entré que longtemps après l'entrée de Thubault."

Tous, says Dallos Rec. Pér. 41, [illegible] "s'accordent à limiter le privilége aux choses que le propriétaire a dû naturellement considérer comme une garantie de ses loyers."

And this is nothing more than the rule of Pothier Louage, No. 242, *in quantum meo interest non esse deceptum.*

And that of Duplessis; exécutions, p. 611:—"Il n'est pas juste que les tiers donnent lieu à tromper le locateur, and that of Guyot Rép. V° Bail. Les propriétaires qui ont compté sur les meubles dont les lieux sont garnis ne doivent pas être abusés dans leur espérance—le propriétaire n'a pas dû ignorer que tout ce qui garnit une maison est assujetti au privilége.

This is alone reasonable, otherwise we must fall into Bourjon's system, and make the privilege apply to every thing, even stolen goods, &c., &c.

In this case not only did the piano belonging to the respondents only enter in the month of December, 1862, the lease to Berwick dating from May, 1861, but in November 1862, Auld allows Berwick to put Pradjet in his place, and when Pradjet leaves, we find he is allowed to remove his furniture, and Berwick is allowed to do the same as to what he had lent or leased to Pradjet. All parties seem to have speculated upon mak-

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ing a piano which must have been well known to belong to a third party, pay the rent, and not only the rent for December and January, but the whole six months' rent, which is against all justice or authority, for, says Marcadé, No. 119:

"Ce serait aller au delà de la juste mesure que d'exigor de ce tapissier qu'il répondir des meubles qu'il m'a loués de tous les leyers a écheoir jusuu'à la fin du bail."

On the other hand in all probability Laurent and Laforce imprudently and in the hurry of business, rented the piano to Pradjet, not knowing who or what he was, or whether he was a landlord or a tenant. How can it be said that Laurent and Laforce consented that the privilege should extend to the piano. They may have been imprudent, but was not Auld still more imprudent.

If a privilege is granted in this case, there is nothing to prevent a landlord after he has deliberately given his house to an insolvent tenant, rather than have none at all, from speculating upon the facility with which such a tenant may get furniture from imprudent tradesmen.

NOTE OF EDITOR.

The second and third arguments in the above cause in appeal were had before the late lamented Chief Justice Lafontaine, and his opinion was in favour of the Judgment rendered in appeal.

MONTREAL, 4 JUIN, 1864.

Coram DUVAL, J. C., MEREDITH, J., MONDELET, J., BADGLEY, J.

En Appel de la Cour Supérieure du District de Montréal.

PAPPANS ET AL.,

ET APPELANTES;

TURCOTTE ET UX.

INTIMES.

SOLIDARITE.

JUGE:—Que les propriétaires par indivis de l'héritage hypothéqué au paiement des arrérages d'une rente, ne sont pas tenus *solidairement* au paiement de ces arrérages.

La décision de cette cause par la cour inférieure a déjà été rapportée dans le 7me volume du " Jurist " page 272.

Le Jugement rendu par la cour d'appel a maintenu la décision de la cour inférieure, à l'exception de la solidarité qui avait été prononcée contre les appelantes.

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

La cour, considérant qu'à l'exception de la partie du jugement dont est appel, savoir: le Jugement rendu par la cour supérieure siégeant à Montréal, le 23 février 1863, qui condamne les appelantes conjointement et solidairement comme il y appert, il n'y a aucune erreur, cette cour confirme le dit jugement sauf et excepté quant à ce qui suit

Mais, attendu que les appelantes sont poursuivis personnellement et non hypothécairement, et que leur responsabilité pour le paiement des arrérages de la rente en question n'est, aux termes de l'acte de donation du 17 mai 1836, qu'individuelle, cette cour amendant à cet égard le dit jugement et rendant le jugement

que la cour de première instance eut dû rendre quant à ce jugement, condamne les appelantes, *et non solidairement* à payer aux demandeurs, etc., etc., le tout avec les dépens de la cour supérieure et quant aux dépens de cette cour, ils sont à la charge de chaque partie.*

Jugement modifié.

Doutre et Daoust, avocats des appelantes.

Belle, avocat des intimés.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL, 30 AVRIL 1864.

Coram MONK, J.

No. 964.

Dudevoir vs. *Turcot.*

JUGE :—Que sur la déclaration faite par la demanderesse qu'elle se désiste de sa demande en séparation de corps pour s'en tenir à sa demande en séparation de biens, elle sera séparée quant aux biens seulement de son mari.

La demanderesse, ayant dirigée une action en séparation de corps emportant séparation de biens contre le défendeur son époux, fit le 10 mars 1864, la déclaration suivante:

"La demanderesse déclare qu'elle se désiste de sa demande en séparation de "corps, pour s'en tenir à sa demande en séparation de biens." Aucun fait de sévices ne fut prouvé, mais seulement des faits touchant la mauvaise administration du défendeur.

Le défendeur n'ayant pas plaidé à l'action; la demanderesse inscrivit la cause pour audition au mérite *ex parte*, et le jugement de la cour est comme suit:

La cour, après avoir entendu la demanderesse par ses avocats, au mérite de cette cause *ex parte*, le défendeur ayant déclaré qu'il ne plaide pas à cette action, et n'ayant pas comparu lors de la dite audition, examiné la procédure, pièce produite et preuve, vu la déclaration faite par la demanderesse qu'elle se désiste de sa demande en séparation de corps, pour s'en tenir à sa demande en séparation de biens, et avoir délibéré, ordonne que la demanderesse sera et demeurera du jour de sa demande, savoir: le onzième jour de février, mil huit cent soixante et quatre, séparée quant aux biens du défendeur son mari, pour par elle en jouir à part et divis, dépens réservés.

La cour, se réservant à faire droit sur les autres conclusions de la déclaration, quand la demanderesse aura opté touchant la renonciation qu'elle fera, ou peut faire à la communauté de biens qui a existé entre elle et le dit défendeur son mari.

Jugement pour la Demanderesse.

Leblanc, Cassidy et Leblanc, avocats de la demanderesse.

Bevque, avocat du défendeur.

(P. R. L.)

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* Autorités citées par les intimés. Loysel, liv. 3, tit. 7, art. 18; Ferrière Grande Coutume, tome 1, p. 1074, no. 27; "Dict. de droit, tome 2, p. 741. Sed contra, Rodière de la solidarité, nos. 38, 39, etc.

MONTREAL, 30 AVRIL 1864.

Coram LORANGER, J.

No. 2307.

Monastesse vs. *Christie.*

JUGE:—Que la possession à titre civil d'un héritage en faveur duquel il existe une servitude est un titre suffisant pour jouir de cette servitude.

2o. Que dans l'espèce, le défendeur ayant nié le droit du demandeur, les frais doivent être régis par la nature de l'action, et non par le montant des dommages alloués.

Il s'agit en cette cause d'une servitude, à laquelle la terre possédée par le demandeur a droit sur celle possédée par le défendeur.

Voici le résumé de la déclaration du demandeur.

Par acte reçu à Verchères devant Mtre. Geoffrion et son confrère, notaires, le 7 janvier 1858, Messire Olivier Bruneau et Adolphe Malhiot, tant en son nom que comme procureur de Charles Malhiot, déclarèrent qu'ils étaient propriétaires, savoir: le dit Messire Olivier Bruneau, d'une terre désignée à l'acte susdit, et les dits Adolphe Malhiot et Charles Malhiot, d'une autre terre aussi désignée au dit acte, et qu'ils n'avaient aucun chemin pour communiquer de leurs dites terres au chemin de la reine.

Les parties convinrent, en conséquence, de se transporter un droit de passage sur leurs terres respectives et stipulèrent que les ponts et l'entretien des dits chemins de passage seraient à la charge de ceux sur la propriété desquels ils passeraient.

Le défendeur acquit de son côté de F. X. Malhiot et de Dame Rosalie Bruneau, son épouse, la terre chargée de la servitude sus-mentionnée envers la terre cédée au demandeur. Dans l'acte d'acquisition du défendeur, les vendeurs déclarèrent ne connaître aucun autre servitude, qu'un droit de passage à pied ou en voiture sur la dite terre en faveur de Pierre Monastesse, le demandeur en cette cause.

Le défendeur n'a pas entretenu le chemin en question de manière à ce que le demandeur pût y passer convenablement.

Les conclusions de la déclaration sont les conclusions ordinaires de l'action *confessoire* avec une demande de dommages de £100, que le demandeur prétendait avoir soufferts en conséquence de la négligence du défendeur à entretenir le chemin en question.

A cette action, le défendeur a plaidé par une défense en droit qui a été déboutée, et par une exception péremptoire qui contenait les allégués suivants:

Le demandeur n'a aucun titre à la servitude.

Si telle servitude a existé chez ses auteurs, le demandeur n'est jamais devenu leur ayant cause relativement à telle servitude, et, de son côté, le défendeur n'a jamais assumé la charge de telle servitude envers qui que ce soit.

Si le demandeur a droit à une servitude, ce ne peut être qu'à un droit de passage et non à son entretien.

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Le défendeur n'a jamais mis d'obstacle au passage du demandeur sur sa terre susdite.

Toute la cause se réduit donc à deux questions :

1o. Le demandeur fait-il voir qu'il a un titre à la servitude, et quel est ce titre ;

2o. Le chemin en question a-t-il été entretenu d'une manière convenable ?

Question de droit ;

Question de fait.

Le demandeur fit voir d'abord qu'il avait un titre en vertu des actes produits dans la cause, et prétendit ensuite qu'en supposant qu'il n'en eût pas eu en vertu des dits actes, sa seule qualité de propriétaire de la terre dominante est un titre suffisant.

Les autorités suivantes furent citées par le demandeur à l'appui de ces prétentions.

Toullier—Vol. III. Des servitudes, tit. IV, ch. III, p. 499, no. 662.
Id—Même volume, p. 501, no. 665.
Pardessus—Traité des servitudes, part. 1re, ch. III, sect. II, p. 85, 86 et 87, nos. 66, 67.
Id—Même traité, part. 1re, ch. 1er sect. 1, §III, p. 18, no. 10.
Nouveau Desgodets, vol. 1er, p. 257.
Domat—Lois civiles, vol. 1er, p. 329.
Guyot—Rép. de jurisprudence, Vo. Servitude.
Décisions des tribunaux du Bas-Canada. Vol. 7, p. 257.

Quant à la question de fait, relative à l'entretien du chemin en question, la cour a jugé que le chemin n'avait pas été entretenu d'une manière convenable, et a ordonné une seconde audition sur la question de savoir si les frais de la cause devaient être régis par la nature de l'action ou par le montant des dommages que la cour jugerait à propos d'accorder au demandeur.

A cette question, le demandeur répondit que la cour, en accordant des dommages, reconnaissait par là-même son droit à l'entretien du chemin : que le reconnaissant, elle ne pouvait l'isoler du droit au chemin : qu'il est réel comme lui. Le demandeur n'avait donc pas d'autre moyen de jouir de son droit et de le faire consacrer par la cour que l'action confessoire, et c'est cette action qui doit régir les frais et non point le montant des dommages qui n'en sont que l'accessoire, quisqu'en supposant même que la cour n'accorderait pas de dommages, mais consacrerait seulement le droit du demandeur à l'entretien du chemin, le défendeur ayant nié le droit du demandeur, devait être condamné aux frais.

Ci-suit le jugement de la cour, rendu le 30 avril 1864 :

" La cour, considérant que par l'acte mentionné au libellé de la demande, reçu devant Geoffrion, notaire, le sept janvier mil huit cent cinquante huit, entre Messire René Olivier Bruneau et Adolphe Malhiot, Ecuyer les auteurs des parties, les terres par eux respectivement possédées et décrites au dit libellé, ont été chargées d'un droit réciproque de passage tant à pied qu'en voiture dont l'entretien devait être à l'entretien de chacun des propriétaires de l'immeuble chargé de ce droit de passage, laquelle charge a constitué une servitude réelle sur l'héritage possédé par le dit Messire Olivier Bruneau en faveur du dit Adolphe Malhiot ou de ses représentants, possesseurs à titre civil du dit héritage et

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réciproquement sur l'immeuble possédé par le dit Adolphe Malhiot en faveur du dit Messire René Olivier Bruneau ou ses représentants, possesseurs du dit héritage au même titre, laquelle servitude a suivi les dits héritages en quelques mains qu'ils aient passé ou passeront à l'avenir, jusqu'à son extinction légale;

"Considérant que le demandeur et le défendeur sont possesseurs à titre civil des dits héritages, le demandeur de celui possédé par le dit Adolphe Malhiot et consorts et le défendeur de celui qui fut possédé par le dit Messire René Olivier Bruneau, et que, conformément aux droits que lui a conférés la dite servitude et son titre d'acquisition du dit immeuble, le demandeur a eu depuis sa possession comme il l'a encore, le droit d'exiger un droit de passage à pied et en voiture en faveur de son héritage sur l'héritage du défendeur à l'entretien de ce dernier;

"Considérant qu'en défense à la présente action intentée pour faire confesser la dite servitude ou droit de passage et à faire condamner le défendeur à livrer ce passage et à l'entretenir, le dit défendeur a nié la dite servitude et le droit du demandeur à icelle;

"Considérant qu'il est en preuve que le défendeur n'a point, pendant le printemps et l'été mil huit cent soixante-trois, entretenu le passage ou chemin à pied et en voiture, que le demandeur avait droit d'exiger de lui et qu'il a, par là causé au dit demandeur des dommages s'élevant à dix dollars et qu'il y a lieu, en sus de cette condamnation à ces dommages, de déclarer et faire confesser la dite servitude;

"A débouté et déboute le défendeur de ses défenses, faisant droit sur la demande, déclare la terre possédée par le défendeur chargée d'un droit de passage à pied et en voiture, à l'entretien du dit défendeur, en faveur du demandeur ou ses représentants comme possesseurs civils du dit héritage, condamne le dit défendeur à entretenir le dit chemin d'une manière convenable à l'avénir. Et le condamne à dix dollars du cours actuel de cette Province de dommages et intérêts civils, le tout avec dépens, etc."* Jugement pour le Demandeur.

Senecal, Ryan et DeBellefeuille, pour le demandeur.

Doutre et Daoust, pour le défendeur.

(D. H. S.)

MONTREAL, 30 AVRIL, 1864.

Coram BERTHELOT, J.

No. 2191.

Hébert dit Lambert, vs. *Lacoste et Jodoin, Intervenant* et *Opposant*.

JUGE:—Que sur preuve qu'il y a erreur, quant au nom du notaire et quant à la date d'obligation mentionnée au certificat du Registrateur, produit avec le rapport du Shérif sur un writ de terris; la cour ordonnera au Registrateur d'amender son certificat en faisant un rapport supplémentaire.†

Le 23 mars 1864, Pierre Jodoin, intervenant et opposant en cette cause, contesta le certificat du Registrateur, et dans ces moyens de contestation, il allégua *inter alia* "que le dit Registrateur mis en cause, a, par M. Mignault, son député,

* Vide 14, L. C. R. p. 134, *Ranger* vs. *Ranger* et *Valois*.
Un appel a été interjeté du jugement rendu en cette cause.

† Vide S. R. B. C., chap. 36, sec. 19.

Hébert dit Lambert, et Lacoste et Jodoin.

" omis de mentionner dans son dit certificat, par lui fourni suivant la loi, au " Shérif de ce district, la susdite obligation," (c'est-à-dire, une obligation consentie à Montréal le 23 août 1842, par le défendeur, en faveur de l'opposant, pardevant Mtre. Lappare, pour £87 15s. 2d.) " ainsi enregistrée, ou s'il a voulu, " la désigner et mentionner par celle décrite au numéro deux du dit certificat, " elle y est désignée et décrite d'une manière informe et incorrecte." Le Registrateur mis en cause répondit entr'autres choses, " que notamment l'obligation " mentionnée au numéro deux, au dit certificat, est correctement désignée, et, " en tout point, conforme au sommaire fourni par le dit contestant lui-même, " ainsi que le dit mis en cause l'établira lorsqu'il en sera requis."

La preuve ayant été faite de l'erreur alléguée par l'opposant Jodoin, dans sa contestation, le jugement de la cour ordonne la rectification de cette erreur et est motivé au long comme suit:

La cour, après avoir entendu le demandeur et le mis en cause, aussi bien que le contestant, sur la contestation par lui faite du certificat du Registrateur, du et pour le comté de Chambly, annexé au writ d'exécution, émané en cette cause, et rapporté le 26 février 1854, avoir examiné la procédure, les pièces produites et preuve et avoir sur le tout délibéré;

Considérant qu'il appert par la preuve et la procédure, que c'est par une erreur commune au dit contestant et au dit mis en cause, que le 20 novembre 1843, lors de la présentation au bureau d'enregistrement du comté de Chambly, de l'obligation produite en cette cause par le contestant le 23 mars 1842, savoir : une obligation du 23 août 1842, reçue devant Mtre. Lappare et son confrère, notaires, par Joseph Grisé au dit Pierre Jodoin, pour la somme de quatre-vingt-sept louis, quinze chelins et deux deniers, avec hypothèque sur les deux immeubles désignés en la dite obligation, ainsi qu'un certificat du Registrateur, du numéro deux d'icelui, pour y être enregistrée par sommaire,—qu'elle fut mentionné au dit sommaire présenté alors, par ou de la part du contestant, au dit mis en cause et reçue par ce dernier pour enregistrement et de fait enregistrée,—le dit jour, 20 novembre 1843, comme ayant été passée le 23 août 1843, devant L. S. Martin et son confrère, notaires; ce qui était une erreur seulement, quant au nom du notaire, qui avait gardé la minute de la dite obligation et à la date d'icelle, mais non quant au montant dû par le débiteur qui hypothéquait les dits immeubles.—Et, vu les dispositions du chap. 59, de la 23ème. Victoria, Sections 8 et 12, et la section 6 de la 25ème Victoria, chap. 25;

La cour ordonne au dit Thomas Austin, Registrateur, mis en cause, d'amender le certificat par lui fourni en cette cause, en date du 28 février 1854, en faisant un rapport supplémentaire faisant mention de la présentation pour enregistrement par sommaire de la dite obligation du 23 août 1842, suivant certificat par lui donné au dos de la dite obligation en date du dit jour, 20 novembre 1843.

Le 17 mai 1864, le Registrateur fit un rapport supplémentaire dans les termes suivants :

" En obéissance à un jugement rendu par la Cour Supérieure, siégant à Montréal le 30 avril 1864, je, soussigné, Député-Registrateur du comté de Chambly, " certifie que l'obligation mentionnée au numéro deux (no. 2,) de mon certificat " filé en cette cause et enregistré par sommaire le 20 novembre 1843, est une obli-

Hébert dit Lambert, et Hervette et Jodoin.

" gation reçue devant Mtre. Lappare et son confrère, notaires, à Montréal, le 23 " août 1843, pour la somme de £87 15s. 6d. courant, et que c'est par erreur " que la dite obligation est mentionnée dans le dit sommaire comme étant en " date du 23 août 1843, et comme ayant été reçue par Le S. Martin et son con- " frère, notaires.

Lonsdale Ricard, avocat du Contestant.

Jodoin et *Lacoste*, avocats du mis en cause.

(P. R. L.)

MONTREAL, 31 MAI 1864.

CORAM SMITH, J.

AUDET DIT LAPOINTE & NORMAND & LABOSSIERE,

ET

OPPOSANTS

MAILLET,

OPPOSANT-CONTESTANT.

1o. Que l'immeuble donné par le mari à sa femme par leur contrat de mariage, et saisi et vendu sur le mari à la poursuite de ses créanciers, ne peut pas être demandé par la femme par sa demande en nullité de décret, par suite et à raison du défaut d'insinuation ou enregistrement de ce contrat de mariage dans les délais prescrits par la loi †

2o. Que partant la femme est tenue de faire insinuer ou enregistrer tel contrat de mariage durant le mariage.‡

Le 19 septembre 1862, Dame Virginie Labossière, l'épouse du défendeur, produisit une demande en nullité de décret, alleguant que par leur contrat de mariage, en date du 21 septembre 1861, Mtre. C. Brin, N. P., le défendeur, " en considération de la bonne amitié qu'il portait à sa future épouse, lui fit " donation en pleine propriété de la terre saisie et vendu sur le défendeur, " et que par la loi du pays et le susdit contrat, et aussi par le fait du mariage " contracté entre elle et le défendeur, il a été établi une communauté de biens " entr'eux et en vertu du même contrat de mariage, la dite opposante est deve- " nue la propriétaire en possession de la dite terre."

Elle alléguait de plus que le défendeur avait consenti diverses hypothèques dont il avait grevé cette terre, et ce, illégalement, et l'aurait laissé vendre et décréter sans adopter aucun procédé pour la protection des droits et priviléges de son épouse, et qu'en conséquence elle avait demandé une séparation de biens.

L'opposant Maillet contesta cette demande en nullité de décret faite en forme d'opposition sur le principe: " que ce contrat de mariage n'a jamais été insinué " ès régistres des insinuations au Greffe de la Cour Supérieure, dans le district " de Montréal, dans les limites duquel se trouve situé l'immeuble susdésigné " ni dans aucun autre district." Il alléguait aussi, " que le dit contrat de ma-

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* Le 11 mars 1864, Smith, J. un jugement fut rendu sur la contestation du demandeur, après preuve faite et *exparte*, " déclarant et adjugeant que les hypothèques mentionnées au dit certificat sous les numéros 281, 1968 et 2565 n'ont jamais existé sur " propriété vendu par le dit [illegible] cette cause," et en conséquence la cour ordonne et enjoint au Prothonotaire de cette cour de préparer un jugement ou projet de distribution des deniers provenant de la vente par le Shérif en vertu du dit Bref, sans avoir égard aux dites hypothèques."

† Vide S. R. B. C. chap. 37, sec. [illegible]

‡ Chap. 37, S. R. B. C. sec. 32.

"riage n'a été enregistré que le ou vers le 12 septembre dernier, c'est-à-dire, "après l'expiration des délais prescrits par la loi pour l'insinuation et enregis- "trement de donation entre vifs et même après la vente et adjudication faite par "le Shérif, de l'immeuble susdésigné, en vertu d'un bref d'exécution émané en "la présente cause, laquelle vente a eu lieu le dix-sept juin dernier.

"Que nonobstant la donation contenue au dit contrat de mariage, le défen- "deur a toujours continué à posséder comme propriétaire le dit immeuble jus- "qu'à l'époque de la dite vente et adjudication.

"Que par suite du défaut d'insinuation et enregistrement de la dite donation "contenue au dit contrat de mariage, le défendeur a pu valablement aliéner ou "hypothéquer le dit immeuble et la dite donation est nulle et de nul effet quant "à tous les créanciers du défendeur, porteurs d'hypothèques sur le dit immeu- "ble susdésigné, dûment enregistrées avant la dite vente et adjudication et avant "l'enregistrement du dit contrat de mariage.

"Que l'hypothèque du dit opposant et contestant, sur le dit immeuble sus- "désigné, remonte au deux décembre mil huit cent cinquante-neuf, ainsi qu'appert "à son opposition produite en cette cause et aux pièces qui l'accompagnent.

"Que la vente et adjudication du dit immeuble, faite sur le dit défendeur, "pendant qu'il possédait le dit immeuble et avant l'enregistrement du dit con- "trat de mariage, est bonne et valable, et que la demande en nullité de décret "par l'opposante est mal fondée."

Après audition des parties sur le mérite, la cour a déclaré la femme déchue de ses droits de propriété sur cette terre, lui réservant l'exercice de ses droits hypothécaires s'il y a lieu, et elle a motivé son jugement comme suit :

"The Court having heard the said opposant, Louis R. Maillet, and the oppo- "sant, Dame Virginie Labossière, by their Counsel, upon the merits of the opposi- "tion made and fyled in this cause, by the said opposant, Dame Virginie Labos- "sière; having examined the proceedings and proof of record and having deli- "berated thereon;

"Considering that the said opposant, Dame Virginie Labossière, hath failed "to establish any right of property in the immoveable sold by the said sheriff, "on the said defendant;

"And further, considering that the donation made in favour of the said Dame "Virginie Labossière, by her said husband under the contract of marriage "entered into between them, is altogether of no effect and inoperative as "against all third persons, by reason that the said marriage contract was neither "*insinué* nor enregistered according to law, anterior to the enregistration of the "claim of the said opposant Maillet. The Court doth maintain the contestation "of the said Louis Raphaël Maillet, to the said opposition of the said Dame "Virginie Labossière, *en nullité de décret*, and doth dismiss the same with costs; "leaving to the said opposant, Dame Virginie Labossière, her rights such as they "may be declared to be on the subsidiary opposition and conclusions on the "distribution of the moneys now before the Court according to law."

Contestation maintenue.

Cartier, Pominville et Bétournay, avocats de Dame V. Labossière.

Dorion et Dorion, avocats de Maillet.

(P. R. L.)

MONTREAL, 27 JUIN, 1864.

Coram MONK, J.

No. 1635.

Ducharme vs. *Morrison et al.*

JUGE:—Que dans l'espèce, les défenses des défendeurs, syndics à la construction d'une Eglise et Sacristie, ne peuvent être rejetées, sur le principe qu'ils n'ont pas été autorisés par la paroisse à se défendre

Le demandeur, ayant actionné les défendeurs pour le paiement d'une somme de £166 15s. 10d., balance du prix stipulé en un marché notarié, intervenu entre lui et les défendeurs, en leur qualité de syndics pour surveiller la construction d'une église et sacristie dans la paroisse de St. Gabriel de Brandon, ces derniers plaidèrent, que par suite de la défectuosité des ouvrages, l'église et la sacristie menacent ruine et doivent inévitablement être reconstruites, et ce, aux risques et périls du demandeur, qui, comme entrepreneur, est responsable durant dix ans.

Les défendeurs, à une assemblée, tenue par eux comme syndics, avaient résolu de se défendre et de repousser l'action du demandeur.

Les parties avaient été entendues sur la défense au fonds en droit qui fut renvoyée le 30 avril 1864, et la cause était inscrite à l'enquête pour le 1er juin 1864, lorsque le demandeur fit, le 22 juin 1864 la motion suivante:

"Motion de la part du demandeur que les défenses produites en cette cause "par les défendeurs, savoir: *deux exceptions péremptoires en droit perpétuelles* "*et une défense au fonds en fait*, soient rejetées de la procédure avec dépens, et "les parties rétablies dans le même état où elles étaient avant l'enfilure des dites "défenses, pour raisons à déduire, et pour entr'autres les suivantes:

"1° Parce qu'il n'appert pas par la procédure et qu'il n'est pas même allégué "dans les dites défenses que la paroisse de St. Gabriel de Brandon ait autorisé "les dits défendeurs comme syndics, dans une assemblée régulièrement convo- "quée et tenue à cet effet, à ester en jugement et à contester la présente deman- "de, aux risques et périls de la paroisse.

"2° Parce qu'en l'absence de telle autorisation, les dits défendeurs n'ont pas "qualité pour se défendre à la présente action, et en faisant une contestation ou- "trepassent les pouvoirs à eux conférés par la loi.

"3° Parce que malgré plusieurs tentatives faites par les dits syndics pour se "faire autoriser par la paroisse, elle s'est refusée dans plusieurs assemblées de "contester la réclamation du demandeur.

"4° Parce que le demandeur ayant cru de bonne foi jusqu'après la contesta- "tion liée en cette cause, que les dits défendeurs étaient régulièrement autorisés "par la dite paroisse, et n'ayant appris, que postérieurement, à la dite contesta- "tion que tel n'était pas le cas, comme il appert à son affidavit produit en cette "cause, il a droit de recourir au présent moyen pour sauvegarder ses intérêts "et obtenir justice."

R. Roy.—Les syndics ont, par le chap. 18, sec. 16 des Statuts Réfondus du Bas-Canada, des pouvoirs limités qu'ils ne peuvent outrepasser, ils sont délégués par la paroisse pour surveiller la construction des églises et presbytères, faire la

cotisation et la prélever,—mais ils ne sont pas autorisés à ester en jugement, et ne peuvent, en plaidant, lier la paroisse qu'ils ne représentent pas, s'ils n'y ont été spécialement autorisés dans une assemblée légalement convoquée et tenue.

Cela est conforme à ce qui se pratiquait en France sous l'ancien droit; l'on sait que les syndics ou administrateurs de paroisses, communes ou autres corps, ne pouvaient plaider en jugement sans autorisation.

Fréminville—Communauté d'hab. p. 202 à 206.

Pigeau, 1, p. 79 et 84.

Lacombe—Rec. de Jur. vo. Commun. d'hab. p. 119, ce dernier cite Néron, 2 note.

Jousse—Paroisses, p. 173–226.

Il est vrai que cette motion aurait dû être régulièrement faite après l'enfilure des défenses, mais le demandeur produit un affidavit constatant qu'il a ignoré, jusqu'après la contestation liée, que les syndics n'étaient pas autorisés par la paroisse, et que c'est un des syndics lui même qui lui a annoncé qu'ils avaient convoqué des assemblées pour se faire autoriser, mais que la paroisse s'y était refusée.

La Fresnaye, pour les défendeurs.—Les syndics ont produit une résolution par eux prise en une assemblée par eux tenue le 16 avril 1864, par laquelle ils ont déclaré qu'ils entendaient résister à la demande du demandeur et contester son action. Dans le cas où plus tard la paroisse, en recevant leur compte, serait justifiable à leur opposer le défaut de l'autorisation des habitants, les syndics seraient tout au plus responsables personnellement des faux frais occasionnés par leur contestation, dans le cas où elle serait considérée mal fondée. Ceci n'intéresse aucunement le demandeur qui ne peut être reçu à exciper du droit d'autrui. Ce défaut d'autorisation par la paroisse n'emporte pas nullité de la procédure et du jugement rendu en conséquence, car ce n'est pas en Bas-Canada une nullité d'ordre public comme cela existe maintenant en France pour les Communes.

Bioche, vo. autorisation—commune—action.*

En sorte que le jugement que le demandeur obtiendra, si sa demande est jugée bien fondée, pourra toujours être rendu exécutoire tant contre les syndics que contre la paroisse, et, conséquement, il n'a aucun intérêt à faire rejeter les défenses des défendeurs.

Per Curiam.—After an examination of the authorities referred to, the Court does not think that this would be considered a matter *d'ordre public* under the

*En France, sous l'ancien droit, les seules lois en force sur la matière étaient: l'Edit du mois d'avril 1683, la Déclaration du 2 août 1687 et du 2 octobre 1703 (qui n'avaient pas été enregistrés au Conseil Supérieur de Québec) et qui exigeaient une autorisation des habitants pour intenter poursuites, à peine de nullité de la procédure et des jugements; car il est dit: 'Faisons défense aux premiers juges de rendre aucun "jugement sur les affaires qui concernent les dites communautés, qu'il ne leur soit apparu de la délibération des habitants, à peine de nullité des procédures et des jugements rendus en conséquence." Plus tard, par l'arrêt du Conseil d'Etat du 8 août 1713, Sa Majesté avait étendu "toutes les formalités prescrites par les déclarations "pour les procès dans lesquels les communautés" (d'habitants) "sont demanderesses "à tous ceux qui pourront leur être faits où elles seront *défenderesses*."

Decharme vs. Morrison et al.

old law of France. It is a matter of discretion with the Court whether the motion should be granted or not. The affidavit is not sufficient to justify the granting of the motion, and, besides, the Court does not consider itself justified [illegible] peremptory law in rejecting the defendants' pleas.

Take nothing by motion.

Roy, avocat du demandeur.

Lafrenaye et Armstrong, avocats des défendeurs.

(P. R. L.)

MONTREAL, 30TH APRIL, 1864.

Coram SMITH, J.

No. 1471.

Conway, Executor, vs. *The Britannia Life Assurance Company et al.*

SURRENDER OF POLICY—ADVANCES.

HELD:—1st. That the plaintiff as executor to a deceased person, whose life had been insured, being unable to surrender the policy of insurance to the insurance company, inasmuch as said policy had been transferred to cover all advances then made, and which might thereafter be made by a third party, can have no right to claim the benefit of said policy, so long as the claim of such third party in possession of said policy remains in dispute and unsettled.

2nd. That the settlement of such claim involves two separate and independent issues, which cannot be joined in the same action.

The *considérants* of the judgment explain sufficiently the different questions at issue in this cause without entering into the pleadings.

The judgment is *motivé* as follows:—

The Court, having heard the parties by their counsel upon the merits of this cause, seen the consent and declaration of the parties, *The Britannia Life Assurance Company*, one of the defendants, and of the plaintiff, fyled in this cause on the 16th April, instant,* examined the proceedings and evidence of record and having deliberated thereon;

Considering that the said plaintiff hath failed to shew any right of action against the Britannia Company as set forth in his declaration, the said plaintiff in his said capacity not being the holder of the policy of insurance declared in the declaration; and, further, seeing the said Walsh in his lifetime had assigned and transferred over to the said Francis Martin the said policy for a good and valid consideration, and that the said Martin became thereby and was the legal holder of the said policy under the conditions of the said assignment; and, further, considering that authority is expressly given by the said Walsh to the said Martin to collect the amount of the insurance stipulated for in the said policy to cover all advances then made and which might thereafter be made by the said Martin to the said Walsh, with an undertaking on the part of the said Martin to pay over any balance which might be found to be due and owing to the said Walsh on the payment of the full claim of the said Martin, and which claim remains now in dispute and unsettled; and, further, considering that until the settlement of this claim of the said Martin, the said plaintiff in his

* By this declaration, *The Britannia Life Insurance Company s'en rapportait à justice.*

said capacity can have no right whatever to claim the benefit of the said policy, or obtain the possession of the said policy to enable him to claim any right under it from the said Britannia Company; and, further, considering that the said Martin cannot be held or bound to deliver up the said policy, or part with his interest therein, until full and complete payment of all advances, which may be found to be due and owing to him according to the terms of the said assignment; and, further, considering that the said defendant, the Britannia Company, cannot be compelled to pay the amount of the said policy of insurance, or any part thereof, except on surrender to the said company of the said policy, and seeing that the said plaintiff in his said capacity cannot surrender the said policy to the said Britannia Company, as the said Martin is in truth the legal holder and proprietor thereof, subject to the conditions contained in the said assignment; and, further, considering that the settlement of the said claim of the said Martin, for which the said policy of insurance was pledged as security and claim for the recovery of the amount covered by the said policy, involve two separate and independent issues which cannot be joined in the same action, not being between the same parties, and that no judgment can be rendered in this cause by reason thereof; and, further, considering that the said Martin, whose rights are secured by the assignment of the said policy, cannot be called on to surrender the said policy, except on payment of his claim; and considering that the said plaintiff, in his said capacity, has not offered to pay the same or otherwise fulfil (*sic*) his obligations in respect thereof.

The Court doth dismiss the action of the said plaintiff with costs.

A. & W. Robertson, attorneys for plaintiff.

Griffin, attorney for the Britannia Life Assurance Company.

Torrance & Morris, attorneys for the said defendant, Francis Martin.

(P. R. L.)

MONTREAL, 30 AVRIL, 1864.

Coram SMITH, J.

No. 889.

Lalonde vs. *Daoust*.

JUGE:—Que l'action possessoire ne peut être maintenue pour voies de fait sur des propriétés contigues et non délimitées; par suite de l'incertitude de la possession respective des parties et que dans ce cas, elles seront renvoyées au pétitoire [illegible] l'action en bornage.

Action en complainte de la part du demandeur, et demande de dommages au montant de $250 pour voies de fait.

Les défenses du défendeur allèguent une possession contraire de la partie ou lisière de terre sur laquelle le demandeur prétend avoir été troublé. Après une preuve contradictoire de part et d'autre, la cour a rendu son jugement motivé comme suit:

The Court, having heard the parties by their counsel and upon the merits of this cause, examined the proceedings and evidence of record, and having deliberated thereon, considering that the said plaintiff hath failed to prove any separate and distinct possession, by well defined and fixed bounds or metes on the property

Lalonde vs. Daoust.

on which the alleged trespass is said to have been committed, by reason of which an action *possessoire* will lie; but considering that the properties of the said plaintiff and defendant are contiguous to each other, and are not separated by visible and clearly visible *limites* or boundaries, and that the proof of possession by plaintiff, or by defendant, is not evidence of such a possession as can give rise to an action *possessoire* from its vagueness and uncertainty.

The Court doth leave the said parties to their remedy *au pétitoire* or *bornage* as they may be advised, and doth dismiss this action, but without costs.

Dorion, Dorion & Senécal, avocats du demandeur.

Leblanc & Cassidy, avocats du défendeur.

(P. R. L.)

MONTREAL, 30TH MARCH, 1864.

No. 528.

Coram BERTHELOT, J.

Giroux vs. *Gareau*, and *O'Brien*, T. S.

HELD:—The allegations contained in an affidavit upon which a *saisie arrêt* before judgment has issued may be denied by an *exception à la forme*.

In this case a *saisie arrêt* before judgment was issued on the affidavit of the plaintiff made in the usual form, setting forth the cause of action, and alleging that the defendant was about immediately to secrete his estate and effects with intent to defraud the plaintiff and his creditors. It was also alleged that the defendant was a trader and notoriously insolvent, and insolvent by his own avowal; that he had refused to arrange with the plaintiff, and had declared he would not pay him, but would take all the means he could to prevent his being paid.

Defendant fyled an *exception à la forme*, which set forth that the affidavit, and, consequently, the writ, was informal, null and void, and ought to be declared so.

1st. Because at the time of the issuing of the writ defendant was not a merchant or trader.

2nd. Because, even if he were a trader, the plaintiff did not allege that the defendant, after the pretended refusal to arrange with his creditors, continued his trade or business, which he should have done according to the provisions of the statute; and lastly the defendant denied the secreting and intention to secrete, and that he was insolvent.

Plaintiff replied by a *réponse en droit*, contending that the facts set forth in the affidavit could not be denied by an *exception à la forme*.

The parties were heard, and the Court dismissed the *réponse en droit*.*

Réponse en droit dismissed.

Johnson & Piché, for plaintiff.

Moreau & Ouimette, for defendant.

(J. L. M.)

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* *Vide* Leslie and Molsons Bank, C. of Q. B., 8 L. C. J. p. 1.

CIRCUIT COURT.

MONTREAL, 30th APRIL, 1864.

Coram BERTHELOT, J.

No. 1324.

Perry vs. *Adams.*

HELD:—1st. That a person who wilfully votes at an election for a member of Parliament, without possessing all the qualifications required by law, will be condemned to pay the sum of forty dollars and costs to any one who may sue therefor as in an action of debt, and will be *contraignable par corps* in default of payment within the period to be fixed by the Court, under the Consol. Stat. of Canada, cap. 6.

2nd. That the fact of the defendant in such an action having obtained a legal opinion of qualification to vote will not, of itself, absolve him from the penalty imposed on one who wilfully vote swithout having all the qualifications required by law for entitling him so to vote.

3rd. That the certified copies of poll books deposited, as required by the above-mentioned Statute, with the Registrar of the county, are valid and sufficient evidence, in Courts of law, of the votes mentioned in them having been polled.

4th. That an action brought as above against a person for wilful voting without qualification is an action of debt, and subject to the rules governing such actions and, consequently, a defendant is bound to answer upon *faits et articles.*

This suit was brought under the elections act, (Consol. Statutes of Canada, cap. 6,) to recover from the defendant the sum of forty dollars alleged to be due to the plaintiff, under the provisions of that act, as complainant against the defendant for having at the election for a member of Parliament for the electoral division of Montreal Centre, held on the 8th and 9th June, 1863, wilfully and knowingly voted without the necessary qualifications, he being an alien. The declaration concluded for *contrainte par corps* against the defendant in default of payment.

The defendant pleaded, besides the general issue, that he had good reason to believe himself and that he was in fact entitled to vote.

The evidence for the plaintiff consisted of the certified copies of the poll books deposited as required by law with the registrar of the county, which contained defendant's name and vote, and which were brought up by the registrar and proved to be true copies by the returning officer for the division, by whom the copies were made and certified according to law. The fact of the defendant's having voted was also established by his answers on *faits et articles*, which contained an admission of the fact, but coupled with the statement that he acted under legal advice in doing so. It was proved by the deputy returning officer, who held the poll at which the defendant voted, and by a witness present on the occasion, that before his vote was entered the necessary qualifications were explained to him by the deputy returning officer, and that he then deliberately voted.

On the part of the defendant it was proved that a lawyer, in the committee room of the candidate for whom the defendant voted, told the defendant that he was a good voter. The same witnesses proved the voting. A certificate under the hand of a justice of the peace, that defendant had taken the oath of allegiance, was also produced.

Terry vs. Adams.

An objection was raised during the examination of the defendant on *faits et articles* to his obligation to answer the question whether he had voted or not, on the ground that the action was a penal one, and that the defendant could not be compelled to give an answer which might criminate himself. The Court overruled this objection, considering the action to be one simply of debt; a further objection was also raised to the acceptance of the copies of the poll-books instead of the originals, which was reserved. The defendant's counsel, however, afterwards admitted the fact of the voting with the qualification attached to it in the defendant's answer.

Mr. J. L. Morris, for the plaintiff, submitted that the case was one of debt, the statute requiring only an allegation of indebtedness for specified reasons; and that the sole point which it was incumbent on the plaintiff to prove was the fact of the defendant's having voted. By the statute the burthen of proof was on the defendant to shew that he was qualified. The copies of the poll-books produced were not unauthorized copies: they were made directly under the requirements of the law by the public officer, and by the same authority were placed in the keeping of another public officer, evidently to be resorted to for the purposes of justice. Their correctness, in this case, was not even assumed, but was testified to on oath by the officer who made them. In addition to this, they had the evidence of the deputy returning officer and of another witness, to say nothing of defendant's own witnesses, who proved that the defendant did vote, and, beyond this, the defendant's admission on *faits et articles*. The plaintiff contended that the subsequent modifying clause in defendant's answer should not be admitted. He was asked if he voted; he admitted he did, and the remainder of the answer was in avoidance of the consequences of his admission, and could not destroy its weight. In support of this point, Mr. Morris cited Ord. 1667, art. 8: note to art 8.—Also Revue de Législation et Jurisprudence vol. III, No. 9, pp. 354, 355.

Taking then the fact of voting as established, what proof did the defendant make to show that he was qualified, or that he had good reason to suppose he was? the vague statement of a witness who heard a lawyer tell him that he was a good voter. Why was the lawyer not produced to say on oath what information was given him on which to base his opinion? The defendant has not attempted to show that he had been in this country three years, before which period of residence he could not, under any circumstances, have a right to vote. At all events the irresponsible *dictum* of a lawyer (not named) could have no weight in face of the fact that the law was explained to the defendant officially, by the deputy returning officer, and that, in spite of such explanations, and knowing that he did not fulfill the conditions of the law as so explained, he voted. For it is to be supposed that if he had satisfied the requirements of the law, some proof of his having done so would have been made.

The rule of law was that "*ignorantia legis neminem excusat*," and it behoved the defendant to make out a very strong case of reasonable belief that he was entitled to vote, to protect him from the consequences of what was undoubtedly an illegal vote. This he had failed to do, and he became liable towards the plaintiff in the sum demanded.

Mr. W. W. Robertson, for defendant, contended that the law evidently required a wilful false vote in order to subject the voter to the penalty—and that if a reasonable ground of belief were shown, the voter must be held harmless. In this case the defendant voted (for the fact of voting could not be denied,) after obtaining the certificate of a justice of the peace, and being legally advised that he was entitled to vote. The law of elections was not so simple that no error could be made in interpreting it; and there was no doubt that on many points conflicting opinions were held by our leading lawyers. The law as laid down at the poll was not an authorized interpretation; it was, (as proved by the returning officer who gave the memorandum to each of his deputies,) the written opinion of one legal gentleman, from which his confrères might very possibly differ; and as it had been shown that the defendant did not under the advice of a lawyer, it would be exceedingly hard to require him to discriminate between the merits of different legal opinions. If he was legally advised, he was entitled to the presumption that he acted in good faith, and should be absolved from the penalty which the law plainly attached only to wilful false voting.

BERTHELOT, J., in rendering judgment, after stating the facts, said he entertained no doubt as to the merits of the case. The fact of voting having been clearly established, which it had been not only by the certified copies of the poll-books, but by the evidence of witnesses on both sides, and by the answers of the defendant on *faits et articles*, the defendant was bound to show that he was legally qualified, or had good reason to believe himself so. This he had failed to do. There was no proof whatever of qualification, even the preliminary requirement of a residence of three years in the Province not having been made out. The proof as to his having formed his belief of qualification under a legal opinion was indefinite; but in any case it was his duty to make himself acquainted with the law on this subject, the more especially as he had already received a warning at the poll, and if he took professional advice, he did so at his risk. It would never do that a foreigner who might but lately have come into the country, and who did not take the trouble to ascertain his rights, should, by merely getting some professional man to tell him that he had a vote, be absolved from the charge and consequences of having wilfully voted without qualification. That would be to lay open the poll-books indiscriminately to all comers.

With regard to the objection raised by the Counsel for the defendant to the defendant's being asked on *faits et articles* if he voted or not, on the ground of its tending to make him criminate himself, the Court was of opinion that the action granted by the statute was simply one of debt, and that the rules of evidence applicable to ordinary cases of debt were in force here.

As to the validity of the copies of the poll-books deposited with the registrar to prove the fact of a vote having been given, the Court considered that the chief object in view by the legislature in requiring the copies to be so deposited was, that they might be obtainable and used for the purposes of justice, without its being necessary to have recourse to the originals in the keeping of the Government.

Judgment for plaintiff in the terms of his conclusions, with *contrainte par corps* against defendant, in default of payment.

Judgment for Plaintiff.

J. L. Morris, for plaintiff.
A. & W. Robertson, for defendant.
(W. F. G.)

MONTREAL, 30 AVRIL 1864.

BERTHELOT, J.

No. 664.

Durocher vs. *Bone, et E. Contra.*

JUGE:—Que par suite des délais écoulés depuis l'échange de chevaux entre les parties, la garantie stipulée de la part du demandeur n'entraine pas la résolution, mais donne lieu seulement à une diminution du prix.*

Les considérants du jugement exposent pleinement les faits de la cause. Ce jugement est comme suit:

" La Cour, considérant que l'échange mentionné dans la déclaration et les " plaidoyers a eu lieu entre les parties le dix juin 1861, avec garantie de la part " du demandeur que le cheval brun qu'il donnait en échange au défendeur, " était exempt de tout défaut et n'avait pas de maladie cachée. Considérant " qu'il est prouvé qu'au jour de l'échange le demandeur savait que son cheval " était attaqué ou sujet au *tic* ou *rot*, vice ou maladie cachée dont le défendeur " ne pouvait s'apercevoir, et que sa valeur en était de beaucoup moindre, et que " bien que le défendeur ne puisse, dans les circonstances de la cause, et après les " délais qui se sont écoulés entre le 10 juin et le 27 octobre 1862, demander la " résiliation de l'échange, il peut néanmoins, vû la garantie qui lui a été faite " du dit cheval, comme exempt de tout défaut, être admis à faire valoir à l'en- " contre de la demande, la diminution de la valeur du dit cheval, à raison du " *tic* ou *rot* ou maladie dont il était attaqué ; et considérant enfin que d'après la " preuve, cette valeur doit être fixée à $100, sur lesquelles deduisant les $10 " payées et la valeur de la jument du défendeur à $30, il reste $60, a condamné " le défendeur à payer au demandeur cette dernière somme avec intérêt depuis " le 20 juin 1861, et les frais comme dans une action au-dessous de £30, et ren- " voie la demande incidente sans frais.

Jugement pour le Demandeur.

Loranger et Loranger, avocats du Demandeur.
Drummond et Bélanger, avocats du Défendeur.
(P. R. L.)

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* Vide 1, Troplong, Vente no. 533.
2 Troplong, " nos. 586 et 590.
Loysel, liv. 3, titre 4, no. 17.

SUPERIOR COURT, 1864.

MONTREAL, 2ND JULY, 1864.

IN CHAMBERS.

Coram MONK, A. J.

No. 1829.

Duchesnay et vir vs. *Watt.*

HELD:—In the case of a *Saisie Conservatoire*, under the 176th Art. of the Custom of Paris, of a quantity of wheat on board a vessel in the Port of Montreal, that the Court can authorize the removal by the sheriff of flour stowed above the wheat, to such an extent as to admit of the proper seizure of the wheat.

This was a petition by the plaintiff, setting forth that the sheriff, who was directed by a writ of *saisie conservatoire* to seize a quantity of wheat on board a vessel in the Port of Montreal, was unable to effect the seizure, in consequence of a number of barrels of flour being stowed over the wheat, which the captain of the vessel refused to allow the sheriff to remove, and praying that the sheriff be authorized to remove the flour to such an extent and in such a manner as to enable him to effect the seizure of the wheat.

MONK, A. J.—This is an application by the plaintiffs, based upon an interim return of the sheriff, charged with the execution of a writ of *saisie conservatoire*. It appears by the return, that serious obstacles to the execution of the writ exist, and the prayer of the petition is that the sheriff be authorized by a judge in chambers to remove and overcome the obstacles. As the case thus presented is of considerable importance, and may result in very serious consequences not only to the parties immediately concerned, but also to the course of trade in one respect, it may be proper that I should state at some length the grounds upon which my decision will rest. The nature and the extent of my authority over the subject matter submitted for my determination must in the first place be carefully considered. I sit here in a simply ministerial capacity, and I am called upon, in so far as this petition claims the exercise of my authority, to perform exclusively a ministerial act—that is, to authorize the sheriff to remove obstacles of an unusual character, and to overcome illegal resistance to the execution of the Queen's writ. The law and the very necessity of the case empower me, exercising ministerial functions, to give such an order—to confer the required authority on the sheriff. But beyond the strict limits within which this ministerial authority is legally exercised I cannot go. I can adjudicate upon no claims—I can determine no rights. I cannot suspend, modify, or restrict the execution of any process or order of the Court. I can order no specific thing to be done in a case like the present, and upon an application such as the one presented. Bearing this in mind, I have next to enquire whether the obstacles presented to the execution of this writ are of a nature to require and justify the intervention of my authority—or whether the officer charged with the process in question should not be left to act upon his own responsibility, to

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desist from any further proceedings in the matter, or to take upon himself the duty of removing the obstacles of which he complains. The plaintiffs here are prosecuting certain rights in virtue of a precise and particular law, which undoubtedly authorizes them to take the proceedings they have adopted, and I find, moreover, that the course they have taken is, so far as I can judge, regular and in strict conformity to the regular procedure known to this Court and followed in like cases. The 176th Art. of the Custom of Paris authorizes the vendor of movable property for cash, or with the expectation of prompt payment, to follow the thing sold wherever he may find it, if the purchaser fail to pay as agreed; and the proceeding usually adopted in such case is the *saisie conservatoire*, the particular description of writ issued in this case. The sheriff is ordered to seize a certain quantity of wheat on board the ship the "Moss Rose," lying in the port of Montreal, in the possession of the defendant, Watt. That is, as I read it, to seize a certain quantity of wheat in the possession of Watt, on board the above-named vessel. This writ was issued upon the affidavit of one of the plaintiffs, disclosing the circumstances which justified the issuing of the process, and the order for its execution was signed by one of the judges of this Court. So far all is plain and undoubtedly regular—here is a legal right and a lawful remedy sought to be enforced in a legal and lawful manner. If I saw anything manifestly defective in these proceedings, or plainly preposterous in the plaintiff's pretensions—if there was apparent upon the face of these documents, capital blunders or manifest and fatal irregularities, rendering the whole proceeding evidently null, I should probably give no such order as that asked for. This, however, is not the case, but precisely the reverse. The sheriff returns that he cannot execute the writ, because there is a large quantity of flour lying over the wheat in the hold of the vessel, and that the captain will not allow him to remove this flour, and the plaintiffs thereupon pray that the sheriff be authorized to take measures to remove the flour, notwithstanding the resistance on the part of the captain. This is a very proper precaution on the part of the sheriff. He would not be justified in acting upon his own authority and responsibility in such a contingency. For a variety of reasons to which it is not necessary to advert, he should be armed with the power asked for him. This being the case, it is clearly my duty to give him this power unless there exist grounds for withholding that authority. Now this application has been informally resisted by the master of the ship and by third parties, holding bills of lading of the wheat in question. No petitions have been presented by these parties—probably none could be at this step of the proceedings. They have come before me with affidavits and verbal statements setting forth certain facts intended to show that the possession of the wheat is not now in the defendant Watt, but is either in the master of the vessel, or the Banks holding the bills of lading. This question of possession is one to which the parties attach great importance, and on which they mainly base their opposition to the granting of this order. Now it is quite impossible for me to take the contents of these affidavits into consideration. There is no petition or other proceeding taken, to which the facts thus disclosed will apply, or in support of which they can be received. There is no prayer on their behalf, no issue joined before me. I

would not be justified in acting upon affidavits such as these, or upon mere verbal statements without any written formal demand being submitted to me, even if I were here exercising judicial authority. But assuming that I could do so, there is nothing in these affidavits or in the statements and arguments of counsel, to warrant my suspending the execution of this writ, or withholding this authority from the sheriff. The master says in his affidavit, that the wheat is on board his ship—a very important fact for the plaintiffs in this cause—and that he is credibly informed that the bills of lading, granted by him to Watt, have been assigned to Mr. King, Manager of the Bank of Montreal, and to the Bank of Upper Canada. The latter institution has produced an affidavit to show that it holds a bill of lading, and that advances have been made upon it. I assume this to be the case, both with respect to this Bank and the Bank of Montreal, and that the bills were taken and the advances made in perfect good faith, and legally on the part of both the banks. I have now to enquire whether there is enough in all this to establish that Watt had been divested of the possession of the wheat. With regard to the captain, if Watt be still the legal owner and possessor of the grain, subject to the Banks' lien, he possesses for Watt; his possession in the eye of the law is Watt's possession—it has been delivered to him as a common carrier, and at the end of the voyage it will be delivered on Watt's order. The wheat, therefore, cannot be said to be in the master's possession in a sense to defeat the execution of this writ. But it is contended, that the Banks are the legal owners and possessors of the wheat under the bills of lading. It is quite true that under our Statute law, and particularly in virtue of the Statute 25 Vic. cap. 23, bills, receipts, specifications, &c., transferred to Banks making advances upon them, carry a *lien* for the full amount of the advances made upon the property, and the Banks are preferred over the unpaid vendor. So far this law is clear and precise; but does the clause of the Statute creating the *lien* also transfer the ownership and possession to the Banks, or does it merely give them a preference upon the proceeds to the extent of their advances? As to the ownership of the property, it plainly does not transfer it. Whatever may be the effect of the transfer of a bill of lading at Common Law between individuals and commercial firms, it has no such effect when made to Banks, unless the Statute authorizing their taking such security gives such an effect to the assignment. Now our Statute only gives a *lien*, but does it give possession? If so, then the captain's possession is the possession of the Banks, and Watt being no longer the possessor, it is argued by Mr. Ritchie, counsel for the Bank of Upper Canada, that the sheriff is invading his client's possession—that the sheriff is a trespasser and may be legally resisted, and hence this order should not issue. Now, grave doubts may reasonably exist, and do exist, as to whether the legal possession of property is transferred by assignment of bills of lading to the Banks under the clause of the Statute, giving them a *lien* for their advances. The law does not say that possession follows the bill of lading, and this law is the Banks' sole authority for holding such bills as preferential security. But this possession may be implied. A *lien* upon movable property under the Common Law supposes possession in fact, and under that law possession is essential. But here there exists a doubt—possession is not necessary, the

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Statute gives the *lien*, and that will exist without actual possession. It may be, as said before, that the Banks are entitled only to rank by preference upon the proceeds to the extent of their advances—their particular rights are the creation of the Statute; they do not result from the Common Law. There may be a conflict between the article of the Custom and the provisions of the Statute. If so, and if a Bank holding a bill of lading has no control whatever over the property on which its *lien* exists, the sooner the law is changed the better. As it is, it is not a very clear law; but even if it were more so, I am not authorized —I have no power sitting in chambers to decide that question. I cannot determine who is owner or who is possessor of this property. To stop this writ, I should have so to decide. I should be obliged judicially to determine the validity and effect of a bill of lading held by the Bank, and this plainly cannot be. But let us pass from these considerations to others of a more general character. It is easy to suppose a case where bills of lading might be granted in fraud of the first vendor, who might show before the Court, when the case came up for pleading and evidence, that the bill of lading was fraudulent—that the party assigning the bill was a bankrupt—that the bill was transferred to meet old liabilities, and effect fraudulent preferences—or that the bill was granted before the grain was on board the vessel; in fact, the existence of circumstances which would render the bill of lading utterly null and void as against the first vendor. In such a case, what a flagrant injustice would be perpetrated, if sitting here I arrested the execution of the writ, or if I did what was equivalent to it, if I refused such an order as that required in this case, simply upon the exhibition of a bill of lading, and a bill of lading which might be wholly inoperative against the plaintiff. Such a course would constitute a most dangerous precedent. I would be lending my authority as a judge to aid in the perpetration of a fraud. This cannot be. If the rights of holders of bills of lading are to be respected, the claims of the first vendors are entitled to an equal measure of protection, in so far as the law affords that protection. The sheriff has made a supplementary return, by which it appears that the Bank of Montreal has served upon him and also on the plaintiffs, a protest intimating that they hold a bill of lading of the wheat from Watt, and warning him not to proceed with the seizure. But the same remarks apply to this protest, as were made in reference to the affidavits and verbal statements. I cannot interfere with the plaintiffs' course of proceeding—they are assuming a very great, a very grave responsibility, and it is difficult to see with what object unless these bills of lading were illegally or fraudulently taken by the holders. They must, however, be supposed to know their own interest and their own business best—it is theirs, not mine. Something has been said by Mr. Devlin, about the illegality of touching other people's property, and the danger to the ship and cargo by removing this flour. There are five or six affidavits to show that the flour would be greatly injured, and the ship perhaps sunk in case of removal of the flour. There are six other affidavits of stevedores to establish the very reverse. If I am bound to give this order at all, I must do so wholly irrespective of these considerations. The plaintiffs assume all the responsibility. The sheriff is ordered to take every precaution in removing the flour, and I have no doubt he will do so—he is

moreover, ordered to replace it after the wheat is removed. This petition for these reasons must be granted with this caution to the sheriff.

Petition granted.

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Strachán Bethune, Q.C., for plaintiffs.
B. Devlin, (in interest of captain of vessel.)
Andrew Robertson, Q.C., (do.)
T. W. Ritchie, (in interest of Bank of U. C.)
Opposing as *Amici Curiæ*.
(S. B.)

MONTREAL, 2ND MARCH, 1864.

Coram LORANGER, J.

No 1447.

Brisson vs. *Lafontaine dit Surprenant*.

PUNISHMENT BY SCHOOLMISTRESS.

HELD:—That schoolmasters have a right of moderate chastisement against disobedient and refractory scholars, but it is a right which can only be exercised in cases necessitated for the maintenance of school discipline, the interest of education and to a degree proportioned to offences committed, and any chastisement exceeding this limit, and springing from motives of caprice, anger, or bad temper, constitutes an offence punishable like ordinary delicts.

This action was an action of damages brought by the father of a child of six years, against his schoolmistress for excessive chastisement.

The plea denied the excessive character of the punishment, and invoked, in favor of the defendant, the legal right to punish a scholar, existing in schoolmasters.

The judgment of the Court was fully explained by

LORANGER, J.—Il résulte de l'enquête que le 24 décembre 1862, l'enfant du demandeur, du nom d'Edmond, et âgé de six ans, se trouvant à occuper un rang distingué dans sa classe, fut requis par la défenderesse de faire son exercice de lecture, ce qu'il ne put faire parce qu'il avait confondu la page du livre indiqué pour cette lecture. Là-dessus, la demanderesse le fit descendre de son rang qu'elle décerna à l'élève qui occupait le rang suivant. L'enfant se prit alors à pleurer, et la défenderesse insista de nouveau pour lui faire faire sa lecture. L'enfant ne pouvant se rendre à cette injonction, la défenderesse le fit supplanter par un troisième élève et ainsi de suite par tous les autres jusqu'au dernier, lui enjoignant toujours de lire et l'enfant continuant toujours à pleurer. Alors elle le frappa pendant dix minutes ou un quart-d'heure sur la main gauche et peut-être sur les deux et sur la tête avec un martinet qui avait été donné par les commissaires d'école de la localité à la maîtresse d'école en chef, une demoiselle Boire, pour la correction des enfants indociles et récalcitrants. Ce martinet consistait, suivant la description faite par les témoins et la demoiselle Boire elle-même, dont le témoignage a été offert par la demanderesse, en une lanière de cuir longue de 15 pouces, large de trois, et épais de quelques lignes. Après cette correction faite au milieu des cris de l'enfant qui voulait retourner chez ses parents, elle l'envoya boire et l'enfant lut ensuite sa leçon malgré que sur ce point le témoignage ne soit pas unanime.

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Il paraît que l'enfant avait eu sur le dessus de la main gauche un bouton ou clou qui n'était pas encore complètement guéri. Il retourna chez son père se plaignant de souffrance à la tête, il avait l'empreinte de deux coups ou barres rouges sur sa joue et de douleur à la main gauche qu'il avait enflée à l'intérieur et enflammée à l'extérieur. Le demandeur conduisit son fils chez un médecin à la demande même de la défenderesse qui le visita à l'égard de la lésion faite à la main gauche de l'enfant, le médecin prescrivit pour lui et lui donna ses soins pendant quelques jours. L'enfant fut retenu au lit pendant un espace de temps assez considérable; une équimose, suivant le témoignage du médecin, ensuite se déclara, il y eut suppuration et la main lui aboutit. Depuis ce temps, jusqu'au temps de l'enquête, il paraît que l'enfant a refusé de retourner à l'école par crainte des maîtresses d'école.

Ces faits, qui sont abondamment prouvés par le demandeur n'ont pas été contredits par la défenderesse qui ne pouvant nier le fait de la flagellation infligée à l'enfant, s'est rejetée sur l'impossibilité que des coups de martinet infligés dans la main d'un enfant put produire équimose et suppuration sur le revers de la main et puis la faire aboutir. Deux médecins ont été appelés de sa part pour contredire le témoignage du médecin produit par le demandeur. Mais n'y ayant jamais vu la blessure, ils n'ont pu former leur opinion que sur la description qu'en avait faite leur confrère, et leur témoignage est impuissant à contredire le sien. La défense dit que le châtiment infligé par la défenderesse dans la main de l'enfant ne pouvait produire les résultats signalés par la demande, mais il ne faut pas oublier que la main était déjà malade, qu'il y avait probablement déjà un travail inflammatoire dans le tissu cellulaire, qu'en cet état une équimose était bien propre à se manifester et qu'une suppuration en pouvait être la conséquence naturelle. La défense prétend n'être pas plus responsable des conséquences qui sont résultées du châtiment que si la main eut été saine, et que la défenderesse ayant eu le droit de corriger l'enfant comme elle l'a fait à cause de sa désobéissance à exécuter ses ordres, elle ne peut être plus recherchée que si la main de l'enfant n'eut pas déjà éprouvé de lésion.

La première question qui se présente est donc celle de légitimité de la correction. La défenderesse était-elle justifiable en corrigeant l'enfant comme elle l'a fait? Sur ce point, le tribunal est décidément défavorable à sa prétention. Sans refuser aux instituteurs un droit modéré de correction légitime et dans le cas de nécessité absolue sur les enfants indociles ou récalcitrants, et alors dans l'intérêt de la discipline de l'école et de l'éducation des élèves, l'on ne peut voir dans le fait d'une institutrice qui, sur une faute aussi légère commise par un enfant de six ans le flagelle aux mains et à la tête pendant dix minutes ou un quart-d'heure, qu'un grave abus d'autorité, un assaut qui constitue un délit punissable au criminel même.

Si elle n'avait pas le droit d'infliger un châtiment comme elle l'a fait, elle doit porter la peine de toutes conséquences qui en sont résultées. Il doit donc y avoir un jugement prononçant des dommages et interêts contre elle, et elle doit être condamnée à tous les frais encourus par le demandeur pour parvenir à cette condamnation. A raison du montant considérable auquel ces frais s'élèvent; la cour n'accorde point un chiffre de dommages aussi élevés qu'elle l'eut fait sans

cela, mais elle doit, néanmoins, jusqu'à certain point, prendre pour les mesurer l'appréciation défavorable qu'elle fait de la conduite de la défenderesse, et rendre un jugement qui, en consacrant le principe sur lequel elle le rend, servira aussi d'exemple à ceux à qui la loi remet l'éducation des enfants, £10 de dommages et intérêts civils est le chiffre que j'établis avec les dépens entiers de l'action.

The judgment was *motivé* as follows :

" La cour, etc., considérant que sans refuser aux instituteurs un droit de correction modérée contre les élèves indociles ou récalcitrants, droit qui ne peut s'exercer que dans les cas nécessités par le maintien de la discipline des écoles, l'intérêt de l'instruction et à un degré proportionné aux offenses commises, il n'en est pas moins vrai que tout châtiment excédant cette limite, et motivé par l'arbitraire, le caprice, la colère ou la mauvaise humeur, constitue un délit punissable comme les délits ordinaires, et que dans les cas proposés aux tribunaux où l'on prétend que la correction présente ce caractère, ils doivent former leur appréciation sur la nature de l'infraction, l'âge de l'élève en faute, le plus ou moins de gravité du châtiment, et les circonstances sous lesquelles il a été infligé.

Considérant que dans l'espèce actuelle, vû l'âge de l'enfant du demandeur, la légèreté de l'infraction de discipline qu'il avait commise, la correction excessive que la défenderesse lui a fait souffrir, qui a produit des résultats préjudiciables à la santé de l'enfant et a exposé le demandeur et sa famille à des inquiétudes et des inconvénients fâcheux, a constitué un abus d'autorité et offert le caractère d'un délit recherchable en dommages et intérêts.

Considérant, en conséquence, que le demandeur était fondé à porter la présente demande en dommages et intérêts civils devant ce tribunal, qu'il l'a prouvé et que la défenderesse n'a offert ni prouvé aucune défense légitime à l'encontre de cette demande, déclare frivole et non fondée la dite défense, et maintenant la demande condamne la défenderesse à payer au demandeur à raison du délit qu'elle a commise le 26 décembre 1862, en infligeant à son fils Edmond, âgé de 6 ans, en la paroisse de St. Constant, sans droit ou justification un châtiment corporel excessif, la somme de £10 à titre de dommages et intérêts civils avec intérêt de cette date et les dépens entiers de l'action. Judgment for plaintiff.

Médéric Lanctot, for plaintiff.

R. A. Hubert, for defendant.

(F. W. T.)

MONTREAL, 15 AVRIL 1864.

Coram SMITH, J.

NO. 95.

EX PARTE.

DENIGER *et al.*,

APPELANTS.

ET

LA CORPORATION DE LA PAROISSE DE LAPRAIRIE.

INTIMEE.

JUGE:—Qu'en conformité aux dispositions du chapitre 6, des Statuts Refondus du Canada, section 14, la cour, sur requête de la partie lésée après une enquête contradictoire suivant les errements de la procédure ordinaire ; ordonnera au secrétaire-trésorier d'inscrire le nom de telle partie lésée sur la liste électorale, et ce avec dépens contre la corporation.

Les appelants, par leur requête présentée le 31 juin 1863, exposaient, qu'ils " possédent la qualification requise par la loi pour voter aux élections des mem-

Ex parte Denigre et al., and La Corporation de Laprairie.

" bres du conseil législatif et de l'assemblée législative de cette paroisse, soit " comme *propriétaires* ou *locataires* ou *occupants*.

" Que mardi, le 26 mai courant était le jour fixé par le conseil municipal de " la paroisse de Laprairie pour la révision du rôle de cotisation et de la liste des " personnes qui, d'après la loi, ont droit de voter aux élections des membres du " conseil législatif et de l'assemblée législative, faits, les dit rôles et listes d'après " les exigences de la loi, et que, dans les délais voulus, vos requérants dont les " noms n'étaient pas et ne sont pas encore sur la dite liste d'électeurs politiques, " ainsi que quelques autres personnes, ont déposé une plainte entre les mains du " secrétaire-trésorier du dit conseil, par le ministère de André Bétournay, un " des dits électeurs, demandant l'insertion de leurs noms sur la dite liste et expo- " sant leurs raisons.

" Que le dit conseil, s'opposant à toute preuve de la part de vos requérants, a " là et alors rejeté la dite plainte et refusé d'entrer leurs noms sur la dite liste " d'électeurs pour la dite paroisse de Laprairie.

" Or, que vos dits requérants sont tous qualifiés aux termes de la loi pour voter " aux dites élections et qu'ils ont droit d'être portés comme tels sur la liste " d'électeurs pour la dite paroisse de Laprairie, et que le dit conseil, en refusant " d'entrer leurs noms sur la dite liste, a commis une grande injustice envers eux " et qu'ils se tiennent et sont réellement lésés par telle décision du conseil.

" Vos dits requérants supplient donc cette honorable cour vouloir bien ordon- " ner que leurs noms soient insérés sur la dite liste d'électeurs politiques pour " la paroisse de Laprairie, et que cette dite liste soit corrigée en conséquence " par le secrétaire-trésorier du dit conseil qui en a la garde, immédiatement après " avoir reçu avis légal du jugement de cette cour, le tout avec dépens contre le " dit conseil."

Avis ayant été donné de la présentation de cette requête au secrétaire-trésorier du conseil municipal de la paroisse de Laprairie pour le 3 juin, elle fut accordée comme suit : This petition presented in chambers on the 3rd June instant, and delay granted to answer until Saturdry, the 6th instant. Montreal, 3rd June, 1863, signed, J. Smith, J.

Le 3 juin, l'intimée répondit par écrit aux allégués de cette requête comme suit : " qu'il est vrai que les dits requérants ont fait application au bureau de " révision pour faire entrer leurs noms sur la liste électorale comme électeurs " politiques ; mais que tous ou chacun d'eux ont été justement répudiés parce " que l'évaluation et la valeur réelle de leurs propriétés était bien au-dessous " de deux cents dollars ou d'une valeur annuelle d'au-dessous de vingt dollars.

" Que quelques-uns des requérants n'ont même aucune propriété quelconque et " occupent seulement de très-petits espaces de terrains sur la grève, lesquels ter- " rains sont complétement improductifs, et que quelques autres requérants ont " tenté de se qualifier exclusivement en vue de l'élection prochaine et par fraude " et dol.

" Que lors de la présentation de la dite requête devant le dit bureau de révi- " sion, environ vingt-cinq personnes ne se trouvant pas sur les listes, furent en- " trées sur la dite liste électorale, et ce sur la preuve qui fut faite de leur quali- " fication et sur l'application faite par un autre requérant que ceux men-

"tionnés dans la présente requête ou dans la requête présentée au bureau de "révision.

"Qu'il ressort de ce dernier fait que l'intimée a agi avec toute l'impartialité et "toute l'enquête nécessaires en pareil cas, en entrant sur la liste électorale, lors "de la révision d'icelle, un plus grande nombre de personnes portées sur la requê- "te des appelants qu'elle n'en a inscrits de ceux portés sur une autre requête "présentée par d'autres requérants. Qu'à aucune époque antérieure à la pré- "sente loi électorale [illegible] la présente révision du rôle d'évaluation, les proprié- "tés occupées [illegible] ce soit par les appelants n'ont jamais été "évaluées à la [illegible] pour donner le droit de vote, et que les "propriétés sont [illegible] leur pleine valeur comptant et même avec [illegible] "terme.

"Qu'il est compl[illegible] l'intimée ait refusé aux appelants ou à leur "agent le droit de faire [illegible] des témoins, lesquels ont été entendus par le "bureau de révision lorsqu[illegible] été requis de les entendre, et que dans presque "tous les cas, il n'a été offert aucun témoin au soutien de la demande des appe- "lants et qu'aucune demande n'a été faite pour faire assermenter et entendre "aucuns témoins.

"Que bien plus le bureau de révision voyant qu'il n'y avait aucun témoin pour "soutenir la prétention des dits appelants, en a lui-même fait entendre afin "d'être encore mieux éclairé que par l'abstention significative des appelants de "faire aucune preuve,

"Que le rôle d'évaluation corrigé par des estimateurs honnêtes et respecta- "bles, et dont l'exactitude et l'impartialité ont été comme la loi le requiert, affir- "mées, et attestées par le serment solennel des dits estimateurs devrait suffire "pour guider la conscience du tribunal, et que les appelants, admettant que le "rôle d'évaluation a été suivi pour la confection de la dite liste électorale, leur "requête est en conséquence mal fondée, nulle de plein droit et doit être rejetée "Pourquoi l'intimée conclut à ce que la dite requête des appelants soit rejetée. "avec dépens contre les dits appelants et à ce qu'en conséquence le jugement "du bureau de révision soit confirmé."

Après la contestation liée et la production des articulations de faits de part et d'autre, la cour rendit, le 15 juin 1863, un jugement interlocutoire dans les termes suivants:

"The court having heard the parties by their respective counsel and having deliberated thereon, doth order that the said respondents do transmit forthwith to this court the record of proceedings had before the municipal council of the parish of Lapraitie, on the application of the said Joseph Deniger and others, the said appellants, to have their names inserted in the voters' list, and the decision of the said council thereon, together with all papers and documents and orders connected therewith."

L'enquête fut ensuite ordonnée pour le 18 juin, et plusieurs témoins furent entendus. Le 8 avril 1864, l'intimée ayant discontinué sa contestation, le jugement fut rendu comme suit:

La cour, après avoir entendu les parties en cette cause par leurs avocats, examiné la procédure et la preuve faite par les appelants, l'intimée ayant disconti-

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nué sa contestation avec dépens, et sur le tout délibéré, accorde les conclusions de la requête des appelants, et ordonne que les noms des appelants, savoir:..... soient inscrits sur la liste électorale de la paroisse de Laprairie, et il est ordonné au secrétaire-trésorier de la municipalité de Laprairie d'inscrire les dits noms sur la dite liste électorale aussitôt que signification du présent jugement lui aura été faite, le tout avec dépens contre l'intimée comme dans une action de première classe.

Magloire Lanctot, avocat des appelants.
Médéric Lanctot, avocat de l'intimée.
(P. R. L.)

MONTREAL, 1er AVRIL 1864.

Coram SMITH, J.

No. 2215.

Demers vs. *Larocque.*

JUGE:—Que par suite de la stipulation d'une hypothèque spéciale jusqu'à concurrence d'une somme fixe et certaine, consentie par le mari à son épouse pour ses droits mentionnés dans leur contrat de mariage qui a été enregistré; elle ne peut réclamer hypothécairement au-delà de telle somme ainsi stipulée

La demanderesse, par sa déclaration, réclamait hypothécairement du défendeur la somme de £769. 7s. 8d, comme suit: £469. 7s. 8d. montant de ses droits et reprises matrimoniales constatées par le rapport du praticien sur sa demande, et en conséquence de son jugement en séparation de biens d'avec son époux, J. A. Porlier; £100 montant du mobilier réservé propre par son contrat de mariage; £100 pour son douaire préfix, et enfin £100 pour son préciput.

Elle alléguait que par son contrat de mariage reçu le 3 août 1845, Mtre. Lacoste, N. P., portant communauté de biens, le dit J. A. Porlier lui avait constitué un douaire de £100, qu'elle y avait stipulé un préciput de £100; que ses droits, dont son tuteur devait lui rendre compte, ainsi que tout ce qu'elle justifierait avoir apporté en mariage; lui sortiraient nature de propre, et quant à tels droits jusqu'à concurrence de £100; et pour sûreté de ces trois sommes s'élevant à £300, son époux (depuis décédé) lui avait donné par tel contrat de mariage une hypothèque spéciale sur l'immeuble dont le défendeur est maintenant détenteur. Ce contrat de mariage avait été enregistré le 8 avril 1847.

Le 30 septembre 1846, la demanderesse avait obtenu une séparation de biens et avait renoncé à la communauté, et le praticien avait constaté ses droits à £469. 7s. 8d. indépendamment des £300 mentionnés au contrat de mariage.

Le défendeur répondit à cette demande par une exception péremptoire au moyen de laquelle il alléguait, que par acte de vente reçu le 13 mai 1856, Mtre. Jobson, N. P., J. A. Porlier vendit franc et quitte à l'auteur du défendeur l'immeuble dont il est question, que cet acte fut enregistré le 15 mai 1856, et par acte de vente reçu le 18 mars 1862, le défendeur fit l'acquisition de cet immeuble.

"Et le défendeur, aux risques et périls des représentants légaux du dix feu "Joseph Alfred Porlier, déclare que quant aux montants reclamés par la deman- "deresse par sa présente action pour douaire, préciput et droits mobiliers, il s'en "remet à la justice, acceptant telle condamnation que cette cour jugera de pronon-

"cer," .....et quant au surplus.....£469 7s. 8d..... le défendeur sou-
"tient que le demanderesse est mal fondée,.....que dans tous les cas en loi
"la demanderesse n'a pas d'hypothèque à réclamer en vertu du jugement homo-
"loguant le dit rapport du praticien: et que même en supposant que la deman-
"deresse aurait obtenu une hypothèque en vertu du dit jugement, cette hypo-
"thèque serait rendue sans effet par l'enregistrement le 15 mai mil huit cent
"cinquante-six, de l'acte de vente par le dit Porlier au dit Révérend Charles
"Larocque.

"Pourquoi le défendeur s'en remettant à la justice comme susdit, quant à la
"demande de la demanderesse en raison des douaire, préciput et droits mobi-
"liers par elle reclamés, et consentant à payer les frais d'une action non contes-
"tée pour tel montant qui sera accordé pour tels douaire, préciput et droits
"mobiliers, sauf son recours pour tels frais contre les représentants du dit Por-
"lier, conclut à ce que la demande de la demandoresse pour le surplus soit
"déboutée avec dépens."

La contestation ayant été liée et les parties ayant procédé à la preuve, furent entendues sur le mérite le 24 mars 1864.*

Barnard, pour le défendeur. 1o. Il n'y a pas de preuve que les propres ont été vendus ou que le mari en a reçu le prix. Le jugement homologuant le rapport du praticien et le rapport du praticien lui-même ne peuvent faire preuve contre un tiers. Bryson et Dickson, 3 L. C. Rep., p. 65. Macfarlane et McKenzie, 5 L. C. Jur., p. 109. Remarques du Juge Aylwin.

2o. En supposant que la femme aurait eu une hypothèque légale pour remploi de propres, ce que le défendeur nie, le défendeur invoque l'opinion de ceux qui croient que l'hypothèque légale est soumise à la formalité de l'enregistrement.

Girard et Blais, 2 L. C. Rep., p. 87. Comte et le Procureur-général, 2 L. C. Jurist, p. 86.

3o. Même en supposant que l'hypothèque légale serait en général affranchie de l'enregistrement, le fait que dans le cas actuel la femme a pris hypothèque par son contrat de mariage pour £300 seulement, la rend non recevable à réclamer une plus forte somme contre les tiers. 2 vol. Troplong, Priv. et Hyp. No. 550.

Ce dernier moyen ayant été accueilli par la cour, elle accorda à la femme ses conclusions hyopthécaires jusqu'à concurrence de £300; rejeta le surplus de sa demande et motiva son jugement comme suit:

* Le 31 décembre 1863, cette cause avait été rayée du délibéré par le jugement suivant: Berthelot, J., "La cour, après avoir entendu les parties par leurs avocats, "examiné la procédure et avoir délibéré, avant de prononcer au mérite en cette cause, "vu qu'il a été produit et filé de la part de la demanderesse comme son exhibit No. 8, "au soutien de sa demande, le 10 juin 1864, un original du rapport du praticien nommé "dans une cause ci-devant mue devant cette cour sous No. 1574, dans laquelle elle "était demanderesse contre Joseph A. Porlier, dans laquelle dernière cause le dit rap-"port fait partie du dossier ou record, a ordonné que cette cause soit rayée du délibé-"ré, que le dit rapport original soit remis par le prothonotaire dans le dossier ou record "ci-dessus mentionné sous No. 1574, et qu'il soit permis à la dite demanderesse, si elle "le juge à propos, de procéder à l'enquête de nouveau en cette cause, pour substituer "à la preuve qu'elle prétendait avoir faite par l'introduction du dit rapport en la pré-"sente cause, et de la preuve testimoniale par elle faite."

Demers vs. Larocque.

The court having heard the parties by their counsel upon the merits of this cause, and upon the motion of the defendant of the 22nd of March last, to reject the inscription upon the role *de droit et d'enquête*, to reject the exhibits therein mentioned, and fyled by the plaintiff, and that the defendant be permitted to plead *de novo*, having examined the proceedings and proof of record, and deliberated thereon, doth reject the said motion, with costs; and considering that the said plaintiff hath established his right in law, to claim a *droit d'hypothèque* on the lot of land and premises, sold to the said defendant and now in his possession to the extent of the sum of three hundred pounds current money of the province of Canada, and interest thereon as hereinafter mentioned, and for no other or greater sum;

And considering that in and by the contract of marriage of the said Porlier with the said plaintiff, it is therein stipulated that the *droit d'hypothèque* stipulated in favour of the said plaintiff for the surety and preservation of all her matrimonial rights shall extend, first, to the sum of £1[illegible] said current money for her dower, second, £100 said current money for her preciput, and lastly, £100 currency for all other her matrimonial personal rights secured to her by the said contract, and no more;

And further considering, that although the said plaintiff may exercise her recourse against the estate of her late husband for all other her rights settled and established by the *rapport de praticien*, and the judgment thereupon, yet as regards the said defendant in possession of the said land so mortgaged and hypothecated as aforesaid, the said plaintiff had no other or further claim thereon than a claim to the extent of three hundred pounds as stated aforesaid. And further considering that the said parties to the said contract of marriage having limited the *hypothèque* on the lot of land mentioned specially in the said contract, to the sum of £100 for all personal rights in respect of the claim of the said wife against her said husband; the said plaintiff cannot now claim by h[illegible] any further or greater claim therefor.

Doth declare the immoveable property, mentioned and described in the declaration in this cause, as follows: to wit:.....mortgaged and hypothecated for the payment of the sum of £300.

Doutre et Daoust, avocats de la demanderesse.

Barnard, avocat du défendeur.

(P. R. L.)

COUR SUPERIEURE.

MONTREAL 30 AVRIL 1864.

Coram LORANGER, J.

No. 264.

Ward vs. *Robertson et al.*

JUGE:—Que les Syndics à la masse en déconfiture d'un insolvable, ne sont pas des tiers détenteurs possesseurs civils contre lesquels une action hypothécaire puisse être exercée.

Le demandeur, par sa déclaration, réclamait $818.88 hypothécairement des défendeurs comme étant détenteurs et en possession d'un immeuble en leur qualités de syndics à la faillite d'un nommé Brown, et sur lequel immeuble ce dernier

avait fait construire deux maisons, et pour le plâtrage desquelles maisons le demandeur avait été employé par lui, et pour laquelle somme le demandeur avait pris une inscription hypothécaire au moyen des procès-verbaux requis par la loi en pareil cas.

Le demandeur alléguait son privilége spécial d'ouvrier sur cet immeuble qui avait été cédé par le failli aux défendeurs, ses syndics, par acte notarié reçu le 30 juin 1863, ainsi que toute la masse de ses biens pour le compte et le profit de ses créanciers, conformément aux termes d'un contrat d'atermoiement généralement fait en pareil cas.

Diverses exceptions et défenses furent plaidées par les défendeurs; mais comme l'action a été renvoyée sur un moyen qui n'y est pas invoqué, il est inutile de les réciter.

La cour, par son jugement rendu le 30 avril 1864, a motivé son jugement comme suit:

La cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, pièces produites et le témoignage et avoir sur le tout délibéré, considérant que les défendeurs en leur qualité de syndics à la masse en déconfiture de John Brown en laquelle qualité ils sont poursuivis hypothécairement comme détenteurs de l'immeuble décrit au libellé de la demande, ne sont pas aux yeux de la loi des tiers détenteurs possesseurs civils contre lesquels une demande ou action hypothécaire puisse être exercée, écartant les moyens de défense soulevés par les défendeurs, sur lesquels il n'y a pas lieu de prononcer, a débouté et déboute le demandeur de son action sans frais, vû que les défendeurs n'ont pas invoqué le moyen sur lequel le présent jugement est rendu.

Action renvoyée sans frais.

McGee et Walsh, avocats du demandeur.
Cross et Lunn, avocats des défendeurs.
(P. R. L.)

MONTREAL, 18TH JUNE, 1864.

Coram MONK, A. J.

No. 1499.

McLean vs. *Short*.

SLANDER—PLEADINGS.

HELD:—That in an action of damages for verbal slander, it is not necessary to set out in the declaration the precise words complained of, and the allegation giving certain words complained of, "*or words to the same effect*," is sufficient.

The plaintiff sued the defendant for $800 damages, alleged by her to have been suffered because the defendant "without any just cause, but maliciously, wrongfully, and illegally, did say and publish in the presence of several persons, in speaking of and alluding to the said plaintiff, and respecting the said plaintiff and her character, the following words, or words to the same effect:" "Mary McLean," (meaning and speaking of the plaintiff in this cause, who was then in question.) "Mary McLean is a common prostitute, a noted thief,

McLean vs. Short.

and has been cured two or three times of the bad disorder, by Dr. Worthington of Sherbrooke."

The defendant demurred to the declaration *inter alia*, "because by law the plaintiff ought to have alleged absolutely and positively in her declaration the very words alleged to have been used by the defendant, and not that he used certain words or others to the same effect, but which are not disclosed."

The parties were heard on the demurrer, and the Court dismissed it with the remark, that it had been decided in the Court of Appeals in the case of *Beaudry* and *Papin*, 1 L. C. Jurist, 114, that the "*ipsissima verba*" of the slander need not be alleged.

Demurrer dismissed.

Dunlop & Browne, for plaintiff.
Rose & Ritchie, for defendant.
(T.W.R.)

COURT OF QUEEN'S BENCH.

MONTREAL, 19TH NOVEMBER, 1863.

Coram LAFONTAINE, C. J., DUVAL, J., MEREDITH, J., MONDELET, J.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF BEDFORD.

OMIE LAGRANGE,
(*Plaintiff in Court below,*)
APPELLANT;

AND

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

PRACTICE—DEFAULT TO ANSWER PLEA.

12 Vic. Cap. 38., § 85, has the following enactment: "And be it enacted, That in any pleading in any contested civil case, every allegation of fact, the truth of which the opposite party shall not expressly deny, or declare to be unknown to him, shall be held to be admitted by him." And 23 Vic. c. 57, § 37, has the following: "Any party in the Superior Court, or in the Circuit Court in appealable cases, entitled to fyle an answer or reply, shall be bound to fyle the same within the delay prescribed by law, but shall be foreclosed from fyling the same by the mere lapse of the delay, without being entitled to a demand of such answer or reply; and in the case of no answer or reply being fyled within the delay prescribed by law, issue shall be deemed joined by the proceedings already fyled."

HELD: 1. That a plaintiff, who in his declaration expressly declares "that the sum of money, in the said promissory note specified, is now wholly due and unpaid;" and who, in effect, repeats that declaration in his articulation of facts, cannot, under 12 Vic. c. 38, § 85, and 23 Vic. c. 57, § 37, in consequence of his failure to fyle an answer to defendant's plea, be held to have admitted that the note has been paid and discharged, as alleged by defendant's plea.

2. That a plaintiff who has failed to fyle an answer to an affirmative plea is not, under 23 Vic. c. 57, in consequence of that failure, to be considered in the same position as he would have been if he had been formally foreclosed, under 12 Vic. c. 38, from answering such plea.

The respective pretensions of the parties to this appeal fully appear from the allegations of their printed cases.

The factum of the appellant contained the following statements:—

Le jugement dont est appel a été rendu par son Honneur Monsieur le Juge McCord à Sweetsburg dans le District de Bedford, le 19 Septembre 1826, et nest cocu dans les termes suivants:

Lagrange and Carlisle.

"The Court having heard the parties by their counsel, examined the pleadings and proceedings of record and duly deliberated, doth adjudge and condemn the said defendant to pay and satisfy to the said plaintiff the sum of two hundred and four dollars and eighty-four cents current money of Canada, composed as follows: of the sum of one hundred and ninety-eight dollars and eighty-eight cents, amount of defendant's promissory note, dated "Waterville, July 13th, 1861," payable to one Chauncey Warner or bearer, on demand with interest annually, and of the sum of five dollars and ninety-six cents being the interest on the amount of the said promissory note calculated up to the thirteenth day of January, one thousand eight hundred and sixty-two, together with interest on one hundred and ninety-eight dollars and eighty-eight cents, from the said thirteenth day of January, one thousand eight hundred and sixty-two, until paid, and costs of suit *distraits* in favour of Messrs. O'Halloran & Baker, attorneys for the said plaintiff."

L'appelant avait rencontré cette action, 1o par une défense au fonds en droit, qui fut déboutée: 2o par une exception de paiement, motivée comme suit:

"And without waiver of the foregoing *défense en droit*, but on the contrary reserving to himself all the benefit thereof, the said defendant for further plea to plaintiff's action, saith that, long prior to the institution of plaintiff's action in this cause, the note referred to in plaintiff's declaration, was and is fully paid, satisfied and extinguished, as the defendant will prove."

"Wherefore he prays for the dismissal of plaintiff's action with costs."

L'Intimé ne produisit aucune réponse, ni générale, ni spéciale à l'encontre de cette exception de paiement, et après avoir produit une articulation de faits inutile et sur lesquels aucune preuve ne devait être produite, mais qui, du reste, fut spécialement niée par l'appelant, il inscrivit la cause pour la preuve sur la contestation soulevée, ou pour se servir de ses propres termes "on the issues therein raised" et pour l'audition finale au mérite à la fois, le seizième jour de septembre dernier.

L'appelant, s'en tenant au défaut de l'Intimé d'avoir répondu à son exception de paiement, et au bénéfice et privilége que la loi lui accorde en pareil cas, ne produisit aucun témoin ni aucune preuve, à l'enquête, du paiement du billet tel qu'allégué dans son exception, preuve qu'il ne pouvait faire, d'ailleurs, qu'en obtenant une "*Commission Rogatoire*" pour examiner des personnes résidant dans les Etats-Unis et témoins de ce paiement; et lors de l'argument il soutint que l'Intimé, n'ayant aucunement répondu à sa dite exception, cette dernière et tous les faits qu'elle contenait, et plus particulièrement l'allégation du paiement du dit billet étaient prouvés et admis par l'Intimé même. Malgré ces prétentions de l'appelant, la Cour Inférieure accorda jugement en faveur de l'Intimé, *mais à ses risques et périls*, ce qu'il accepta.

Aujourd'hui, comme en cour inférieure, l'appelant soutient que le paiement qu'il a plaidé à l'encontre de l'action de l'Intimé est prouvé, et que la dite action devait et doit être déboutée avec dépens. Si l'on consulte en effet les lois de la procédure, qui nous régissent, l'on trouvera plusieurs dispositions, tant du droit commun que de nos statuts, concluantes en faveur de la cause de l'appelant. Le

Lagrange and Carlisle.

principe qu'il invoque, on le trouve d'abord dans les lois de la procédure de l'Angleterre et des Etats-Unis, comme l'enseigne Philipps dans son traité de la preuve (*édition américaine annotée* 1850); vol. iv, *notes to vol. i*, page 608 et page 604, où il est dit: "*Qui non negat fatetur*, is the maxim in respect to "pleading. All material allegations not denied are admitted. Thus, where in "trespass *de bonis asportatis* the defendant pleaded that he assisted the sheriff "in taking the goods in execution against the plaintiff; and the plaintiff replied "a previous ca. sa., an arrest and a voluntary escape, and that the defendant "then sued out the execution in question; and the rejoinder was that this exe- "cution was sued out by another, and not the defendant; this was held to admit "the escape and other material allegations except that this execution was sued "out by the defendant. (*Cheever* vs. *Mirrick*, 2 *N. H. Rep.* 376,7.) On repli- "cation setting forth a code of by-laws, and alleging a breach, an issue on the "breach admits the by-laws. (*Union Bank of Maryland* vs. *Ridgley*, 1 *Har. "and Gills Rep.* 324.) In *assumpsit*, the defendant pleaded a set-off of $2500; "replication that the defendant was in debt to the plaintiff $3000; and paid the "plaintiff $2500 in part thereof; rejoinder he had not owed the $3000, the plain- "tiff has the onus; for he has admitted by the replication, the payment of the "$2500 (*Waggener* vs. *The Bells*, 1 *Monroe* 7, 11.)"

On la trouve également cette même règle de procédure, expressément formulée dans les lois de la procédure civile du Châtelet de Paris. Jousse, *Traité de la justice*, s'exprime en ces termes sur ce point, à la page 86c du tome 1: "Mais "si l'action paraît suffisamment prouvée, le juge examinera les exceptions du dé- "fendeur, pour voir si ces exceptions détruisent l'action du demandeur; car si "ces défenses détruisent et anéantissent entièrement l'action, sans répliques va- "lables de la part du demandeur, le juge doit pareillement donner congé de "la demande, de la même manière que si la demande n'était pas prouvée."

Pigeau, Traité de la Procédure Civile du Châtelet de Paris, tome 1, page 269 "décide de même: "Si, dit-il, celui contre qui les faits sont articulés ne les "dénie pas, ils sont tenus pour avoués, et l'on juge en conséquence."

En cela, nos statuts provinciaux n'ont fait que confirmer les règles du droit commun suivi dans ce pays. On lit en effet à la 12ème Vict. chap. 38, s. 85, au chap. 73, s. 76, page 741 des Statuts Refondus du Bas-Canada, la disposition suivante:

"Dans tout plaidoyer, dans une cause civile contestée, toute allégation de "faits dont la partie adverse ne niera pas expressément la vérité, ou qu'elle ne "déclarera pas lui être inconnue, sera considérée comme admise par elle."

La justice de cette disposition, tant du droit commun que de nos statuts, n'est pas douteuse, et est exposée en de bien belles paroles par Son Honneur Monsieur le juge Aylwin, pour et au nom de la majorité de la Cour, dans une cause de Copps, appelant, et Copps, intimé, jugée en appel le 11 juillet, et rapportée au 2me volume des Décisions des Tribunaux du Bas-Canada, page 105 et suivantes, où l'on lit à la page 108 ce qui suit: "Now a large portion of these services "were rendered in Upper Canada, and, to prove them, the party respondent "would have been obliged to sue out a *Commission Rogatoire* to Upper Canada. "Had he done so, the defendant might have said to him: "I never denied the

"fact of the services, having been rendered; you have gone into unnecessary evi-"dence and must pay the costs yourself. I deem the section of Judicature Act I "have quoted above to be one of the most wholesome and beneficial provisions "of the existing law."

Aujourd'hui comme dans le cas de l'appelant Copps, si l'appelant en cette cause eût pris une *Commission Rogatoire* pour les Etats-Unis, dans le but de prouver par témoins le paiement du billet en question, l'intimé aurait pu lui répondre: "I never denied the fact of the payment having been made; you have gone "into unnecessary evidence and must pay the costs yourself."

D'ailleurs, le principe que l'appelant invoque a été reconnu dans deux autres causes jugées par la Cour Supérieure de Montréal, savoir; St. John vs. Delisle et al., et McGregor vs. McKenzie et al., jugées en 1851 et rapportées au 2nd volume des Décisions des Tribunaux du Bas-Canada; pages 150, 151, 152 et 153. Il est vrai que dans ces deux dernières causes, la décision ne va pas aussi loin que celle de la Cour d'Appel, dont nous avons parlé plus haut, un certain partage d'opinions existant sur l'effet du mot "*expressément*," que contient la clause 76ème du chap. 83 des Statuts Refondus du Bas-Canada; mais d'un autre côté, il ne semble pas douteux que ces deux dernières décisions établissent clairement que la partie qui ne nie pas, ni généralement, ni expressément et en aucune manière quelconque, les faits allégués par son adverse partie, est censée et considérée les avoir admis, et qu'alors il n'est pas nécessaire d'en faire aucune preuve à l'enquête.

The respondent stated his case as follows:

The respondent brought his action on a promissory note (declaration in the usual form), in which it is *specially* alleged, "that the said sum of money, in the said "promissory note specified, is now wholly due, and *unpaid*, as appears by the "said promissory note herewith fyled to form part hereof;" that "the interest "accrued thereon is still also due;" and, that defendant refuses to pay the amount "of said note and interest, although thereto often requested."

To this, appellant (defendant below) pleaded a *défense en droit*,—evidently for delay, the same being wholly unfounded,—and a plea of payment before action commenced, for the same obvious purpose. Respondent answered the *défense en droit*, but fyled no answer to the plea of payment. The *défense en droit* was dismissed, and appellant offering no proof of his plea of payment, the judgment appealed from was, on the merits, rendered for the respondent, plaintiff below.

That this appeal is a dishonest attempt to cheat the respondent out of his money,—he still holding the promissory note, and the appellant offering no proof whatever of its payment,—is obvious; and, to assist him in his purpose, appellant invokes the fact, that respondent having fyled no answer to his plea of payment expressly denying the same, that, therefore, he has admitted such payment. This is the only ground of appeal.

Respondent submits that, by the allegations of his declaration above quoted, *directly denying* the payment of said note, and the plea of payment of appellant, in answer to said allegation, issue is joined; to wit, by the allegation of payment, by the appellant, on the one hand, and the denial of payment, and the allegation of refusal to pay, on the other, by the respondent.

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We have here all the essentials of an issue, a fact, involving the whole issue, alleged by the one party and denied by the other.

In addition to this respondent refers to the 75th sec. of "Consolidated Statutes," cap. 83, where it is expressly provided, that, "if no answer be fyled within the delay issue shall be deemed joined by the proceedings already fyled;" that is, the parties shall go to proof of their respective allegations.

With this law of procedure in support of the respondent's position in this cause, as having expressly denied the material allegations of appellant's plea as aforesaid, and thereby, in fact, answered the same, respondent trusts that appellant will fail in his obviously unfair purpose in this appeal.

The section of law above cited was enacted in the 23 Victoria, and hence, in so far as it specially regulates pleading and procedure, must take precedence of any provisions upon the same points previously enacted. Had the contents of sec. 76 found a place in the "Consolidated Statutes" before Sec. 75, as they ought to have done, in the order of consolidation,—thus showing that the legislation, on this point of the 12 Vic. had been much modified by that of the 23rd Vic.,—the appellant might have acquiesced in the judgment of the court below.

LAFONTAINE, C. J. *dissentiens.*—Appel du jugement final du 19 sept. 1862, rendu à Nelsonville, dans le district de Bedford.

Question de procédure résultant de certaines dispositions statutaires. (Chap. 83 des Statuts Refondus du Bas-Canada.)

L'action est fondée sur un billet promissoire du 13 juillet 1862, fait payable à Chauncey Marner ou au porteur.

La *déclaration* du demandeur allègue que le dit billet "is now wholly due "and unpaid."

Il y a une défense au fonds en droit, qui a été déboutée. Il ne faut pas s'en occuper. Mais elle est suivie d'un "Plea" ou exception péremptoire dans laquelle on allègue paiement du billet, même avant l'introduction de l'action.

Le demandeur a bien répondu par écrit à la défense en droit, mais n'a pas ainsi répondu à l'exception.

Le demandeur a, de plus, produit une articulation de faits, formant deux questions, et le défendeur y a répondu par une dénégation; mais, de son côté, le défendeur n'a pas produit d'articulation de faits.

Aucun témoignage n'a été pris de part et d'autre.

Enfin, le jugement du 19 septembre 1863, condamne le défendeur à payer le montant du billet.

Le demandeur n'ayant pas répondu à l'exception de paiement, le défendeur prétend que, sous l'autorité du statut, le fait doit être censé admis.

"Tous plaidoyers sur le droit ou sur le fait.....seront faits et complétés par "la *déclaration*, la *réponse* et la *réplique*, ou par le *plaidoyer*, la *réponse* et la "*réplique* dans les cas de plaidoyers dilatoires (ou préliminaires), et au fonds... "et pas d'autres plaidoyers ou écrits sous forme de plaidoyers.....ne seront "reçus ou admis." (Chap. 83 des Statuts Refondus du Bas-Canada, sec. 72.) C'était la disposition de l'ordonnance de la 25e Geo., chap. 2, sec. 13. La partie intéressée devait donc mettre l'autre en demeure de produire une *réplique.*

On lit dans la section 76: "Dans tout plaidoyer,.....toute allégation de

" faits dont la partie adverse ne niera pas expressément la vérité, ou qu'elle ne " déclarera pas lui être inconnue, *sera considérée comme admise par elle*; et les " frais découlant de la preuve de toute telle allégation, ou de tout document " produit à l'appui, seront toujours à la discrétion de la cour, etc., etc.,....." C'était la disposition de la 12e Vict., chap. 38, sec. 85.

Son effet, lorsqu'il avait lieu, équivalait donc à un aveu judiciaire, à une concession du fait, et l'autre partie était dispensée d'en faire autrement la preuve.

Après, nous avons eu une loi spéciale en ce qui regarde une " action sur let- " tre de change ou billet négociable, cédule, chèque, écrit ou promesse, ou autre " acte ou marché par écrit sous seing privé." C'est la 20e Vict., chap. 44, sec. 87. " Si," dans une telle action, " le défendeur fait défaut, ou si pour toute " autre raison le demandeur se trouve avoir droit de procéder *ex parte*, alors " telle lettre de change ou billet... seront présumés vrais *sans en faire la* " *preuve*, et jugement pourra être rendu en conséquence." (Stat. Ref., chap. 83, sec. 86, subd. 1.)

Puis, si dans toute telle action un défendeur nie sa signature ou toute autre signature ou écriture, etc....., ou la vérité de tel document ou de partie d'icelui....., que cette dénégation soit faite *en plaidant la dénégation générale* ou dans d'autres plaidoyers, tels document et signature seront néanmoins présumés vrais....., à moins qu'avec tel plaidoyer, il ne soit produit un affidavit du défendeur, etc..... Chap. 83, susdit, sec. 86, subd. 2.)

Enfin, nous avons eu la 13e Vict., chap. 57, sec. 37, laquelle section est maintenant la 75e du dit chap. 83 des Stat. Ref. du B. C., qui porte que " toute " partie..... qui aura droit de produire une *réponse* ou une *réplique*, sera tenue " de la produire dans le délai prescrit par la loi, et sera forclose de ce faire par le " seul laps du délai, *sans qu'il soit nécessaire de faire une demande de telle réponse* " *ou réplique*, et, si telle réponse ou réplique n'est pas produite dans le délai pres- " crit par la loi, *la contestation sera liée sur les procédés alors faits.*" De ces derniers mots on doit conclure, ce me semble, que le mot " réponse," employé dans cette section, doit s'entendre de la " réponse" à une exception, et non de la réponse à l'action, puisque, sans cette réponse, " la contestation sera liée sur les procédés alors faits," ce qui, nécessairement, suppose une réponse déjà faite à l'action par le défendeur. Ainsi, à l'avenir, il n'est plus nécessaire de mettre la partie en demeure de produire une " réponse" à l'exception, non plus qu'une " réplique " à la défense. La " contestation" n'en sera pas moins " liée" par suite des " procédés déjà faits," c'est-à-dire, suivant le cas, par la *déclaration* du démandeur et par *l'exception* ou la *défense* à l'action. " La contestation ainsi liée," est exclusive de toute réponse ou réplique que peut-être on serait tenté de supposer comme étant faite en pareil cas, soit *spéciale*, soit *générale*, n'importe de quelle façon par la partie qui n'en veut pas faire, et cela, nonobstant sa détermination de n'en pas faire, et la déclaration expresse du Statut, qu'en pareil cas, la contestation sera " liée," et ce, sur les " procédés déjà faits," disposition qu'il serait plus que téméraire de regarder comme admettant ce qu'elle exclut expressément.

La disposition du dit chap. 83, sec. 86, subd. 2, permet donc de nouveau de " plaider la dénégation générale," du moins à une action sur billet comme l'est

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la présente. Si tel est le cas, le défendeur qui ne nie pas expressément une allégation de fait, ne sera donc plus, dans une cause de cette nature du moins, considéré comme l'ayant admise. Ce qui semble faire exception à la 76e sec. du dit chap. 83.

Venons maintenant à l'articulation de fait, lorsque le consentement des parties n'en exempte pas selon la 93e sec. du dit chap. 83.

" Dans les deux jours," dit la 77e sec. du chap. 87, " qui suivront *toute contestation liée*, sur laquelle la preuve devra être produite, chaque partie.....
" produira une articulation de faits pertinents à telle contestation et non admis
" dans les plaidoyers, lesquels elle entend prouver, et en signifiera copie à la par-
" tie adverse, et dans les trois jours qui suivront telle signification, la partie à
" laquelle elle sera faite, produira et signifiera sa réponse reconnaissant ou niant
" tous ou aucun des dits faits, ou déniant que tous ou quelques-uns des dits
" faits soient à sa connaissance; et si telle réponse n'est produite et signifiée
" dans le délai susdit, les faits articulés par la partie adverse seront considérés
" comme avérés par la partie qui aurait dû produire et signifier telle réponse,
" aussi bien que tout fait allégué dans l'articulation et non expressément nié
" dans la réponse, ou que la partie faisant la réponse aura prétendu n'être pas
" à sa connaissance." C'est la disposition de la 20e Vict, chap. 44, sec. 74.

Quant aux frais de la preuve des faits non mentionnés dans l'articulation on peut voir la 3e subd. de la sec. 87 du dit chap. 83, et aussi la 90e sect. qui a aussi trait au même sujet, dans le cas où " une partie qui aurait dû produire et
" signifier telle articulation de faits comme susdit, néglige de le faire, etc....."

Il me semble que cette articulation de faits, exigée par la 20e Vict., chap. 44, rendait inutile la 85e sect. du chap. 38 de la 12e Vict., qui est la 76e du dit chap. 83 des Stat. Ref. du Bas-Canada, l'articulation, lorsqu'elle était faite, devant remplacer cette section pour les fins de la procédure. Mais le chapitre, 83, dans sa sect. 92, semble ne pas vouloir qu'il en soit ainsi; car cette section porte que " les six sections immédiatement précédentes seront interprêtées com-
" me ayant été décrétées pour donner suite aux dispositions contenues dans la
" 76e section du présent acte, lesquelles dispositions seront toujours appliquées
" dans la Cour Supérieure et la Cour de Circuit, dont les règles de pratique
" pourront comprendre toute disposition qui pourra être considérée comme
" nécessaire pour mettre à effet les dispositions de la dite section."

Dans tous les cas, l'articulation de faits ne paraît pas être exigée des parties; elle est seulement permise, et celui qui la fait s'assure certains avantages contre la partie qui n'y répond pas.

Ici, il y a *contestation liée*, bien que le demandeur n'ait pas répondu à l'exception du défendeur. Il n'était pas obligé de le faire, et le défendeur n'était pas obligé de le mettre en demeure. Mais, puisque la 76e sect. doit être exécutée, ne peut-on pas dire que le demandeur n'ayant pas répondu à l'exception de paiement, doit être considéré comme ayant admis le fait ainsi allégué? Il me semble qu'on doit en venir à cette conclusion, à moins qu'on ne prétende que " l'articulation de faits " du demandeur ne doive répondre à ce qu'exigeait de lui la 76e section. Or, cette 76e section exigeait une " réponse " à l'exception dans laquelle fût faite la dénégation de l'allégation de paiement; et le deman-

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deur n'a pas fait cette réponse. Il doit donc en subir les conséquences. C'est la disposition expresse du Statut. Si le demandeur n'eût pas produit, d'articulation de fait, (et il n'était pas obligé de le faire) pourrait-on refuser au défendeur l'avantage qui lui était acquis en vertu de la 76e section du chap. 83, par le fait même du demandeur qui n'a pas jugé à propos de répondre à son exception ? Je ne le pense pas.

L'articulation de fait ne propose que deux questions : 1° Le défendeur n'a-t-il pas fait et signé le billet en question, et ne l'a-t il pas délivré au demandeur ? " Non," répond le défendeur : 2° n'est-il pas vrai que le défendeur doit la somme dont le recouvrement fait l'objet de l'action ? " Non," répond le défendeur.

Si l'articulation de fait du demandeur doit être censée suppléer à la " réponse " que le dit demandeur avait le droit de faire, et qu'il aurait dû faire à l'exception, et si l'exception de paiement n'est pas une admission de la dette demandée, alors nous sommes sans preuve du billet en question.

La force, de ces aveux judiciaires est dans l'intérêt des deux parties ; elle dépend entièrement du fait auquel la loi les rattache.

Si, poursuivi sur un billet, le défendeur ne comparait pas, ou bien comparait, mais ne plaide pas à l'action, la loi veut qu'il soit censé avoir, par ce fait-là même, admis le billet, et le demandeur a droit d'obtenir jugement. Car le demandeur a, par sa déclaration, affirmé un fait qui, dans ce cas, n'est pas nié. Il a donc le profit du défaut de dénégation. Lorsque ce défendeur plaide à l'action, et, dans son plaidoyer affirme un fait qui tend à repousser la demande, la loi (sec. 76 du chap. 83) veut que, si cet allégué affirmatif n'est pas nié par la " réponse " ou " réplique," il soit censé être admis ; elle lui donne la force de l'aveu judiciaire, en donnant en pareil cas au défendeur qui a affirmé ou allégué le fait, le profit du défaut de dénégation. Si on objecte au défendeur le défaut de production d'articulation de faits de sa part, il a droit de répondre : Je n'étais pas obligé d'en produire. Je puis être seulement exposé, le cas échéant, à payer certains frais de justice qu'une articulation de faits aurait peut-être pu m'exempter de payer.

L'articulation de faits du demandeur suppose qu'il voulait faire sa preuve des allégués de sa déclaration, il la proposait pour avoir une réponse affirmative. Au lieu de faire une réponse affirmative, le défendeur en fait une qui est négative. Le demandeur ne va pas plus loin ; il ne fait pas de preuve.

J'ajouterai que la " contestation en cause " dont le Statut parle, n'est pas un droit nouveau ; c'est la répétition de l'article 104 de la coutume de Paris que je trouve copié dans le *Nouveau Denisart*," contestation en cause est, quand il y a " règlement sur les demandes et défenses des parties, ou bien quand le défendeur " est défaillant, et débouté de défenses."

" L'usage des déboutés de défenses dont parle cet article, a été abrogé par " l'ordonnance de 1667, *tit.* 5, *art.* 2, c'est pourquoi cette ordonnance, *tit.* 14, " *art.* 13, dit que " la cause sera tenue pour contestée, par le premier règlement " qui interviendra, *après les défenses fournies*, encore qu'il n'ait pas été " signifié."

" Ainsi, trois choses doivent essentiellement concourir pour former la contes- " tation en cause, en matière civile : 1° La demande de celui qui attaque (nous

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" avons ici la *déclaration* du demandeur) ; 2° la réponse du défendeur ou son " refus de répondre (ici nous avons l'exception péremptoire du défendeur appe- " lant) ; 3° la prononciation d'un jugement quelconque (ici nous avons le Sta- " tut qui tient lieu de règlement du juge, et qui prononce qu'il y a contestation " liée sur les " procédés déjà faits," c'est-à-dire, par la demande et la réponse " (déclaration et exception)."

Pothier dit le même chose dans son Traité de la *procédure civile*, page 43, "..... Aussitôt qu'il y a eu des défenses fournies sur le fond de la contestation, " on même sans avoir été fournies par écrit, si elles ont été prononcées devant " le juge, la première prononciation du juge qui intervient sur la plaidoierie de " ces défenses, forme ce qu'on appelle contestation en cause."

Je donne à des dispositions statutaires une interprétation dont pourrait profiter injustement le défendeur, car on peut soupçonner un peu la sincérité de son exception. Il s'agit d'interpréter ou d'appliquer de nouvelles dispositions statutaires sur la procédure qui, peut-être, entraîneront plus de difficulté qu'on ne serait tenté de le croire à première vue. Je dois penser que je me trompe, puisque je diffère d'avec la majorité des juges de cette cour, mais si je suis dans l'erreur, quant à l'interprétation de ce qui doit former une " contestation en cause " ou " contestation liée," il me semble que je le suis en assez bonne compagnie, l'étant avec Pothier et les auteurs de la nouvelle collection de Denisart

MONDELET, J. The action was upon a promissory note. Plaintiff alleges that at the time the action was brought " the said sum of money, in the said promissory note specified, is now wholly due and unpaid, as appears by the said promissory note fyled to form part thereof: that the interest accrued is still also due."

The defendant pleads :—

" That long prior to the institution of plaintiff's action in this cause, the note referred to in plaintiff's declaration was and is fully paid, satisfied and extinguished, as the defendant will prove."

Now it is plain, that the 85th Section of 12th Vict., c. 38, that " any allegation of fact in a pleading not denied should be held to be admitted," would be conclusive, were it not to be taken and placed in juxta-position with the 37th Sec. of the 23rd Vict. c. 57 which enacts, that " if no answer or reply be fyled within the delay prescribed by law, issue shall be deemed to be joined, in the French text, " *la contestation sera liée*," by the proceedings already fyled."

It follows, then, that the want of an answer to the defendant's plea is tantamount to an answer. That answer might have been either special or general.

If general, it would have been a denegation of the allegation of payment. If special, it would have been a repetition of the owing of the note by defendant, at the time of the institution of the action. Consequently not only is an admission of the note being paid out of the question, but we have technically, and according to law and the rules of procedure, well understood, a denegation of the plea of payment or a repetition of the allegation of the declaration of the note being due.

I am, therefore, clearly of opinion, that were we to give the Statute of 1849 the interpretation which is sought to bring it under, without reference to the

statute (23rd Vict.) which takes it out of the general rule which it would seem to have had in view to lay down, we would *forcibly* extract from plaintiff's doings the very reverse of what he meant, and what was disclosed by his proceedings. Such a contracted interpretation of two Statutes, to give that of 1849 its effect in such a case as the present, would in my opinion not only be a flagrant injustice to plaintiff, who would lose his debt, but it would be an interpretation which would be an error, a juridical error.

The Judgment of the Court below should be confirmed.

MEREDITH, J.—This Appeal presents a question of practice of general importance.

The plaintiff sued upon a promissory note, which he produced with his declaration, alleging expressly that the amount of the note "was then *wholly due and unpaid.*" The defendant pleaded that the note had been paid. To this plea the plaintiff fyled no answer.

But by an articulation of facts he called upon the defendant to say in effect,

1°. Whether he did not make the note?

2°. Whether he did not owe the amount of it?

To both these questions the defendant answered in the negative—and the point which we have now to determine, is whether the plaintiff, who in his declaration expressly declared "that the sum of money, in the said promissory note specified, is now wholly due and unpaid;" and who, in effect, repeated that declaration in his articulation of facts, can nevertheless, in consequence of his failure *to fyle an answer* to the defendant's plea, be held to have admitted that the note had been paid and discharged, as alleged by the defendant.

Under the 12th Vic., c. 38, the plaintiff would have had eight days to fyle an answer to the defendant's plea, and he could not have been deprived of his right to fyle such answer without a regular notice, followed by a foreclosure.

The interests of a party having a right to fyle a pleading being thus carefully guarded by this statute, there was nothing unreasonable in the provision contained in it, declaring, in effect, "that any allegation of fact in a pleading not "denied, shall be held to be admitted." But the provisions of the 12th Vict., c. 38, already adverted to, were modified by the 23 Vict., c. 57. Under that law the plaintiff lost his right to fyle an answer by mere lapse of time, and without any demand of such answer being necessary. By the thirty-seventh section of the statute last mentioned, it is also declared, "that in case of no "answer or reply being fyled within the delay prescribed by law, *issue shall be deemed joined* by the proceedings already fyled."

The pretension of the defendant, as I understand it, is, that the plaintiff who has failed to fyle an answer to an affirmative plea, is under the 23 Vict., c. 57, in consequence of that failure, to be considered in the same position as he would have been had he been formally foreclosed, under the 12th Vict., c. 38, from answering such plea. This pretension does not seem to me well founded;—under the plain terms of the 12th Vict., c. 38, the failure to fyle an answer to an affirmative plea was, after a special foreclosure, equivalent to an admission of the allegations in such plea; whereas under the 23rd Vict., c. 57, the failure of the plaintiff to fyle an answer to the defendant's exception had the effect of causing

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"*issue to be deemed to be joined* by the proceedings already fyled." We must now, under the provisions of law just cited, consider the issue in this cause raised by the declaration and exception. But it does not therefore follow, that the plaintiff is to be deemed to have admitted the allegations in the defendant's plea; on the contrary, I think, according to the 23rd Vic., c. 37, he is to be reputed to have done that which was necessary for the raising of *the issue*, which the law declares *shall be deemed to be joined*; in other words, he is to be regarded as if he had fyled a general answer.

I therefore think that the learned judge in the Court below was justified under the 23rd Vict., c. 57, in holding that the failure on the part of the plaintiff to answer the defendant's plea, ought not to be deemed an admission of the allegations contained in that plea. I shall merely add, that even if we had to decide this case by the provisions of the 12th Vict., c. 38, I think it might fairly be contended, that the plaintiff ought not to lose his action in consequence of his having failed to repeat in a general answer an allegation which he had already made in his declaration.

If the defendant had fyled a *défense en fait*, the case would, of course, be wholly different, because that plea, according to my view, would have thrown upon the plaintiff the necessity of proving his note.

Judgment confirmed.

D. Girouard, for appellant.
M. Doherty, for respondent.
(F. W. T.)

MONTREAL, 1st JUNE, 1860.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

Coram SIR L. H. LAFONTAINE, BART., C. J., AYLWIN, J., DUVAL, J., C. MONDELET, J.

JOHN GREENSHIELDS *et al.*,
Plaintiffs in the Court below,
APPELLANTS;

AND

LOUIS PLAMONDON,
Defendant in the Court below,
RESPONDENT.

COMPOSITION WITH CREDITORS—FRAUD.

HELD:—That a promissory note made by the respondent by virtue of an agreement between the appellants and respondent, at the special instance and request of the respondent, and for his benefit and advantage, to facilitate a final settlement then proposed between the respondent and his creditors, where such agreement is not prejudicial to the creditors, and they have not complained, and where the respondent has frequently, since the final settlement between him and his creditors, acknowledged the amount of the note to be owing, and promised to pay the same to the appellant, is binding on the maker of the note.

The facts of this case, and the pretensions of the parties, and the judgment of the Court below, are reported 3 L. C. Jurist, 240.

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In appeal, *Laflamme* for the appellants, argued that the judgment was erroneous: that in the whole transaction relating to the note, and subsequently, there had been no fraud on the part of the appellants, and no injury to the creditors. The appellants had not received any more than the other creditors, and had no fraudulent preference. If they obtained judgment for the amount of this note, they would still receive less than the others, who had received 10s. in the £. The appellants alone, on the claim which they had against the respondent for his guarantee of Desrosiers' debt, amounting to £261 2s., received by the note £100, which was much less. Having made the composition for this claim, he subsequently settled the other claim of the appellants for 10s. in the £. In this transaction there was certainly no fraud or prejudice to other creditors. Even supposing that the composition should have reference to this particular claim of the appellants, settled by common agreement between the parties, independent of the composition, it was at all events well established; and the judgment itself admits that this amount was not included in the composition, and for the reason that the respondent required it. The appellants, nevertheless, had a lawful claim against him. Should it be that the omission of this claim in the statement should involve the absolute forfeiture of all right for the creditor, and procure a complete discharge to the debtor? There was no law to justify such a pretension. The most that could be contended for in such a case would be that the claim should be reduced to the composition upon other claims, and that the creditor should only receive 10s. in the £ like others. Even in this point of view, the most favourable for the respondent, the appellants were entitled to a judgment for £50.

Doutre, for the respondent. The facts on both sides are proved, save and except the pretension of the appellants, that the respondent was at any time the *garant* of Desrosiers. On the contrary, the appellants had no lien or right of action against the respondent for the debt of Desrosiers when the respondent asked them to sign his composition; and it is evident that the note in question was only given to the appellants in order to give them a preference over the other creditors, and induce the appellants to sign the composition. The legal question submitted in this cause was free from all ambiguity, and could be stated in the following terms: "Can a note given by an insolvent debtor to a creditor, in view "of a deed of composition, as an exceptional advantage for this creditor, without "the knowledge of other creditors, be enforced in a court of justice?" The Court below decided in the negative, supported by the most formal authorities of the English and French law.

MONDELET, J.—L'action, en Cour de Première Instance, avait pour objet le recouvrement de la somme de £100, montant d'un billet promissoire souscrit par le défendeur le 11 déc. 1854, payable à 20 mois.

Les faits sont tout simplement ceux-ci: Plamondon étant en banqueroute, fit un arrangement avec ses créanciers à raison de dix chelins dans le £. Les Greenshields ayant une réclamation contre le nommé Desrosiers, ne consentirent envers Plamondon à signer l'acte de composition qu'à la condition que Plamondon se chargerait envers eux de la dette de Desrosiers, ce que fit Plamondon qui consentit le billet dont il est maintenant question.

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Les créanciers payés, il s'agit maintenant de savoir :

1° S'il est libre à Plamondon de payer ce billet et si en le payant, il fraude des créanciers ;

2° Peut-il à l'heure qu'il est, exciper du droit de ses autres créanciers, attaquer ce billet comme fait en fraude de ses créanciers et refuser de les payer ?

D'un côté l'on peut dire qu'il a agi en fraude de ses créanciers, qu'il a tenu dans l'ignorance du motif de la transaction qu'il a ainsi faite avec les Greenshields qui refusaient de signer l'acte de composition à moins que Plamondon ne souscrivit le billet de £100 en leur faveur. On pourrait peut-être ajouter que Plamondon souscrivant un billet de £100 en faveur des Greenshields songeait probablement, dès lors, aux moyens de rencontrer ce billet.

D'un autre côté, quelle est la loi qui frappe de nullités une telle transaction ?

Le nouveau droit fronde ces transactions, mais quant au droit ancien ?

Il n'y a aucune prohibition.

J'opine donc pour l'infirmation du jugement.

The judgment in appeal was recorded as follows :

"The Court, * * * considering that the promissory note signed by the respondent in favour of the appellant, on the eleventh day of December, 1854, and for the recovery of the sum specified wherein this action is brought, was so made and signed, in virtue of an agreement entered into between the appellants and respondent, at the special instance and request of the respondent, and for his benefit and advantage, to facilitate a final settlement then proposed between the respondent and his creditors: considering that such an agreement was not prejudicial to the interests of the said creditors, and that the said creditors have not complained thereof: considering, finally, that the respondent, since the final settlement between him and his creditors, has acknowledged the amount of the said note to be still due and owing to the appellant, and promised to pay the same ; and that by reason of the facts above mentioned, fully established by the evidence adduced in this cause, the agreement so entered into between the appellants and respondent was valid and binding on the respondent, who is now justly indebted unto the appellants in the amount specified in the said note, doth reverse and annul the judgment rendered by the Superior Court sitting at Montreal on the thirty-first day of May, 1859,—with the costs of this appeal against the said respondent, and in favour of the appellants ; and this Court, proceeding to pronounce the judgment which the Superior Court ought to have pronounced, doth condemn the said respondent, defendant in the Court below, to pay to the said appellants, plaintiffs in the said Court, the sum of one hundred pounds of lawful current money, with interest from the 14th day of August, 1856, and the costs incurred in the said Superior Court, together with ten shillings, costs of protest, &c., &c.

AYLWIN, J., dissenting.

Judgment reversed.

Laflamme, Laflamme & Bernard, for the appellants.

Doutre & Daoust, for the respondent.

(F. W. T.)

CIRCUIT COURT.

MONTREAL, 30TH DECEMBER, 1863.

Coram LORANGER, J.

No. 1832.

Perrault vs. Laurin.

COMPOSITION.—PREFERENCE.

HELD:—That an agreement by which a debtor gives his creditor a promissory note in consideration of the creditor agreeing to sign a composition deed between the debtor and his creditors whereby the debtor is discharged on payment of a part of his debt, the note given being in excess of the amount of the composition, is valid.

The action was to recover a sum of $19.50, amount of a promissory note.

The plea was to the effect that all notes due by the defendant to the plaintiff had been paid by a composition deed between them of date the 5th March, 1862, (M. Garand, N. P.) and a discharge of the same date before the same notary.

The nature of the contestation between the parties fully appears from the judgment of the Court.

LORANGER, J.—An important question arose in this case. The defendant had become insolvent, *en état déconfiture*, and had made an assignment of his effects to his creditors. A composition was then effected, by which he agreed to pay seven shillings in the pound by instalments. The plaintiff consented to accept this composition on condition that the defendant gave him a note for an extra payment of five shillings in the pound. The composition was signed, but the note was not signed till a subsequent period.

The plaintiff sued on this note, and the defendant pleaded that the agreement was null *de plein droit*, because the plaintiff had consented to the composition. The general question presented itself whether agreements of this nature made after a party had become insolvent are legal, or whether they are against public order. The question had come up in the case of Greenshields against Plamondon, 10 L. C. Repts., p. 251 and 8 L. C. Jurist, p. 192, in the Superior Court, and it was there held that a note given by an insolvent debtor to a creditor in contemplation of a deed of composition, and as a preference to such creditor, without the knowledge of the other creditors, was null and void. The reasons for the judgment in that case were that at the time of the making and delivery of the note to the plaintiff, the defendant was insolvent, and had made a composition with his creditors, which agreement of composition was shortly afterwards carried into effect, the plaintiff being a party to it, and agreeing to take ten shillings in the pound. It was held that the consideration of the note was included in the sum for which the composition was effected, and the note was fraudulently taken. The Superior Court, therefore, dismissed the plaintiff's action, holding that agreements of this nature were null and contrary to public order, and the interests of commerce. That one creditor should not be preferred over another, the property of the debtor being common to all. On the other hand it was contended that the other creditors had no right to complain; that their security was not diminished by the fact of the debtor binding himself to pay an additional sum, not from the property assigned, but from moneys which he might earn by his future labour, or acquire subsequently in other ways. As to the question of public order, it was said that here we had no bankrupt law. A debtor might make his own terms

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with his creditors, and if he promised to pay one an extra sum it was nothing to the others. The Court of Appeals had reversed the judgment of the Superior Court in the case of Greenshields and Plamondon, reasoning in an entirely different way from the Court below. His Honour was of opinion that these agreements should be declared null by statute, but in the absence of special legislation on the matter the Court must be governed by the decision of the Court of Appeals and judgment must go in favour of the plaintiff.

Judgment for plaintiff.

Loranger & Loranger, for plaintiff.
Denis & Trudel, for defendant.
(F.W.T.)

MONTREAL, 23rd MAY, 1864.

Coram MONK, J.

Chapman vs. *Gordon*.

HELD:— That in an action upon a foreign judgment "assessing the damages of the plaintiff on occasion of the not performing of the promises within mentioned over and above his costs and "charges by him about his suit in this behalf expended to £26 7s 2d. damages;" proof *aliunde* of such promises is required, * and interest will be given from the date of such judgment.

By his declaration, the plaintiff alleged that by a certain judgment rendered in the County Court, in and for the County of Elgin, in that part of this Province, heretofore called Upper Canada, on the 16th March, 1848, the plaintiff obtained a judgment against the defendant for £37 13s. 7d. with interest thereon, from the said date, as the whole more fully appeared by an exemplification of said judgment. The defendant made default. By said judgment "it is considered that the said plaintiff do recover against the said defendant, his damages, costs, and charges by the Jurors aforesaid, in form aforesaid, and also "£11.6.5, for his said costs;" but no interest whatever is mentioned. On the 30th April, 1864, the cause which had been inscribed for judgment was discharged from the *délibéré* to afford the plaintiff an opportunity of proving the cause of action founded on this foreign judgment.

On the 11th May, 1864, the defendant having answered affirmatively to several interrogatories upon *faits et articles*, the judgment of the Court was rendered as follows:—

The Court having heard the plaintiff by his counsel, the defendant having made default, examined the proceedings and proof of record and having deliberated thereon. It is considered and adjudged that the plaintiff do recover from the defendant the sum of £37 13.7, current money of the Province of Canada, to wit the sum of £26 7.2, amount of the judgment obtained in the County Court, in and for the County of Elgin, in that part of this Province heretofore called Upper Canada, on the 16th day of March, 1858, by the plaintiff against the said defendant and one Thomas Gordon, and £11.6.5. costs taxed upon the said judgment with interest upon the sum of £37.17.7, from the 16th March, 1858, until actual payment and costs of suit.

Abbott & Dorman, attorneys for plaintiff.
(P. B. L.)

* Vide East vs. Sutherland, 30th June, 1864, Loranger J., a non-appealable case, wherein proof of the identity of the defendant was ordered.

COUR SUPERIEURE.

MONTREAL 30 MARS 1864.

Coram LORANGER, J.

No. 2143.

Dufresne vs. *Lamontagne.*

IMPUTATION—BAIL EMPHYTEOTIQUE—RESCISION—MISE EN DEMEURE—SURSIS.

JUGE:—1o. Que l'imputation faite dans une action non-contestée et sur laquelle est intervenu un jugement *ex parte* doit être maintenu à l'encontre du débiteur qui aurait dû la contester alors, s'il y avait lieu.

2o. Que depuis l'abolition du système fédéral le bail à cens n'étant plus reconnu; notre loi ne reconnait comme baux à long terme que le bail à rente et le bail emphitéotique et que dans l'espèce actuel le bail à long terme stipulé entre les parties est un bail emphytéotique.

3o. Que le droit de commise s'exerce à l'égard de ce bail sans aucune stipulation par le défaut de paiement de la reute ou cánon emphytéotique pendant trois années et sans aucune mise en demeure de payer.

4o. Que le juge a le pouvoir d'accorder un sursis a l'exception du jugement prononçant la résolution de ce bail avec faculté au preneur de payer pendant ce délai et de garder possession de l'héritage.

Le 9 avril 1855, par acte appelé Bail, fait à Montréal, Maître Weekes, N. P., le demandeur loua au défendeur, un terrain vacant, situé à Montréal, pour quinze années moyennant £10 par an pour les dix premières années et £15 pour les cinq dernières années, payables les 1er novembre et 1er mai de chaque année en sus des taxes et cotisations.

Le défendeur s'obligea de construire sur ce terrain, des bâtisses de la valeur de £500 à £600, qui, à l'expiration du bail, appartiendrait au demandeur à sa faculté, en payant £200 au défendeur, sinon, les bâtisses et le terrain deviendraient la propriété du défendeur, moyennant le payment de £600 au demandeur.

Le 6 avril le demandeur paya au défendeur, suivant qu'il appert par l'acte reçu ce jour là devant le même notaire, la motié de la somme de £200 et lui paya la balance le 14 mai de la même année, et ce, dans le but, y est-il dit, de favoriser le défendeur.

Le demandeur par son action reclamait la somme de £45 pour quatre années et demi du loyer de ce terrain et £13 6s. pour les cotisations, et concluait à la résiliation du bail.

Le défendeur a plaidé une première exception, alléguant qu'il n'avait jamais été mis en demeure de payer les arrérages, et qu'en conséquence, le demandeur était non-redevable en sa demande pour expulsion. Par la seconde exception le défendeur allègue que par un acte reçu le 22 juin 1855, Maître Weekes, N. P., le terrain du bail a été prorogé à vingt ans et que le loyer des cinq dernières années fut élevé à £19 et qu'au lieu de construire des bâtisses de la valeur de £600, il y a construit des bâtisses de la valeur de $1100—qu'il a payé tout son loyer jusqu'au 1er mai 1863, ainsi que les cotisations.

Par sa réponse spéciale à cette seconde exception, le demandeur a prétendu que la seule somme qui lui a été payé a été celle de £92 5s. et ce à diverses

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époques et qui a été imputée sur des billets et obligations que lui devait le défendeur pour le recouvrement desquels il a obtenu un jugement *ex parte* contre le défendeur et par lequel, crédit lui a été donné de cette somme qui a été imputée sur les billets et obligations.

LORANGER, J.—Sur les faits de la cause, trois questions se présentent et elles ont été l'objet de plaidoirie des parties.

1ère *Question.*—Dans le silence des parties sur l'imputation de la somme de £92 5s. 0d. payée au demandeur, cette somme a-t-elle imputé sur les loyers ou sur l'obligation et les billets?

2ème *Question.*—Si le paiement de cette somme ne doit pas être imputé sur le loyer, quelle est la nature du bail du 9 avril 1855? Est-ce un bail ordinaire soumis aux règles tracées par le Statut des locateurs ou locataires? Ou bien, est-ce un bail emphitéotique?

3ème *Question.*—Dans ce dernier cas, le défaut de paiement du loyer pendant quatre années et demie, emportera-t-il la rescission du bail et à quelles conditions?

Après avoir exposé les états de compte fournis par les parties, Son Honneur continue ainsi:

Sur la première question, deux règles de droits relatives aux imputations paraissent se trouver en conflit par rapport à la présente espèce.

La première est: que quand l'imputation n'a été faite ni par le débiteur ni par le créancier, elle doit se faire sur celle des dettes que le débiteur avait le plus d'intérêt à acquitter.

La seconde est: qu'entre les dettes civiles, l'imputation doit se faire plutôt sur celles qui produisent des intérêts que sur celles qui n'en produisent pas?

J'adopterais ce genre d'imputation et débouterais le demandeur de sa demande si ce n'était l'action intentée par lui contre le défendeur le 12 octobre 1863 sur la balance des billets et obligations, et le jugement, rendu sur cette demande. Par le libellé de la demande et l'état qui y est annexé, le demandeur a fait l'imputation de la somme de £92 5s. sur les billets et obligations, le défendeur a accepté cette imputation en ne plaidant pas à la demande et la cour l'a sanctionnée par son jugement en condamnant le défendeur à payer le montant de ces billets et obligations; moins la somme de £92 5s. payée. Le jugement dit en termes exprès que le défendeur est condamné à payer au demandeur la somme de £327 13s. 7d., balance de £420 4s. 5d., faisant la différence entre les deux sommes.

Dans l'espèce à résoudre, les obligations et le billet produisaient des intérêts, le bail n'en produisait pas. Cependant le débiteur avait plus d'intérêt à acquitter le loyer dont le défaut de paiement pouvait emporter la rescision du bail, et la perte de ses améliorations que l'obligation dont on ne fait pas voir qu'elle emportait hypothèque; vû qu'elle n'a pas été produite.

Sur ce conflit, il me parait, que l'on doit suivre l'opinion de M. Pothier, qui, traitant de l'imputation des paiements au numéro 577 de son traité des obligations, dit au corollaire 6: "Tous ces corollaires peuvent recevoir par les circonstances, des exceptions qui sont laissées à l'arbitrage du juge."

D'après les circonstances du littige, il faut que le juge arbitre l'imputations.

Le demandeur ne reclame le loyer qu'à compter du 1er mars 1849, reconnaissant les avoir reçus jusque là.

Le créancier a donc fait lui-même l'imputation et le débiteur ne s'y est pas opposé. Suivant les principes reçus en cette matière quand le débiteur qui paie n'impute pas lui-même son paiement, le créancier peut le faire, et le débiteur qui accepte la quittance faisant l'imputation sur une dette quelconque quand plusieurs dettes sont dûes, est censé avoir accepté cette imputation quelque soit d'ailleurs la différence dans la nature des diverses créances. Ici par son action, le créancier a fait l'imputation, le débiteur l'a accepté en ne la contestant point à une époque où la présente action était pendante et le tribunal a sanctionné cette convention implicitement faite entre eux. En outre, par ce paiement, le défendeur a eu crédit de la somme payée, et si je faisais l'imputation qu'il réclame, je lui accorderais pour cette somme un crédit qu'il a déjà obtenu de la cour. Cette considération serait seule suffisante pour me faire décider contre lui la question d'imputation ; et appuyée de l'autre elle ne laisse dans mon esprit aucun doute que le loyer réclamé par le demandeur lui est dû, c'est-à-dire, pour une période excédant trois années.

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La seconde question. Le bail du 9 juin 1845, a-t-il été un bail à loyer ou à ferme ordinaire ; sinon est-ce un bail emphitéotique ?

Un bail à loyer suivant les principes de notre jurisprudence ne transfère aucun droit réel.

Pothier, Louage, numéro 285.

" Le droit du conducteur suivant la définition que nous en avons donné, n'est " qu'un droit de créance personnelle qu'a le conducteur contre la personne du " locateur ; c'est seulement *jus ad rem.* C'est pourquoi la tradition qui est faite " de l'héritage du locataire ou fermier non seulement ne lui en transfère pas la " propriété (*non solet locatis dominium mutare*) mais elle ne lui transfère aucun " droit dans la chose, pas même la possession de la chose ; elle continue d'appar- " tenir au locateur."

Numéro 288. " Des principes que nous venons d'établir résulte une diffé- " rence très-grande entre le droit d'un locataire ou fermier et celui d'un usufrui- " tier, d'un emphitéote, etc. Le droit de ceux-ci est un droit dans la chose " qu'ils conservent, en quelques mains que passe la chose."

" Au contraire le locateur ou fermier n'ayant aucun droit dans l'héritage qui " lui a été livré si le locateur a vendu ou légué cet héritage à quelqu'un sans la " charge de l'entretien du bail qu'il en a fait, cet acheteur, ce légataire ne serait " pas obligé de l'entretenir à moins qu'ils ne l'aient approuvé, du moins tacite- " ment." Un bail fait pour plus de neuf ans n'est pas un bail à loyer, mais un bail à long terme qui conférait un droit immobilier.

Pothier, Louage, numeros 4 et 5.

Troplong, louage, sur l'article 1799 du Code Civil, numéro 4, page 74.

De ce qui précède, il est évident que le bail en question fait originairement pour quinze ans et prorogé jusqu'au terme de vingt années, n'a pas été un simple bail à loyer.

Il a été un bail à long terme. Mais dans quelle classe de baux à long terme ou à longues années doit-il être placé ?

Notre loi ayant aboli le système féodal et par conséquence le bail a cens ne reconnait aujourd'hui comme baux à long terme que le bail à rente et le bail emphitéotique.

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Sans entrer dans l'énumération des faits sur lesquels ces deux baux se ressemblent ou diffèrent l'un de l'autre, qu'il suffise de dire : que le caractère particulier du bail emphitéotique et qui le distingue du bail à rente est de la part de l'emphitéote l'obligation d'améliorer l'héritage baillé.

Le bail emphitéotique est un contrat par lequel le propriétaire le cède pour plus de neuf ans et pour pas plus de quatre-vingt-dix-neuf à la charge par le preneur d'y faire des améliorations et de payer une rente annuelle, et moyennant les autres charges qu'on peut y stipuler.

Domat, liv. 1, titre 4, sec. 10, no. 1.

6 Guyot, Rép., Emphitéote, page 296, no. 1.

7 Nouv. Den., vol. Emphitéote, page 538.

2 Argou, page 300, 1 Dict. de Droit, page 784.

Ancien Den., vol. Emphitéote, page 680.

DUNOD.—Prescription, page 338.

2 Proudhon, Domaine de propriété.

No. 709. 1 Proudhon, usufruit.

No 97, page 98. Pothie, bail à rente, nos. 1, 55, 57.

D'après cette définition appuyée des citations que je viens de faire et dont l'autorité est incontestable, il est évident que le bail en question fait pour vingt ans par le demandeur au défendeur d'un héritage que le preneur a promis d'améliorer à un montant de £400 à £600, moyennant une rente ou canon emphitéotique, variant de dix à quinze louis payable semi-annuellement, a été un véritable bail emphitéotique, auquel doivent s'appliquer les règles qui gouvernent ce contrat et sujet à résolution pour les causes prononcées par la loi.

Nouchons maintenant à la troisième question dont la solution nous sera comparativement facile,

Pendant quatre années et demie, le défendeur a négligé de payer sa rente ou canon emphitéotique. Or, rien de plus élémentaire en droit que le principe que le défaut de paiement de la rente ou canon emphitéotique pendant trois années emporte la résolution du bail, que le bailleur rentre dans la propriété de l'héritage et des bâtisses construites par le preneur conformément à sa stipulation et que ce droit de commise est de la nature du contrat, c'est-à-dire qu'il s'exerce sans stipulation à cet égard. Les auteurs cités par rapport à la définition de l'emphitéote ne laisseraient aucun doute à cet égard, si une maxime aussi constaté avait besoin de preuves. Dans leur projet de codification, les commissaires on ont fait l'objet d'un article spéciale. Voyez livre 2ème, titre 5 de l'emphitéose, sect. 1ère, art. 8.

Le bail doit donc être résolu et le défendeur déclaré déchu de l'immeuble en question et de ses améliorations.

Vainement on objectera que dans la présente espèce, le bailleur devant à l'expiration du bail payer £200 pour les améliorations, à son refus de le faire, le preneur pouvait garder l'héritage et les bâtisses qu'il y construirait, moyennant le paiement de la somme de £600, et que l'acte en question a renfermé une promesse éventuelle de vente. Qu'importe cette circonstance ? Comme la plupart des contrats commutatifs, le bail emphithéotique est susceptible de toutes les stipulations qui ne répugnet pas à la nature, et ces stipulations quelques inusitées

qu'elles soient ne peuvent avoir l'effet de le soustraire à l'opération des règles qui lui sont propres. D'ailleurs, le fait que le bailleur par anticipation paya la somme de £200, stipulée au contrat originaire, n'impose-t-il pas un prompt silence à cette objection? La résolution doit donc être prononcée malgré que le bailleur n'ait pas mis le preneur en demeure de payer? Cette demeure n'étant pas nécessaire nonobstant ce qu'en dit le défendeur.

Dans aucun des auteurs qui ont traité de l'emphytéose, il n'est fait mention de la nécessité de cette mise en demeure. Je trouve même le contraire enseigné par les éditeurs du nouveau Denisart vo.—Emphitéote, vol. 7, page 542, sec. 3ème., verset 2. "Un des premiers engagements qui résultent de l'emphytéose "à l'égard du preneur, est celui de payer le canon ou la rente emphitéotique. "Si l'emphitéote laisse écouler trois années sans acquitter la redevance, il peut "être expulsé par le bailleur qui n'est pas même obligé de lui faire une som- "mation de payer."

La seule question qui reste, est de savoir, à quelles conditions la résolution doit être prononcé? Doit-elle l'être purement et simplement ou doit-on accorder un délai pour purger sa demeure.

Il n'est pas douteux que le juge ait ce pouvoir d'accorder un sursis à l'exécution du jugement prononçant la résolution avec faculté au preneur de payer pendant ce délai et de garder possession de l'héritage.

Domat, lois civiles, partie 2, livre 2, titre 4, sec. 10, no. 11, observe qu'il est de la prudence du juge selon la qualité des améliorations et des autres circonstances, d'accorder à l'emphitéote un délai raisonnable pour le mettre en état ou de payer et conserver le fonds, ou de pouvoir le vendre.

Pothier, bail à rente, no. 40, s'exprime ainsi:

"A l'égard de l'autre objet de l'action qui est de rentrer dans l'héritage à "défaut de paiement de la rente, le bailleur n'y est reçu lorsqu'il lui est dû "plusieurs termes; même en ce cas le juge avant de statuer définitivement a "coutume d'ordonner que le preneur sera tenu de payer dans un certain temps "fixé par la sentence, faute de quoi il sera permis au bailleur de rentrer. Il y "a plus; même après que le bailleur a obtenu la sentence qui lui permet de ren- "trer et qui condamne le preneur faute de paiement, à quitter l'héritage, le pre- "neur peut encore sur l'appel, en payant tous les arrérages qu'il doit et en "offrant de payer tous les dépens, se faire renvoyer de la demande du bailleur et "domeurer dans l'héritage. Je pense même que quoiqu'il eût été condamné "par arrêt à quitter l'héritage *faute de paiement*, n'étant pas encore en ce cas "condamné purement et simplement, mais faute de paiement, avant que l'arrêt "soit exécuté, et que le bailleur soit rentré dans l'héritage, il peut encore en "payant tout ce qu'il doit, ou en consignant sur le refus du bailleur, se conser- "ver en la possession de l'héritage."

Dictionnaire de droit, vol. 1, vo. Emphitéose, page 705.

"Faute de paiement de trois années de redevance, pour des biens appartenant "à des particuliers, ou faute de paiement de deux années, pour ceux qui appar- "tiennent à l'église, le preneur peut être expulsé; mais il faut que le bailleur "le fasse ordonner par justice, partie appelée, à laquelle le juge doit donner la "liberté de purger sa demeure; sinon déguerpir." Cette doctrine équitable

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n'a rien d'exhorbitant en droit. Elle est empruntée à la théorie des conditions qui ne s'exécutent rarement à la rigueur, sans accorder au débiteur un délai pour remplir son engagement.

Le code Napoléon en contient un article particulier. L'art. 1184 porte:

"La condition résolutoire est toujours sous-entendue dans les contrats synallagmatiques, pour le cas où l'une des deux parties ne satisfait pas à son engagement. Dans ce cas le contrat n'est point résolu de plein droit. La partie envers laquelle l'engagement n'a point été exécuté a le choix ou de forcer l'autre à l'exécution de la convention lorsqu'elle est possible, ou d'en demander la résolution avec dommages et intérêts. La résolution doit être demandée en justice et il peut être accordé au défendeur un délai sous les circonstances."

En vertu du pouvoir discrétionnaire que la loi m'accorde, et sous les circonstances de cette cause, j'accorde deux mois de délai au défendeur, pendant lesquels, en payant le capital, intérêts et dépens, il pourra conserver la possession de l'héritage sinon déguerpir.

Le jugement est motivé comme suit:

La Cour après avoir entendu les parties par leurs avocats sur le mérite de cette cause, et sur la motion du demandeur du 26 décembre dernier, que l'objection du demandeur à la preuve testimoniale faite par le défendeur, soit maintenue par cette Cour, pour les raisons mentionnées à la dite objection, avoir examiné la procédure, pièces produites, et preuve, et avoir sur le tout délibéré, a rejeté et rejette la dite motion et adjugeant au fonds;

Considérant, que le bail fait par le demandeur au défendeur, le 9 avril 1855, devant Maître Weekes, notaire, pour quinze années et ensuite prorogé à vingt ans, par acte reçu devant le même notaire, le 22 juin de la même année, d'un terrain y mentionné, moyennant une rente annuelle de £10 et £15 courant à la charge d'y construire des bâtisses au montant de cinq à six cents louis, avec option au demandeur, de reprendre ce terrain avec les bâtisses, en payant au défendeur deux cents louis courant, option qu'il a depuis faite, en payant par anticipation cette indemnité au défendeur qui l'a acceptée, a été un véritable bail emphitéotique, soumis aux règles qui régissent ce contrat, et sujet à récision dans les cas pourvus par la loi, nommément pour défaut de paiement pendant trois ans de la rente ou canon emphitéotique.

Considérant, que, le défendeur, a échoué dans la preuve qu'il a tenté de faire, que la somme de £92 5s. 0d., mentionnée en son exception péremptoire, a été payée au demandeur en accompte de cette rente ou canon emphitéotique sur les quatres années et demie de cette rente, échus lors de l'institution de l'action que le demandeur réclame; qu'au contraire il appert que cette somme a été imputée sur les billets et obligations, pour le recouvrement desquels le demandeur a obtenu jugement *ex parte* contre le défendeur, imputation qui ayant reçu la sanction du tribunal, est revêtu de l'autorité de la chose jugée.

Considérant, que lors de l'assignation du défendeur il devait au demandeur, la somme de £[illegible] pour quatre années et demie de la dite rente ou canon emphitéotique, et [illegible] municipales dues sur l'immeuble baillé, redevances que le défendeur s'était engagé de payer et qu'à son défaut le demandeur a payées pour lui à la municipalité, et que partant il y a lieu de prononcer la

résolution du dit bail emphitéotique du 9 avril 1855, ainsi que de l'acte du 22 juin de la même année (bien que le demandeur n'ait pas mis le défendeur en demeure de payer, laquelle demeure est encourrue de plein droit), en accordant cependant au défendeur un délai raisonnable, pendant lequel en payant le montant de la condamnation qui va être prononcée contre lui en principal intérêt et dépens, il pourra purger la demeure.

A débouté et débouté les défenses du défendeur; et faisant droit sur la demande, condamne le défendeur à payer au demandeur la dite somme de £56 8s. 0d. du cours actuel de cette province du Canada, avec intérêt sur icelle à compter de ce jour, les dépens distraits à messieurs Moreau, Ouimet et Chapleau, avocats du demandeur, avec un délai de deux mois, pendant lesquels en payant la dite somme de £56 8s. 0d. avec intérêt et les dépens à être mis en taxe, il conservera la possession de l'héritage à lui baillé et des bâtisses dessus érigées, sinon, et ce délai expiré, faute de paiement, declare résolus, annulés et mis au néant le dit bail du 9 avril 1855, ainsi que l'acte du 22 juin de la même année, casse, annulle et met au néant les dits actes, et condamne le défendeur à déguerpir et abandonner la possession et jouissance du dit héritage et des dites bâtisses au demandeur comme en étant le propriétaire incommutable sans autre délai ou demeure que la signification de la présent sentence; et à défaut par lui de ce faire, sera le demandeur mis en possession du dit héritage et des dites bâtisses et le défendeur expulsé sous l'autorité de la présente sentence en la forme et suivant la procédure usités devant cette cour.

Jugement pour le demandeur.

Moreau, Ouimet et Chapleau, avocats du demandeur.
Doutre et Daoust, avocats du défendeur.
(P.R.L.)

MONTREAL, 12TH JANUARY, 21ST MARCH & 14TH OCTOBER, 1863.

Coram MONK, J., *before a jury and in banco.*

AND

THE 30TH NOVEMBER, 1863.

Coram BERTHELOT, J., *in banco.*

No. 1303.

Hartigan vs. *The International Life Assurance Society.*

LIFE INSURANCE—FALSE STATEMENTS.

HELD 1mo. That where an applicant for Life Insurance in answer to printed questions misstates his age; or declares that his health is good, whereas it is bad; or fails to disclose the name of medical attendants, though he had them, and answers as if he had none, and upon such answers, which are made to form a part of the contract, a policy is issued by the insurer, such policy is void.

2do. Generally that false statements made by the applicant for Insurance absolutely void the policy.

3to. That parol testimony of age will not be admitted until the non-existence of baptismal registers has been proved.

This was an action brought by the plaintiff, as widow of the late *Roger Finn*, and as *commune en biens* with him, claiming from the defendants $1300 as for damages suffered by the non-payment by the defendants to the plaintiff of one half of a policy of insurance on Finn's life for $2600 currency.

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This policy was issued by the Society on a proposal and declaration made by Finn on the 15th June, 1858, containing *inter alia*, the following particulars.

In answer to the question (4) as to his age next birth day, Finn said "30 years."

The question (6), "Is he temperate in eating and drinking," was answered "temperate."

The question (11), "Has he had asthma, shortness of breath, spitting of blood, "continued cough or any sign of consumption," and the question (12), "Has he had gout, aguish complaint, scrofula, skin disease, rupture, or any other disease?" and the question (13), "Have his parents, or any of his near relatives, had consumption, or any of the preceding diseases? or has the person's life been in danger from any disease?" were severally answered "No."

The question (18), "Name and residence of the usual medical attendant, to "be referred to for similar information, and how long has he known the person; "if no medical attendant, name the residence of a second intimate friend?" was answered, "J. F. Bradshaw, Esq., Quebec, has known him 10 years."

Under the questions, 24 in all, and answers to them, was subscribed by Finn the following declaration: "I do hereby declare that the age of Roger Finn, the above named, does not now exceed thirty years; that I am now in good health, and do ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health, or habits of life of myself with which the Directors of the International Life Assurance Society ought to be made acquainted. And I do hereby agree that this declaration and the above proposal shall be the basis of the contract between me and the said Society; and that if any untrue allegation be contained herein, or be made with respect to this proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said Society, and the policy void."

The policy bore date the 22nd June, 1858, and made the above proposal and declaration, the basis of the contract between Finn and the Society, in the following words: After reciting that the said Roger Finn had proposed to effect assurance, and had delivered the said declaration to the said Society, "thereby "agreeing that the said declaration, together with the proposal therein referred "to, should be the basis of the contract between himself and the said Society."

The policy further contained the following proviso, "provided always that in "case any fraudulent or untrue allegation be contained in the said recited decla- "ration, or in the proposal therein referred to, or in any of the testimonials or "documents addressed to or deposited with the said Society in relation to the "said assurance, then this policy shall be void, and all moneys paid thereunder "shall be forfeited to the said Society."

One of the conditions endorsed on the said policy was as follows: "The "Society will in all cases require proof of the age of the person whose life is "assured before payment of the policy, unless that fact shall have been previously "ascertained and admitted by endorsement on the same."

The annual premium of $53.50 was payable half yearly. The first instalment of $26.75 was paid at the time of the execution of the policy, and a second

instalment of $26.75 on the 22nd January, 1859. Roger Finn died on the 9th March, 1859.

The declaration of the plaintiff in the suit set up the quality of the plaintiff, the policy, the payments of premium, the death, and expressly averred, "That "the said declaration, so as aforesaid made by the said Roger Finn, and referred "to in the said policy, was in all respects true, to wit, at Montreal aforesaid, on "the 22nd day of June, 1858."

The defendants met the action by the following pleas:

1. That the condition of the policy requiring proof of age before payment, if the age had not been previously ascertained and endorsed on the policy, had not been complied with before action brought, and that the age had not been proved or admitted, and therefore the plaintiff's action could not lie.

2. That Finn, when he agreed with the Company for the policy, warranted that his age did not then exceed thirty years, whereas in fact it was thirty-three and upwards.

3. That the following question was put to Finn on his proposal for insurance: (11) "Has he (meaning the said Roger Finn) had asthma, shortness of breath, "spitting of blood, continued cough, or any sign of consumption?" and said question was answered by Finn in the negative, which answer was untrue, and Finn then knowingly disguised and concealed his true state of health.

4. That Finn gave the same negative answer to questions 12 and 13 as follows: "Has he (meaning Roger Finn) had gout, aguish complaint, scrofula, "skin disease, rupture, or any other disease? Have his parents, or any of his "near relatives had consumption, or any of the preceding diseases? or had the "person's life been in danger from any disease?" to both of which the answers were untrue.

5. That in reply to question (18), Finn concealed the fact that he had been attended by a medical attendant, and that his declaration was false and untrue in the foregoing and other particulars, and the policy thereby void.

The defendants lastly pleaded the general issue.

The following questions were put to the jury, who tried the case on the 12th January, 1863, and their answers are appended:

1. Was the said Roger Finn duly and legally married to the said plaintiff on or about the tenth day of July, 1854, and was there a community of property existing between the said Roger Finn and the plaintiff, and after the death of the said Roger Finn did the said plaintiff accept the same? Answer —Yes.

2. Did the defendants, by their duly authorized attorneys, on or about the twenty-second day of June, 1858, execute and deliver to the late Roger Finn the Policy of Insurance in the plaintiff's declaration mentioned, whereby the life of the said Roger Finn was declared to be insured for $2500 currency, during the whole continuance thereof, and did the said late Roger Finn, prior to the effecting of the said Insurance by the defendants, make, sign and deliver to the defendants the proposal for assurance and declaration mentioned and referred to in the said policy, being defendant's exhibit number one in this cause filed, as also the written answers to the printed questions contained in the said proposal, and did the said late Roger Finn on or about the twenty-second day of December,

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1858, pay to the defendants the premium of $26.75, the half-yearly premium as due under the said policy? Answer—Yes.

3. Did the said Roger Finn when making the said proposal and declaration, on or about the 15th of June, 1858, at the city of Quebec, represent to the said defendants that his age did not exceed thirty years, and if so, would the age of the said Roger Finn on his first birth-day after the said 15th day of June, 1858, have been thirty years? If not, what would it have been? Answer—No intention of fraud, there being no proof of age.

4. Was proof of the age of the said Roger Finn at any time before the institution of the present action ever made to the defendants by the plaintiff in conformity with the conditions of the said policy, or was his age ascertained or admitted by endorsement on the said Policy by the defendants? Answer—No.

5. At the time of making the said proposal and declaration, to wit, on or about the 15th of June, 1858, or at any time previous thereto, had the said Roger Finn had disease of the lungs and attacks of illness occasioned thereby, or any sign of consumption, or had the life of the said Roger Finn been in danger from any disease prior to his making the said proposal, answers and declaration, and of what disease did the said Roger Finn die and when did he die? Answer—We can only be guided by the evidence of the medical officer of the Company, who gave him a certificate of good health.

6. Did the said Roger Finn at the time of making the said proposal withhold the name of his usual medical attendant or attendants, and had the said Roger Finn on or about the said 22nd of June, 1858, or at any time previously thereto, at Quebec aforesaid, had the services of a medical attendant or attendants who acted for him as such? Answer—Dr. Russell says in his evidence that he was his family physician, but we have no evidence of his being under medical treatment when he applied for the policy, or previously.

7. After the death of the said Roger Finn, was satisfactory proof produced to the defendants by the plaintiff of the death of the said Roger Finn? Answer—Yes.

The defendants complained of the finding of the jury as being wholly unsupported by, and contrary to the evidence adduced in the case, and made three several motions before the Court *in banco*.

1. A motion in the alternative form for judgment dismissing the action, inasmuch as the verdict was contrary to evidence and, in the event of the defendant not being entitled to have the action dismissed, that a new trial be granted. Higginson vs. Lyman, 4 L. C. Jurist, 329.

2. A motion that the verdict saving the answer to the third question be set aside, and that judgment be entered up in favor of the defendant, and plaintiff's action dismissed. Grant vs. Ætna, 5 L. C. Jur. 285. Tilstone vs. Gibb, 4 L. C. Jur. 361. Grant vs. Ætna 6 L. C. Jur. 224. Racine vs. Equitable, 6 L. C. Jur. 89.

3. A motion for a new trial because the verdict was without evidence and against evidence, and because the charge of the honorable judge presiding at the jury trial was wrong in referring to the private certificate of Dr. Fremont, the medical referee of the defendant, as evidence to be weighed against the sworn testimony of other witnesses.

The Court (S. C. Monk, A. J.) by judgment of date, 31st March, 1863, ordered a new trial, which accordingly took place on the 14th October, 1863.

Mr. Kerr opened the case for the plaintiff. He stated that the action was brought upon a policy of insurance, by the widow of the party insured. The insurance was effected by the late Roger Finn, master shoemaker, of Quebec, on the 23nd June, 1858, for the sum of $2,500. Finn paid the premium of $26,75; also a second premium on the 22nd December, 1858; but before the third became due he died, in March, 1859. According to the laws of Lower Canada, a community having existed between Finn and his wife, the present plaintiff, she was entitled to one-half this amount, the other half belonging to the children and the heirs. The plaintiff having failed to obtain the money from the Company, after waiting over two years, at length instituted the present action.

The defendants pleaded that the deceased had made an erroneous statement as to his age; that he had concealed the fact of his being attended by a medical man; and, further, that at the time of effecting the insurance he was in a bad state of health, which circumstance he did not disclose to the officers of the Company. The case had already been brought before a jury, and they had found in favor of the plaintiff. A motion had then been made by the defendants for a new trial, and this application had been granted by Mr. Assistant Justice Monk. Mr. Kerr, however, believed that he should be able to satisfy the jury that the plaintiff had been wrongly kept out of the amount of the insurance.

The Clerk of the Court then read to the jury the policy, the conditions of insurance, and the admissions made by the parties as to time, amount and execution of the policy, payment of premiums, &c. The signature of Dr. Fremont, the medical referee (since dead) to the certificate was also admitted to be genuine. An extract of the burial of deceased on the 11th March, 1859, was also read to the jury. (Previous to the former trial most of the witnesses had been examined by a commission at Quebec. On the present occasion, with the exception of Dr. Russell, they were brought up to give their testimony orally before the jury, as suggested by the Judge at the time of granting the new trial.)

Mr. Kerr proceeded to call the witnesses on the part of the plaintiff.

Jane Keane—Mrs. Clancy—deposed:—I knew the late Roger Finn, of Quebec, from the time of his boyhood.

Witness being asked if she knew his age,—

Mr. Torrance, for the defendants, objected to the adduction of parol testimony as to the date of deceased's birth, until the absence of the baptismal certificate should have been proved. It was well established that secondary evidence should not be received till it was shown that primary evidence was wanting.

Mr. Kerr differed entirely, contending that it was a generally recognized principle that verbal evidence should be received to establish the date of birth.

Mr. Torrance cited the ordinance of 1667 tit. 20, art. 14, and also the Consolidated Statutes, Lower Canada, cap. 20, s. 13, to show that it must first be proved that the registers of birth, &c., do not exist.

Mr. Kerr referred to Taylor on evidence, §§ 386, 578, to show the admissibility of parol evidence.

The Court held that it must first be shown that the register of the birth did not exist.

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Witness resumed that she knew deceased at Carrick on Shannon, in Ireland, when he was only four or five years old. She believed there was no register of births kept. Knew him until 1841, when he left Ireland. He was then only twelve or fourteen years of age. She did not recollect the year in which he was born. Knew him at Quebec up to the time of his death. Witness came out to this country in 1854, and was in the habit of seeing Finn constantly. Never heard him complain of bad health till three or four months before his death. Witness referred to his likeness, but could not say how long before his death it was taken.

Cross-examined—To the best of my belief there was no register kept in the church in Ireland where deceased lived. My ground for supposing this is my knowledge that the priest was applied to for affidavits in several cases. Never met a doctor in Mr. Finn's house; never inquired, and never heard that he had a doctor. Am almost confident that the priest in Carrick, where deceased was born, never kept a parish register. Am now forty-two or forty-three. Was born at Carrick on Shannon. Was acquainted with the mother of Roger Finn, and was in the habit of seeing the children every day. Do not think I could be mistaken as to the fact that deceased was only twelve or fourteen years old in 1841 when he left Ireland. He was a stout healthy boy of his age.

James H. Oakes.—Knew Roger Finn, was baptized in Carrick, in the Episcopal Church. Remembers Roger Finn when a boy in Carrick on Shannon. Knew him two years previous to 1841. To the best of my belief he then appeared to be between twelve or fourteen. I have no knowledge as to the existence of a register in the Parish Church at Carrick on Shannon. I believe there was none.

Cross-examined—Cannot say how old Mr. Finn was when I first saw him. Shortly before his death he was suffering from what I thought was a bad sore throat. He had a cough. In 1858 he once or twice complained to me that he was not well. He did not mention to me the name of any medical attendant. On one occasion he called at my house, and there was a person with him called Dr. Tumblety. I think he mentioned that he had met Dr. Tumblety in Montreal by accident, and the doctor had informed him that his lungs were affected. To the best of my belief this was in 1858, in the early part of summer. Finn never mentioned any particular ailment to me; I understood him to complain of his health generally. I think he told me that his widow would be in the receipt of $12 per month in the event of anything happening to him. I understood him to refer to an insurance recently effected, and felt surprised because I thought the state of his health at this time was such as to prevent an Insurance Company from accepting him. This was shortly before his death in the winter of 1858-9. He died in March, 1859.

To the Court—My sole guide in judging of his age was his appearance, his voice, and his manner.

Francis B. McNamee.—Knew the plaintiff from about the year 1850 up to the time of his death. Saw that his health was delicate for some time before his death. Witness was born in Carrick in Ireland. There was no such thing then kept as a register of births. Witness was sure of this.

Edward Hartigan.—Am father of the plaintiff, the widow of Roger Finn. I stated the age of Roger Finn at the time of his funeral to the priest. I could not ascertain his exact age, and mentioned thirty-three to the priest as an approximation. Until on one occasion deceased fell into the river while travelling between Montreal and Quebec, I believe he was a sound man. He met with this accident about four months before his death. The likeness produced in Court was taken about two months before his death.

Cross-examined.—Made the acquaintance of deceased three or four years previous to his death. This was the case for the plaintiff.

Mr. Torrance proceeded to address the jury on the part of the defendants. After stating the manner in which the action had arisen, he commented upon the importance of Insurance Associations to society, and the necessity which existed that both parties to the contract should preserve good faith. The aggregate amount of life assurances was exceedingly large, but disputed claims had seldom come before the Courts, because the Insurance Companies had seldom had anything to complain of. But he believed he should be able to make it quite apparent to the jury that this was a claim which the Company were quite right in resisting. They were, in fact, bound to do so, for the protection of others who had insured with them. The law required the insured to state all the circumstances relating to his health in the most open and candid manner, and the slightest deceit on his part made the policy void. The reason of this was evident. Insurance Companies could not be supposed to know the ailments and infirmities of those who applied to them for insurance. It was necessary, therefore, to afford them the information which would enable them to make a fair bargain. The insured was also required to give the name of his usual medical attendant, and in default of a medical attendant, of his most intimate friend. This practice was also founded upon the same common sense view that they must be put in possession of all the information necessary to enable them to enter into the contract without being at a disadvantage. In the present case, Roger Finn had been in a very delicate state of health for several years before his death. He (Mr. Torrance) would produce two of the most eminent and skilful physicians of Quebec to testify to Finn's condition. One of these, Dr. Russell, had been Finn's medical attendant for ten years before his death. The other, Dr. Marsden, was President of the College of Physicians and Surgeons at Quebec, and was a gentleman of the highest standing in his profession. Finn came to Dr. Marsden, and stated that if he would give him a certificate, he could get his life insured. Dr. Marsden, at his request, made a careful examination, and found that his lungs were so far affected that he could not give him a certificate. This was in October, 1857. Dr. Marsden stated, however, that as he was not the medical referee of the International, and as he did not wish to injure him, he would do nothing more, but allow him to try elsewhere, though at the same time he informed him that any medical man who made an examination of his chest, and knew what he was about, would not pass him. In March, 1858, Finn came back to Dr. Marsden, and desired him to make another examination, but this showed that the disease, tubercular consumption, was making steady progress, and that it was only a question of time how long he should live. Dr.

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Russell, who had been Finn's medical attendant for ten years, had also made an examination, and with the same result. Nevertheless, with this knowledge, Finn had subsequently gone to Dr. Fremont, the medical referee of the International, and, as it afterwards appeared, by deception had succeeded in getting a favorable certificate without undergoing any examination. There were three points to which he (Mr. Torrance) would more particularly call the attention of the jury. 1st, Finn mis-stated his age, informing the officers of the company that he was only 29, whereas he was 32. 2nd, he concealed the fact that he had a medical attendant, and 3rd, he concealed the bad state of his health. He was asked whether he had ever been troubled with asthma, shortness of breath, spitting of blood, &c.; and he answered, No. He was asked whether he had any disease whatever; and he again answered, No. He was asked whether any of his relatives had died of consumption, &c.; and he answered, No, notwithstanding his previous avowal to Dr. Marsden, that one of his brothers had died of consumption. He was asked the name of his medical adviser. But he kept back the fact that Dr. Russell was his medical attendant, and that he had consulted Dr. Marsden, and referred to the late Mr. Bradshaw, cashier, Quebec Bank, as his second most intimate friend. Mr. Bradshaw merely stated that he had known him for ten years. In his declaration, the statements of which were the basis of the contract, he alleged that he had concealed no material circumstance. Now the mere fact of there being error in this declaration rendered the policy void. It was not necessary that fraud should be established, though he (Mr. Torrance) believed that this was a case of most disgraceful fraud. After getting his policy, Finn met Dr. Russell in the street, and said he had got his insurance. Dr. Russell, in a jocular way, mixed with some indignation, recommended him to go back and get the amount doubled for the sake of his family, as it would soon have to be paid. Some time after, Dr. Marsden again examined him at the request of Mrs. Finn, and found unmistakable signs of disease. The man declined from day to day, and died some months after the insurance had been effected. The first plea of the Company was that the man had mis-stated his age. He (Mr. Torrance) would undertake to say on behalf of his clients that though the age was an important point, yet, if deceased had stated the other points correct, the Company would not have disputed the claim on account of the error in age. Deceased stated his age next birthday to be thirty whereas it was really thirty-three. Mr. Torrance also contended that the action had been brought before the executors of deceased had informed the Company as to his age. The Company had done business in Canada for twenty years, and paid claims to the amount of £50,000, without having ever resisted a demand before. But he contended it was the duty of the Company to oppose a demand of this description. It was the duty of the jury, remembering that they were sworn to do justice between the plaintiff and defendants, and to discharge the duty they owed to society, to prevent a dishonest and fraudulent claim of this description from being successful. The Company had been exposed to the annoyance of litigation. Although they had been forced into Court in a most improper manner, yet many persons, without reflection, would consider only that they were resisting a claim, and a loss of popularity more than an equivalent for the amount in dispute would be the

result. But the Company, strongly impressed with a sense of duty, had the fortitude to resist a fraudulent demand—they had the courage to incur the odious charge which unthinking persons might cast upon them, of refusing to pay the widow's claim and the orphan's portion. But if any of the gentlemen of the jury had their lives insured they would feel the responsibility imposed on the Company; for in what position would any Company be, if it made a point of settling every demand, however iniquitous and fraudulent? What chance would it have of maintaining its solvency? And what hope could those who had been paying premiums for twenty, thirty, or forty years have that their relatives would receive the amount of insurance after their death from a Company thus prodigal in satisfying fraudulent demands?

After an appeal to the jury to put a stop to actions of this description by the verdict which they were about to render, Mr. Torrance said he would proceed to refer to one or two legal points which had presented themselves in the case.

His Honor observed that the Court had already held that it was the duty of the plaintiff to establish the age of deceased in a satisfactory manner. In fact it was one of the grounds for granting a new trial, that the age was not clearly made out. This point, therefore, need not be referred to, but his Honor desired to hear counsel on the question as to what constituted a medical attendant.

Mr. Torrance cited authorities to the effect that the phrase "usual medical attendant" meant the person who was best acquainted by experience with the health of the insured at the time the policy was effected. He also referred to Reynolds on Life Assurance as to to the question of referring to a medical attendant. If there was any misrepresentation on this point, the policy might be avoided. Parsons on Mercantile Law was cited to the same effect. A mere consultation with a medical man in fact constituted the physician a medical attendant. The object of putting the question respecting a medical attendant was to enable the Company to obtain information which would put it in a position to make a fair bargain.. Several other authorities were cited to the effect that the omission of the insured to mention the person under whose care he had last been was fatal to the validity of the policy.

The proposal of insurance was then read to the jury.

The witnesses for the defence were then called:

J. B. E. Chipman—Was agent of the International Assurance Company in 1858-9 for the British Colonies, and was notified of the death of Finn. No proof was made of the age of deceased. No baptismal certificate was produced. There is no endorsement of the age on the policy produced. The premium of insurance is of course heavier for an older person, other things being equal.

Dr. Wm. Marsden—Am President of the College of Physicians and Surgeons of Lower Canada. Have been referee to Insurance Companies, and have also examined persons who have applied to me. Am in the habit of carefully examining the whole body. Knew the deceased for eight or ten years before his death. I attended him occasionally. In 1853, I was for a short time the medical attendant of Finn and his wife, and prescribed for them. On the 3rd Oct., 1857, I again attended him. He stated that he wished to have his lungs

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examined as he had doubts of their healthy condition. He wished to have his life insured. He said he had been attended both by Dr. Russell and a certain Dr. Tumblety. He said he had been prescribed for by Tumblety and Dr. Russell. I asked him why he did not go to Dr. Russell for the certificate, and he stated that he had had some quarrel with him. I examined him with great care, using the stethoscope. After the examination I told Mr. Finn that I was sorry I could not recommend him for life assurance; that I was medical referee for several companies, but as he had not come to me from any of those companies, but simply to obtain my opinion, for which he paid a fee, he might apply to any company for which I was not referee; but I told him not to come to me, as I would have to reject him. I further told him that I believed he would be rejected by any referee who was well up in his profession and made an examination. I also questioned him as to the hereditary tendency to consumption in his family. He told me that he had one brother who had died in Ireland, and another in Montreal. He was not sure that they had both died of consumption, but one, he believed, had. The physical signs I noted in my memorandum book were, pulse 84; respiration 29 (this was high); dry cough, more troublesome in the morning difficulty of breathing after unusual exertion. Part of lung dull on percussion, &c. Seems to be in the second stage of tubercular consumption. Height 5ft. 6in. Chest nearly 32 inches. Has been attended by Dr. Russell. He had been complaining of coughing, hoarseness, irritation of the throat, indicating laryngeal disease. I do not think there was at that date any tubercular softening, inasmuch as there was little or no expectoration. There are three stages of consumption, and he was then, in Oct., 1857, in the second stage. I do not believe that he had the slightest doubt as to his condition, as I did not wish to deceive him, and told him that he would not get his life insured by any gentleman who knew what he was about. Either at this time, or on the 29th March, 1858, when he came for another examination, he appeared more sanguine, owing to his believing that something which Dr. Tumblety had given him was doing him good. My impression was that before he came to me he had been told by Dr. Russell something like what I had told him with reference to his position. He was of such a lively, active disposition, that he did not sink so soon as another of a different temperament would have done. Finn called on me again on the 29th March, 1858. I examined him again with the same care as before. The disease was progressing, and I advised him to abandon the idea of getting his life insured. The doctor here detailed the symptoms, such as increased expectoration, cough, night sweats, &c. About three months after this I heard that Mr. Finn was insured, and was perfectly astounded—I could not believe it. On inquiry I found that the report was correct. Many of the friends and acquaintances of Mr. Finn were also surprised, as it was a matter of notoriety that he was consumptive. On the 12th November, 1858, I was sent for by his wife who requested me to examine him again, which I did. There was hurried respiration, pulse more frequent, &c. He was then in fact beginning to break up, and it was only through his great energy and sanguine temperament that he lived as long as he did. I believe there was no *post mortem* examination made. A *post mortem* would have been of great value in establishing beyond cavil the cause of

death. It is my impression that he told me he had been getting medicine from Dr. Tumblety. The J. F. Bradshaw, Esq., mentioned in the proposals as the second intimate friend referred to by deceased, is dead. He was a banker, and never was a doctor.

Cross-examined—I came to know about this case as follows. I was sitting in Dr. Russell's surgery when a gentleman, a Mr. Oxley, came in, and there was some conversation on the subject of Roger Finn's death. I told the gentleman that he had been to me two or three times on the subject of insurance, and I had refused to recommend him. I was not then aware that Mr. Oxley was one of the officers of the Company; I did not divulge anything respecting deceased till the subject of insurance was started. I cannot say that the symptoms I observed were infallible—the only real infallible test of existence of disease is the examination of the body after death; nevertheless if a person in Finn's state of health had recovered, I should have considered it miraculous, and should have set myself down as extremely ignorant of my profession. I never heard of a case of recovery from the second stage of consumption, though such may have occurred. I never talked to Dr. Russell about this case, having purposely avoided the subject. Know Dr. Fremont, who was the medical referee. Dr. Fremont told me that Finn deceived him; Finn had come to him, and clapped his chest, and his lively manner imposed on Dr. Fremont, who passed him without examination. He had been to him once before; the first time he was a little feverish, and Dr. Fremont thought he had been dissipating. But the second time he came, Dr. Fremont passed him without examining his chest. Fremont introduced the subject to me himself; he was very sorry for his mistake. It was the subject of general conversation among the medical profession at Quebec. Dr. Fremont went to the office of the Company and told them they should return the money, as the insurance had not been properly effected. A person in apparent health might sink as rapidly as Finn did. The time a person takes to die of tubercular consumption is so various, that I cannot assign any particular time. A brother of Finn died afterwards much more suddenly, because he was exposed. The time depends on clime, temperament, and the care taken of the person. I can swear that Finn had the disease of which he died when I examined him five months before his death. The prescription which Dr. Tumblety gave him was good; it contained some of the ingredients generally used in such cases.

To a juryman—Deceased told me that his age was 32, in 1857.

To the Court—Deceased complained a little of his chest. The signs were most unmistakeable when I examined him. I did not attend him in his last illness, and did not see him after his death.

The evidence of Dr. Russell, taken at Quebec on the 9th January, 1863, by consent of the parties, was then read to the jury. It was to the following effect:—Knew deceased well for nine or ten years, and attended him in his last illness. He died of organic disease of the lungs. About five years before his death I told him his lungs were affected; I told him that unless he was more temperate and took great care, he would shorten his days. Two or three years before his death, he asked me to give him a certificate, that he might get his life

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insured. I refused, after making an examination, as his lungs were affected. He repeated the request several times, and at last told me one day that Dr. Fremont had passed him. I said he had better, for the sake of his family, go back and get the amount doubled, as he had not long to live. I spoke to Dr. Fremont about him, and he told me that he had been woefully deceived. (This was not permitted to go to the jury.) The evidence, which we do not give in detail, fully bore out Dr. Marsden's statement.

Mr. Kerr here requested that Dr. Fremont's certificate be read to the jury.

Mr. Torrance objected to the certificate as not legal evidence. The certificate was a falsehood, as Dr. Marsden had shown. He had a right to keep this paper from the jury. Cited Taylor on evidence, to show that the certificate was an unsworn statement of a private individual, and would therefore be rejected. Greenleaf to the same effect.

His Honor was of opinion that whether the certificate was legal evidence or not, it must go to the jury, under the direction of the Court as to its value.

The certificate was then read. It stated the chest to be well developed, sounded all over on percussion, no reason to suspect any affection of the chest, &c.; and recommended the acceptance of the proposal.

Dr. Howard—Am referee of the Scotch Life Association, and of the Mutual; have examined many applicants. Have heard or read all the statements made by Dr. Marsden. I have no doubt that the disease from which Finn at that time was suffering was pulmonary consumption. His life was not insurable at that time.

Cross-examined—There is a general unanimity among the members of the Medical profession, as to the diagnosis of consumption. I have no doubt from Dr. Marsden's reports of the gradual progress of the disease, that Finn died of consumption. The symptoms were a proof of the existence of disease, even if Finn had not died. Persons sometimes recover from organic disease.

The letter of the executors of Finn to the Company was then read to the jury.

Mr. Oxley—Has seen the certificate of Dr. Fremont. Had some conversation with Dr. Fremont on the subject of this certificate. This conversation, which was to the effect that Dr. Fremont had told witness that he had given the certificate erroneously and without examination of deceased, was objected to, and ruled out by the Court.

This was the case for the defendant. Mr. Kerr proceeded to address the jury in reply, laying considerable stress upon the certificate of Dr. Fremont, the medical officer of the defendants. He contended that juries should not sanction the practice of Insurance Companies in accepting premiums, and then disputing the claim, when the person died.

His Honor then charged the jury—1st. With reference to age, his Honor felt satisfied that the deceased made an erroneous statement of his age, perhaps not fraudulent. He stated to Dr. Fremont that he was thirty-two, instead of twenty-nine, as it was now pretended. His Honor felt bound to say this, but it was for the jury to weigh the evidence carefully. Mrs. Clancy, the first witness, merely said in her opinion he was twelve or fourteen at a particular time. Oakes

testified to the same effect. The Court felt bound to say that the plaintiff had not satisfactorily established the age of deceased, as she was bound to do. Next, as to the question of a medical attendant. It was proved that Dr. Tumblety was treating deceased, and in this treatment Dr. Marsden entirely concurred. Whether he had any disease, or not, it was evident that deceased had three medical attendants, Dr. Tumblety, Dr. Russell, and Dr. Marsden; yet he declared that he had no medical attendant. The jury must, therefore, if they believed Dr. Marsden's testimony, state that he concealed this fact. It was for them, however, to weigh the evidence carefully. But as to the third question, whether deceased had organic disease of the chest, they had the evidence of Dr. Russell and of Dr. Marsden.

But his Honor thought there was no positive evidence as to the disease of which the man died. The only legal evidence of the cause of death would be a *post mortem* examination. It might be said, therefore, that we had no legal evidence of the cause of death. He might have died of apoplexy, or disease of the heart, for all we knew. His Honor attributed some weight to the certificate of Dr. Fremont, though it was not sworn to; but it could not be taken to be of the same weight as the sworn evidence of two medical men. It appeared to the Court therefore that the balance of evidence was against the plaintiff. His Honor felt bound to express this opinion, leaving the jury to decide on the degree of credibility to be attached to the evidence. If they believed the statement of Dr, Marsden (whom His Honor entirely exonerated from the charge of making any revelations inconsistent with the character of a medical adviser), the jury must find for the defendants.

The jury retired at a quarter to six p. m. At 6.15 p. m. they came into Court with a verdict in favor of defendants on all the material points. The same questions which were put to the first jury were put to the second. The following are the findings :—

To the first question : Answer.—Yes.

To the second question : Answer.—Yes.

To the third question : Answer.—Roger Finn represented himself to be of the age of thirty years next birthday, but we find no proof of his age.

To the fourth question : Answer.—No.

To the fifth question : Answer.—Yes; and he died of consumption, in the month of March, 1859.

To the sixth question : Answer.—Yes.

To the seventh question : Answer.—Yes.

Subsequently on the 30th November, 1863 (BERTHELOT, J.), judgment was on these findings entered up in favor of the defendants.

Judgment for defendants.

AUTHORITIES CITED BY PLAINTIFF.

1. That verbal testimony is sufficient to prove age.

Taylor : Evidence § 386, p. 360 ; § 578, p. 507.

That the materiality of disclosing all information required by the Insurer from the applicant for insurance, is a question for the jury.

Morrison vs. Muspratt, 4 Bing., 60.

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AUTHORITIES CITED BY DEFENDANTS.

1. *Onus probandi.*

Should any dispute arise upon the death of the assured as to the correctness of the statements made in the declaration, the burden of proof, it is said, will fall upon the plaintiff, with whom it will rest before the insurers are required to produce any evidence to impugn such statements, to make out by evidence their truth, which is in fact the basis of the action and a condition precedent to any right to recover upon the policy.

Bunyon, * 81, p. 66. Angell on Insurance, § 309.

2. General Doctrine of Warranty.

The effect of a stipulation amounting to a warranty is to render the accuracy of the state of facts alleged in it a *condition precedent* of the insurer's responsibility, and he becomes bound only "if" and in event that they are literally as the assured has thus represented them to be.

Angell, Ins., § 307.

The same principle in life as in fire policies.

Angell, § 353, 2 Greenleaf, Ev., § 409.

3. Warranty in proposal as forming part of the policy.

The party proposing the insurance having first signed a declaration * * * agrees that such declaration shall be the *basis of the contract* between himself and the Company.

Shaw and Ellis, * 105, p. 189.

This declaration when forming part of the policy amounts to a condition or warranty which, as before observed, must be strictly true or complied with, and, upon the truth of which, whether a misstatement be intentional or not, the whole contract depends.

Shaw & Ellis, * 112, p. 205.

As to temperance, where the declaration affirmed that the assured was of intemperate habits, proof that the habits were in fact intemperate was held to avoid the policy, and the plea was bad that his habits were not so intemperate as to injure his health, and that he died from a malady uninfluenced by habits of intemperance. The statement was a warranty.

Bunyon, * 39, p. 40.

False statements absolutely void the policy.

This point was fully considered in a leading case, Anderson vs. Fitzgerald, in the House of Lords, in which the house held with the unanimous advice of the judges of England, that the only questions to be left to the jury were: 1st. Whether the statements were false, and, 2nd, whether they were made in obtaining the policy. English Law and Equity Reports, Vol. 24, p. 9.

In which case Parke, B., delivering the opinion of the judges to the house, said:

"The proviso is clearly a part of the express contract between the parties, and on the "non-compliance with the condition stated in the proviso, the policy is unquestionably "void;" and the Lord Chancellor, delivering judgment, said: "Whether or not certain "statements are or are not material where parties are entering into a contract of life "assurance, is a matter upon which there must be a divided opinion. Nothing can "therefore be more reasonable than that the parties who are entering into that contract "should say for themselves whether they think any thing material or not; and if they "choose to do so, and stipulate that unless the assured answers a certain question accu-"rately the policy or contract they are entering into shall be void, it is perfectly open "for them to do so. Now it appears to me, my Lord, that that is precisely what the "Company have done here. They have said: 'The basis of our contract shall be your "answering truly these two questions.' There were a great many others, but putting "these aside they say: 'The basis of the contract between us shall be that you shall "answer truly these two questions, and if you do not answer them truly the policy shall "be void.' But then when the trial comes on as to whether the plaintiff has made out his

"right under the policy, the question is whether the direction to the jury ought to have "been: 'You are to ascertain whether what was then stated was untrue—was false. "If it was false there is no question as to whether it was material or not, the parties "having stipulated that if it be false the policy shall be void. Therefore the question "for the jury to decide was simply whether it was false or not. In that narrow com- "pass the whole case lies." Id. 9.

In which view Lords Brougham and St. Leonard concurred.

Shaw & Ellis, 231; materiality of no consequence.

STATEMENTS AS TO AGE.

A declaration of the age and state of health made previously to the policy being issued which is always referred to in the policy, is to be taken as a part of it, and where there is no stipulation amounting to a warranty, an untrue allegation of a material fact or a concealment of a material fact will avoid the policy, though such allegation or concealment be the result of accident or negligence and not of design.

Angell, § 307.

Les fausses déclarations même sans fraude vicient l'assurance si elles influent sur l'opinion on du risque; il doit en être de même des omissions ou reticences; ainsi l'erreur sur l'âge est une cause qui annullerait l'assurance soit qu'il y eut fraude ou simplement l'erreur.

2. Alauzet, p. 491.

Bunyon, p. 14. Remarks on the importance of getting admission as to age from the frequent difficulty of proving it.

In the case of a trifling difference in the age of the party insured from that stated in the declaration, although there can be no doubt that an office might successfully resist a claim upon that ground, yet they usually content themselves with deducting such a sum of money from the sum insured for as would compensate the office for additional premiums with interest which ought to have been paid if the age had been accurately stated.

Shaw & Ellis,* 112, p. 206, *vide* also Reynolds, Insurance 93.

AS TO DISCLOSURE BY INSURED OF MATERIAL FACTS.

It is the duty of the insured to disclose all material facts within his knowledge * * * and the concealment of a material fact when a general question is put by the insurers, at the time of effecting the policy, which would elicit the fact, will vitiate the policy.

6 Cushing, 42.

Shaw & Ellis,* 119, p. 217.

Not only is he required to state all matters within his knowledge which he believes to be material to the question of the insurance, but all which are in fact so. If he conceals anything which he knows to be material, it is a fraud; but, besides that, if he conceals anything which may influence the rate of premium, which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy.

Bunyon,* 30, p. 35.

PERSONAL EXAMINATION BY MEDICAL OFFICER OF THE COMPANY NO REMOVAL OF OBLIGATION TO DISCLOSE.

The personal appearance and examination of the assured does not remove the obligation resting upon the proposer of communicating all material facts in his knowledge to the insurers.

Bunyon,* 33, p. 37.

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AS TO DISCLOSURE OF MEDICAL ATTENDANT.

All insurance offices are desirous to consult with the medical man who has been last in attendance on the assured, and when a reference was made to a person who had been the ordinary adviser, but no mention was made of the person attending at the time of the insurance, the policy was vacated.

Id. * 44, p. 43.

It is evident that if a party to be insured should state that he had no medical attendant, whereas he had been attended for a dangerous disorder shortly before the insurance was effected, such a statement falling within the provisions of the policy would avoid it; and this appears to have been held in a case of Palmer vs. Hawes. Norwich Summer Assizes. Alderson, J.

Shaw & Ellis, p. 231, * 131.

And it would appear from this and other cases that it is important the insurers should be enabled to make enquiries of the medical man who has last had the party under his care, and, therefore, if the medical man who is not the usual medical attendant has been in recent attendance, whether there is or is not a reference to the usual attendant in the declaration, an omission to communicate that fact would be fatal.

Angell, § 320.

5 Dowl. & Ryl., 266.

5 Bingh., 503.

The Insurers always ask, who is the physician of the life insured, that they may make enquiries of him if they see fit, and this question must be answered fully and accurately. It is not enough to give the name of the usual medical attendant, but *every physician really consulted should be named*, and *every one consulted as a physician* although he is an irregular practitioner or quack.

Parson's Mercantile Law, p. 558, 9.

As to meaning of phrase, MEDICAL ATTENDANT, *vide* Reynolds, 93.

As to value of PRIVATE CERTIFICATE.

1 Greenleaf, Evidence, p. 611, 12.

2 Taylor, Evidence, § 1584, p. 1420.

Kerr & Nagle, for plaintiff.

Torrance & Morris, for defendants.

(W.E.B.)

MONTREAL, 2 MARS 1864.

Coram LORANGER, J.

No. 1898.

Pepin vs. *Rocand* dit *Bastien*.

JUGE :—Qu'il n'existe aucune présomption de réconciliation de la part d'un demandeur, qui lui a enlevé son droit d'action; par suite d'une entrevue qui le défendeur aurait eue avec lui et durant laquelle les parties auraient bu ensemble; attendu que durant toute cette entrevue le demandeur aurait protesté qu'il se réservait son droit de poursuivre la réparation du délit commis envers lui.

Le demandeur ayant poursuivi pour la somme de £125, montant de certains dommages qu'il alléguait avoir soufferts, par suite des injures verbales proférées contre lui par le défendeur en octobre 1862; ce dernier plaida qu'en supposant que les allégués du demandeur fussent vrais, néanmoins, il était sans action, parcequ'avant l'institution de sa demande il y avait eu réconciliation entre eux, les parties ayant bu ensemble.

Pepin vs. Rocand dit Bastien.

La preuve ayant été faite par les parties de leurs allégués respectifs, elles furent entendues au mérite le 26 décembre 1863.

LORANGER, J.—Après avoir récapitulé la preuve du demandeur, dit: Il est en preuve que le demandeur ayant été informé que s'il faisait entrer le demandeur dans une auberge et le faisait boire, son procès serait gagné, (ainsi qu'en déposent le témoin Jean-Baptiste Dupré, et le défendeur lui-même), le premier mars 1863, le défendeur s'adresse au nommé Hilaire Hotte, le priant de lui procurer une entrevue à cet effet. Les parties se rencontrèrent chez le nommé Jean-Baptiste Chevallier, hôtelier. Le défendeur prie le demandeur ainsi que son fils de monter dans une chambre où les suivit le nommé Hotte. Là, les parties se parlèrent d'arrangement qui ne put être effectué et se traitèrent sans fiel; amicalement même si l'on en croit les témoins étranger; les fils du demandeur disent autre chose. Elles burent même un verre de bierre payé par le défendeur, et le demandeur offrit un autre verre à la compagnie, ce qui fut refusé et ils se séparèrent sans rancune apparente. Mais, pendant toute la conversation, pas un mot ne fut dit qui comportait de la part du demandeur un abandon de son action, où une remise de l'injure en autant qu'elle lui donnait un droit de poursuivre en justice; au contraire, dans tout le cours de cette entrevue il a toujours protesté qu'il n'abandonnait pas son procès et ne s'arrangerait pas, et avant même de boire, il fut d'un commun accord convenu entre le demandeur et le défendeur qu'ils plaideraient.

Interrogé, le défendeur dit: J'ai demandé au demandeur s'il voulait s'arranger il m'a dit que oui, qu'il s'arrangerait avec $50 et les frais, je n'ai pas voulu consentir à cet arrangement; j'en ai ri et j'ai dit au demandeur, "nous allons plaider, je vais te faire perdre." Le demandeur a dit: "c'est bon." De ce moment, c'était bien entendu qu'il n'y avait pas d'arrangement.

Plus tard, le défendeur s'est vanté aux témoins Dagenais et Dupré qu'il avait fait perdre le procès du demandeur en lui faisant prendre un verre de liqueur.

Quant à la justification, il est clair que le défendeur n'en a prouvé aucune.

Les injures proférées par le défendeur étant prouvées, le demandeur ayant justifié de son action; la question qui se présente, est de savoir si le fait que les parties ont bu ensemble et se sont traitées amicalement constitue réconciliation et abandon de l'action du demandeur? Or, la Cour sous les circonstances ci-dessus rapportées ne voit aucun abandon de l'action.

Le jugement de la cour est motivé comme suit:

La Cour * * * Considérant que le demandeur a prouvé les allégations essentielles de sa demande, savoir: qu'il a établi en preuve que le ou vers le commencement du mois d'octobre 1862, et à plusieurs époques subséquentes, le défendeur a tenu sur son compte des propos injurieux et diffamatoires de nature à ternir son caractère, flétrir sa réputation et à lui faire tort dans l'opinion publique; ce qui aux termes du droit; constitue un délit recherchable en dommages et intérêts civils.

Considérant que le défendeur n'a point fait la preuve de la justification qu'il a invoquée et que dans le fait que les parties ont bu ensemble, le ou vers le 1er mai dernier, le tribunal ne saurait trouver de présomption de réconciliation de la part du demandeur qui lui ait enlevé son droit d'action, en autant qu'en l'occa-

Pepin vs. Rocand dit Bastien.

sion en question et pendant tout l'entrevue que le défendeur eut avec lui, il a, à différentes reprises protesté qu'il se réservait son droit de poursuivre en justice la réparation du délit commis envers lui par le défendeur, protestation suffisante pour faire disparaître la présomption d'abandon d'action de sa part, et que conséquemment le défendeur n'a point justifié devant la Cour, une défense valable à l'encontre de l'action du demandeur qui est bien fondée.

A rejeté et rejette les défenses du défendeur et faisant droit sur la demande du demandeur, condamne le défendeur à raison du délit ci-haut mentionné par lui commis, à payer au demandeur la somme de $15.00 de dommages et intérêts civils avec intérêt de cette date et les dépens entiers de l'action telle qu'intentée.

Jugement pour le demandeur.

Bélanger et Desnoyers, avocats du demandeur.

Archambault, avocat du défendeur.

(P. R. L.)

MONTREAL, 31st MAY, 1864.

Coram MONK, A. J.

No. 165.

Nunns et al. vs. *Bqurne.*

HELD: That a letter of guarantee in the following words is not a continuing guarantee,—"At the "request of my son in law, Mr. S. T. Pearce, I write this to inform you, that I will guaran- "tee to you the payment of any debt which he may contract with you for Pianofortes, "not exceeding two thousand dollars in amount, whether the same be closed by his note "or otherwise."

"You are at liberty to look upon this as my undertaking to pay you on his default in the "event of your giving him credit to that extent."

This was an action to recover from the defendant the sum of $2,000, as part of a sum of $10,785.98, alleged to be due for piano-fortes sold and delivered by the plaintiffs to S. T. Pearce, named in the above recited letter, on the faith of that letter, which was written and signed by the defendant.

The defendant pleaded, in effect, that after the signing of the letter in question, the plaintiff sold and delivered to Pearce piano-fortes to the value of $2,104.50, which were settled for by two notes, which were paid long before the institution of the action. That the debt of $2,104.50 was the first debt contracted by Pearce with the plaintiffs, after the making and signing of the letter of guarantee, and was, in fact, the only debt ever contracted by Pearce on the faith of that letter.

The evidence established that the $10,785.98 constituted the balance of a running account for pianos between the plaintiffs and Pearce, and that the $2,104.50 formed the first indebtedness after the giving of the letter of guarantee, and that the amount was settled and paid, as pleaded by the defendant.

Robertson, Q.C., for plaintiffs, contended that the expression "*any* debt," clearly showed the intention of the writer of the letter to make it a continuing guarantee, and not to confine it to a single operation; and that if any doubt existed on the point, it ought to be interpreted rather against than in favor of the surety, who was the party stipulating, and therefore bound to restrict his liability (if he wished to do so) by clear and positive language. And, in support, he cited Story on Contracts, No. 866; 2 Campbell's Rep., p. 413;

12 East, p. 227; 6 Bingham, p. 244; 6 Meeson & Welsby, p. 604; 3 Campbell, p. 20; 1 Metcalf, p. 24; 1 Bell's Com., p. 373.

Bethune, Q. C., for defendant, argued that if the letter had read, "any "debt in which he may, *from time to time*, contract," the guarantee would doubtless have been continuing; but, in the absence of the words "from time "to time," the mere expression "any debt," particularly when followed by the explanation contained in the last paragraph of the letter, could not reasonably be held to cover more than the first transactions after the giving of the letter, to the extent of the limit of $2000. At all events, it must be admitted that the interpretation claimed by the plaintiffs was at the least doubtful. The rule of law, therefore, under our system, was to give the surety the benefit of the doubt.—Voet. Lib., 45; Tit 1, No. 23, vols. V. & VI., p. 117; Pothier Obligations, No. 97; 4 Marcadé, p. 384; Burge, Suretyship, p. 42; 3 L. C. Jurist, p. 191; Broome's Legal Maxims, p. 401. It could not be denied, according to some of the cases cited by the plaintiffs, that this letter would probably be regarded in England as a continuing guarantee, but there the rule of law was stated to be the very opposite of that recognised under our system. In the language of Abbot, C. J., in one of these cases, (Mason *vs* Pritchard, 12 East., p. 27) the words of the contract "were to be taken as strongly against the party giving "the guarantee as the sense of them would admit of." Whereas the rule of interpretation known to our law is, "*dans le doute, la convention s'interprète "contre celui qui a stipulé, et en faveur de celui qui a contracté l'obligation.*" Even in England the judges were not unanimous on the subject of this rule of interpretation; for in Nicholson *vs* Paget, 1 Crompton & Meeson, p. 49., BAYLEY, J., said that the Court thought it was "the duty of the party who takes "such a security to see that it is couched in such words as that the party so "giving it may distinctly understand to what extent he is binding himself." And PARK, J., in Hargrave *vs.* Smee, p. 244, said that LORD WYNFORD had held the doctrine, "that a guarantee ought to receive a strict construction."

The following was the judgment of the Court:—

The Court, * * * considering that the defendant has established by legal and sufficient evidence the allegations of the plea by him made and fyled in this cause, and that the same is well founded in law, doth dismiss the plaintiff's action with costs. Action dismissed.

A. & W. Robertson, for plaintiffs.

Strachan Bethune, Q. C., for defendant.

(S. B.)

MONTREAL, 31st OCTOBER, 1863.

Coram BERTHELOT, J.

No, 1325.

Lanthier vs. *McCuaig & divers, Opposants.*

HELD: That it is not competent for a party collocated in a judgment of distribution, by reason of his appearing as a mortgage creditor in the registrar's certificate returned into Court with the writ of execution, but who is not otherwise a party to the cause, to move for *folle enchère* against an *adjudicataire*.

This was a motion for *folle enchère* against an *adjudicataire* by a mortgage creditor who was collocated in the judgment of distribution, homologated in the

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cause, by reason of his appearing as such mortgage creditor in the registrar's certificate returned with the writ of execution, but who was not otherwise a party to the cause.

Per Curiam.—The party moving has no legal *status* in the cause, and cannot be recognised as a party therein entitled to make such a motion as that submitted to the Court. The motion must, therefore, be rejected. Motion rejected.

B. A. T. DeMontigny, for plaintiff.

(S. B.)

MONTREAL, 30TH MARCH, 1864.

Coram LORANGER, J.

No. 1959.

Perry vs. *Milne.*

CAPIAS AD RESPONDENDUM AFTER JUDGMENT.

HELD: That a *capias ad respondendum* may issue on a judgment of this Court.
That such a writ is valid although it be issued in a new action,—a writ *introductif d'instance*
That it is competent to a defendant on the merits of the cause, after fyling a plea to the merits, to disprove the allegations of the affidavit upon which the *capias* has issued.

The plaintiff, on the 23rd March, 1863, sued out a writ of *capias ad respondendum*, under which the defendant was arrested and gave bail to the sheriff.

The declaration fyled by the plaintiff alleged a judgment of this Court, for a sum of £1850 currency, besides interest from the 8th May, A.D. 1858, rendered in this Court under the number 536 on the 30th day of March, A.D. 1861, against the defendant in favor of the plaintiff as the cause of indebtedness: it further recited the allegations of the affidavit upon which the *capias* issued, and concluded as follows:

"Wherefore the said plaintiff brings suit and prays that a writ of *capias ad* "*respondendum* or attachment may forthwith issue against the body of the said "defendant to compel the said defendant to appear before this Honorable Court "on the 6th day of April next, to hear the said attachment declared good and "valid and to answer the premises, and that the said attachment may be declared "good and valid, and thereupon that the said defendant may be adjudged and "condemned to pay and satisfy to the said plaintiff the said sums of £1850 and "£527 9s currency, making together the sum of £2377 9s. currency, with the "interest on the said sum of £1850 from the 19th day of March instant until "paid and costs of suit *distraits* to the undersigned attorneys."

The defendant on the return of the writ presented his petition for his liberation under the provisions of the *Capias* Act.

Evidence was taken in the usual way on this petition, and after an argument in chambers before Mr. Justice MONK, the petition was rejected on the 27th May, 1863.

The defendant subsequently, on the 15th June, 1863, fyled three pleas to the plaintiff's action.

By the first plea, he in substance averred that the allegations of the plaintiff's affidavit were untrue, and that by law no writ of *capias* could legally issue.

By a second plea, the defendant said:

"That all the allegations, matters and things set forth in the said declaration "or so far as they recite and rely upon the allegations in the affidavit therein "mentioned contained are untrue.

"That moreover the said plaintiff cannot by law bring a second action in the "same Court to obtain a second condemnation against the said defendant as "prayed for as and by said declaration, and such action, is wholly illegal and "unfounded.

"That moreover the said plaintiff hath not paid the said debt for which he "became security as referred to in said declaration nor any part thereof, and "that no judgment can or ought to be rendered against the defendant absolutely, "as prayed for in this cause, and that the said action, resting as it does upon the "said allegations of said affidavit and upon alleged fraud on the part of the "defendant, the said plaintiff cannot obtain any judgment against him, the said "allegations being untrue."

The third plea was a *défense en fait*.

The parties then went to evidence and were heard on the merits before Mr. Justice LORANGER, who rendered his judgment as follows:

LORANGER, J.—This is a *capias ad respondendum* after a judgment primarily obtained by plaintiff against defendant; the conclusions of declaration praying for a new condemnation.

There are two issues substantially raised, one in law denying the right of plaintiff to issue a *capias ad respondendum* on a judgment and to obtain a new condemnation, and the other in fact traversing the fact alleged in the affidavit upon which the *capias* has been issued, in support of the allegation therein contained in the following words: "And the said deponent saith that he hath "reason to believe and doth verily believe that the said defendant hath secreted "and is about to secrete his property with intent to defraud the said deponent, "and is immediately about to leave the Province of Canada with an intent to "defraud the said deponent, and that such departure will deprive the deponent "of his remedy against said defendant whereby without the benefit, &c.".

By his plea the defendant has also denied his indebtedness, but this ground which has been implicitly abandoned at the argument is totally devoid of foundation.

On the question of law I am of opinion that under the old maxim of the Roman law *non bis in idem*, and the constant jurisprudence of the Courts of Justice founded upon it, the plaintiff cannot support his demand for a second condemnation, and that that part of his conclusions must be dismissed, but, on the other point, I am as distinctly certain that a writ of *capias* may be issued on a judgment.

The first clause of the chap. 87 of C. S. of Lower Canada says: "In all cases "in which a judge of the Superior Court, &c., is satisfied that the defendant is per- "sonally indebted to the plaintiff in a sum amounting to or exceeding $40, &c., "he may grant a *capias*, &c." The law making no distinction between the right of a creditor who has previously obtained a judgment against his debtor, and the right of a creditor who has not, to obtain a writ, it seems evident to me that the Judge cannot make it; and excluding a creditor in virtue of a judgment from that writ would seem to me equivalent to the declaration that a judgment

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nstead of helping one would do him harm, which is certainly against the spirit of all law. Besides I think that precedents contained in our Law Reports, fully justify my view of the matter, both in regard to the second condemnation and the right to issue a *capias*.

It has been contended that, if a *capias* can issue, it must be in the same cause in which the first judgment has been pronounced, and on subsequent proceedings. That looks pretty much like a distinction without a difference; for if plaintiff can issue a *capias*, is it not to the defendant a matter of perfect indifference to be arrested on a writ *introductif d'instance*, or on a writ *sur une instance déjà terminée*. The only interest on behalf of defendant might be as to costs, but the matter has not been put in that light. I cannot then entertain the defendant's pretension in this respect.

The only question is one entirely of evidence,—was plaintiff justified in issuing the *capias* on the ground of fraudulent secreting of property or of fraudulent intent to depart from the province. I say, a question of evidence, for I hold that on a *capias* a defendant on the merits of the cause may disprove the alleged fraud against him, in other words, disprove the truth of the affidavit. That has not been denied at the argument; and the same reasons which have induced the Court of Appeals to reform the old jurisprudence in regard to *saisie arrêt avant jugement*, apply with a tenfold authority to the writ of *capias*, and that exclusive of the right which the defendant may have to obtain his liberation on a summary petition.

My only duty was then to examine the evidence adduced by defendant, and to say whether it is of a nature to disprove the affidavit filed by plaintiff; and after a long, careful and patient investigation of the same, I hold that that evidence is not only insufficient to make good the denegations of defendant, but the contrary; that coupled with the evidence adduced by plaintiff in rebuttal has sufficiently proved fraudulent intent on behalf of defendant, and the full justification of plaintiff in issuing the writ. The judgment must go for plaintiff in consequence declaring the *capias* executory with costs, and dismissing the rest of the action.

The judgment of the Court was *motivé* as follows:

"The Court, having heard the parties by their counsel upon the merits of this cause, examined the proceedings and proof of record, and having deliberated thereon; considering that the plaintiff has established his allegations as to the indebtedness of defendant to said plaintiff to the amount of £2377 9s. current money of the Province of Canada, in virtue of a judgment obtained before this Court against defendant for the sum of £1850, bearing interest thereno at the rate of six per centum per annum from the 8th of May, 1858, and calculated to the 19th day of March, 1863, making the said sum of £2377 9s. 0d., which sum is still due; considering that the defendant has failed to disprove the truth of the affidavit fyled in support of the writ of *capias ad respondendum* in this cause issued as to the fraudulent intent of defendant in regard to the secreting of his goods and his alleged departure from this province; considering that notwithstanding anything to the contrary alleged by defendant the plaintiff had a perfect right to issue the said writ of *capias ad respon-*

dendum on the judgment above mentioned, and that the said writ must be declared executory; considering, however, that the plaintiff is not entitled to obtain a judgment pronouncing a new condemnation against the said defendant for the sum of money which in and by the said judgment the said defendant has already been condemned to pay and satisfy to the said plaintiff: doth dismiss that part of the conclusions of the plaintiff's demand in regard to such condemnation; declares the said writ of *capias ad respondendum* to have been rightly issued, and declares and orders the same to be executory according to law for the recovery and satisfaction of the said sum of £2377 9s. 0d. said currency with interest on the said sum of £1850 from the said 19th day of March, 1863. And the Court doth condemn the defendant to pay and satisfy to the plaintiff the costs by him incurred in this suit," &c.

Judgment for plaintiff.

Plaintiff's authorities: *Gale* vs. *Allen*, 3 L. C. Repts. 456; *Mac Dougall* vs. *Torrance*, 5 L. C. Jur., 148: *Perry* vs. *Milne*, No. 1959. S. C. Montreal. *Coram* Mondelet, *judice*, 27 May, 1863.

Defendant's authorities: *Gagnor* vs. *Blagdon*, 1 Rev. de Leg., 348. *Hay* vs. *Caddy*, Id., 3; 306. *Pelletier et al.* vs. *Freer*, 12 L. C. Repts., 199. *Leslie et al.*, and *Molsons Bank*, Id., 265.

Torrance & Morris, for plaintiff.

A. & W. Robertson, for defendant.

(F. W. T.)

IN THE QUEEN'S BENCH, 1864.

MONTREAL, 1st MARCH, 1864.

Coram Duval, C. J., Meredith, J., Mondelet, J., Badgley, J.

EDEN COLVILE *et al.*, *ès qualité*,
(*Defendants in the Court below,*)
AND
APPELLANTS;

THE REVEREND JOHN FLANAGAN,
(*Plaintiff in the Court below,*)
RESPONDENT.

CHEQUE—CODICIL.

HELD:—1. That a writen will, duly executed before three witnesses, may be altered, in its bequests, by cheques signed by the testator during his last illness, and left, "as parting gifts," for the parties indicated in them, in the hands of his private secretary.

2. That probate of a written memorandum of such bequests made by the testator's private secretary, at his request, as his "last bequests," will suffice to entitle the legatees to recover, without obtaining probate of the cheques themselves.

3. That the testator in this particular case was *compos mentis*.

The nature of this case and the arguments submitted by respondent's counsel fully appear from the printed factum of the respondent, as follows:

The action out of which this appeal has arisen was instituted by the respondent in October, 1861, for the purpose of recovering from the executors of the late Sir George Simpson, of Lachine, Governor of the Hudson's Bay Company's Territories, the sum of $1,000, claimed to have been given or bequeathed by Sir George Simpson to the respondent, by dispositions made in September, 1860.

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The declaration contained four counts in which the cause of action was set forth in as many different forms; alleging,

1st. That on the 4th September, 1860, the said late Sir George Simpson being desirous of bestowing upon the plaintiff the sum of $1,000, drew his cheque upon the Bank of Montreal, to the order of the plaintiff, for that amount, and by manual delivery, *don manuel*, handed and delivered the same to E. M. Hopkins, his private secretary, who acted for and represented the plaintiff, for delivery to the plaintiff. That the amount of the cheque was, in due course, passed through the private account books of Sir George Simpson, and was not included in the cash balance belonging to the estate, mentioned in the inventory, and of which the defendants, as executors, took possession.

2ndly. Setting up the *don manuel* in the same terms as in the first count, and adding a confirmation of the same by Sir George Simpson, upon the sixth of September, 1860, by verbal directions to his secretary, that the amount should be paid to the plaintiff, as well as several other amounts to various other persons, in whose favour cheques had also previously been drawn, which amounts, with the names of the persons to whom they were to be given, were then and there put in writing by Mr. Hopkins, the secretary, and in the presence of numerous witnesses read over to Sir George Simpson, who confirmed and approved of each gift separately.

3rdly. Alleging the drawing and delivery of the cheque, followed by the making of the bequests upon the sixth of September, by the writing down at Sir George's

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(Copy.)

Memoranda at the request of Sir George Simpson on the 6th September, 1860.

Angus Cameron	$ 5000	For each of these amounts I was instructed to draw cheques on the 5th September, which were signed by Sir George Simpson in the presence of myself and James Murray.
Hector M'Kenzie	5000	
E. M. Hopkins	5000	
Rev. J. Flanagan	1000	
Rev. W. Simpson	1000	
James Murray	1200	

The above was written and read over by me, and approved by Sir George Simpson in the presence of all his family.

(Signed,)

EDWARD M. HOPKINS.

The above memoranda were taken in the presence of the undersigned, at the request of Sir George Simpson.

(Signed,)

A. Cameron, James Murray, Frances Webster Cameron, Margaret McKenzie Simpson.

Lachine, 6th September, 1860.

I was in attendance upon the late Sir George Simpson yesterday when he made the bequests stated in the foregoing memoranda, and I consider that he was quite collected and calm in his mind, and that he was conscious.

(Signed,)

JAMES THORBURN, M.D.

desire of the names of the legatees, and the amount given to each, which devises were then and there expressly and separately confirmed and approved by the testator; and alleging also that probate of such bequests had been granted on the 11th October, 1861, at Montreal.

4thly. Setting up the bequests of the 6th September, 1860, as a codicil, in writing, to the last will and testament of Sir George Simpson, executed in the preceding month of March, and alleging the probate of such codicil.

The plaintiff fyled, with his declaration, besides other papers, Sir George Simpson's cheque in favour of the plaintiff for $1,000, dated 4th September, 1860; and the paper writing containing the names of the several legatees, with the amounts bequeathed to each, drawn up by Mr. Hopkins on the 6th September, 1860, by Sir George Simpson's directions, and in his presence, and in that of several members of his family, and attested by them as having been drawn up at his request.

The defendants by their plea denied that Sir George Simpson had in any way revoked or altered his will of March, 1860; denied any knowledge of the cheque fyled by plaintiff, or that any value was ever given for such pretended cheque, and alleged that on the 4th September, 1860, Sir George Simpson was labouring under disease of the brain, with which he had been some time previously attacked, and of which he died on the 7th September, 1860; and that he was not on the 4th September, 1860, of "sound and disposing mind, memory and understanding;" but on the contrary was throughout the whole of that day, and for some time previously had been, and from that day till his death continued to be of unsound mind, memory and understanding, and wholly incapable in law of contracting or of disposing by last will and testament or otherwise; that the memorandum of bequests fyled by the plaintiff never was or could be admitted by the defendants to be a codicil to Sir George Simpson's last will and testament, or in any way equivalent thereto; and that, moreover, at the time the said memorandum of bequests purports to bear date, Sir George Simpson was not "in full "possession of his mental faculties, and of sound and disposing mind, memory "and understanding," as alleged in the plaintiff's declaration; but on the contrary was and for some time previously had been, and from that time until his death continued to be, of unsound mind, and wholly incapable in law of contracting or of disposing by last will and testament or otherwise. The general denegation followed, and issue was joined on the questions thus raised.

The points at issue resolve themselves into two, viz.: the mental capacity of Sir George Simpson to make the dispositions of money in question; and, secondly, the legal sufficiency of those dispositions as *dons manuels*, or as legacies.

1st. *As to Sir George's mental capacity at the times in question.*

The attack of illness from the effects of which Sir George died upon the 7th September, 1860, occurred upon the first of that month, and is described by the attending physicians as an attack of apoplexy with epileptiform symptoms. There had been an attack of an almost identical nature, though less severe, in the preceding February, from which he had recovered sufficiently to attend to business as usual, though with impaired physical strength, and after which, viz.: in March,

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he had made his last will and testament, disposing of the whole of his large estate. On this occasion Dr. DeCouagne, of Lachine, was immediately called in, and he remained in constant attendance throughout the whole illness until Sir George's death. Dr. Sutherland, of Montreal, was also sent for upon the first, and continued to pay him short morning and evening visits until the morning of the sixth. The only other medical man who had personal cognizance of the case was Dr. Thorburn, of Toronto, who came down for the purpose of prescribing for him, and remained in close attendance upon him until his death. Both the gentlemen who were with him continuously, viz., Drs. DeCouagne and Thorburn, agree in representing the disease to have been one which, while exhibiting acute temporary phases, during which the patient's mind was undoubtedly disturbed, was not inconsistent with his full enjoyment of his mental faculties (modified, of course, by physical weakness) in the intervals between the attacks. Dr. De Couagne, after affirming in many places throughout his evidence that Sir George was perfectly rational (in connection with certain incidents there referred to), sums up his opinion in the following words: —"*In Sir George's case there was "nothing in his disease after the morning of the fourth, when the inflammation "had commenced to subside to a certain extent, to prevent his having intervals "of perfect lucidity.*"

Dr. Thorburn, after stating that on the occasion of the making of the bequests which are the subject of this action he "considered Sir George's mind to be "quite clear," also concludes, "when I saw Sir George, he was labouring *only* "*under great exhaustion*, the result of some previous attack, of the character of "which I have no knowledge except from hearsay; his condition was such as is "consistent with his having suffered from any severe attack of illness, including "apoplexy; he was not labouring under insanity, as generally understood, *or* "*under mental incapacity;* there is always more or less of suspension of the "mental powers at the attack of apoplexy which may continue or disappear."

Dr. Sutherland, whose visits were made in the morning and evening,—periods when the night's restlessness and sometimes delirium had not worn off, and when the fatigue of conversation, &c., through the day had aggravated any symptoms of mental excitement,—and for from fifteen minutes to half an hour at a time, takes upon himself to say that at no time during the whole illness could Sir George have been of a sound and disposing mind. This opinion, as may be supposed, is based less upon the actual features of the disease which came under Dr. Sutherland's notice, or came to him at second hand from those in attendance, than upon a theoretic view of the case, which it was impossible afterwards to confirm by facts, no *post-mortem* examination having been made. The following question and answer put to and given by Dr. Sutherland in his cross-examination will serve to explain this statement:

"*Question.*—Is it possible that the deceased of the said George Simpson could have been attributed, even with the symptoms you observed, to another cause than *laceration of the brain?*"

(Dr. Sutherland in his examination-in-chief had mentioned "laceration of the substance of the brain, occurring at the time of the attack," as being the prime

cause of the mental phenomena of Sir George's case, the subsequent inflammation caused by that laceration occasioning the later appearances.)

"*Answer.*—In my opinion it could not be attributed to any other cause than "to that which gave origin to the whole disease, the immediate cause being *the "hemorrhage and laceration with the inflammatory process*, and its termination "as consequences thereof."

After the examination of the three medical gentlemen before mentioned, their testimony was sent, with a *commission rogatoire*, by the appellants to Toronto, for the purpose of obtaining the opinion thereon of Dr. Joseph Workman, Superintendent of the Provincial Lunatic Asylum at Toronto. Dr. Workman pursues an entirely different course from Dr. Sutherland, but reaches the same conclusion. He refuses, however, the very grounds on which Dr. Sutherland's opinion is built; for he states, "*I do not believe the hallucinations resulted from laceration "of the brain*, for this is a morbid lesion which I have very seldom realized in "*post-mortem* examinations of the brains of persons who had been affected "similarly to Sir George Simpson; and in those cases in which I have realized "it, the symptoms were different from those of Sir George's case." In fact, Dr. Workman, rejecting all possibility of *temporary* mental aberration in the present case arising from physical prostration or acute physical suffering, brings the case within his own specialty, and says, "I believe that only by withdraw-"ing Sir George's case from the rank in which Dr. Sutherland has placed it, and "*installing it in the category of insanity*, can all its symptoms and phases be "accounted for." It would appear from Dr. Workman's testimony that he disconnects entirely the mental disease which he imputes to Sir George from the attack of illness from which he was suffering in September, and believes that the former was of long growth, and had no reference to physical infirmity. In that case the will of the March previous was executed after the fatal disease had seized upon Sir George's brain.

The respondent, while acknowledging the weight which attaches to the evidence of a medical man of the eminence of Dr. Sutherland, ventures to affirm, that with the opportunities which his short occasional visits gave him of becoming acquainted with all the facts of Sir George's case, Dr. Sutherland was necessarily not in a position to speak positively on many points of which, nevertheless, he assumes to have a perfect knowledge. Not only does he report in the strongest terms information which he must have received from others (who themselves report the same facts in a much milder form) concerning incidents occurring during the night, out of his presence, as where he makes "maniacal delirium" a frequent feature of Sir George's case, though it appears that he witnessed none of it himself; but he also takes for granted the continuance throughout the day of certain of the symptoms sometimes visible at the time of his visits, and from which he forms his most unfavourable opinion of Sir George's mental state. Thus, for instance, though on some occasions Sir George conversed with him freely and rationally, and "made use of no particular expressions which indicated of them-"selves aberration of mind," Dr. Sutherland found conclusive evidence of the progressive disease of the brain in Sir George's "elation of manner, the excite-"ment of his language, and the positive indifference he entertained as to his

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"state, and in his declaring himself with fearful unreason to be not only better, "but absolutely well, and never expressing the slightest anxiety as to his "recovery." If these signs carried the greatest weight to Dr. Sutherland's mind, as the inevitable accompaniments of a progressive brain disease, we might look for their steady continuance until the disease had culminated in delirium. But does this ignorance of and indifference to his state show itself throughout, as Dr. Sutherland's evidence would lead us to believe it must have done as the consequence of the disease to which he refers it? When handing the cheque to James Murray on the third, Sir George said to him, "You did not think you "were going to lose me so soon: had I lived longer, it would have been better "for you." On the next morning early (the fourth), when pressing Mr. McKenzie to draw a cheque for himself, and the latter endeavoured to put the matter off, saying that Sir George would soon be better, and laughed with him about it, Sir George answered "No," and persisted in his request, with an evident consciousness of his danger and with none of the levity which Dr. Sutherland observed; and a little later in the same morning, when Mr. Hopkins was called in to prepare the cheques for his signature, and seemed to endeavour to dissuade him from such an act, telling him not to think of parting from his friends, Sir George replied—"Why do you thwart my wishes and try to deceive me with "hopes of recovery—I am a dying man;" saying afterwards, when Mr. Hopkins urged delay—"I have no time to lose,—besides what is the use of delay? it "will not hasten my death to settle what I have on my mind." It is impossible to read the deposition of Mr. Hopkins, with his account of Sir George's apportioning these final gifts among his friends, and the reasons he gave for fixing each amount, and more particularly his affecting leave-taking of Mr. Hopkins, without being convinced that he was as well aware of his condition as any man could be, and that he had entirely recovered from the "elation of manner and "indifference to his state" which Dr. Sutherland states to be concomitants, or at least necessary symptoms of the disease which he believed to have continuously existed, and which, if it existed, must, in his opinion, necessarily have produced mental unsoundness. If these symptoms disappeared, as they did, it follows that the view of the pathological condition of the brain upon which Dr. Sutherland rests his opinion of mental unsoundness is at fault, and liable to be refuted by the unquestionable facts of the case of which Dr. Sutherland could know nothing personally, though he takes the contrary for granted as the base of his professional opinion here given in evidence.

It has been seen that Drs. DeCousgne and Thorburn, both of whom attended Sir George continuously, though the latter was present only during the latter stage of the illness, assert the existence of undoubtedly lucid intervals, or rather (for the term "lucid intervals" applies more correctly to rational moments in the course of a protracted term of insanity) that Sir George's mind was, and remained, sound, except when immediately under the influence of a passing fit, and excepting also the time between the evening of the fourth and the morning of the sixth of September, when paroxysms of illness occurred.

The same testimony which had been submitted to Dr. Workman was also laid before Dr. R. L. MacDonnell, of Montreal, and Dr. E. B. Tuson, Military Staff

Surgeon. The former, who spoke with some *connaissance de cause*, having been personally acquainted with Sir George Simpson for many years, and having a knowledge of his habit and temper of body and mind, concludes his examination-in-chief by saying: "It is my opinion that Sir George Simpson must have been "in full possession of his mental faculties on those occasions when Drs. Thorburn "and DeCouagne state that he enjoyed intervals of perfect lucidity."

Dr. Tuson describes an analogous case occurring in Montreal within his own observation, in which the mind of the patient recovered its full power in the intervals between the different attacks, whence he infers a like restoration of the mental faculties in Sir George Simpson's case.

In this conflict of medical opinions, where, however, those in favour of Sir George's mental capacity preponderate, there remains a mass of evidence of the highest value, having reference to *facts* from which a very decided opinion may be drawn, and given by persons who, medical knowledge apart, were in the best position to judge of his mental condition. They were members of his own family, servants in his own household, and personal friends who had for a great portion of their lives been in daily intercourse with him. Is it to be supposed that these were less capable of perceiving any aberration of mind, any inconsistency of expression, any departure from the usual mode of thought, because they were ignorant of a supposed condition of the patient's brain, upon which a physician might interpret every act or word, however reasonable, giving it a meaning all his own? Yet without exception, they agree in stating that Sir George was often as calm and rational and clear in mind as a man could be, and support the statement by giving conversations held with him, and other proofs disclosing on his part a discrimination, foresight and justness of thought and feeling which could not easily have been the product of a disordered mind. The respondent respectfully asks of the Court a careful consideration of the depositions of these witnesses (and particularly of that of Mr. Hopkins, which is more in detail), whose evidence alone, he contends, establishes an array of facts which could only yield to the most positive and incontrovertible medical testimony. He submits that such medical testimony is entirely wanting, and that such as is produced is contradictory and irreconcilable, while the lay testimony is supported by the opinions of the two medical men who were, of all the physicians testifying in the case, in the most favourable position for ascertaining the truth, subsequently confirmed by that of two medical men of high standing.

As regards the acceptance of simply medical testimony, and the weight which is due to all evidence bearing on the main question, the rule is laid down thus definitely in *Bell's Commentaries*, Vol. I, Book II., part 2, c. 8, § 2, and it assuredly is the rule most consonant with reason:

"It has been well said that it is scarcely possible to be too strongly impressed "with the degree of caution necessary in examining the proof of lucid interval. "But the law does recognize as valid, acts done during such an interval; and this "rule of law must not be defeated by overstrained demands of the proof of the "fact. It may be observed in general, that the lucid interval may be either in re-"lation to time, or to subject. 1st. If in point of time there is proof of remission, "or of intermission, either periodical or at a particular date, including the interval

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"during which the deed was made, it is enough to sustain the deed. There is "no rule in law fixing any precise duration for a lucid interval—a week, a day, "an hour. The point truly for enquiry is, whether there was time sufficient for the "rational doing of the act in question? 2nd. If the description of the malady be "such that the person is insane on particular topics only, and the act done, with "all its associations, from no insane topic, this will be enough. 3rd. In either "enquiry, the act itself and the manner of performing it are of the first import- "ance. If it be a rational act, rationally done, without the guidance or control "of another; if there be no delusion, no insane irritation or hallucination induc- "ing it; if from the deed, or the manner, no indication of frenzy or folly can be "gathered; it will be sustained. 4th. It is very important that facts, not opin- "ions, shall be relied on in matters of this sort. The opinions of calm and "skilful observers may be useful to guide the jury; but even from such persons, "no opinion is of weight independently of the fact on which it rests; and to the "evidence of keepers, and of nurses and of the vulgar, who with a carelessness "or a prejudice, which overlooks all the necessary discriminations, and misinter- "prets every action of a person pronounced to be insane; this observation requires "to be very vigilantly applied. 5th. Some difference of opinion has arisen as to "the strength of proof necessary in a case of lucid interval, considered relatively "to the proof of the insanity to which it forms an exception. Two great mas- "ters in jurisprudence have expressed opposite opinions on this question. Lord "Thurlow seems in both cases to have deemed it necessary to have a proof as de- "monstrative of the lucid interval as of the insanity, and of a restored strength "of mind not inferior to the original state of intellect of the person in question. "But Lord Eldon has well limited the doctrine, since neither the same demon- "stration can be expected in acts of rational calmness, as in striking symptoms of "insanity; nor those the law require, in order to validate many acts, the same "perfect tone of intellect as while untouched by disease; but is satisfied with a "much less degree of capacity."

The following leading decision from the English Ecclesiastical Reports, embodying the principles of the Roman law, and citing the authority of Swinburne upon the subject of lucid intervals, fully supports this view.

1 Phillimore p. 51, *Cartwright* vs. *Cartwright*. (The testator was *insane* for several months before the date of the will, and continued so after making the will.) "Now what is the legal effect of such a proof as this? Certainly not wholly to "incapacitate such a person and to say a person who is proved to be in such a way "was totally and necessarily incapacitated from making a legal will. I take it "the rule of the law of England is the rule of the civil law as laid down in the "2nd. Book of the Inst. lib. 4, tit. 12, §2, '*furiosi autem si per id tempus "fecerint testamentum quo furor eorum intermissus est jure testati esse videntur.*' "There is no kind of doubt of it, and it has been admitted that is the principle. "If you can establish that the party afflicted habitually by a malady of the mind "has intermissions, and if there was an intermission of the disorder at the time "of the act, that being proved is sufficient, and the general habitual insanity will "not effect it.

"Now I think the strongest and best proof that can arise as to a lucid interval

"is that which arises from the act itself: that I look upon as the thing to be "first examined, and if it can be proved and established that it is a rational act "rationally done, the whole case is proved. What can you do more to establish "the act? because suppose you are able to show the party did that which appears "to be a rational act, and it is his own act entirely, nothing is left to presumption "in order to prove a lucid interval. Here is a rational act rationally done. In "my apprehension where you are able completely to establish that, the law does "not require you to go further, and the citation from *Swinburne* does state it to "be so.....Says he (part II. sec. 3.) 'If a lunatic person, or one that is beside "' himself at some time, but not continually, make his testament, and it is not "' known whether the same were made while he was of sound mind and memory "' or no, then in case the testament be so conceived as thereby no argument of "' phrenzy or folly can be gathered, it is to be presumed that the same was made "' during the time of his calm and clear intermissions, and so the testament shall "' be adjudged good; yea, although it cannot be proved that the testator useth "' to have any clear and quiet intermissions at all, yet nevertheless I suppose that "' if the testament be wisely and orderly framed the same ought to be accepted "' for a lawful testament.' "

See also *White* vs. *Driver*, 1809, Phillimore, vol. I., p. 84, and *Towart* vs. *Sellars* in the House of Lords, 16 May, 1817, 5 Dow, p. 231.

Beck (Med. Jurisprudence, p. 368) quotes the definitions of "lucid interval" given by D'Aguesseau, Lord Thurlow, and others, which are referred to by Dr. Workman in his deposition, adding however in a note that Lord Eldon was at variance with Lord Thurlow on the point. Further, as an instance of the extreme views held by some, he mentions that Dr. Powell, an eminent London physician, and for many years secretary to the *Commissioners for the licensing of Mad-houses*, held "there was no such thing as a lucid interval."

Assuming, then, the existence of lucid intervals in the course of Sir George Simpson's illness, it remains to be seen whether the acts upon which the respondent's claim is founded were performed at such times. All the cheques signed by Sir George, excepting for Murray, were signed early in the morning of the fourth of September: the memorandum of bequests was drawn up on the evening of the sixth. Mr. Hopkins, who shortly after Sir George's death, noted down in writing the facts given in evidence by him, states—"upon both the fourth and sixth, on the "occasions I have described, namely the signing of the cheques and the dictating "of the memorandum, I have not the least doubt, and can say positively that "his mind was calm and sound, and that he was in full possession of his mental "faculties," and in his cross-examination, in answer to a question to that effect, "I assert that Sir George Simpson was not completely nor at all delirious be-"tween the morning of the third and the morning of the fourth of September, "unless it occurred in my absence in the night." There was, undoubtedly, one long period of delirium between the evening of the fourth and the morning of the sixth, of which the time is accurately established. Mrs. Cameron, Sir George's daughter, arrived from Toronto on that morning at eight o'clock, with Mr. Cameron and her sisters, and immediately visited Sir George in his room, leaving him shortly afterwards to go to breakfast, and while she was in the room, Mr. Hop-

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kins entered. The cheques were signed as soon as Mrs. Cameron left. Her declaration is, that at that time Sir George was perfectly rational, and that he seemed quite capable of attending to business; further that "it was only some "hours after her arrival that Sir George first became unconscious." It appears also from Mr. Hopkins' deposition that some time after the cheques were signed viz.: "about mid-day" of the same day (the fourth), Sir George held further conversations with him on business, giving instructions on several matters which he wished attended to. Mr. Cameron, the Rev. William Simpson, James Murray and Mr. McKenzie, agree with the two last-mentioned witnesses in saying that the period of greatest excitement was during the fifth. Dr. DeCouagne, upon whose evidence the appellants relied much in the Court below, to prove incapacity on the morning of the fourth, appears to have fallen into an inaccuracy as to the date. He mentions a similar term of delirium, preceded and followed by calm periods; but he states from memory that this commenced on the third instead of the fourth. His statements coincide perfectly with those of the others, excepting on this point, and it is one so precisely marked by incidental circumstances that there can be little room for error on it. Mrs. Cameron's arrival from Toronto on the morning of the fourth would naturally impress upon her mind her father's condition upon that day, and as there can be no doubt that it was on the morning of the fourth that the cheques were signed, and the conversations held which are recorded by Mr. Hopkins, the facts (and they are not disputed) speak for themselves, and indicate that Dr. DeCouagne made a mistake as to the day. It may be mentioned that Dr. DeCouagne was one of the first witnesses examined, and gave a general narrative of the case without being closely enquired of as to dates.

If it is admitted that lucid intervals were possible, the question of Sir George Simpson's mental capacity upon the evening of the 6th, when the memorandum of bequests was drawn up, is disposed of, without difficulty, by the unanimous testimony of all present on the occasion. Dr. Thorburn's certificate is subjoined to the document, of which a copy is herewith printed, and Dr. DeCouagne had made a special examination for the purpose of enabling Mr. Hopkins to send a report of his health to England by the next day's mail, and found him "perfectly rational."

The memorandum of bequests was admitted to probate by a Judge of the Superior Court, on the 11th October, 1861, and the full powers of the Ecclesiastical Courts of England, for such purposes, having been conferred upon any single Judge of the Superior Court in Canada, it is very doubtful, upon the following, among other, authorities, whether the question of sanity or the contrary can be re-opened.

1 *Williams on Executors*, pp. 337-340. Ed. 1832.

"Hence, a probate even in common form, unrevoked, is conclusive both in "Courts of Law and of Equity as to the appointment of executor, and the "validity and contents of a will, as far as it extends to personal property; and "it cannot be impeached by evidence even of fraud,

"Therefore, it is not allowable to prove that another person was appointed "executor, *or that the testator was insane*, or that the will of which the pro-

" bate has been granted, was forged; for that would be directly contrary to the " seal of the ordinary in a matter within his exclusive jurisdiction."

Also 1 *Jarman on Wills*, p. 22, note; and *Clark* vs. *Fisher*, 1 *Paige*, p. 179.

2ndly—As to the legal validity of the disposition.

The claim is made as resting either on a *don manuel* or a legacy, and the judgment of the Court below maintained it on the former ground without declaring upon the latter. To the *don manuel* the appellants opposed only the plea of *insanity*, and whatever difficulties may exist in the English decisions it would seem clear that such gifts, *dons manuels*, passing the article by mere delivery and regarded as gifts *inter vivos*, whether the giver was near his death or not, are good by our law and sustained by numerous precedents. The English law, however, is not absolutely unfavourable. In *Grover* vs. *Grover*, Pickering's Reports vol. 24, p. 263, after weighing the different leading decisions, the Court continued :—

" The leading case on this point is that of *Miller* vs. *Miller*, 3 P. Wms. 356, " in which it was held that the gift of a note, being a mere chose in action could " not take effect as a donation *mortis causâ*, because no property therein could " pass by delivery, and an action thereon must be sued in the name of the exec- " tor.—But in *Snellgrave* vs. [illegible]y, 3 At R. 214, Lord Hardwicke decided " that the gift and delivery of a bond was good as a donation *mortis causâ*. " on the ground than an equitable assignment of the bond was sufficient. It " seems to be very difficult to reconcile these two cases. The distinction suggested " by Lord Hardwicke in the case of *Ward* vs. *Turner*, 2 Ves. Sen. 431, in " which he adheres to the decision in *Snellgrave* vs. *Bailey* is technical, and to " my mind unsatisfactory: and certainly has no application to our laws which " place bonds and other securities on the same footing. We cannot therefore " adopt both decisions without manifest inconsistency; and we think for the " reasons already stated, that the decision in *Snellgrave* vs. *Bailey* is supported " by the better reasons, and is more conformable to general principles, and the " modern decisions in respect to equitable assignments. We are therefore of " opinion that the gift of the note of hand in question is valid; and in coming " to this conclusion we concur with the decision in the case of *Wright* vs. *Wright*, " 1 Cowen 598, wherein it was held that the gift and delivery over of a promis- " sory note *mortis causâ* is valid in law, although the legal title did not pass " by the assignment."

By both our own and the English law it is held, as in *See* vs. *Muggeridge*, 6 Taunton, p. 36, "that a moral obligation is a good consideration for a promise to " pay." In *Woolbridge* vs. *Spooner*, 3 Barn. and Ald. p. 233, the consideration of a note being stated "for value received and his kindness to me," *Abbott, C. J.* said: " there is no doubt that a proper and sufficient consideration existed for " this note." The appellants in this case plead no consideration given for the cheque, and it is not pretended on the respondent's part that actual pecuniary value was given although he had been in the habit of performing friendly services which in another would probably have been remunerated in money. The consideration is sufficiently shewn in the words with which the cheque was handed to Mr. Hopkins for the respondent: " Mr. Flanagan has been very useful

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" to me and most discreet in everything he has undertaken. I wish to make him " acknowledgment of my obligation to him."

Such gifts are acknowledged by the French law, and pass by mere delivery.

1 GRENIER Tr. *des Donations.* Page 418.—" C'est le cas, en traitant des " formalités des donations, de dire quelque chose des dispositions qui peuvent " se faire d'effets mobiliers par la seule tradition, sans aucun acte, qu'on appelle " communément dons manuels et sur lesquels on peut prendre de fausses idées " dans quelques auteurs."

" Dans tous les temps on a pu faire des gratifications, des présents dans la vue " d'exercer des actes de munificence ou de générosité, ou enfin de récompenser " des services rendus. Il n'est pas nécessaire de constater par des actes ces " dons, qui ne peuvent porter que sur des objets mobiliers, ils sont suffisamment " assurés par la tradition.

Also p. 421, No. 179—p. 421, No. 179 [bis]—p. 424, No. 179 [bis]—p. 426, No. 179 [bis.] *Journal des Audiences*, Vol. II. p. 343, 351, Liv. 3, cap. 59.

See *Merlin*, Qu. de dr. Vo. Donation § VI (where among other points bearing strongly on the case a promissory note endorsed in blank is declared to be a good gift, *don manuel*,) and p. 450. Also p. 456:—

" Maintenant abordons notre question principale, le don manuel qui, sans être " constaté par un acte, réunit toutes les conditions qui lui seraient nécessaires " pour avoir son effet, s'il avait lieu entre-vifs, est-il valable, lorsqu'il est fait à " cause de mort."

" Pourquoi ne le serait-il pas?

" Serait-ce parceque l'art. 893 du Code Civil, n'admet d'autre dispositions à " titre gratuit, que celles qui sont faites par donation entre-vifs ou par testa- " ment dans les formes établies par les articles subséquents? Mais si cet article " ne fait point d'obstacles à la validité du don manuel entre-vifs, comment le " pourrait-il à la validité d'un don manuel à cause de mort? Si la tradition " seule suffit pour consommer l'un, par quelle raison serait-elle insuffisante pour " consommer l'autre.

" Serait-ce parceque l'art 931 du Code Civil, en réglant la formalité des " actes portant donation entre vifs faites de la main à la main et sans acte? " Mais l'art. 967, en disant que toute personne pourra disposer par testament " sous toute dénomination propre à manifester sa volonté, ne parle non plus des " dispositions de dernière volonté, qui seraient faites sans testament et qui " seraient de nature à être exécutées sur le champ. D'ailleurs, quel est le fon- " ment principal de la doctrine qui tient le don manuel entre-vifs pour valable, " nonobstant le défaut des formalités prescrites par l'Art. 931. C'est évidem- " ment la maxime écrite dans l'art. 2279, *en fait de meubles la possession vaut* " *titre* or cette maxime ne s'applique pas avec moins de justesse aux meubles " donnés manuellement à cause de mort, qu'aux meubles donnés manuellement " entre-vifs, on peut même dire qu'elle s'y applique *a fortiori*; car il faut bien " moins de précautions pour faire valider un don toujours révocable, qu'il n'en " faut pour faire valider un don qui exproprie incommutablement le donateur."

A cheque, by the French law, is considered as a promissory note payable to

bearer, and transferable by mere delivery. As such it can be the subject of a valid donation by mere delivery as a promissory note payable to bearer or order. *Pardessus* Cr. Com. Part III. Tit. 2, cap. 10, No. 457—*Gouget et Mercier*, Dict. de Droit Com., Vol. 3, p. 479.

Lastly, was the *mandat* contained in the cheque revoked or extinguished by the death of Sir George Simpson? Such a mandate the respondent contends was not and could not be. See *Troplong* du mandat, p. 661, also p. 679, §737, "Il n'est pas toujours necessaire qu'une convention intervienne pour que le man-"dat survive à la mort du mandat..... Il est encore le même dans le man-"dat de payer que renferme une lettre de change."

On the preceding points the respondent begs to refer to the following additional authorities, establishing, along with those already cited, that a cheque may be the subject of a *don manuel* passing by mere delivery, and that the *mandat* thereby created is not extinguished by the death of the *mandant*, viz.: *Augeard, Arrêts Notables*, vol. 2, p. 135.—*Nouveau Denisart, vo. Donation entre-vifs*, § 12.—5 *Toullier*, No. 172-3.—*Troplong, Donation entre-vifs*, No. 1047-1055.—*Troplong, dépôt*, No. 146-150.

While the respondent claims that his demand is valid regarding it as based on the *don manuel*, there is, he contends, sufficient reason to consider it equally good as founded on the legacies made up of the cheque of the fourth of September, and the bequests of the sixth. "There is nothing that requires so little solem-"nity," said Lord Hardwicke, "as the making of wills of personal estate accord-"ing to the Ecclesiastical law of this realm; for there is scarcely any paper writ-"ing which they will not admit as such." *Williams on Executors*, p. 54. Nor is it necessary that an instrument should be of a testamentary form in order to operate as a will.

Idem, p. 55: "And it must be further observed, that it is not necessary for the "validity of a testamentary instrument, that the testator should intend to perform "or be aware that he had performed a testamentary act: for it is settled law, "that if the paper contains a disposition of the property to be made *after death*, "though it were meant to operate as a settlement or a deed of gift, or a bond; "though such paper were not intended to be a will or other testamentary instru-"ment, but an instrument of a different shape; yet if it cannot operate in the "latter, it may nevertheless operate in the former character."

"So if a testator by a subsequent paper say he has bequeathed by a former "instrument that which he has not bequeathed, the subsequent paper would, it "should seem, be admitted to probate, as being a declaration of his will at the "time he made it, to dispose by the will."

And two or more documents may be united to constitute a will, even though not testamentary in form.

Idem, p. 56: "The Ecclesiastical Courts do not confine the testamentary dis-"position to a single instrument; but they will consider several of different "natures and forms, as constituting altogether the will of the deceased."

Jarman on Wills, pp. 49-20 (2nd Amer. Ed., 1849) is to the same effect: "The Ecclesiastical Judges (before whom, of course, questions of this kind are "most frequently agitated) act fully up to the principle which regards as testa-

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"mentary any instrument that is designed not to take effect until the maker's "decease, though assuming the form of a disposition *inter vivos*; and, accord- "ingly, in repeated instances, the Prerogative Court has granted probate of such "irregular documents as the assignment of a bond by endorsement, receipt for "stock and bills endorsed, a letter, marriage articles, and promissory notes and "notes payable by executors to avoid the legacy duty." Foot-note to the fore- going: "*So drafts on bankers.*" *Bartholomew* vs. *Henley*, 3 Phil., 317.

The respondent begs to make particular reference to this last mentioned case, where three cheques on a banker were held to be codicillary; *Sir John Nicholl* saying: "On the whole I am bound to look to the benefit intended; and "although it has been done in an anomalous form, it is the duty of the Court to "carry into effect the intentions of the deceased, and to consider these papers as "a part of the will and codicils of the testator."

A case bearing a still more striking resemblance to the present, and, in fact, almost precisely similar, is that of *Jones* vs. *Nicholay*, 2 *Eng. Law and Equity Reports*, 591 : 14 *Jurist*, 675. "E. N. on his death-bed gave directions for the "writing a paper in the form of a bill of exchange upon his agents, and this paper "was signed in the presence of two witnesses, who attested and subscribed the "same." (This occurred in 1844, since the recent alteration in English law of wills, not in force here, requiring signature by the testator.). This draft was admitted to probate as a codicil to a will previously made, after resistance made on behalf of the mother of the testator, residuary legatee under the will.

Sir H. Jenner Fust (in pronouncing judgment): "I am of opinion that this "allegation ought to be admitted to proof. Its object is to establish as a testa- "mentary paper or codicil to the will of the deceased, a bill of exchange—cer- "tainly an unusual form of testamentary instrument; still if the Court should be "satisfied that it was the intention of the deceased that it should operate as part "of his will, and if the paper was duly executed in conformity with the provisions "of the statute, the Court would be bound to grant probate of it."

It does not appear to be necessary that the instrument should bear any testa- mentary form whatever, mere notes or heads of instructions being sufficient if the intention is made out in evidence.

BURNS' ECCLESIASTICAL LAW, *vol. vi., p.* 107, *note g.*: "A testament of "chattels though written in another man's hand and never signed by testator, "yet if proved to be according to his instructions and approved by him it hath "been held a good testament of the personal estate."

In Ross vs. *Ewer*, 3 *Atk.*, 162, it was said, "that nothing required so little "solemnity as the making a will of personal estate according to the Ecclesiastical "laws of this realm: for there is scarcely any paper writing which they will not "admit as such."

LOVELASS ON WILLS, *page* 317: "But when a writing, however informal, "is proved to contain that which the testator intended to be a definitive disposi- "tion of his property, to take effect after his decease, it will be admitted to pro- "bate by the Ecclesiastical Court. Thus, a letter written to a solicitor containing "instructions for drawing up a will, written minutes taken from the mouth of "the testator as instructions for a will, or rough heads for a will written down by

"the testator himself, may be a good will of personalty, *and it is immaterial* "*that such notes or memoranda were intended to be copied fairly or drawn out* "*in more regular form.*"

It is scarcely necessary to multiply authorities to show how freely and informally the English Courts permitted the devise of personalty to be made. The point, it is declared in all the cases, to be ascertained, is the intention of the testator, and where that is apparent, where no fraud or interference is shewn, and where the testator's sanity is established, the writing, whatever it may be, will be admitted to probate.

A will of real property, as well as of personalty, made by answers to interrogatories, was maintained in the case of *Green* vs. *Skipworth et al.* (1 Phillimore, 53). The testator neither wrote nor signed anything, and his will was elicited by questions which were even suggestive in their nature, though put with a good purpose and out of regard to his weakness.

See also *Williams on Executors*, London, 1832, vol. i., 49, 51, 53, and 54, note *c.*—4 *Kent's Com.*, p. 517, 8th. Lect., 68, foot note *b*. "It need not be "signed or sealed by the party. The authentic wishes of the testator as to the "disposition of his property are sufficient." *Swinburne on Wills* (7th Lond. Ed., 1803), pp. 10, 11, 67, 74, 76.

The interest of the witnesses to a will was by 25th Geo. II., cap. 6, made no disqualification to their proving the will.

The respondent confidently submits his claim, on the foregoing grounds, to the decision of the Court. The appellants, in resisting, in the first place, the demand, and then in appealing from the judgment of the Court below, have taken their stand mainly upon the unsoundness of mind, *without intermission*, which they impute to Sir George Simpson during his last and fatal illness. It is true that the legal validity of the claim has also been brought in question, but in view of the evidence adduced in the progress of the case it can hardly be maintained that a continued resistance was not a positive thwarting of the expressed wishes of the deceased, for which the only justification could be a belief that these wishes were the offspring of a disordered mind. Such an opinion the respondent ventures to hope, this Court will by no means, arrive at. If any indication of the state of a man's mind is to be found in the nature of the [illegible] the enquiry becomes necessary, or in the mode of performing it, then assuredly few cases could show a more rational spirit than the present. Sir George Simpson was a man of large estate, admitted of record in this case to have been worth at least £150,000, and the total amount of the sums disposed of upon his death-bed, divided, as they were, among six persons, did not reach £5,000. The recipients, (if they are to receive it) were not strangers, suddenly and in a freak of madness, taken into his regard; they were his daughter's husband, the clergymen of his parish, whose churches he attended, his two oldest friends and fellow-workers, and his domestic servant. These were those who had always lived about him, and if any cause for what the appellants represent as a piece of "excessive generosity" is sought, it may be found in the softened feelings of a sick man, aware of his approaching death, and sensible of the kindness and attention which were at the very time endeavouring to alleviate his sufferings. Nor was the man-

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ner of making the gifts less rational. There was not a sudden impulse of liberality, suddenly appearing and as suddenly dying away. There was a sustained intention, dating probably from a time before that on which he first mentioned the subject, and persisted in after the attack of delirium, under which he laboured upon the fifth of September, had disappeared. He was, says Mrs. Cameron, anxious early upon the fourth to have the matter carried out, and on the evening of the sixth, again recurring to it, made it, as he imagined, safe beyond a doubt, and then seemed satisfied and more at ease. It is true that most of the witnesses, though not all, are themselves interested. Under the circumstances, however, it could scarcely have been otherwise, and the truthfulness of their evidence, except on those points on which the appellants do not acknowledge them to be competent judges, has not been impugned in the least. Lastly, the intention to make these gifts evidently arose spontaneously in Sir George Simpson's own mind. So far from there having been any suggestion or encouragement of the idea, both Mr. McKenzie and Mr. Hopkins attempted to dissuade him from it until he became irritated at their hesitation, and his renewal of the subject upon the sixth was as clearly a thought of his own. The respondent respectfully submits his case, believing that the Court will so construe the facts as, in the words of Lord Mansfield, "to pursue, if possible, the will of the testator," and prays that the judgment of the Court below be confirmed.

The following is a brief summary of the argument submitted by *Bethune*, on behalf of the appellants:

1. The *check* is sued on as a *don manuel inter vivos*, and the portion of the judgment having reference to the check characterizes it as such.

To render such a donation valid, there must be, says Borrjon (tome 2, tit. 4, ch. 1, § 1, Nos. 1, 3, 4), "*Dépouillement effectif, irrévocable*,"—"*ce dépouillement n'est pas une simple forme, mais l'essence même de la donation, et sa base.*" And, in speaking of the distinctive character of a donation *inter vivos*, he says, it ought to be quite clear, "*que le donataire a préféré le donataire à lui-même et non-seulement à son héritier.*"

The rule on this point is thus laid down in the Nouveau Denisart, *verbo* Don. Entre Vifs, § 7, No. 5, pages 40 and 41,—"la tradition requise pour la validité des donations entre-vifs, est une tradition *parfaite et consommée*. "Il faut que celui qui donne *cesse de posséder*; que celui auquel on donne, commence à posséder, *il ne suffirait pas* que celui qui donne, *abandonne la propriété* de la chose donnée. Par cette abdication, elle peut cesser de lui appartenir; *mais elle n'est pas encore la chose du donataire qui ne s'en est pas mis en possession.*

Demolombe (Traité des Donations, etc., 1 vol., No. 22, pages 21, 22) states the point thus,—"*Le dépouillement actuel et irrévocable* du donateur au profit du donataire, tel est le second caractère *distinctif et essentiel* de la donation entre-vifs," "c'est-à-dire qu'il est *indispensable*, que dès l'instant où la donation entre-vifs s'accomplit, le donateur soit *dessaisi* de manière à *ne pouvoir* [illegible] *ressaisir.*"

Troplong (Traité des Donations, etc., Vol. 2, No. 1046, page 411) says,—"Le don manuel *tire sa force* de la *dépossession actuelle et irrévocable* du propriété-

"taire. *Ce n'est pas un don manuel que celui où l'on trouve d'autres combinai-*
"*sons.*"

In the present case, the check was never actually delivered by the donor to any body. He merely signed it in the check book, whilst lying on his back; the book being held by Mr. Hopkins, his private secretary, who received no directions whatever as to the disposition of the check. Mr. Hopkins, moreover, did not deliver the check to the respondent during the donor's lifetime, but locked it up in his desk with other checks signed at the time; "his firm belief "being that Sir George would recover, and that it might be painful to him to "see them, as a record of how seriously ill he had been."

The respondent contends that Mr. Hopkins received delivery of the check for and as the attorney or *negotiorum gestor* of the respondent.

On the question of delivery to a stranger, as here contended for, the rule is thus stated in the Nouveau Denisart (verbo Don. entre-vifs § 12, p. 62, No. 10),—"lorsque l'étranger auquel on remet la somme est *père, tuteur, adminis-*
"*trateur, ou mandataire du tiers*, au profit du quel la somme doit être employée, "il la reçoit pour le donataire, qui en est saisio par son ministère dès le moment "de la tradition." "*Au contraire*, lorsque l'étranger auquel on remet la somme "*n'a aucun de ces titres*, on ne peut pas dire qu'il la reçoive pour le donataire "et en son nom. *Il est regardé alors comme le mandataire du donateur.*"

There was no attempt to prove here that Mr. Hopkins was *de facto* the attorney or *negotiorum gestor* of the respondent. It must merely be contended that he was so inferentially or by some fiction of law that has never yet been explained. But according to the citation given above he is in law presumed to have been the "*mandataire du donateur*," and, being the *private* secretary of the donor at the time, he was *de facto* the *mandataire* of the donor, and of him alone.

The *arrêts* relied on by the respondent are, under the old law of France, those of the 15th December, 1864 (Journal des Audiences, tom. 2, p. 351, liv. 3, ch. 59); 1st September, 1708 (Angéard, tom. 2, p. 135), and 19th January, 1768 (Nouv. Den. vo. Don. entre-vifs, § XII, p. 61, No. 7); and under the Code that of the 12th December, 1815 (Journal des Audiences, 1816, Pt. 1st, p. 132, and *seq.*).

The first of these cases was that of a *dépôt* of money made long anterior to the donor's death, in the hands of his aunt, and the evening before his death he declared to her that the amount thus placed *en dépôt* belonged to his nephews, then minors apparently, but that she was not to pay it over to them till their marriage day. The Court held, under all the circumstances of the case, that the property had passed. But there is no kind of similarity between that case and the present. There was an actual delivery and acceptance by an aunt for her minor nephews—as complete a donation, under the circumstances, as could practically be made. Apart from the non-application of the *arrêt* cited to the present case, there is an *arrêt* of the Parlement de Paris of 1786, reported in the Nouv. Den. vo. Don. entre-vifs, §XII, No. 11, p. 62, which was rendered in the opposite sense; it being there held, that where the money was not actually paid over during the donor's life to the intended recipients, the donation, although accepted by a stranger for a third party, was null.

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Troplong, moreover, in criticising this judgment of the 15th December, 1664 (Dépôt, No. 150, p. 121) says, that such a *dépôt* is *not* an "*aliénation de la "part du déposant;*" that the death of the *déposant* operates as a complete revocation of the *mandat* of the *dépositaire*, and leaves him "*sans titre pour "remettre la chose à la personne désignée.*" "Ces considérations (he adds) sont "*décisives.* M. Favard Laglade les a exposées avec force dans son discours au "corps législatif comme membre du Tribunat. Fenet T. 14, p. 515." As to the *arrêt* reported in Augéard, little or nothing need be said about it. It is enough to draw attention to the fact that it was the special case of a *dépositaire* refusing to divulge the contents of a casket entrusted to him *en secret* by the *déposant;* and the Court simply held that according to the rules of common honesty he was bound not to divulge the secret thus entrusted to him. The *arrêt* has no application to the case under discussion.

The *arrêt* of the 19th January, 1768, reported in Denisart, determined nothing whatever on the question of validity of the donation. On page 61 it is distinctly stated,—"*en conséquence sans rien statuer sur la validité ou "nullité de la donation*, les juges du châtelet du parlement se sont détermi-"nés," etc.

And as to the *arrêt* of the 12th December, 1815 (which is of course not law here), Merlin (Ques. de Droit vo. Don. § 6, p. 452, 4th Ed.) says, in criticising the decision,—"*il me paraît impossible de la justifier sous aucun rapport.*" —"*Quelle qualité* avait le Sieur Jeannin, pour accepter au nom des donataires, "le don manuel du Sieur Thomas? *Aucune;* il n'avait reçu d'eux *aucun "pouvoir* à cet effet, et il *ne pouvait pas accepter* pour eux, *sans un mandat "spécial.*" See also Troplong Dépôt, No. 151, and 8 vol. Duranton, Nos. 392, 393, 394.

2. If the check can be regarded as a donation at all, it was one *à cause de mort*, and is therefore null and void.

The check was signed during Sir George Simpson's last illness, and comes therefore clearly within the provisions of the 277th Article of the Custom of Paris,—"Toutes donations, *encore qu'elles soient conçues entre-vifs*, faites par "personnes gisant au lit, *malades de la maladie dont ils décèdent, sont réputées "faites à cause de mort* et testamentaires, *et non* entre-vifs." Besides, Mr. Hopkins distinctly states that it was intended as a *parting* gift, and that he locked it up with the other checks, in order that, should Sir George recover, there might be no record for him to see how ill he had been.

Under all systems of law at any time prevailing in the *pays coutumier* in France, donations *à cause de mort* were utterly null and void.

Bourjon, vol. 2, Tit. 4, ch. 2, Nos. 1 and 4.

Ricard, Traité des Donations, vol. 1, Part 1, ch. 2, Nos. 43, 63, and *seq.* to 82, and note (*g*) to No. 81.

Nouv. Denisart, *verbo* Donations, § 2, pages 6 and 7. *Verbo* Donation *à cause de mort*, § 1, pages 13, 14; § 111, pages 17, 18; Nos. 8, 9, pages 20, 21. *Verbo* Donations, *entre-vifs*, § 3, Nos. 4, 5, 6, pages 25 and 26; § 7, Nos. 2, 3, 5, pages 40 and 41; § 12, No. 6, page 60.

Demolombe, Traité des Donations, &c., vol. 1, Nos. 35, 36, 37, 38, and 39.

Troplong, Traité des Donations, &c., No. 1053.

Arrêt de la Cour des Cas., 4th May, 1816. Jour. des Au. 1817, Pt. 2, p. 9.

3. It is contended by the respondent that the check is a will.

The case mainly relied on is that of *Bartholomew et al.* vs. *Henley*, 3 Phil. p. 317, and printed at pages 16 and 17 of the respondent's memorandum of points submitted to the Superior Court; but there the testator, in the margin of his check book, distinctly declared that he intended the checks to be bequests, and the checks and records in the book were all proved together.

Without, however, discussing whether a check might or might not have been proved as a will under particular circumstances in the Ecclesiastical Courts in England before the passing of the 1st Vict., ch. 26, it is enough to say here that the check, as soon as it got into the respondent's possession, was treated by him as an ordinary check, and protested by him for non-payment. Moreover, the present action is brought on the check, as a *donation manuelle inter vivos*, and in no way as a will, and no attempt was ever made to prove it as a will. No action can be brought on a will of personalty without probate. Williams on Executors, vol. 1, page 239. (Eng. paging, 4th Ed.). 1 Jarman on Wills, page 211.

4. Sir George was *non compos mentis* when the check was signed.

The date of the check is the 4th September, 1860, and Mr. Hopkins says that it was signed "*early*" on the morning of that day.

Dr. Sutherland says: "On the *third* I visited him twice, early in the morning and late in the evening; the symptoms were now *unequivocal;* he had had "*scarcely any sleep*, and had been *delirious* during the night; was labouring under *delusions* so strongly impressed that they became *genuine hallucinations;* "though speaking to me fluently and apparently with correctness of his state, he "informed me *that he had died during the night*, and that he had *paid a visit* "*to Hell*, and that he found it a *very agreeable place*. The *same* hallucinations *continued*, I would say, *intensified*, up to the *last day* on which he was "*able to speak* to me.

"On the *fourth* day I again saw Sir George twice, *in the morning and evening; all* the symptoms were *aggravated;* he had had *maniacal* delirium "through the night; he had not only been delirious, but *furious;* he *yet* conceived himself to be *dead*, and *pointing to Mr. McKenzie*, who was in the room at "the time, he said, 'It is a very sad affair; *McKenzie has just died*, and I have "'just seen *two persons*, a man and his wife [giving their names, which names "'I do not at this moment recollect], *they likewise dropped down dead*. Indeed, "'I have never seen such an epidemic.'"

And in a subsequent part of his deposition he says, that Sir George was "*never at any time* on the *fourth* or *fifth* of September, 1860, of a sound and "disposing mind, memory and understanding."

Dr. DeCousagne says, that on the morning of the *third* Sir George "gave "*equivocal* signs of inflammation of the brain, and was *completely delirious from* "*that time until the next morning*," when he says "he showed the first indications of returning consciousness," adding, however (in cross-examination), that he had "a fit (explained in another part of his examination to be *epileptiform*) "every hour or two, and they gradually subsided, having greater intervals between

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"them, and finally ceased on the morning of the sixth, from which time until he "died he had no fit."

Dr. Workman, on the facts sworn to by Drs. Sutherland and DeCouagne, gives it as his opinion, "that at *no time*, from the first day of September, 1860, "up to his death, was the said George Simpson of sound and disposing mind, "memory and understanding."

And Dr. Macdonnell, in answer to a question, based on the evidence of Drs. Sutherland and DeCouagne, whether or not he believed "that at *any time* early "in the morning of the 4th September, 1860, Sir George was of sound and dis- "posing mind, memory and understanding," answered, "If these hallucina- "tions were permanent, and not provoked by injudicious questioning or refer- "ence to the past hallucinations, I should think he could *not* have been of sound "mind, memory and understanding at the period named."

Dr. Sutherland attested that the hallucinations in question were "spon- "taneous."

As a matter of medical jurisprudence, it is submitted that "delusions are a "*test* of unsoundness of mind."—*Vide* Medical Jurisprudence of insanity by Ray, p. 36 and 37, and Dean's Medical Jurisprudence p. 513. Lord Brougham has also laid down the doctrine that,—"delusion as long as it exists, whether "much or little under control, is a *manifestation* of insanity, and hence *no con-* "*fidence* can be placed in the acts or *any act* of a *diseased* mind, however *appar-* "*ently rational* that act may *appear* to be, or may in reality be."

5. As to the pretention set up in the declaration that the estate has been foreclosed from refusing payment of the check, by the fact that it was charged in Sir George's private ledger, and the balance of cash entered in the inventory was the balance struck, after deducting this particular check and the other ones said to have been made at the same time, the Court can attach no importance to the point, as the entry in the ledger was made by Mr. Hopkins about a month after Sir George's death, without special or other instruction from the appellants (who had not even as yet proved the will of March, or taken possession of the estate), and the entry in the inventory was made from a memorandum of the cash balance shown on the balance-sheet furnished by Mr. Hopkins to the notary; no mention whatever of the checks being made either in the balance sheet or in the inventory.

6. The memorandum of the 6th September, 1860, is claimed by the respondent to be a *written* will or codicil.

In the respondent's declaration it is alleged to be a codicil to the written will of the 10th March, 1860, made by *word of mouth*, and according to one count of the declaration, "at the request of the said Sir George Simpson, *committed to* "*writing*, by Edward M. Hopkins, of Lachine, Esquire, in the presence of the "said testator, and of numerous witnesses, and immediately thereafter read over "to the said testator, and approved, and confirmed by him," and (according to another count of the declaration) "*put into* writing within six days from the "*speaking*, declaring and publishing of such *words*."

If this memorandum be a testamentary paper at all, it is clearly nothing more than a *nuncupative will*, reduced to writing, and therefore falls within the provisions of the Statute of Frauds (29 Car. 2, ch. 4, § 19, 21 and 22.)

Now by that statute it is distinctly enacted, that no such will "shall be good, "that is not *proved* by the oaths of *three* witnesses (at the least) that were "*present* at the making thereof; nor, unless it be *proved* that the testator at the "time of *pronouncing* the same, did *bid the persons present*, or some of them, "*to bear witness*, that such was his will." And that no such will shall have the effect of repealing, or altering or changing any clause in a "will in writing con-"cerning any goods or chattels, or personal estate," "except the same be in the "lifetime of the testator committed to writing, and, after the writing thereof, "read over to the testator, and allowed by him, and *proved to be so done* by "*three witnesses at the least.*"

It is submitted, 1st, That such witnesses must be disinterested, and that the legatees are wholly incompetent.—*Vide* 1 Jarman on Wills, p. 63 (English Ed.) and 104, 105 (Am. Ed.); Lovelass on Wills, p. 161 (Am. Ed.) and 301 (English Ed.); Swinburne on Wills, p. 347; Williams on Executors, 1 vol., page 278 (Eng. paging, 4th Ed.); 2nd, That the [illegible] be proved to have *pronounced* the will; and 3rdly, That it must [illegible] he *bid* the persons present to *bear witness* to his will thus pronou[illegible] Statute of Frauds, *loco citato*; Lovelass on Wills, p. 181, 182 [illegible] Ed.), 339, 340 (Eng. Ed.); 1 Jarman on Wills, p. 130, 131, and notes (Am. Ed.), 89 and 90 (Eng. Ed.); and 2 Blackstone's Com., p. 501, (old paging); Williams on Executors, vol. 1, pages 99, 100 101 (Eng. paging, 4th Ed.).

Now *all* the witnesses (with the single exception of Miss Simpson) were, in the present case, *legatees*, and therefore *incompetent*, and all concur in stating, that he never *dictated* any portion of this pretended will, much less did he *bid* the parties present, *or any of them*, to *bear witness* to what was going on.

On this point Williams (*loco citato*) says,—"The words of the Statute of "Frauds, with respect to nuncupative wills, have *always* been construed *strictly*, "and *all* its provisions *must be completely* complied with;"—"for the words of "the Statute are *very strong*, and must be held *strictly*."

The case of Green vs. Skipworth (1 Phil. p. 53), which is mainly relied on by the respondent, and printed in his memorandum of points submitted to the Superior Court at pages 20 and 21, and many others cited by the respondent to the effect that mere instructions for a will of personalty, written by a third party, and never signed by the testator, have been admitted to probate in the Ecclesiastical Courts in England, have no application to this case, inasmuch as the documents admitted to probate in these cases did not interfere with a former written will, as here. Then, as to the cases cited from Phillimore, where they did so interfere, it is enough to say (all of them having been rendered after 1774, the date of our ordinance 14 Geo. 3, ch. 83) that they have no force of law in this country, and are directly in the face of the Statute of Frauds as above cited, and no doubt led to the passing of the 1st Victoria, ch. 26, by the 9th section whereof it is provided, "that *no* will shall be valid, unless it shall be "*in writing* * * and *signed* at the foot or end thereof by the testator, or "by some other person *in his presence and by his direction*,"—and that "in "the presence of two or more witnesses present at the same time; and such "witnesses shall attest, and shall *subscribe* the will *in the presence of the tes-*"*tator*."

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A nuncupative will, when *all* the formalities of the Statute of Frauds are complied with, may possibly become or be considered a *written* will, but, to make it so, all that the Statute requires as to proof *must* be *strictly* attended to.

As to the characters of the witnesses, they must be such at the time of the passing of the Statute of Anne (4 and 5 Anne, ch. 16, § 4) would have been "good witnesses on trials at law." The respondent contends (p. 20 of his said memorandum of points) that the Statute 25 George 2nd, ch. 6, so interfered will the Statute of Anne as to render legatees competent witnesses to prove a will or codicil, by annulling their legacies, but the Statute relied on is evidently confined to wills of real property, and has been always so regarded in England.—Lovelass on Wills, p. 302 (English paging, 12th Ed.); 1 Williams on Executors, p. 278 (English paging, 4th Ed.); 2 Williams, p. 907.

7th. The respondent contends that, having obtained probate of the memorandum of the 6th September, 1860, no question can now be raised about it.

It is submitted that the authorities relied on on this point are based on the *exclusive* jurisdiction of the Ecclesiastical Courts in England, whereas here the will was contested in the same Court which granted probate. Besides the mode of procedure in this country is wholly unattended with the formalities observed in the English Ecclesiastical Courts, where all the parties are *contradictoirement* before the Court, and witnesses are examined and cross-examined, and counsel heard on both sides, as formally as in an ordinary civil trial; whilst here the whole affair is conducted *ex parte*, and with so little solemnity that *even a Prothonotary* can grant a probate of a will. It must be borne in mind also, that so little similarity is there between our mode of probate and that in England, that the jurisdiction of the Ecclesiastical Courts is confined to wills of personalty, whereas here we prove all kinds of wills in the Superior Court.

Apart, however, from all these considerations, the memorandum in question could not "be at any time received to be proved, unless *process* have first issued "to call in the widow, or next of kindred of the deceased," 29 Car. 2, chap. 4, § 21. At the very least, therefore, Sir George Simpson's oldest son, who is the residuary legatee under the will of the 10th March, 1860, ought to have been called in by writ or other *process*. So far as the *acte* of probate discloses, the proceeding was purely *ex parte*, and must be so presumed to have been conducted in the absence of statement or declaration to the contrary in the *acte* of probate. *De non apparentibus et non existentibus, eadem est ratio.*

8th. The last point calling for the attention of the Court is the state of mind of Sir George Simpson and his capacity in law to make a will on the evening of the 6th September, 1860.

It is submitted that, in testing the soundness of the testator's mind, "we must "not (as Lord Kenyon said) look first to the act done, and argue up from that "to the sanity of the mind," but look "at that which is the *real* question, and "which the law ever conceives to be *the* question, namely, whether the testator "was of *sound* and *disposing* mind and understanding when he made his will. "This is *the* question which the wisdom of ages has framed, and which, as often "as the question arises in Courts of Justice and is put into form, in those words "it is put into form." 1 Beck's Med. Jur., p. 840. Again it was said in Combe's

case, Moore R. p. 759. "The same *memory* for the making of a will (agreed "*all* the Judges of England at an early date) is not at all times when the party "can *answer* to any thing *with sense*, but he ought to have *judgment* to *discern* "and to be of *perfect memory*, otherwise the will is *void*." "He ought to have "a *disposing* memory (said Lord Coke) so that he is able to make a disposition, "&c." Wharton and Stillé, Med. Jur., p. 10, § 5. And specially in a case like the present (where the penman of the will takes a pecuniary benefit under it) the Courts exact "the most *decisive* proof of the *complete* absence of influence "and *excitement*, at the preparation and making of the asserted will, and must "require unimpeachable evidence of unbiassed *volition*, and of *clear capacity*, "and must expect it to be shown by *instructions* coming *from* the deceased "himself." Wharton & Stillé, Med. Jur. p. 11, § 5—and note (*i*). And Beck says, at page 852 of the 1st. vol. of his work on Medical Jurisprudence, that we ought not to be satisfied "with having the instrument read over to the testa- "tor, and obtaining the *assent* of the dying man, but require him to *dictate* "the provisions of the document. If he does this *accurately*, there is no doubt "of his having a *disposing* mind. In the *other* case, he may have *assented*, al- "though he did not *understand* the full purport of the instrument." In this connection also, the distinction between the condition of the mind which manifests itself by *maniacal* delirium (as Dr. Sutherland swears was the case with Sir George), and that which manifests itself by *febrile* delirium, is specially to be kept in view; no fever whatever being proved to have existed in Sir George's case. In the former the patient recognizes persons and "things, and is perfectly conscious of and remembers what is passing around him." In the latter there is a complete absence of power of recognition. In the former also, the patient *reasons*, although incoherently. In the latter "there is an *entire abolition* of the reasoning power." In the former also the patient "*hears* and feels." In the latter "sensation is greatly impaired, and this avenue to the understanding "seems to be *entirely closed*." Ray, Med. Jur., p. 318, § 308. Dean's Med. Jur., p. 543. 1 Beck's Med. Jur., p. 800.

The attention of the Court is here called to the fact, that on the *third* of September, *between ten and eleven o'clock* in the morning, Sir George is said to have signed a check for $1200, in favour of his servant James Murray, and (according to Mr. Hopkins' evidence) to have "handed it to Murray himself with some kind "expressions of his regard for him." And when all the other checks (including the one in dispute in this cause) were made and signed "*early*" on the morning of the *fourth*, Sir George is reported to have held somewhat detailed and apparently rational conversation with Mr. Hopkins on the subject of them. As previously shown, however, Sir George was, according to *all* the *medical* evidence, indubitably *non compos mentis* at these particular periods of time, and on the authorities cited he must be presumed to have been so.

The appellants, having thus established an absolute derangement of mind at the above periods, submit, as a legal proposition, that the *onus probandi* of a sufficient "lucid interval," on the night of the sixth of September, is on the respondent, and would refer to Beck's Med. Jur., p. 851; Lovelass on Wills, p. 141 (Am. Ed.), 263 (Eng. Ed.); Ray's Med. Jur., p. 340, § 334.

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It now becomes interesting to enquire what is a lucid interval? Lord Thurlow said, in the case of The Attorney General vs. Parnther, 3 Brown's Ch. cases, p. 234,—"By a perfect interval, I do not mean a cooler moment, an abatement "of pain or violence, or of a higher state of torture—a mind, relieved from ex- "cessive pressure; but an interval in which the mind, having *thrown off* the *dis-* "*ease*, had *recovered* its *general* habit." And on the same occasion he added, that "the *evidence* in support of the allegation of a lucid interval, *after de-* "*rangement of any period has been established*, should be as *strong and demon-* "*strative* of such fact, *as where* the object of the proof is to establish derange- "ment."

D'Aguesseau, in his celebrated pleading in the case of the Abbé d'Orleans said: "It must not be a mere *diminution, a remission* of the complaint, but a kind of "temporary *cure*, an intermission so *clearly* marked as in *every respect* to resem- "ble the *restoration of health*."

Dr. Reid says, "The mere *interruption* of a disorder is not to be mistaken for "its *cure*, or its *ultimate* conclusion."

Dr. Combe says, "However *calm* and *rational* the patient may *appear* to be "during the lucid intervals as they are called, it must never be supposed that he "is in *perfect* possession of his senses, *as if he had never been ill*."

And Beck, at page 852 of his 1st vol. on Med. Jur. (already quoted) gives it as his opinion, that unless the patient can *dictate* his will at the time of the alleged lucid intervals, no value should be attached to any apparent indications of return to reason.

Except the citation from Beck, the whole of the above quotations are to be found in Ray's Med. Jur. at p. 334 *et seq.* And the Court is further referred to Dean's Med. Jur., pages 526, 527, 528 and 529, and especially to Sir John Nicholl's remarks as reported on page 529. He said, "that where there is not "*actual recovery*, and a *return* to the *management of himself and his concerns* "by the unfortunate individual, the proof of a lucid interval is *extremely difficult*.

Attention is now specially requested to the extract already given from Dr. Sutherland's evidence, as to Sir George's condition on the 3rd and 4th of Sept., 1860, and to the following extracts from his evidence as to his state not only during the other periods of his illness, but also antecedent thereto:—"I was "well acquainted with the late Sir George Simpson mentioned in the pleadings "in this cause, and was so acquainted with him for about twelve years preceding "his decease. I had seen and prescribed for Sir George on occasions previous "to his last illness, one of these a case of *congestive apoplexy*, on or about the "first of February, eighteen hundred and sixty, from which he rapidly recovered. "Subsequently, during the summer, I prescribed for Sir George *for symptoms* "*clearly having for their cause head disease.* I warned him of their significa- "cance, and of the precautions and general regimen he ought to follow and "pursue, and more especially, *anticipating some such attack as eventually occur-* "*red*, I advised him never to drive alone, in order that he might have ready aid "in case of attack. In the absence of his own medical man, on the first of "September, eighteen hundred and sixty, in the afternoon, I was summoned to "see Sir George. On reaching Lachine, I found that Sir George had had an

"attack of *hæmorrhagic apoplexy attended with epileptiform convulsions*, "several of which he had already had. He was then *perfectly insensible* with "imperfect *paralysis* of one side. Dr. DeCouagne was in attendance on my "arrival, and continued in that duty up to the time of his death; I being the "consulting physician."

"*At that period* I expressed the opinion, that the case was one of *great dan-* "*ger*, and to Dr. DeCouagne I explained my views, by saying, that I *anticipated* "*inflammation of the brain, and that of the effects of such inflammation he* "*would die;* basing such opinion, not only upon the case as it *then* was, but "upon its *previous history*, to which allusion has already been made. We "readily agreed upon a line of treatment, which was at once commenced and "steadily pursued till the morning of Thursday immediately preceding the day "of his death."

On the *second* of September I visited Sir George at an early hour, and found "him to common observation better; there was nevertheless, in his demeanour "and language, the *evidence* that he was *under the influence of incipient mental* "*excitement*, which I regarded, and told the Doctor my opinion, as being the "*first stage* of the *true inflammation rapidly about to follow.*"

"During the visit he was not only cheerful but gay, even to jocularity and "levity, apparently thoroughly indifferent as to his state, and yet declaring "that he would be quite well the next day and smoking his cigar."

* * * * * *

"On the *fifth*, I visited Sir George, *once*, in the *morning*, and found him *yet* "*worse;* he had had, in the interval of my visit, during the night, *epileptiform* "*convulsions*, he had again been *utterly unmanageable*, had *forcibly gone out of* "*the room*, and even if I remember right, *had gone down stairs. The old* "*hallucination still prevailed*, he had been *killed*, he then said, *by the persons* "*in the room, every one of whom had taken part in the murder*,—he said that "he had been *drugged to death likewise.*"

"On the *sixth*, I visited Sir George for the last time,—*found him in a state* "*of coma*, he had had during the night *involutary* evacuations, *as evidenced* "*by what I saw in the bed;* he was *evidently* sinking *fast*, and that opinion I "expressed unhesitatingly to those in the room, even though one gentleman "strongly expressed his opinion to the contrary; and this opinion of the rapidly "approaching decease I reported next morning to his own physician, Dr. Camp- "bell, who had just arrived from Cacouna, informing Doctor C. that he need "not be in a hurry to go out to Lachine, inasmuch as Sir George would be "either *in articulo mortis* or absolutely dead before he could reach Lachine."

And, in answer to a question to that effect, he gave his unqualified opinion, that at no time during his illness was Sir George of sound mind.

Dr. Thorburn, who only saw Sir George after Dr. Sutherland's last visit, and when the *coma* alluded to by Dr. Sutherland had apparently passed off, and who acknowledges to utter ignorance as to the nature of the disease Sir George was labouring under, says:—"During the time that I saw him he was at no "time in a state of *profound stupor*, until within a short time of his death, nor "was he incapable of expressing himself. He was capable of *expressing* himself

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"until within an hour of his death. He seemed *conscious*, and, although very "weak, he was capable of *hearing* remarks and *asking* questions." During the time the scene was being enacted on the night of the 6th of September, he "considered Sir George's mind to be quite clear." And, after stating that he did not know of what disease Sir George died he added,—"he was not *labouring* "under *insanity, as generally understood*, or under *mental incapacity*."

The only other attendant physician was Dr. DeCourcy, who says, that Sir George, "from the morning of the 6th until within a couple of hours of his "death, was perfectly conscious and had no more fits." He also states, that before the making of the supposed will on the night of the 6th September, he examined Sir George, at the request of Mr. Hopkins; that the examination occupied "*about five minutes*," and that he found him *perfectly rational*." He also gave it as his opinion, that "in Sir George's case, there was nothing "in his disease, after the morning of the fourth, when the inflammation "had commenced to subside to a certain extent, to prevent his having intervals "of perfect lucidity."

Dr. Workman is of opinion with Dr. Sutherland that there could have been no lucid interval in Sir George's case, and, as his evidence on this point, and as containing a criticism of the evidence of Drs. Thorburn and DeCourcy, is (to say the least,) extremely important, the attentive perusal of his whole testimony is earnestly pressed on the Court.

Dr. Macdonnell, on the other hand, differs from both Drs. Sutherland and Workman, as to the existence of such lucid interval, but the attention of the Court is drawn to the fact that he attaches no value to the hallucinations so much relied on by the physicians, whose evidence he criticizes, because in a "prominent case" in the garrison, a person here had somewhat similar hallucinations, from which he says the patient rapidly recovered and attended to his ordinary avocations. And Dr. Tuson, Staff Surgeon, who attended the person who had been thus affected, proved the fact of rapid recovery, but, when asked to compare that case with Sir George's, he says, they very closely resembled each other, "up till the morning of the sixth, when the patient (Sir George,) is "stated to have been found comatose, *the cases terminating quite differently*; "the one by the patient *completely recovering and going about his usual avoca-* "*tions*; and the other *terminating* in *coma, and followed next day by death*." Dr. Tuson gave no opinion on the mental capacity or otherwise of Sir George.

In cross-examination, Dr. Macdonnell was in effect obliged to admit that if all that Dr. Sutherland stated in respect to Sir George's case was true, Sir George was *not* of sound mind *at any time* during his last illness; and that the anæmic condition of Sir George's brain (which he conceived to have been his real malady) *frequently predisposes to the rupture of the blood-vessels of the brain*. And, in justification of the opinion expressed in his examination-in-chief, he explained that he attached much value to Sir George's restored *power*, enabling him to sign his name. But he added that if the *left* and *not* the *right* side was the one which had been paralyzed "the evidence of improvement" (in the absence of *actual* proof of restoration), "although valuable, would not be so "convincing." It is only necessary to say, that it is admitted by the plaintiff,

that it was the *left* side which was paralysed, and there was no evidence in the record of its restoration.

Now, when it was borne in mind that Sir George is stated by both his attending physicians (Drs. Sutherland and DeCousagne) to have died of inflammation of the brain, and that the only other two medical men who pronounce an opinion in the cause of death (Drs. Workman and Macdonnell) both attribute it to *cerebral disease*, although the former has denominated the disease *insanity* and the latter *anæmia*, terminating in *softening of the brain* and consequent death; when it is also borne in mind that *none* of the medical attendants attest to any *remission* of the disease, much less to anything amounting to *cure* or *recovery*, and however Dr. Sutherland's *diagnosis* of Sir George's case may not have met with entire approval by his brother physicians, that his *prognosis* was proved by the results which followed, to have been singularly accurate, not only from the very beginning of the attack of which he died, but from the summer previous; one feels irresistibly driven to the conclusion, that "*perfect lucidity*" in such a case was impossible, and, in the language of Dr. Workman, that one "cannot believe that this disease, *whilst killing the body* was *restoring the mind* "*to soundness*."

Moreover, and it is a point specially to be kept in view, the acts and conversations of Sir George connected with the signing of the checks, as related by Mr. Hopkins, are far more indicative of a rational state of mind than anything that he said or did on the evening of the 6th of September. On the former occasions, he is said to have held conversations and apparently reasoned about the character and amounts of the intended bequests, besides being able to sign his name; whereas on the latter occasion he had to appeal to Mr. Hopkins for information, and when answered could only respond by such expressions as "yes, yes, go on," and was apparently wholly unable to write or sign his name. It is impossible to compare what is related as having passed on these different occasions, without concluding that, instead of Sir George's mind being improved, it was eminently more defective on the evening of the 6th than on the mornings of the 3rd and 4th of September. There were not, of course, the same manifestations of the violence of his disease, but the prostration of his physical powers can sufficiently account for their absence, particularly when it is borne in mind that he died the next morning.

It has been said, that the legacies themselves were moderate, compared with the value of the whole estate, and were moreover nothing more than reasonable, considering the relations that had always existed between the testator and the legatees; but it must be remembered, that in his will of March previous Sir George had already recorded his measure of bounty in favour of three of the persons beneficially interested in these legacies. He had bequeathed £500 to Mr. Hopkins, £15,000 to Mrs. Cameron (less £1000 already received by her as a marriage gift), £300 to the servant man Murray, besides £500 to Murray's daughter, and that in his conversations with Mr. Hopkins at the time the checks were signed, the only allusion made by Sir George to previous gifts or legacies was to the £1000 given to Mrs. Cameron on her marriage day. It is true that in his will of March he gave nothing to Mr. McKenzie, but that gentleman was

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living with him as his intimate friend at the time just as he was during his last illness, and the [illegible] was, that of intimate friendship, existed in March as well as in September. So far therefore as the legacies to Mr. Hopkins, Mr. Cameron and James Murray are concerned, Sir George had evidently *forgotten*, that he had already bequeathed anything to these parties, much less that he had done so to the extent above mentioned. It may be said that the intended legacy of the 6th September was to Mr. Cameron and not to his wife, but, in the conversation already alluded to between Mr. Hopkins and Sir George, the latter alluded to the £1000 given to Mrs. Cameron on her marriage day as if it had been given to her husband. It is clear, therefore, that if he intended to give £1000 more on the 6th September, it was evidently to the same person to whom he gave the same amount on the occasion of the marriage.

This misapprehension of excessive generosity, at a time when Sir George's brain was affected to the extent detailed by cerebral disease (the expression is used as consonant with the opinion of all the physicians who have pronounced upon the character of Sir George's malady), beyond what Sir George deemed important: a time when he was undoubtedly unsound in mind, is relied upon as indicative of perfect rationality on the [illegible] and the days of September. The appellants can only say, that they not only [illegible] the force of this reasoning, but, in view of all the circumstances of this [illegible] complicated case, they arrive at quite an opposite conclusion, and feel that the impulse of excessive generosity thus displayed by Sir George was much the same as is often displayed under the elation of intoxication or other equally exciting cause, and that no reliance should be had on the mere act itself as indicative of any particular state of mind.

On the whole the appellants confidently claim a reversal of the judgment of the Court below.

MADDLEY, J., gave this judgment: On the first day of September, 1860, as the late Sir George Simpson was driving to his residence at Lachine from Montreal, he was suddenly attacked by a fit under the effect of which he was carried into his own house in a state of insensibility. The resident physician at Lachine, Doctor DeQuaigne, who had already attended him, was immediately in attendance, and continued with him until his death on the 7th. Dr. Sutherland, of Montreal, was also called in, and attended upon him until the 6th, as consulting physician. The state of insensibility disappeared in the afternoon of the day of the attack, but Sir George died on the following 7th, in the forenoon. During his illness, having become fully aware of the fatal result of the disease, he expressed his desire to show his parting good will and kindness to his servant and to some of his friends: on the 3rd he directed a check for £300 to be drawn in favour of his servant, which he signed and himself gave to him, accompanied with some kind remarks. On the following day, the 4th, he also directed other checks for different amounts to be drawn in favour of the respondent and other persons, which he then and there signed, and of which on the 6th he desired his private secretary in the presence of witnesses, to make a memorandum in writing as of his bequests, namely, of the amounts which he had given by the checks referred to which were severally read over to him in detail from the memorandum and there acknowledged and approved by him.

He died possessed of great wealth, which he had disposed of chiefly amongst his children by his last will, dated the 10th of March, 1860, probate whereof was duly granted on the following 6th of November, and in which last will the appellants were appointed his testamentary executors; they accepted the office, and still continue to act as such.

The check drawn on the 4th remained in the possession of Mr. Hopkins until after Sir [illegible]'s death, and also thenceforward for some time as agent of the executors who were made fully aware of their existence, and how they had been drawn: they did not go into the inventory of the estate, but remained in his hands as such agent. The check, the subject matter of this contention, was demanded of Mr. Hopkins as such agent by the respondent; and the executors having left it to him to decide whether he held it for the estate or for the respondent, he determined in favour of the latter, and gave it up to him because it had already been charged against and passed from the estate.

On the 11th October, 1861, probate was granted of the said memorandum of bequests drawn up by Mr. Hopkins as stated above, as a codicil to Sir George's will, and the check having been refused payment by the executors aforesaid, this action was instituted against them for the recovery of its amount.

The declaration sets out the cause of action under four different counts: 1st, that the check was a *don manuel*, a gift from the deceased to the respondent, left with Mr. Hopkins by Sir George, to be delivered to the donee; 2nd, that it was a *don manuel* confirmed by the approval of the deceased by the subsequent memorandum; 3rd, that the drawing and delivery of the check, followed by the making of the bequests by writing the same in the memorandum aforesaid was a confirmation of them, and of which bequests probate was granted on the 11th October, 1861; 4th, that the bequests were a codicil to the will, and probate of that codicil was granted at Montreal.

To this action the appellants pleaded:

"That on the said fourth day of September, 1860, the said Sir George Simpson was labouring under disease of the brain, with which he had been some time previously attacked, and of which he died on the seventh day of September, 1860;

"That the said Sir George Simpson was not, on the said fourth day of September, 1860, "of sound and disposing mind, memory and understanding," as is pretended and alleged in said declaration; but, on the contrary, was, throughout the whole of that day, and for some time previously had been, and, from that day until his decease continued to be, of unsound mind, memory and understanding, and wholly incapable in law of contracting or of disposing by last will and testament, or otherwise;

"That, moreover, at the time the said pretended memorandum of bequests purports to bear date, the said Sir George Simpson was not in full possession of his mental faculties, and of sound and disposing mind, memory and understanding,' as pretended and alleged in said declaration; and on the contrary, was, and for some time previously had been, and from that time until his decease continued to be, of unsound mind, and wholly incapable, in law, of contracting, or of disposing by last will and testament, or otherwise."

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The real issue then in this cause is the incapacity of the deceased to make the bequest or disposition in controversy, either as a donation or as a legacy, by reason of his alleged continued mental alienation during the entire period of his illness, from his first attack on the first of September, until the termination of his malady, by his death on 7th of the same month.

It must be premised that at the time of his attack Sir George was in his natural normal state of sanity, and in the full legal enjoyment of his civil rights; he was *integer status*, and had the entire full capacity of disposing of his property and estate either by donation or by last will, as he might think proper. This capacity, which in all men not formally and judicially interdicted from its exercise, is indisputable, is the general rule and principle of our law, but it is subject nevertheless to disqualifications which are exceptions to that general rule, and which, under certain states of mind, impede and even prevent its exercise altogether; these are called incapacities, and are either relative or absolute. It is with the relative incapacities that we are called upon to deal in this cause, because, if present, they would prevent any valid disposition of property by the disponent during their existence; they are technically known as incapacities of fact, and apply to all donations whether *inter vivos* or *causa mortis*, as well to legacies as to bequests by will. The chief of these proceed from mental alienation, that is, the condition of not being *sain d'esprit*, or, as forcibly expressed in the words of the 292nd Art. of the Custom of Paris, as the state of *une personne non saine d'entendement*."

To constitute the mental sanity required by the law, two conditions are essential: the first, intelligence or the power to understand and know the nature and character of the act to be done, and the second, volition or the power of willing to do the act and of manifesting that will.

It may be stated *in limine* that no imputation is cast upon the bequests so made by the deceased by reason of suggestion or influence practiced upon him for the purpose of inducing him to make them: the objection is simply his mental alienation and want of disposing mind at the times in controversy.

The circumstances relating to or connected with the doing of an act are necessarily and altogether matters of fact, and hence arises the question, had the disposing person sufficient intelligence and will to make the disposition? If a condition of positive imbecility, folly or madness be established as present at the time of the disposition, or in other words if a state of mental alienation then existed, it is plain that the answer would be in the negative. It is indifferent what denomination psychological science may give to the mental affection, or whether it is termed folly, madness or fury by physicians, the nomenclature given to the mere disease is of no moment, but it is important in a legal point of view that its extent and power should be judicially appreciated by courts of justice. Judicial respect is doubtless due to the teachings of medical science and to the researches and discoveries of its interpreters and professors, which are so frequently brought forward in controversies of this description; but Judges are charged to estimate and appreciate the reasonings and inferences of psychology and medicine from their own legal and judicial point of view, as well in respect of their application of them to civil life as in regard to the conduct of the indivi-

dual which is submitted to them for their decision. Judges are not called upon to prosecute an inquiry, with more or less of merely medical science alone, into the influence of any particular cerebral lesion upon the faculties of man in general, but to ascertain and determine whether the individual in question did still preserve a sufficient mental capacity validly to make the act in contestation. Medical science is not more positive and infallible than many other sciences; and it is notorious that perfect unanimity and certainty do not always prevail amongst medical practitioners. "Who shall decide when doctors disagree" is a question still requiring an answer in pathology as well as in ethics; and as regards mere medical science and its professors, their fallibility has been strongly exemplified in the conflicting and contradictory opinions and doctrines advanced and propounded with very peremptory assertion by the several medical witnesses who have been examined in this case.

It is not proper to deny, nor will it be here denied, that medical inferences and opinions may be, and frequently are of great importance in the administration of justice in cases of this description; but judges in their researches into the full merits of such cases must recur to facts, to the proved condition of the mental faculties exhibited by the individual disponent himself, and to all the actual particular circumstances connected with that condition, to determine whether he had retained or lost the intelligence and will necessary to enable him to effect a valid disposition of his property. Was he, to use the technical Latin terms, *demens*, deprived of mind, *mente captus mentis non compos*, or, in the language of our common law writers, was he *insensé* or *fou*, under which terms they comprehend the various phenomena of intellectual derangement.

Speaking under the guidance of our municipal law, it is indifferent whether the disponent was or was not in a permanent state of alienation or in an accidental and temporary state of such derangement when the disposition was made, because the existence of sufficient integrity of mind to do the act at the time of making it, and which of itself is the work of the mind, must be shown and established; hence the derangement of the intellectual faculties which might possibly be only the momentary result of sickness. Febrile delirium, for instance, may cause that temporary mental insanity which is as positive an obstacle at the time to the exercise of the disposing power as the most persistent and continuous state of madness. Paulus gives us the following dogma: *In adversa valitudine mente captus eo tempore testamentum facere non potest.* L. 17 § qui testam facere poss. But it is equally true that merely physical or corporal maladies or infirmities are not to be taken into consideration. "*In eo qui testatur, ejus temporis qui testamentum facit integritas mentis, non corporis sanitas exigenda est.*" Labeo L. 2 § qui testam facere poss, or as Ricard, *Traité des donations*, part 1, Ch. 1 Sect. 1 and 11 says: "il faut distinguer la capacité intérieure, celle de l'esprit, d'avec la capacité extérieure, celle du corps." However severe therefore a bodily malady may be, however great the pain and suffering it may occasion, in and of itself does not incapacitate a person from validly disposing, if it do not take away his mental sanity; and that power of disposition may even reach to the extremest period of the malady and to the approach of death itself, *balbutiens lingua*, without incapacitating, so long as mental sanity remains.

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The condition, therefore, of the disponent at the time of making the disposition is all important, and it is moreover one of fact, to be established by evidence, and therefore the question arises upon whom the obligation should fall of making that proof? It is authoritatively held [illegible] that it falls upon the party alleging the insanity, not alone because [illegible] the fact of the then present insanity, but also because he [illegible] that is contrary to the presumptions of nature and of law, which hold that man in general is of sane mind, and that madness is an accident, an exception. Upon this part of the case the following citation from Dallos, Jurisp. Général du Royaume Vo. *Dispositions Entre-vifs*, p. 205, is applicable and appropriate: "Les tribunaux n'admettent "qu'avec circonspection, la preuve de la démence [illegible] mort en posses- "sion de son état: Les demandes d'annullation pour cause de démence doivent- "être appuyées sur des faits précis et nettement articulés. Les magistrats ne les "reconnaissent comme concluants, que lorsqu'ils contiennent une démonstration "complète. Jamais ils ne procedent par induction, parce qu'il s'agit d'une "incapacité."

The evidence therefore to establish the alleged insanity of Sir George Simpson, when he made and acknowledged his disposition in this case, namely, when he made the check the present object of contestation, and when he recognized and assented to the memorandum of bequests containing that check, must possess the requisites of legal testimony, liable of course to be controverted by conflicting legal testimony, and subject also to be considered and examined not in a medical but in a legal manner, and according to the distinctions and discriminations of law. The evidence adduced by the appellants, defendants, upon the point of Sir George's insanity at the period in question, is confined to the testimony of two physicians,—Dr. Sutherland, who was in occasional attendance upon the deceased during his illness, as consulting physician, and Doctor Workman, the Superintendent of the Insane Asylum at Toronto, as that of an expert in cases of insanity, who did not see Sir George at all, and who was asked to express his opinion, upon an examination of a part of the adduced testimony submitted to him. The testimony of the former is the only direct evidence in support of the appellants' plea, and his deposition shews that his opportunities of personal communication with the deceased were few and limited. Sir George was brought home insensible about noon on the first September, the witness reached him some three hours later, and continued in attendance for an hour. Early on the morning of the 2nd, his visit lasted for fifteen or twenty minutes. On each of the mornings of the 3rd and 4th, a similar visit of equal duration, and a late evening visit of twenty-five minutes on each of these days, and an early morning visit of a few minutes on each of the 5th and 6th: he did not attend on the 7th, the day of Sir George's death. Now, including the first day when he says Sir George was insensible, and his visit reached to an hour, and the 6th, when he says that Sir George was in a state of coma or utter stupor, the attendance of the witness altogether extended to about three hours. It is not intended to question the sufficiency of the time given, but merely to shew the limited periods for personal communication with the deceased. During all the other periods of the disease, the witness of course cannot testify of his own know-

ledge, either of the conduct or condition of the patient, and for those periods can only report the hearsay communications of others.

Opposed to this witness are those brought forward by the respondent, the intimates, the friends, and the relatives of the deceased, who knew himself, his manner and disposition, and who were with him during his malady. These were Doctor DeCousagne, the resident physician at Lachine; Murray, his only male servant for eight years; Mr. McKenzie, his friend for thirty years, and for nearly two years at time of his malady, his guest; Mr. Hopkins, his private secretary for upwards of twenty-five years, all of whom were in close attendance upon him from his first attack until his death; Mr. and Mrs. Cameron, his son-in-law and daughter, who reached him from Toronto in the early morning of the 4th, and were with him until he died. The Reverend Mr. Simpson, the Presbyterian Pastor at Lachine, whose ministry Sir George attended, was with him occasionally from the 4th; and Dr. Thorburn, his friend and connection, who arrived in the morning of the 6th, and remained with him until his decease. It is from these witnesses that the respondent has drawn his direct testimony; and it is with the facts in evidence therein that the testimony of Dr. Sutherland must be confronted and compared. The testimony of this witness consists of his personal observation and communication with the deceased, of the professed reports and communications of others which he sets out in his deposition, and of his professional medical opinion upon the nature of the disease and its effects upon the mental capacity of the deponent during his illness. A daily statement was prepared from the evidence of Doctor Sutherland, as shewn in the factums and confronted with that of the respondent's witnesses from day to day, as given by them, to serve for my personal reference in settling this case, and need not be noticed here; it will suffice to detail therefrom the daily occurrences, demeanour and language of the deceased, his sayings and doings as it were, presented as facts from day to day, by the witnesses themselves, because, as already observed, the issue is to be decided upon the facts in evidence, not upon merely medical opinion.

Although consideration is due from courts of justice to such opinions, they cannot be allowed necessarily and absolutely to control judicial decision. Whatever may be the experience of the physician of the cause or course or period of a patient's physical suffering and life, his capacity to dispose of his property does not, before courts of justice, repose upon merely psychological or medical opinions and inferences, but upon all the facts and circumstances of the disease and its continuance, and as they are connected with and exhibited at the making of the disposition; and therefore it is, that as facts are never really opposed to facts, it must be upon the adduced evidence of facts that the issue in this cause must be adjudged, and from a legal and not a medical point of view.

The facts then shewn in this cause from the first are as follows, as taken from the printed evidence in the factums of the parties, which will be set down in order, but will not presently be read to save the time of the Court, but will of course be open to the parties for examination. They are as follows:

Sir George Simpson, *a man of good health*, of *great strength of constitution*, was attacked *by apoplexy* or by *a fit of epilepsy threatening apoplexy*, about

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noon on the first of September, which produced temporary insensibility. The attack subsided in the afternoon, and Doctor Sutherland directed Mr. Hopkins to inform Sir George's children, then at Toronto, "not to come to him, that he was better." Towards the evening Sir George became sensible and spoke rationally and thence continued to improve, so that Doctor Sutherland found him early in the morning of the 2nd "to common observation better, cheerful and gay, declar- "ing that he would be well to-morrow, indifferent as to his state and smoking a "cigar." Doctor DeConagne, his close attendant, pronounces him *totally conscious* all that day; and Mr. Hopkins from the early morning, found him *convalescent, with his mind quite clear, and anxious to converse on business subjects*, which Mr. Hopkins dissuaded him from doing, and contented himself with repeating to him the substance of a number of letters which he inquired about. This state of consciousness and reason continued during that night, and lasted until towards the afternoon of the 3rd. Upon Mr. Hopkins' early morning visit very shortly after Doctor Sutherland's departure that morning, Sir George appeared to be better, but "was impressed with the belief, in consequence of something Dr. "Sutherland had said to him, that his case was more serious than had been "supposed." He then made particular inquiry about the letters received by that morning's mail, the substance of which was repeated to him by Mr. Hopkins. Amongst them was one from General Bruce, respecting some horns Sir George had given the Prince of Wales. Sir George thereupon mentioned which horns he wished to be packed and forwarded to the Prince, and begged that matter to be attended to immediately. Another matter he spoke about was a pending suit between the Ebbwvale Company, for whom he acted as attorney, and the Ottawa and Prescott Railway Company; he begged Mr. Hopkins to write to the Ebbwvale Company, stating that, as he could not now act as Receiver, he would recommend Mr. Harris, of Ottawa, for that office. He next asked where his will was? Upon being informed that one copy was in the safe (then at the Hudson's Bay House) and a duplicate was at the Bank of British North America, in Montreal, he replied, "Quite right—be sure you send the copy here to Mr. "Finlayson"—(one of the defendants.)

Between 10 and 11 of the same morning he expressed his desire to do something for his faithful servant, James Murray. Mr. Hopkins stated he thought Murray was perfectly satisfied, and not to trouble himself upon such matters; he persisted, however, and requested Mr. Hopkins to go to the office and draw out a cheque in Murray's favour, for three hundred pounds, and to bring it to him for signature. This was done, and after the cheque was signed, it was cut from the Cheque Book, and Sir George handed it to Murray himself, saying "there is a present for you—you did not think that "you were going to lose me so soon—had I lived longer, it would have been "better for you. I want you to remain at my place,"—meaning the Island. In the afternoon of the 3rd, he became delirious, but by the morning dawn of the 4th he was again better, and gradually recovered his consciousness and was able to converse and speak rationally. During the night, from the 3rd to the 4th, Mr. McKenzie, whose bedroom adjoined Sir George's, says, that he was up and down with him the whole night, and when he wanted anything he called him

(McKenzie). Later in the morning of the 4th, he frequently wished Mr. McKenzie to draw a cheque for himself: but he endeavoured to get Sir George's mind off the subject altogether. Mr. McKenzie says: "He said to me that we "had long been acquainted,—long friends. It being my impression then that he "would recover, I said to him that we would both be laughing at this before long; "he said 'No,' and then wanted me again to draw out a cheque; I then said— "If you insist upon it, Mr. Hopkins will soon be here, whose duty it is to draw "cheques, and he will do it,"—the matter then dropped. But Mr. McKenzie distinctly avers that Sir George was perfectly calm and collected when he spoke to him about the cheque. Mr. and Mrs. Cameron, and her two sisters, Sir George's children, reached him at about eight that morning; when they went into his room, he knew them all, called them by name and retained their hands some time in his; he was perfectly calm, and spoke to them with tears in his eyes. Mr. Hopkins having come into the room upon business with Sir George, his family withdrew, but Mr. Cameron testifies that when they left him with Mr. Hopkins, he seemed quite capable of attending to business. After they had retired, Sir George intimated his wish that a cheque should be drawn for Mr. McKenzie, which Mr. Hopkins dissuaded him from doing, and told him not to think of parting from his friends: but Sir George said, "why do you thwart my wishes, and "try to deceive me with hopes of recovery—I am a dying man." Mr. Hopkins then urged delay, at all events, but Sir George said, "I have no time to lose,— "besides, what is the use of delay? it will not hasten my death to settle what I "have on my mind." As Mr. Hopkins was going to execute Sir George's wish in that respect, he called him back, and directed cheques to be prepared for the other persons mentioned in the memorandum of bequests, accompanying each with observations and reasons for making the cheques for each of them. Mr. Hopkins says as to Mr. McKenzie, "upon going to Sir George's room I made "inquiry respecting his condition, &c., &c., when he said to me, 'I have been "anxious to see you for some time—McKenzie has been most attentive to me; "I have known him a very long time, and always esteemed him: I wish now to "show my regard by making him a present of five thousand dollars.' I had "previously learned from Mr. McKenzie that Sir George wished him to draw a "cheque for that amount, in his own favour, which he declined doing, as it was in "my department."

"With reference to the Reverends Mr. Flanagan, the respondent, and Simpson "he said, 'Mr. Flanagan has been very useful to me, and most discreet in every- "thing he has undertaken—I wish to make him an acknowledgment of my obli- "gation to him; I was thinking of giving a hundred pounds to each of the par- "sons (meaning Mr. Flanagan and Mr. Simpson), but that is scarcely enough— "do you think one thousand dollars each would be considered as doing the "thing liberally?' I said it was more than liberal, it was very generous. Sir "George said, 'I am glad to hear it; that is what I should wish.' As to Mr. "Cameron, his son-in-law, he soon after said, 'There is Cameron, I wish to do "something for him,—what do you think would be fair and liberal in his case?' "As I hesitated in my reply, Sir George said, 'What did I give him on his "marriage?' I replied, four thousand; Sir George said, 'You mean dollars?

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"—to which I replied in the affirmative. He asked if I thought that would be "a proper sum to give Cameron; I stated that I thought it liberal, but that it "might be better, to avoid unpleasantness, to put Cameron and McKenzie on the "same footing. Sir George said, 'You are quite right, make them both five "thousand dollars, and yourself the same.' He soon afterwards added, "'We are very old friends, few people have been so much together, and have "got on so well; I am indebted to you for long, useful and kind services— "it is very hard to have to part now;' he shook my hand, and turned his "head away, apparently much affected." About mid day of the same day, the 4th, Mr. Hopkins testifies he had further conversation on business with Sir George, at his request; "he gave me instructions upon several points, amongst "others, that James Murray and his family should remain at Isle Dorval— "also respecting the transmission of his will to England. He then said, "after a considerable pause, 'You will write to the Company, saying I have "left the business of this establishment in your charge—McKenzie will go "to the Ottawa, as already arranged.' Before I left him, he sent farewell "messages to my wife and sister, regretting he had seen so little of the "latter (she had lately arrived from England), and also to some of the members "of my family in England, specifying them by name." About one o'clock of the 4th, the Rev. Mr. Simpson attended Sir George officially, and entered upon religious conversation with him. He testifies that Sir George was quite sensible of the dangerous nature of the last illness, and though he soon got tired he spoke distinctly and rationally; and Mrs. Cameron adds that it was some hours after their arrival that morning that Sir George first became unconscious, and he was so at intervals throughout the remainder of the day. By six of the next morning, the 5th, Sir George was better; he was very calm all that day, and passed a quiet night with his mind perfectly clear, and had no more fits after that. His consciousness and clearness of mind continued through the following day and night, the 6th, and he was sensible until within an hour or two of his death at about eleven of the next morning, the 7th. Doctor Sutherland says of his last visit early in the morning of the 6th, that he had no conversation with Sir George, that he was in a state of coma, which he explains as that of utter stupor, but his testimony of this day is distinctly contradicted by Mr. Cameron and Mr. McKenzie. Mr. Cameron testifies to his own presence in Sir George's room part of the time of Doctor Sutherland's last visit in the morning of the 6th: he says, "I "recollect that the Doctor addressed him (Sir George), and spoke to him as if "he thought him unconscious, at which Sir George seemed a good deal annoyed, "and replied shortly and sharply; as I left soon after the Doctor came into the "room, I cannot say what the conversation was about. I left Mr. McKenzie in "the room with him." And Mr. McKenzie details what occurred, "I heard Sir "George conversing with Doctor Sutherland, of Montreal, the last time the Doctor "saw him alive,—I think about eight o'clock on the morning of the 6th. When "the Doctor came into the room Sir George said 'Well, Doctor, this is the last "scene of all'—and the Doctor said, 'Yes, Sir George;' the Doctor, then "approaching his bedside, asked—'Where would you wish to be buried, Sir "George?' Sir George seemed to me to look at him with astonishment, and

"said, 'In the Montreal Cemetery, of course;' then the Doctor asked, 'Would "you wish to have a monument erected over your grave?' and Sir George said, "'There is a monument there already;' the Doctor said, 'Would you wish any "particular inscription upon it?' Sir George then said, 'That is the business of "my executors, not yours.'"

Mr. McKenzie also added that Sir George was perfectly sensible, quite calm and collected in his mind during this conversation.

The testimony of Doctor Thorburn, who arrived about nine that morning, and remained with Sir George until his death is as follows:

"When I arrived on the morning of the sixth, he said: 'My dear boy, I am "glad to see you, when did you come down?' and then enquired after my wife "and children, and made the remark, 'You find me very low.'" Doctor Thorburn then details circumstances which indicated to his mind Sir George's consciousness; amongst others, "He was always enquiring, when I administered medi- "cines, why I did so, and also what effect I expected,—particularly on one occa- "sion, I remember, when I wished to give him brandy, that he expressed himself "opposed to the use of brandy, and it was not till I assured him that it was good "that I could persuade him to take it; I told him that it was of the brandy pre- "sented to him by his friend, Matt. Clark, he having enquired where it came "from, and having objected that he thought that I could get no good brandy; he "then said he would take it, for it would be good if Matt. sent it, as he kept noth- "ing but that which was good. I did not leave the house from the time I first "attended upon Sir George, and I scarcely left the room. When I saw Sir "George, he was labouring only under great exhaustion, the result of some previous "attack, of the character of which I have no knowledge, except from hearsay; his "condition was such as is consistent with his having suffered from any severe "attack of illness, including apoplexy; he was not labouring under insanity, as "generally understood, or under mental incapacity, there is always more or less "of suspension of the mental powers at the attack of apoplexy, which may continue "or disappear. Subsequently during his last hours, he expressed his opinion that "he was very weak. I asked what I thought of his condition. During the time "that I saw him, he was at no time in a state of profound stupor, until within a "short time of his death, nor was he incapable of expressing himself; he was "capable of expressing himself until within an hour of his death. He seemed "conscious, and although very weak, he was capable of hearing remarks, and of "asking questions."

His servant, Murray, testifies as to the signing of the several cheques on the 4th, and adds, "Sir George was in bed, and raised himself on his arm to write them; "the cheques were retained by Mr. Hopkins, who placed them before Sir George "for signature. I never saw them afterwards. Sir George could speak quite well "on that day, and his mind was apparently quite right. From that time on, I "was with him pretty constantly, and he spoke frequently to me, but I do not "remember anything precisely that he said to me, until Thursday morning, the "sixth, when he said, 'You have not been at the Island—you'd better go and "see what they are doing there.' I went up, and returned about one o'clock, "but did not speak to him, as the Doctor said, 'Let him repose, do not annoy "him with anything.' It was Doctor DeCouagne who said this."

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Mr. Cameron, also, testifies with reference to the 6th: "During that day I was "with Sir George a good deal; with the exception of weakness, he appeared decidedly better than he had been before, and we had strong hopes of his recovery. "The others of his family were also with him that day, as he was better able to "converse with them than he had been, and seemed pleased to have them in the "room with him. I had many conversations with him on this day; he sometimes "spoke to me in Gaelic, which he had been in the habit of using on occasions. I "remember mentioning to him that I had telegraphed for Dr. Thorburn, on my "own responsibility, and he appeared satisfied, but at the same time remarked "that it was no use—meaning thereby, that he did not expect to recover. Taking "hold of my hand he remarked, calling me by name, 'Cameron, I've left you "perfectly independent;' there were many other remarks which he made to me, "which I do not at this moment recollect, but which perfectly satisfied me that "his mind was clear. At no time during the conversations on that day had I "reason to think that his mind was not collected. Towards evening, Sir George "expressed a desire to see a clergyman, and asked them to send for the Rev. "Mr. Simpson, who accordingly came over soon."

And from Doctor DeCouagne, the testimony is as follows: "On the fourth, after his fits of excitement were over, he at times was able to converse, and "when he did speak, he spoke as rationally as I have ever known him to do. He "would often ask me how I found him, and how his pulse was; he would sometimes ask me what I was giving, and what was the effect to be produced. "I speak of the whole period covered by his last illness, with the exception of "the period from the morning of the third to the morning of the fourth, when he "was completely delirious; it was towards daylight on the morning of the fourth "when he showed the first indications of returning consciousness. On the sixth, "as I said before, he was quite conscious the whole day." He also says that from the morning of the 6th until shortly before death Sir George was perfectly conscious and had no more fits.

It was in the evening of this same day, the 6th, that Sir George caused the said memorandum of his bequests to be made by Mr. Hopkins, who details the circumstances as follows:—

"On the evening of that day, between seven and eight o'clock, on returning from "my own house, where I had been for a couple of hours, I was told Sir George "wished to see me, in order to dispose of a matter of business which he had on "his mind. I found, in his bedroom assembled, Mr. and Mrs. McKenzie, Mr. "and Mrs. Cameron, the two Misses Simpson, Dr. Thorburn, Dr. DeCouagne, the "Rev. Mr. Simpson, and James Murray. As I entered the room, Sir George "said, 'Has Hopkins come?' I went to his side and said, 'Here I am, Sir "George, have you anything particular to say to me?' he replied, 'Yes, I "wish you to take a memorandum of my last bequests.' As I did not exactly "understand him, he said, in explanation, 'Get pen, ink, and paper, quickly, and "make a memorandum of my wishes, as I have no time to lose.' Having provided myself with writing materials, I sat down on the bedside, and stated I "was ready. Sir George then said to me, 'Now put down what I have been "doing—the bequests I have made;' I said, 'Do you refer to the cheques you

"drew the other day?' he replied, 'Certainly,—now put them down—what "are they?' Seeing present several persons who were interested, I felt a deli- "cacy about proceeding, and motioned to Mr. Simpson to leave the room, when "he and Mr. and Mrs. McKenzie left the room, the two doctors were going "backwards and forwards between the bed-room and dressing-room, the door "between the two being wide open. The delay seemed to make Sir George impa- "tient, and he said, 'Go on, go on, why do you keep me so long?' I thereupon "made a list of the six cheques, and said, 'Here is a memorandum of the cheques, "shall I read them over to you?' On his replying in the affirmative, I com- "menced as follows: Angus Cameron, five thousand dollars—is it your wish "that that sum should be paid him?' Sir George replied, 'Yes, certainly, go "on—why do you tease me by delay?' Either Mrs. Cameron or Miss Margaret "Simpson, or both, who were sitting close to their father's head, repeated my "question, to which he again replied, 'Yes, what next?' I went on reading, "'Hector McKenzie, five thousand dollars—do you wish him to receive that "sum?' Sir George replied, 'Yes, what next?' Somebody repeated my ques- "tion, when he said, 'Certainly, go on.' In this way, I read out the other names "and amounts as follows: 'E. M. Hopkins, five thousand dollars—the Rev. J. "Flanagan, one thousand dollars—the Rev. William Simpson, one thousand "dollars—James Murray, twelve hundred dollars;' after reading each bequest, I "formally asked Sir George if that was his wish, and if he wished the parties to "receive the sums which followed their names; my questions were repeated by "others around the bed, and on every occasion, Sir George replied, 'Yes,' or "'certainly, go on—what next?' After having gone over the list, *seriatim*, I "said, 'Sir George, am I to understand that these are your last wishes, and that "it is your desire I should make these payments?' He asked me the amount of the "whole: I replied, eighteen thousand two hundred dollars, when he said, distinctly "'Yes, certainly;' Mr. Cameron and his daughters asked him if I had properly "understood him, and had done all he wished, to which he invariably replied, "'Yes.' From that time (about nine in the evening of the sixth) his mind "appeared more at ease, and though I remained with him till he died, about "eleven o'clock next day, he never once adverted to any matter of business."

All the other witnesses more or less fully corroborated Mr. Hopkins' state- ment, which need not be repeated here.

Murray also testifies to Sir George being quite sensible and calm at the time; and Mr. Hopkins also testifies: "I have been so long acquainted with Sir George "Simpson, that no person could be more familiar with his manner and his mode "of thought than I,—and I could judge as well as any one, physician or friend, "if his mind was collected and in its usual state. Upon both the fourth and the "sixth, on the occasions I have described, namely, the signing of the cheques, "and the dictating of the memorandum, I have not the least doubt, and can say "positively, that his mind was calm and sound, and that he was in full possession "of his mental faculties."

Mrs. Cameron, who was present at the making of the memorandum, says: "When this memorandum was made my father was quite sensible and able to do "any business of that sort; there seemed to be only weakness." And Mr. Cameron,

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who also speaks as to the making of the memorandum, adds "He (Sir George) "seemed clearly to understand the whole, and expressed his satisfaction and "approval; from the morning of the 6th until he died there was nothing the "matter with Sir George except extreme weakness." To this add the testimony of the Rev. Mr. Simpson upon the same occasion, who declares, "I have not "the least hesitation in saying that on that occasion Sir George's mind was as "calm and clear as it could be, though he was very weak." Doctor Thorburn also testifies, "during all this time I considered Sir George's mind to be quite "clear;" and Doctor DeCousgne, in addition to his other testimony, says that "from the morning of the 6th until shortly before death he was perfectly con-"scious."

The sum of all this testimony is that the intervals were really intervals of delirium or so alleged mental alienation, were transient and of short duration; that, apart from the few hours of insensibility caused by the attack, and continued until towards the evening of the 1st of September, he was delirious from the afternoon of the 3rd until the morning daylight of the 4th, from the evening of the 4th until four o'clock in the morning of the 5th, and for a short interval in the afternoon of the 5th, and at all the intervening times until his death he was calm and conscious as well as rational. From all this it may be gathered that Sir George's normal state after his recovery from insensibility on the afternoon of the 1st was that of consciousness and reason, with the exceptions of those transient intervals of delirium or alienation above mentioned and that his state indicated not only his use of memory, understanding and will, but also plainly showed that he was not indifferent to his condition, inasmuch as from Doctor Sutherland's first intimation to him on the morning of the 3rd of the danger he was in, he was duly impressed with the belief that he would not recover, and made every necessary preparation to meet his end, by settling his business matters, acknowledging his parting kindness and good will to his friends, and seeking the consolations of religion, throughout exhibiting the clearest appreciation of his state and of his danger.

Against this mass of testimony is opposed the testimony of Doctor Sutherland, which, apart from the state of insensibility of the first day, really commences on the second and continues only to the morning of the 6th. He says that on the morning of the 2nd Sir George was to common observation better, and then referring to his demeanour and language during his visit of that morning, the witness gives two different descriptions in his evidence, as they appear in chief and in cross-examination: in the former Sir George was *cheerful and gay*, which in the latter became *elation of manner and excitement of language;* in the former he was *apparently indifferent as to his state*, in the latter this becomes *positive indifference he entertained of his state;* in the former *he declared he would be well the next day;* in the latter, *conceiving himself with fearful unreason not only better but absolutely well, and never expressing the slightest anxiety as to his recovery.* The differences between these two statements are manifest and need no comment, but to the latter is appended the opinion "that the circum-"stances were such that in a person of the meanest correct apprehension, alarm "or, at all events, anxiety would have been entertained." The witness did not

remember that but a few hours previously he had directed Sir George's children to be informed that he was better, and that they need not come to him, and that himself says, Sir George to "common observation was better on that day," whilst it is not shewn that he had intimated to his patient the opinion he expressed, that Sir George would die of the attack; and yet, under such circumstances, the witness considers it *fearfully unreasonable* in Sir George not to exhibit alarm, or, at all events, anxiety. It is in this demeanour and language of Sir George this day that the witness finds symptoms of incipient alienation, and it is to these original symptoms that he refers in his subsequent daily testimony, *symptoms fully manifest* and *unequivocal*, and *aggravated*, and *yet worse*. Now were these references to the symptoms of the evidence in chief or of the cross-examination? On the afternoon of the 3rd the witness discovered hallucinations as present, which he asserts were "*spontaneous* and *constant* as well as *fixed* and *unequivocal* as *the disease advanced*, and *I would say intensified up to the last day which he was able to speak to me.*" It would be an easy task to controvert this witness by the evidence adduced by appellants, and to prove that his memory of the circumstances has been erroneous. It is manifest that no hallucinations were present in Sir George's mind at the various times and conversations between himself and the witnesses for the respondent as above detailed, and they certainly were not present at the last conversation of the witness with Sir George on the 6th, when he says he had no conversation whatever with Sir George; it may be stated as very peculiar that these *spontaneous* and *constant*, *fixed* and *unequivocal hallucinations* were not noticed or observed upon even in the most distant manner by any of the witnesses of the respondent. Doctor Sutherland has also reported the alleged information of others which he has clothed in the strongest and most energetic expressions, such as *maniacal delirium*; Sir George had been *utterly unmanageable*, had *forcibly gone out of his room—not only delirious but furious*; and, *if I remember right, had gone down stairs, &c.*; but there is nothing in the testimony of any of the respondent's witnesses to warrant its being intensified or energized into this very strong language. This evidence is not satisfactory, and cannot prevail against the array of proved facts established in evidence by the respondent, which go to prove the daily, almost hourly demeanour and language, the saying and doings, as it were, of Sir George from the evening of the 1st, when he was attacked, until the forenoon of the 7th when he died. Under these circumstances the merely medical opinion of Dr. Sutherland against Sir George's sanity on the 4th and 6th, and as he says the whole period of his disease, cannot be permitted to prevail. He will not even allow that Sir George had or could have intervals of lucidity, although they were positively established by the witnesses, and positively asserted by Doctor DeConagne, who adds: "in Sir George's case, there was nothing in his "disease after the morning of the fourth, when the inflammation had commenced "to subside to a certain extent, to prevent his having intervals of perfect "lucidity;" even although Doctor Sutherland himself admits in answer to the *Question*,—"Do you believe that a medical man in constant attendance near "Sir George could not distinguish and ascertain lucid intervals between your "visits?"

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Answer.—"Most certainly such a person, had any such lucid intervals ex "isted, ought to have perceived; and doubtless did perceive them."

Now as to merely medical testimony, the citation from 1 Bell's Comm., Bk. 2, part 2, c. 8, § 2, given by the respondent's counsel, is very apt:

"It has been well said that it is scarcely possible to be too strongly impressed "with the great degree of caution necessary in examining the proof of lucid "interval. But the law does recognize as valid, acts done during such an in- "terval; and this rule of law must not be defeated by overstrained demands of "the proof of the fact. It may be observed in general, that the lucid interval "may be either in relation to time or to subject. 1st. If in point of time there "is proof of remission, or of intermission, either periodical or at a particular "date, including the interval during which the deed was made, it is enough to "sustain the deed. There is no rule in law fixing any precise duration for a "lucid interval—a week, a day, an hour. The point truly for enquiry is, whether "[illegible] time sufficient for the rational doing of the act in question? 2nd. "If the description of the malady be such that the person is insane on particular "topics only, and the act done, with all its associations, forms no insane topic, "this will be enough. 3rd. In either inquiry, the act itself and the manner of "performing it are of the first importance. If it be a rational act, rationally done "without the guidance or control of another; if there be no delusion, no insane "irritation or hallucination inducing it; if from the deed, or the manner, no in- "dication of frenzy or folly can be gathered; it will be sustained. 4th. It is "very important that facts, not opinions, shall be relied on in matters of this "sort. The opinions of calm and skillful observers may be useful to guide the "Jury; but even from such persons no opinion is of weight independently of "the fact on which it rests; and to the evidence of keepers, and of nurses and "of the vulgar, who with a carelessness, or a prejudice, which overlooks all the "necessary discriminations, and misinterprets every action of a person pronounced "to be insane, this observation requires to be very vigilantly applied. 5th. "Some difference of opinion has arisen as to the strength of proof necessary "in a case of lucid interval considered relatively to the proof of the insanity to "which it forms an exception. Two great masters in jurisprudence have ex- "pressed opposite opinions on this question. Lord Thurlow seems in both cases "to have deemed it necessary to have a proof as demonstrative of the lucid in- "terval as of the insanity, and of a restored strength of mind not inferior to the "original state of intellect of the person in question. But Lord Eldon has well "limited the doctrine; since neither the same demonstration can be expected in "acts of rational calmness, as in the striking symptoms of insanity; nor does the "law require, in order to validate many acts, the same perfect tone of intellect "as while untouched by disease; but is satisfied with a much less degree of ca- "pacity."

This is the expression of common sense and reason, whatever Doctor Workman may opine as to the "depictions and bloated caricatures of insanity "made by writers," as he observes. Now Doctor Workman, above mentioned, is the other witness produced by the appellant, and it is curious to note the differences and divergences between his testimony and that of Dr. Sutherland.

Dr. Workman testifies as an expert upon cases of insanity, but in this case only upon portions of the testimony submitted to him for his opinion, and rests chiefly upon the very strong and energetic language of Dr. Sutherland; but he does not agree with the latter's description of the attack; he differs from him as to the diagnosis of the case and the mode of treatment, and declares that he is not prepared to affirm his concurrence in Doctor Sutherland's *pathological view of Sir George's case as to the truly inflammatory character of the disease on the 2nd, 3rd and 4th days of illness.* Now Murray's check was made and given to him off the 3rd, and the other checks were made and signed on the morning of the 4th, and Dr. Workman, without being aware of these having been so made and without the evidence of those circumstances being submitted to him, refers to the making of the memorandum as follows:

"The terms of the question 'what are my last bequests?' taken in conjunction with Dr. Thorburn's detail of the transaction, suggest to me an antecedent "fact which I do not find stated in the evidence before me, yet I consider, its "existence of much value in ascertaining the mental condition of Sir George at "the time above referred to. It appears to me obvious that Mr. Hopkins had "knowledge of a prior consideration of the bequests mentioned. Mr. Hopkins "was able to mention and to write down, or to call out the names of the parties "and the several amounts to be bestowed on them without present dictation from "Sir George; it would then be important to know the time at which the inception "of those bequests, or their previous discussion, took place. If their consummation "on the evening of the sixth day was the carrying out of a purpose declared by "Sir George before he became insane, this fact might be regarded as *prima facie* "evidence of his present sanity; but if they stood connected with an expression "of purpose, or act, occurring after Sir George became insane, then it would "appear to me a fatal morbid affinity existed." And we have seen that he would not affirm the truly inflammatory character of the disease on the 2nd, 3rd and 4th.

Doctor Workman, upon another point of Dr. Sutherland's testimony, also differs with him even upon the partial testimony brought to his notice in the evidence of the latter witness, whilst the fact was that coma did not exist at all. After recurring to the evidence of Doctor Sutherland, that he had left the patient in a comatose state on the 6th, Doctor Workman says: "But notwithstanding "this very unpromising condition, and notwithstanding the fact that Doctor "Sutherland's prognosis of death was next day verified, the depositions of Doctor "DeCouagne and Doctor Thorburn establish the fact that the coma passed off, "and that Sir George became quite conscious, and so continued the whole day.

"Now I must confess that were I to admit the accuracy of Dr. Sutherland's "diagnosis of the case, and regard it as primarily one of hemorrhagic apoplexy, "and subsequently of intense inflammation of the brain, I should be unprepared "to admit the statements of Dr. DeCouagne and Dr. Thorburn as to Sir George's "condition on the sixth day after Dr. Sutherland took leave of him, in a state "of coma and apparently in *articulo mortis.*

"I have not found that in post mortem examinations of patients similarly "affected, dying under my care, evidence of hemorrhagic apoplexy has been "afforded, unless in cases in which coma proved persistent."

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It is questionable whether Doctor Workman, with the full testimony submitted to him, would have ranked Sir George's case in the category of insanity. One thing he does believe that its *symptoms and phases* cannot be accounted for except by withdrawing the case from the rank in which Doctor Sutherland has placed it. Even if it could be said that the normal state of Sir George Simpson's mind was insanity, the respondent's evidence proves perfectly lucid intervals at the periods alleged to be insane, and the authority from Bell's commentaries above cited is thereon conclusive. To this add 5 Dalloz, vo. Dispositions Entrevifs, Ch. 2, Sec. 2, Act 2, p. 37: "Les maladies du corps qui tourmentent "presque tous les hommes à leurs derniers moments ne sont une cause de nul- "lité de testament que quand elles occasionnent du trouble dans les fonctions de "l'intelligence. La peine d'une maladie aigüe accompagnée de délire et de trans- "port serait insuffisante si l'on ne justifie pas que le testament a été fait hors "des instants d'intermittence que peut admettre une pareille affection." Sec. 5, "L'individu non interdit étant toujours présumé sain d'esprit, la charge de prouver "la démence retombe sur ceux qui allèguent des faits de cette nature. Les "légataires ne seront pas désarmés en présence d'une enquête qui prouverait des "accès de démence plus ou moins fréquents: ils pourraient opposer que le tout "a été passé dans un intervalle lucide, etc," see Furgole, des testaments, ch. 4, sec. 2, no. 208. Ricard, 1 part. ch. 3, sec. 3 et 155. "Mais c'est à eux, ceux "qui allèguent la démence à faire la preuve etc.," and 1 Ricard, p. 35. "Et "même d'avantage les lois ont voulu que si la démence n'est pas continue, les "testaments et autres actes qui se trouvent faits pendant les bons intervalles, "seraient exécutés."

It is scarcely necessary to test the sanity of the deceased by the reasonableness of the bequests. Sir George's fortune would surely permit, without cavil, of bequests in the whole amounting to about £4500, distributed amongst such legatees as those named by him.

It may properly be added, that the testimony of Dr. Workman, built upon the energetic language of Dr. Sutherland, appears to be influenced by a feeling common to medical men having charge of that particular class of disease, of constantly considering insanity as absolute and permanent. Little experience of human life teaches that human reason is subjected to numerous permanent or accidental alterations. Between a momentary trouble of mind or the state of torpor of intelligence and the complete loss of reason, there is a multitude of degrees and shades, which must be appreciated, and the influence of physical and moral causes must be determined which may prevent a man from being truly of sane mind. Doctor Workman and Dr. Sutherland, both from different grounds, adopt absolute and permanent insanity, *semel furiosus semper presumitur furiosus*, but that is not the principle of law, "mais c'était plus qu'une fausse doc- "trine, c'était une sorte de cruauté, et la doctrine de Mantice est bien plus juste "et plus humaine, lorsqu'il dit: *qui fuit furiosus aliquo temporis momento, non "ideo præsumitur in posterum fuisse furiosus*; liv. 2, Prt. 5, no 7." The evidence of this expert in insanity, Doctor Workman, cannot be held to influence this case in support of the plea, the more so as his evidence is met and contradicted in essentials by the medical testimony of two experienced professional men adduced

in his rebuttal. The plea of insanity has not been proved, and hence, therefore, the parting gifts or the dispositions and bequests of the late Sir George Simpson must be considered made whilst he was conscious and rational, and whilst his memory and understanding existed. Moreover Demolombe, p. 367, lays it down, "lorsqu'il y a doute sur le point de savoir si le disposant était ou n'était pas "sain d'esprit, le caractère de la disposition est à prendre en sérieuse considéra- "tion : car on doit être plus porté à croire que le disposant était sain d'esprit "lorsque la disposition est telle qu'un homme judicieux et équitable l'aurait "faite et surtout aurait dû la faire."

There is a fallacy in the defendant's case: it does not really present a contestation as to acts done during intervals of sanity by a normally insane object, but the absolute converse, as to acts done by a sane subject, presumed by law to be such, and proved so by evidence,—suffering, however, from acute malady, accompanied by intervals of delirium. It is proved most clearly that the bequest complained of was not made nor recognised during these latter intervals but at times of usual consciousness.

Under all these circumstances, considering the facts adduced in evidence under a judicial, not a merely medical point of view, the plea of insanity has not been established but on the contrary disproved, and the disposition in contest in this cause made by Sir George Simpson cannot be impugned.

The other points raised in argument on both sides in the case being merely subsidiary to the main point discussed above, need not to be referred to.

MEREDITH, J.—I think that the cheque sued on in this cause, considering the circumstances under which it was made and approved of, may be regarded as a *donation à cause de mort*, or testamentary bequest, and therefore that the main question which we have to determine is this:—Was the late Sir George Simpson of sound and disposing mind on the 4th September when he made, and on the 6th of the same month, when he acknowledged and approved of the making of the cheques, the payment of one of which is sought to be enforced by the action now before us?

If the action of the respondent had rested exclusively upon what took place, when the cheques were made, I am not prepared to say that it could have been maintained; because it is certain that throughout the 4th of September, Sir George Simpson was subject, at intervals, to fits, which, for the time they lasted, deprived him of the use of his reason. Besides this, there were only two witnesses present at the making of the cheques, namely, Mr. Hopkins, the secretary of Sir George, and James Murray, his servant; and however deserving of credit these witnesses may be, we cannot but remember that they are deeply interested in the matter in controversy.

But when we turn our attention to the events of the 6th of September, that being the day upon which it is said Sir George confirmed the making of the cheques, we find a body of evidence in favour of the pretensions of the respondent to which it is difficult to refuse credit.

In considering the evidence thus adduced, it is proper to bear in mind that there is no reason to suppose, and indeed it has not been suggested, that any attempt was made by those near Sir George Simpson to prevent his relatives

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or friends from having access to him during his sickness. On the contrary, Mr. Hopkins, upon the day of Sir George's attack, telegraphed to his son-in-law, Mr. Cameron, Cashier of the Bank of Toronto, in these words:—"Sir George "has had a fit of apoplexy,—his medical advisers think his case serious." In the afternoon of the same day, by the advice of Dr. Sutherland, Mr. Hopkins again telegraphed to Mr. Cameron, saying:—"Sir George is better, do not come "down until you hear further." But on the afternoon of the 3rd, at the suggestion of the medical men, Mr. Hopkins sent a third message by telegraph, saying:—"You had better come down with Sir George's daughters, without "delay,—an unfavourable change has taken place." Mr. and Mrs. Cameron and the two Misses Simpson arrived on the morning of the 4th. On that or the following day, Mr. Cameron telegraphed for Dr. Thorburn of Toronto, whose wife was a grand-daughter of Sir George Simpson: and on the morning of the 6th, at nine o'clock, Dr. Thorburn arrived at Sir George Simpson's house.

I now come to the consideration of the evidence bearing on the facts alleged to have taken place on the 6th of September; and I advert to it particularly, because it is mainly upon those facts that I base my judgment. On the morning of that day, Sir George Simpson was visited for the last time by Dr. Sutherland. The evidence of the witness last named, not only from his high professional standing, but also from the fact of his having been the consulting physician on the occasion in question, must necessarily have great weight in this cause. Dr. Sutherland says:—

"On the sixth, I visited Sir [illegible] for the last time, and found him in a state "of coma. He had had dur[illegible]ght involuntary evacuations, as evidenced "by what I saw in the be[illegible] evidently sinking fast, and that opinion "I expressed unhesitatingly to [illegible] in the room, even though one gentleman "strongly expressed his opinion to the contrary, and this opinion of the rapidly "approaching decease I reported next morning to his own physician, Dr. "Campbell, who had just arrived from Cacouna, informing Doctor C. that he "need not be in a hurry to go out to Lachine, inasmuch as Sir George would "be either *in articulo mortis*, or absolutely dead before he could reach "Lachine."

And in his cross-examination, the same witness says:—"On the morning of "the sixth, I had no conversation whatever with Sir George, for he was in a "state of coma, which is that of utter stupor."

Sir George, according to the evidence of the other witnesses, cannot have remained long in the state described by Dr. Sutherland. For about an hour or an hour and a half after he left, Dr. Thorburn of Toronto, who had been telegraphed for as already mentioned, arrived. This witness, who, it is to be recollected, was married to Sir George's grand-daughter, describes his reception by Sir George as follows:—

When I arrived on the morning of the sixth, he said: "My dear boy, I am "glad to see you, when did you come down?" and then enquired after my wife and children, and made the remark, "You find me very low." During the day, I was in attendance upon him, and along with Dr. DeCouagne administered remedies to him; he always required to know why and wherefore medicines

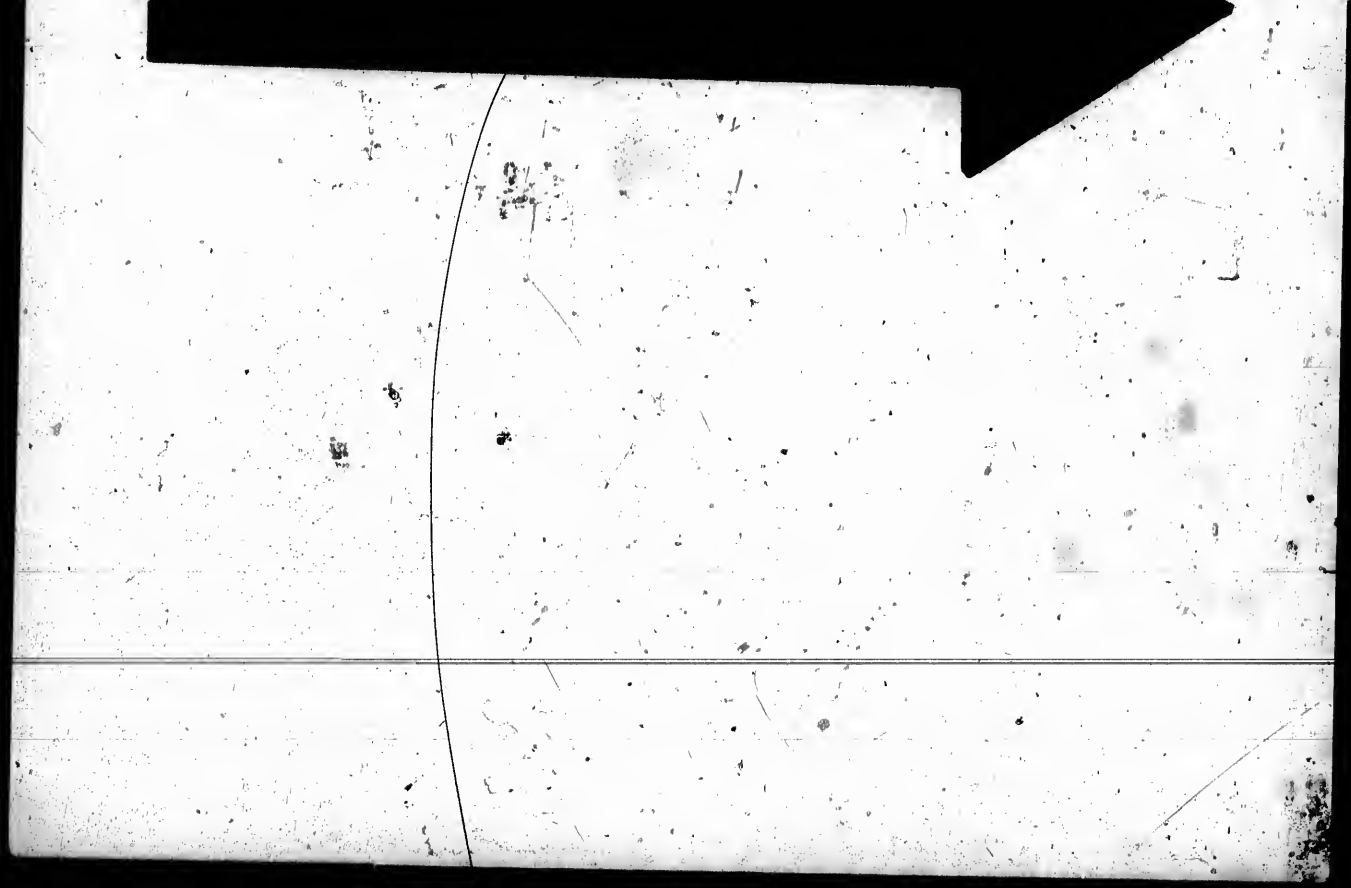
were given him, before taking them; his sense of hearing was very acute, and if any one came into the room, he would ask who came, and if any remarks were made, he would enquire what they were, and repeat the question until answered.

Mr. Cameron, Mr. McKenzie and Mr. Hopkins give the substance of or refer to, conversations in which Sir George Simpson took part [illegible] testimony of Mrs. Cameron, as to the manner in which [illegible] cheques was ratified by Sir George Simpson, is as follows:—

"On the evening of Wednesday he became quite calm, and [illegible] "night; he seemed to know us quite well, but did not speak m[illegible] "try to induce him to speak, preferring that he should rest, but w[illegible] "speak, it was sensibly. On Thursday morning he was quite clear and [illegible] "so, sleeping a good deal during the day; I was in his room nearly all day and "all evening. Between eight and ten o'clock my two sisters, myself, Mr. Came- "ron and James Murray were in the room with Drs. Thorburn and DeCouagne, "when my father asked for Mr. Hopkins who had just come into the house from "his own; he seemed to be impatient for him to come, and repeatedly asked for "him. Mr. Hopkins came soon, and asked him what he wanted him for; he told "Mr. Hopkins to get pen, ink and paper, and write down his last bequests. "I think Mr. Hopkins brought the pen and ink into the room with him, having "gone out for the purpose of getting them. Mr. Hopkins asked him if he meant "the cheques he had signed a few days before, to which he answered 'Yes.' "Mr. Hopkins wrote down a memorandum of the names and sums of money as "contained in plaintiff's exhibit number five, now shown to me; Mr. Hopkins "then read out the first name and sum of money, and asked him if it was correct, "he replied 'Yes, go on.' Mr. Hopkins then read out each name and sum, and "asked particularly after each if it was correct, to which he always answered much "in the same way, 'Yes,' or 'Certainly,' generally adding, 'go on.' I am not "certain whether Mr. Hopkins read out each name as he wrote it down or wrote "them all down, and then went over each separately, but each name was read to "my father separately with a question as to its correctness, and he expressed his "approval of each. When they were all written down and read over, Mr. Hop- "kins asked him if it was his wish that those amounts should be paid to the "persons named, and he replied distinctly that it was. I remember that he "enquired what the whole came to, and Mr. Hopkins told him; when he said "'all right,' or 'exactly,' or some words to that effect, and seemed quite satis- "fied; his mind seemed more at ease when this was over. I afterwards signed "the memorandum which Mr. Hopkins had made, and read to him—I think "immediately after my father's death. When this memorandum was made, my "father was quite sensible and able to do any business of that sort."

The same facts are testified to by Mr. Hopkins, Sir George's secretary, as follows:—

"On the morning of the sixth, the paroxysms had ceased, but his strength had "evidently been much reduced, but his mind was quite clear, so that he was "enabled to converse in a collected manner with those about him: On the evening "of that day, between seven and eight o'clock, on returning from my own house,



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"where I had been for a couple of hours, I was told Sir George wished to see me, "in order to dispose of a matter of business which he had on his mind. I found, "in his bedroom assembled, Mr. and Mrs. McKenzie, Mr. and Mrs. Cameron, "the two Misses Simpson, Dr. Thorburn, Dr. DeCouagne, the Rev. Mr. Simpson, "and James Murray. As I entered the room, Sir George said, 'Has Hopkins "come?' I went to his side and said, 'Here I am, Sir George, have you "anything particular to say to me?' he replied, 'Yes, I wish you to take a "memorandum of my last bequests.' As I did not exactly understand him, "he said in explanation, 'Get pen, ink and paper, quickly, and make a memo- "randum of my wishes, as I have no time to lose.' Having provided myself "with writing materials, I sat down on the bedside, and stated I was ready. Sir "George then said to me, 'Now put down what I have been doing—the bequests "I have made;' I said, 'Do you refer to the cheques you drew the other day?' "he replied, 'Certainly,—now put them down—what are they?' Seeing present "several persons who were interested, I felt a delicacy about proceeding, and "motioned to Mr. Simpson to leave the room, when he and Mr. and Mrs. McKee- "zie left the room; the two doctors were going backwards and forwards between "the bed-room and dressing-room, the door between the two being wide open. "The delay seemed to make Sir George impatient, and he said, 'Go on, go on, "why do you keep me so long?' I thereupon made a list of the six cheques, "and said, 'Here is a memorandum of the cheques, shall I read them over to "you?' On his replying in the affirmative, I commenced as follows: 'Aegus "Cameron, five thousand dollars—is it your wish that that sum should be paid "him?' Sir George replied, 'Yes, certainly, go on—why do you tease me by "delay?' Either Mrs. Cameron or Miss Margaret Simpson, or both, who were "sitting close to their father's head, repeated my question, to which he again "replied, 'Yes, what next?' I went on reading, 'Hector McKenzie, five thou- "sand dollars—do you wish him to receive that sum?' Sir George replied, "'Yes, what next?' Somebody repeated my question, when he said, 'Certainly, "go on.' In this way, I read out the other names and amounts as follows: "'E. M. Hopkins, five thousand dollars—the Rev. J. Flanagan, one thousand "dollars—the Rev. William Simpson, one thousand dollars—James Murray, "twelve hundred dollars'; after reading each bequest, I formally asked Sir "George if that was his wish, and if he wished the parties to receive the sums "which followed their names; my questions were repeated by others around the "bed, and on every occasion Sir George replied, 'Yes,' or 'Certainly, go on,— "what next?' After having gone over the list, *seriatim*, I said, 'Sir George, "am I to understand that these are your last wishes, and that it is your desire "I should make these payments?' He asked me the amount of the whole: "I replied, eighteen thousand two hundred dollars, when he said, distinctly, "'Yes, certainly;' Mr. Cameron and his daughters asked him if I had properly "understood him, and had done all he wished, to which he invariably replied, "'Yes.' From that time (about nine in the evening of the sixth) his mind "appeared more at ease, and though I remained with him till he died, about eleven "o'clock next day, he never once adverted to any matter of business. The memo- "randum I prepared on that occasion, and of which plaintiff's exhibit number

"five is a certified copy, I signed on the spot, and also got it signed by Mr. and "Mrs. Cameron, James Murray, and Miss Margaret Simpson, as soon as I had "an opportunity of so doing. Dr. Thorburn added, on the back, his certificate of "Sir George's state of mind, within an hour after Sir George's death. On the "evening of the sixth, before the making of the memorandum I have described, "I had asked Dr. DeCouagne for a special report on Sir George's condition, my "principal object in so doing being to put myself in a position to report to the "Company in London, by next day's (Friday's) mail. In the memorandum, I "have said the cheques were drawn on the fifth of September: this was an error, "attributable to the confusion and excitement of the moment; the cheques "referred to were drawn, Murray's on the third, and the others on the fourth, "as I have stated before. I had been so long acquainted with Sir George Simp- "son, that no person could be more familiar with his manner and his mode of "thought than I,—and I could judge, as well as any one, physician or friend, "if his mind was collected and in its usual state. Upon both the fourth and the "sixth, on the occasions I have described, namely, the signing of the cheques "and the dictating of the memorandum, I have not the least doubt, and can say "positively, that his mind was calm and sound, and that he was in full pos- "session of his mental faculties."

The testimony of the Reverend Mr. Simpson, who, upon the occasion in question, was present in the discharge of his duty as a clergyman, is as follows:—

"The next time I saw him was on the evening of the sixth, when I was again "sent for to come to the house, as he wished to see me. When I came to his bed- "room I found Mr. and Mrs. Cameron and the two Misses Simpson and Dr. "Thorburn in the room; the servant Murray was going about the room doing "different things. When I went in I enquired how he felt: I observed that he "looked much weaker; he told me that he was weaker. I then prayed, and "afterwards Sir George called for Mr. Hopkins, who came in and went up to the "bed to speak to him. Mr. Hopkins asked him what he wanted with him, when "Sir George replied that he wanted him to take a memorandum of the bequests "he had made; he seemed very earnest that no time should be lost, and Mr. "Hopkins said to me it might be as well if I would leave the room as there might "be some private affairs to be gone into; and I accordingly went into the dressing- "room, opening off the bed-room: Dr. DeCouagne was in the room when I went "in, and Dr. Thorburn afterwards came in: Murray remained in the bed room "all the time. From what Mr. Hopkins had said, I did not like to listen, and "therefore did not hear what was going on in Sir George's room. I did not "return to the bed-room. I have not the least hesitation in saying that on that "occasion Sir George's mind was as calm and clear as it could be, though he was "very weak."

The evidence of Mr. Cameron, Mr. McKenzie, and of the servant man, Murray, agrees with that of Mr. Hopkins, Mrs. Cameron and the Reverend Mr. Simpson, as to the confirmation of the cheques. These witnesses, although not in law incompetent, are deeply interested in the question, respecting which they have given their testimony, and therefore, however respectable they may be, their evidence must be read with great caution. But at the same time it must be

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borne in mind as a point of very great importance, that the evidence of the interested witnesses is quite in harmony with that of Dr. Thorburn and of Dr. DeCouagne, who are perfectly disinterested. The evidence of Dr. Thorburn has been already adverted to, and Dr. DeCouagne, who attended Sir George Simpson during the whole of his last sickness, says:—"On the sixth, before "leaving the room when his family came in, I had been examining him particu- "larly, and found him perfectly rational; he conversed with some case. The "reason I examined him was, I had just been to supper, and Mr. Hopkins, on "return from my own house, asked me to go in to see Sir George, and report "very particularly to him (Mr. Hopkins) in what state I found him,—that was "about two minutes before I made the examination, which took about five "minutes,—and I then immediately left the room as before stated."

Here it may not be out of place to remark that the witnesses by whom Sir George was surrounded during his dying hours were not in any respect intruders; on the contrary, they may be said to have been persons of his own choice, each of whom was bound to be present on that solemn occasion by the ties, either of nature, of friendship, or of duty. They were his three daughters, his son-in-law and the husband of his grand-daughter, his friend who had lived with him for the two years preceding his death, a gentleman who had been his private secretary for more than twenty years, his servant who had lived with him for six years, and in fine, one of the physicians and the clergyman who had attended him during his last sickness. And unless we can believe that all these persons were either deceived themselves or have attempted to deceive us as to the state of Sir George's mental faculties on the occasion of which they speak, we must regard him as having been then of sound and disposing mind.

I therefore think the respondent must be deemed to have made out his case, unless indeed the medical evidence be sufficient to prove that it was impos[illegible] that Sir George could then have been of sound and disposing mind. S[illegible] appears is the opinion entertained by Dr. Sutherland, the consulting physician who attended Sir George during his last sickness. And the opinion of this witness is fully borne out by the evidence of Dr. Workman, superintendent of the lunatic asylum at Toronto, who occupies a very high position in that branch of the medical profession to which he has specially devoted his attention. I do not propose to refer to the symptoms of insanity or to the hallucinations spoken of by Dr. Sutherland, because it is admitted that Sir George Simpson, at different times during his last sickness, was completely delirious. But the question is not as to whether the mind of Sir George wandered *at any time* during his last sickness, but as to what his mental condition was when he made and afterwards ratified the cheques in question. I therefore content myself with giving the opinion of Dr. Sutherland as to the point under consideration, which is as follows:

"In my opinion there could have been no state of perfect lucidity in Sir "George's case from the time the inflammation of the brain manifested itself "until the time of his death;" and in answer to the question:

"If you had remained constantly with Sir George, and found him after your "second visit speaking rationally and also on the second day and third day

"indicating after ten o'clock in the morning unmistakeable signs of intellect, "would you have believed him notwithstanding unsound of mind and not enjoying at these moments the use of his faculties?" Dr. Sutherland says: "Most "assuredly I would have conceived him of unsound mind throughout those two "days and the whole period of his disease: I have already stated that the "glimpses of seeming reason were fitful, transient, and, if relied on, fallacious, "and affording no testimony in the slightest degree approaching to sanity."

The opinion of Dr. Workman is given in the following emphatic terms:

"The evidence of Sir George's insanity from the first day up to the morning "of the 6th day, is to my mind entirely convincing, nor could any amount of tes- "timony showing that *at intervals* Sir George was free from delusions or hallu- "cinations satisfy me that his insanity was absent on such occasions." And in another part of his deposition the witness says: "Dr. Sutherland's "theory of Sir George's mental condition, in so far as it presents the case as one "of incurable insanity, and, from its connection with fatal disease of the brain, "incapable of reliable lucid intermission, coincides exactly with my own views of "Sir George's state of mind throughout his last illness."

It is necessary, however, to observe that although Dr. Sutherland and Dr. Workman agree as to the impossibility of there having been any lucid interval in Sir George's case, yet that as to some points they seem to differ. For instance, Dr. Sutherland says:

Answer.—"In Sir George's case, the mental phenomena may be divided into "two phases: the one directly caused by the laceration of the substance of the "brain, occurring at the time of the attack; the second period or phase occur- "ring as the consequence of the inflammation caused by that laceration. In "the first of these states or phases the absence of consciousness is absolute and "total: in the second, the effect on the mind is gradual and progressive, and "proportional to the changes going on in the brain itself; such change involving "softening, the possible formation of pus and serous effusion, according to the "duration of the disease."

As to this point Dr. Workman has said: "I do not believe the hallucinations "resulted from laceration of the brain; for this is a morbid lesion which I have "very seldom realized in *post mortem* examinations of the brains of persons "who had been affected similarly to Sir George Simpson, and in those cases "in which I have realized it the symptoms were different from those of Sir "George's case. Indeed it is my opinion that laceration of the brain with "consequent necessary effusion of the blood would have precluded the possibi- "lity of hallucination or any other form of mental activity. Such at least has "been my own observation."

In another part of his deposition, Dr. Workman observes: "I am not "prepared to affirm my concurrence in the pathological view of Sir "George's case expressed by Dr. Sutherland and Dr. DeCouagné as to the truly "inflammatory character of the disease of the brain, on the second, third, and "fourth days of illness; and yet I have no other designation to offer unless I "should call it a *quasi* or *pseudo* inflammation just as I should, I think, have "termed both Sir George's attacks of apoplexy, *pseudo* or *quasi* apoplexy."

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Dr. Workman also says:—"I believe that only by withdrawing Sir George's "case from the rank in which Dr. Sutherland has placed it, and installing it in "the category of insanity, can all its symptoms and phases be accounted for."

And when we turn to the evidence of Dr. Macdonnell, a physician also enjoying a very high and widely extended reputation, we find that he gives his opinion of the case as follows:—

"I consider that Sir George Simpson died from *anæmia* or bloodless condi- "tion of the brain, causing a commencing softening of the brain which would "have ended in the formation of abscess or purulent infiltration of the brain; I do "not think that there was acute inflammation of the brain on the third, fourth or "fifth days of September; I do not consider that he died from inflammation of "the brain, but that he died rather from exhaustion of the nervous system caused "by the *anæmic* or bloodless condition of the brain; the delirium, as described "by the attending physicians, is consistent with the physical condition of Sir "George that I have described."

And in another part of his evidence he gives his opinion as to the point now particularly under consideration in answer to the following question:—

"In view, then, of the facts stated in the depositions of the medical men before "referred to, do you believe it possible that, on the occasions when Drs. Thor- "burn and DeCouagne state that Sir George Simpson enjoyed intervals of per- "fect lucidity, he should not have been in full possession of his mental faculties?"

Ans.—"It is my opinion he must have been in full possession of his mental "faculties on those occasions."

The evidence of this witness, it will be recollected, is supported by that of Dr. Decouagne, whose examination-in-chief closed with these words:

"In Sir George's case, there was nothing in his disease after the morning of "the fourth, when the inflammation had commenced to subside to a certain ex- "tent, to prevent his having intervals of perfect lucidity."

Seeing then the embarrassing conflict which the medical evidence in this case presents, it appears to me impossible for us to make it the basis of our judgment, and, therefore, that we must form our own opinion as to the sanity of Sir George Simpson upon the occasion in question mainly from the facts of the case as established in evidence; and viewing the case in this light, after going over the whole of the evidence with much care, I am of opinion that the judgment of the Court below is right. At the same time I think that the circumstances of the case were such as to make it the duty of the appellants to bring the matter under the consideration of the Court. The investigation that has taken place has established these two points at least: 1st. That whatever may have been the mental condition of Sir George Simpson when he made the legacies impugned, they were, at any rate, the spontaneous dictates of his own mind, and are not in any degree attributable to the suggestions and artifices of others; and, secondly, that we cannot annul those legacies unless we are prepared to adopt the opinion of Dr. Workman, that the case of Sir George Simpson was one of "incurable insanity." This would be a painful conclusion to arrive at, and as it is one which I do not think the evidence sufficient to establish, I concur in confirming the judgment of the Court below.

MONDELET, J.—The question will, I think, reduce itself to this:—When Sir George Simpson signed the cheque in favor of the respondent, on the 4th September, 1860, was he sufficiently *compos mentis* to do it *en connaisance de cause*. I have attentively read the evidence, and, after reflection, have come to the conclusion that he was. Dr. Workman's dissertation may, in itself, be very scientific, but it applies specially to lunatics. Dr. Tuson's illustration of cases and Dr. Macdonnell's practical truths, connected with the evidence of Dr. DeCouagne, Hopkins, and others, speak more to the case than all the rest. Dr. Sutherland's opinion is also more of a theory than grounded upon all the continuous facts.

As to the *don manuel*, it is legal. Whether Hopkins was or was not the agent of Sir George Simpson or of the respondent, or of both, is indifferent. The cheque was given on the fourth September for the respondent, it became his property, and by his action he claims it as such.

I need not here enter into a metaphysical or physiological dissertation on the mind and its operations. I am for confirming the judgment.

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

"The Court of our Lady the Queen, now here, having heard the appellants and "respondent by their counsel respectively, examined as well the record and pro-"ceedings had in the Court below as the reasons of appeal fyled by the said ap-"pellants, and the answers thereto, and mature deliberation on the whole being "had; considering that the said late Sir George Simpson, at the time of his mak-"ing and signing the cheque, the subject matter of contestation in this cause, "in favor of and payable to the said respondent, plaintiff in the Court below, for "the sum of one thousand dollars, to wit: on the fourth day of September, 1860, "and at the time of his, the said late Sir George Simpson's subsequent acknow-"ledgment and recognition of the said cheque, to wit: on the sixth day of Sep-"tember, 1860, was of sound mind and understanding, and considering that in "the disposition aforesaid by the said late Sir George Simpson of the said sum "of money in and by the said cheque, the same was a legacy and bequest made "by the said Sir George Simpson to and in favor of the said respondent, plain-"tiff aforesaid; considering that in the judgment of the Superior Court for Lower "Canada, sitting at the City of Montreal, in the district of Montreal, on the "26th day of September, 1862, adjudging and condemning the said appellants, "defendants aforesaid, to pay and satisfy to the respondent, plaintiff aforesaid, "the said sum of one thousand dollars, there is no error, doth, for the considera-"tions aforesaid, affirm the said judgment with costs to the respondent against "the said appellant, &c."

The late Chief Justice SIR L. H. LAFONTAINE left on record his concurrence in the judgment as above rendered.

The following was the judgment rendered in this cause by Mr. Assistant Justice MONK, in the Superior Court, on the 26th September, 1860, and appealed from:

"The Court, having heard the parties by their counsel upon the merits of this cause, "and upon the motion of the defendants of the twenty-third of May last, that the depo-"sitions of the following witnesses examined by the said plaintiff, to wit: Hector Mc-"Kenzie, James Murray, Edward M. Hopkins, the Rev. William Simpson, Angus Cameron, "and Francis Webster Simpson, be rejected from the record of proceedings in this cause, "and the evidence therein contained held for naught, having examined the proceedings,

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"and proof of record, and having duly deliberated, doth reject the said motion of the "said defendants; and considering that it is not alleged, pretended, or proved by the de- "fendants that there was any fraud or suggestion practised in regard to the gift or dona- "tion mentioned and set forth in the plaintiff's declaration, or any improper influence "whatever exercised over the mind of the late Sir George Simpson relative to the said "gift or donation, the amount whereof is sought to be recovered by the present action; "and considering that the defendants have not proved by legal and conclusive evidence "that the said late Sir George Simpson, at the time of making and signing the order or "*cheque* by the plaintiff produced and filed in this cause, and at the time of making the "gift or donation set forth in the plaintiff's declaration, was of unsound mind and inca- "pable in law of making such gift or donation; considering, on the contrary, that the plain- "tiff hath established by legal and sufficient testimony that at the time and times of "making and signing such order or cheque and of making such gift or donation, to wit, "on the fourth and sixth days of September, 1860, the said late Sir George Simpson, "though sick with his last illness, was of sound mind and capable in law of making such "gift or donation; seeing, moreover, that in the act itself of making such gift or donation "there does not appear to this Court anything unreasonable, irrational, or indicative of "unsoundness of mind on the part of the said late Sir George Simpson; and inasmuch "therefore as the defendants, in their said qualities and capacities, have failed to establish "by legal and sufficient testimony the material averments of their plea firstly pleaded in "this cause, doth overrule, reject and dismiss the said plea; and the Court proceeding to "adjudge upon the merits of the plaintiff's action and *demande*, considering that the plain- "tiff hath established by legal and sufficient evidence the material allegations of his "declaration, and particularly that the order or cheque dated 4th September, 1860, and "upon which the present action rests in part, was drawn and made payable to the order "of the said plaintiff, at the request and by the order and direction of the said late Sir "George Simpson voluntarily and without any fraud, suggestion, or improper influence "on the part of the said plaintiff, or on the part of any person or persons whomsoever, "and was in like manner duly signed and delivered to E. M. Hopkins, his private secre- "tary, with precise and strict directions to him, the said E. M. Hopkins, to deliver the "same to the said plaintiff for his sole benefit and behoof; and considering that it is "clearly apparent from the evidence of record, and in an especial manner by the memo- "randum of the 6th September, 1860, made and prepared by order of the said Sir George "Simpson, and by him fully sanctioned and approved, that it was the will and inten- "tion of the said late Sir George Simpson thereby to make a gift or donation of the "amount or sum of money in the said order or cheque and in the said memorandum speci- "fied to the said plaintiff, as a token of his remembrance, and of his friendship and regard "for the said plaintiff, and in requital of past friendly acts; considering that although "the medical testimony adduced in this cause is conflicting and not entirely conclusive "in establishing the state of the late Sir George Simpson's mind during the period of "his last illness, yet that it clearly results from the whole of the evidence adduced that "during the 4th, 5th and 6th days of September, 1860, the said late Sir George Simp- "son enjoyed several intervals of reason, and was at different times on those days in a "rational and sound condition of mind; and seeing that it is proved that at the time "and times of making and signing the order and cheque above mentioned, and of mani- "festing the intention aforesaid not only verbally but by the memorandum aforesaid, "the said Sir George Simpson was restored to and showed lucid intervals of reason, and "exhibited a sound and rational state of mind; considering that in the opinion of "this Court there is no rule or principle of law fixing a duration of a lucid interval or "the intermission of delusion, hallucination or insanity, in order that acts done in those "intervals or intermissions should be valid in law; and considering, therefore, that at "the time and times of making and signing the order or cheque aforesaid, and of making "the gift or donation aforesaid, as manifested by said cheque and by said memorandum "of the 6th of September, 1860, the said late Sir George Simpson was capable in law "of making such gift or donation; considering also that from the act itself no indica-

tion of frenzy, folly or mental incapacity on the part of the late Sir George Simpson "arises or can be inferred, but, on the contrary, the gift or donation is not excessive "in amount, considering the fortune left by the late Sir George Simpson, or unreasonable when the position of the plaintiff and his friendly relations with the deceased are "borne in mind; seeing, moreover, that from the manner of performing the act in question, insanity or an otherwise irrational state of mind cannot be presumed, but the "reverse; and considering that the delivery of the said order or cheque of the 4th "of September, 1860, by the said late Sir George Simpson to the said E. M. Hopkins, "under all the circumstances proved in this case relative thereto, was by law and the "jurisprudence of this country equivalent to actual and immediate delivery *tradition "réelle* to the said plaintiff; seeing that the making, signing, and delivery of the said "order or cheque and the reiterated intentions of the said Sir George Simpson relative "thereto, both written and verbal, in the manner and under the circumstances proved in "this case, constituted and was in law a gift or donation, *don manuel inter vivos*, of the "sum of money therein specified by the late Sir George Simpson to the said plaintiff as "alleged in his declaration; considering inasmuch as by the order or cheque aforesaid, "and the memorandum of the 6th September, 1860, plaintiff's exhibit No. 6 produced in "this cause, the said plaintiff became and was, and is entitled, as the donee of the late "Sir George Simpson, to have and receive from the said defendants in their said qualities and capacities the sum of money claimed by the present action, it follows that by "the actual delivery afterwards of the said order or cheque by E. M. Hopkins to plaintiff, "the said plaintiff was entitled to receive the amount of said cheque or order upon presenting the same for payment thereof; considering that by the decease of the said late Sir George Simpson previous to the presentment of the said order or cheque for "payment the said gift or donation did not by law lapse or fail, nor could the payment "of the said order or cheque be legally refused, the order or *mandat* therein contained "not being extinguished by the death of Sir George Simpson, but under the circumstances of this case continued thereafter to be and is now in full force and effect; "seeing that the said gift or donation is undisputed by any executor of the late Sir "George Simpson, but is questioned and disputed by the defendants only, the executors "of his last will and testament; considering, therefore, that the amount and sum of "money given and granted as aforesaid and mentioned in the said order or cheque of "the 4th September, 1860, and in the said memorandum of the 6th September, 1860, "constituted and is in law a legal and valid claim now against and upon the estate and "succession of the said late Sir George Simpson, and is recoverable from the said defendants in their qualities and capacities by them admitted of executors of the last "will and testament of the said late Sir George Simpson, doth maintain the plaintiff's "action, and doth adjudge and condemn the defendants in their said qualities and capacities to pay and satisfy to the plaintiff the sum of two hundred and fifty pounds, one "thousand dollars current money of the province of Canada, being the amount of the "said gift or donation, *don manuel*, with interest thereon from the fourteenth day of "October, 1861, date of service of process, till paid, and costs of suit."

Judgment confirmed.

Strachan Bethune, for appellants.
Snowdon & Gairdner, attorneys for respondents.
F. W. Torrance and R. Laflamme, counsel.
(S.B. & W.F.G.)

Vide Lambert and Gauvreau in appeal, 1 L. C. Jur., 206-233,—*passim*.

CROWN SIDE.

MONTREAL, 23RD OCTOBER, 1855.

Coram AYLWIN, J.

Regina vs. *Miller.*

VENIRE FACIAS AD TRIANDUM.

An alien indicted for a felony has the right of being tried by a jury *de medietate linguæ* if he claims the benefit *upon pleading* at the arraignment.

The prisoner was indicted for carnally abusing a child under ten years, and at the time of his arraignment he entered a suggestion on the record as follows: "The said * * * * says he is an alien, born in Cassel, in the Electo- "rate of Hesse Cassel in Germany, and owes allegiance to the sovereign the "Elector of Hesse Cassel, and he prays the writ of our said Lady the Queen "to cause to come here twelve good and lawful men of the city of Montreal, "whereof one half to be of natives and the other half of aliens, to try the issue "on the said plea, according to the form of the statute in such case made and "provided."

The order being given as follows: "And it is granted to him that the writ of "our Sovereign Lady the Queen do issue as prayed for." Twelve jurors, whereof one half to be natives and the other half to be aliens, and who were of no affinity to the prisoner, were accordingly summoned.

The prisoner was tried and found guilty on the 26th October, 1855, and after the *allocutus* and proclamation, he was sentenced to death.

D. Ross, Solicitor-General.

(P.R.L.)

MONTREAL, 17TH MARCH, 1857.

Coram AYLWIN, J.

Regina vs. *Harley.*

PREVIOUS CONVICTION.

On an indictment for any offence after a previous conviction, the defendant is first to be arraigned and tried upon the offence charged, and if found guilty, then the jury are to be charged to try whether he has been so previously convicted.*

This was an indictment for house breaking and larceny therein after a previous conviction for felony.

The jury found the prisoner guilty of larceny in manner and form laid in the indictment, but not guilty of house-breaking. Henry Driscoll, Esquire, Queen's Counsel, fyled a certificate of a previous conviction for felony against the prisoner, which was read to the jury; and called * * * * * who were sworn and examined as witnesses to prove the identity of the prisoner.

His Honor, MR. JUSTICE AYLWIN, charged the jury, who said by their foreman that they found the prisoner to be the individual mentioned in the certificate of conviction.

(P.R.L.)

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* *Vide* the criminal law consolidation and amendment acts by Greaves, p. 202 and 203, as to the procedure now followed in England.

CROWN SIDE.

MONTREAL, 14TH MARCH, 1857.

Coram AYLWIN, J.

Regina vs. *Caisse.*

On charge of assaulting a Bailiff in the execution of his duty.

MISDEMEANOR—QUARTER SESSIONS.

The following order was made in this cause: The Court having examined the affidavits in support of this case, and finding that the charge against the defendant is simply a misdemeanor triable by the Court of General Sessions of the Peace, it is ordered on the motion of Henry Driscoll, Esquire, prosecuting for our Lady the Queen, that the Record in this case be sent down to the Court of General Sessions of the Peace for the district of Montreal, to be there dealt with according to law.

(P.R.L.)

MONTREAL, 31ST MARCH, 1857.

Coram AYLWIN, J.

Regina vs. *Lamère.*

The jury have a right, after the summing up and the case is concluded, to re-examine any of the witnesses whose evidence was not well understood by them.*

This indictment was for larceny.

The jury, having been sent to their room for deliberation, afterwards appeared in Court and declared that they were not yet agreed, and expressed a wish that they might be permitted to ask some questions of * * * whose evidence they stated had not been well understood by them.

The witnesses * * * were called and appeared, and the jury having heard them, they retired to deliberate, and, returning into Court, they gave a verdict of not guilty.

(P.R.L.)

MONTREAL, 31ST MARCH,

Coram AYLWIN, J.

Regina vs. *Dorion.*

FORM OF THE INDICTMENT.

Upon a motion for arrest of judment, the indictment for larceny drawn up according to the form given by Statute ch. xcix. sec. 51 (Cons. St. of Canada) held valid.

The prisoner was tried on an indictment for larceny.

The indictment was as follows:—

"PROVINCE OF CANADA, LOWER CANADA. { "In the Court of Queen's Bench, "Crown side, March term, 1857.

"DISTRICT OF MONTREAL. "TO WIT: { "The jurors for our Lady the Queen, upon their "oath present that * * * late of the "parish of * * * in the district of Montreal * * * on the twenty-"fourth day of April, in the year of our Lord one thousand eight hundred and

* *Vide* 2 Wheeler's C. C., p. 254. 4 Parker, C. Rep. 592. 4 Black, Com. by Christian, p. 356, as to the right of the Crown prosecutor. Also, as to the Judge. 2 Taylor, on Ev., sec. 1, 331; and 6 C. and P., p. 653.

Regina vs. Dorion.

" fifty-one, at the parish aforesaid, in the district aforesaid, feloniously did steal * " one * * * and six printed books† of ‡ one S. D."§

The jury returned a verdict of " guilty." Whereupon a motion was made on the part of the prisoner " that the judgment of this Court upon the verdict of " guilty returned and rendered against him upon his trial upon the indictment be " stayed and arrested for the following reasons: 1st. Because no legal charge or " offence is set forth in the said indictment against him as required by law to " constitute a legal and valid charge of larceny. 2nd. Because the value of the " several articles enumerated in the said indictment is not stated, neither is it " alleged that they were of any value. 3rd. Because the said several articles " are not alleged to be the property of, or of the goods and chattels of S. D. " 4th. Because the ownership of the said several articles enumerated in the said " indictment is not stated and is not therein set forth as required by law. 5th. " Because the said indictment is wholly insufficient, informal, null and void." ‖

" S. C. Monk, Esquire, Queen's Counsel, acting on the part of the Crown, " submits the case."

Judgment.—" The Court, having heard the prisoner by his Counsel on the " motion in arrest of judgment, overrules the same."

Cassidy, counsel for prisoner.

(P.R.L.)

MONTREAL, 6TH NOVEMBER, 1857.

Coram AYLWIN, J.

Regina vs. *McCorkill.*

A witness who has been ordered to withdraw from the court-room is guilty of contempt if, *after* his examination, he communicates facts disclosed in evidence at the trial to another witness not yet examined.

The witness having been ordered by the Court on the usual application to withdraw from the Court-room until called for, one of the witnesses examined on the part of the prisoner, J. H. Mosier, after his examination, and before the examination of another witness, did communicate to him a fact disclosed in evidence before the Court, and thereupon *Henry Driscoll, Esquire*, Queen's Counsel, moved that a rule do issue against him for contempt, unless cause be shown, and in support thereof fyled the affidavit of L. B. C., and the following rule was served upon him:

" Upon seeing the affidavit of * * * to the effect that after the order " made in this cause, that the witnesses should withdraw from the Court-room, " J. H. M., one of the witnesses examined on behalf of the prisoner, after his " examination, and before the examination of * * * another witness, " did communicate to the said * * * * * * a fact disclosed in evidence " before the Court, to wit * * * * * * * *

" It is ordered that the said J. H. M. do show cause to-morrow at ten o'clock " in the forenoon why he should not be attached for contempt in making known

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* *Cepit* and *asportavit*, unnecessary in this statutory form.
† It is unnecessary to state the value in this statutory form.
‡ *Ex bonis* et *catallis*, unnecessary in this statutory form.
§ *Contra formam statuti* and *Contra pacem* omitted.
‖ *Vide* Cons. St. of Canada, ch. xcix. sec. 84; 3 Cox, C. C., p. 483, aider by verdict.

"to him evidence given at the trial, and further dealt with according to law."

"Signed, * * *

"Clerk of the Crown."

On the return of this rule before the Court, the witness made the following affidavit in answer thereto: "J. H. Mosier, being required by a rule *nisi* served "upon him yesterday, the * * * to show cause why he should not be "attached for contempt of the said Court, for having made known to one * * "a witness in this cause *before* his examination, certain evidence given at the "said trial, after the order made in this cause that the witnesses should with- "draw from the Court room; now comes forward before the said Court, and to "purge himself from the said charge of contempt, doth depose and say: 'that "he faithfully obeyed the order made as aforesaid, and did not enter the Court "room during the said trial, until he was called forward to give his testimony.' &c., &c. (He casually mentioned that fact in conversation.)

"That he did so * * * without any intention of influencing the evi- "dence to be given by the witness or of committing a contempt of this Court, "and in utter ignorance of there being any impropriety in his so doing.

"And the said J. H. M. further doth say, that he is unacquainted with the "rules and forms of proceedings in Courts of Justice, and that at the time he "did so, &c., &c., he was wholly unconscious of the possibility of his conduct in "that respect being considered an act of contempt or a violation of the order "made by the Court as aforesaid, which order, as he understood it, went no "further than to require the witnesses who were to be examined in this cause to "withdraw from the Court-room, and not to enter again until called."

Judgment. It is ordered that the rule against the defendant in this cause for contempt be discharged on payment of ten shillings currency for costs.

(R.R.L.)

MONTREAL, 9TH NOVEMBER, 1857.

Coram SIR LOUIS HYPOLITE LAFONTAINE, BART., C. J., AND AYLWIN, J.

Regina vs. *McCorkill.*

FORGERY—RECEIPT.

HELD:—That in an indictment for forging a receipt, it must be alleged that such receipt was *either for money or goods, &c.*, as mentioned in the statute, ch. 94, sec. 9, of the Consolidated Statutes of Canada.

The indictment contained two counts as follows:

"The jurors for our Lady the Queen upon their oath present that R. McCor- "kill, late of the parish of*** in the District of Montreal, *** on the thirtieth "day of November, in the year of our Lord one thousand eight hundred and "fifty-six, feloniously did forge a certain receipt, purporting to be the receipt of "one*** with intent to defraud, against the form of the statute in such case "made and provided. And the jurors aforesaid upon their oath aforesaid do "further present that the said R. McCorkill on the twentieth day of April, in "the year of our Lord one thousand eight hundred and fifty-seven, feloniously "did offer, utter, dispose of, and put off a certain forged receipt purporting to "be the receipt of one***with intent to defraud (he, the said R. McCorkill, "at the time he so offered, uttered, disposed of, and put off the said forged

Regina vs. McCorkill.

"receipt as aforesaid, then well knowing the same to be forged); against the form "of the statute in such case made and provided."

Verdict—not guilty on the first count, but guilty on the second count.

The prisoner, by his counsel, moved on the 7th November, that the judgment of this Court upon the verdict of the jury in this cause rendered upon the second count of this indictment be stayed and arrested for the following among other reasons: 1st. Because the charge contained in the said indictment is wholly and altogether insufficient in law, and the said indictment is informal, null and void. 2nd. Because in the said indictment the purport of the receipt or document alleged to have been forged is not set forth, neither is any description of the same therein given, from which the Court, here judging from the said indictment, can say whether the instrument was one in respect of which a charge of forgery or of uttering a forged document would lie, or was an instrument having any value or in respect of which an intention to defraud could be presumed. 3d. Because the terms of the statute were not pursued in describing the document alleged to have been forged, it not being stated to be a receipt either for *money* or for *goods* or any accountable receipt either for money or goods, or for any note, bill or other security for payment of money, and thus it is not shown by the indictment that the receipt mentioned is such a document, the forging or uttering of which is prohibited by law. 4th. Because no description whatever is given in the said indictment of the instrument alleged to have been forged such as by law is required, and such as would be and is necessary to enable the said R. McCorkill to plead as against any other or subsequent charge, *autrefois convict*. A motion for a new trial was also made, but upon other grounds. The judgment in the register of the Court is as follows: the Court render judgment on the motions for a new trial and in arrest of judgment made on behalf of the prisoner. On the motion made on behalf of the prisoner for a new trial, it is ordered that the prisoner take nothing by his motion. On the motion on behalf of the prisoner made in arrest of judgment, the Court grant the motion, and order that judgment in this case be and the same is hereby arrested. *Henry Driscoll, Esq., Q. C.*, and *B. Devlin*, acting on the part of the crown. The Honble. *L. T. Drummond* and *Ed. Carter*, counsel for the prisoner.

(P.R.L.)

MONTREAL, 3RD JULY, 1861.

Coram AYLWIN, J.

Regina vs. *Vendette.*

EXHIBITING ARTICLES OF THE PEACE.

HELD:—That when articles of the peace have been exhibited in open Court against a person, the Court will direct that he do stand committed until security to keep the peace be given.

On the first day of July, 1861, the wife of the defendant exhibited articles of the peace against him, which were sworn to by her in open Court, and, therefore, the Court ordered that process do issue to arrest the defendant.

On articles of the peace exhibited by*** wife of the said V., against the said V. her husband, through fear of death, or of receiving some grievous bodily harm, charging the said V. with having lately, and especially on the***used the most

cruel and barbarous treatment to her by assaulting, beating and wounding her, and, moreover, threatening to take her life.

Regina vs. Vendette.

The prisoner was arrested and brought up on a bench warrant issued out of the Court.

"The Court thereupon doth order and adjudge that the said V. do give "security to keep the peace and be of good behaviour towards all Her Majesty's "subjects, and particularly towards the said * * * during the space of twelve "months, himself in the sum of $1200 and four sureties (being landed proprie- "tors) each in the sum of $300, and that he do stand committed to the common "gaol of this District until such security be given."

Vide 7 Cox's Crim. Cases, p. 238, Reg. *vs.* Woodside.

Johnson, counsel for exhibitant.

(P.R.L.)

MONTREAL, 28TH OCTOBER, 1857.

Coram ALYWIN, J.

Regina vs. *Johnson.*

PERJURY.

The following order was made against the prisoner:

The Court orders that the prisoner A. Johnson do give bail to our Lady the Queen, in the sum of £50, and two sureties each in the sum of £25, the said moneys to be levied of their goods and chattels, lands and tenements to the use of our said Lady the Queen, Her Heirs and Successors, if the said A. Johnson shall fail to appear to answer to a charge of wilful and corrupt perjury, committed on the trial of Thomas Welsh for robbery, and in default of bail, that she be committed to the common gaol of this District to be dealt with according to law.*

(P.R.L.)

MONTREAL, 24TH SEPTEMBER, 1862.

Coram MONDELET, J., BERTHELOT, J.

Regina vs. *Hathaway.*

HELD:—That in an indictment for forgery it is not necessary to allege that the defendant did the act with intent to defraud any particular person.†

This was an indictment for forgery as follows:

"The jurors for our Lady the Queen upon their oath present that J. Hathaway, "late of the city of Montreal in the District of Montreal, laborer, on the seven- "teenth day of March, in the year of our Lord one thousand eight hundred and "sixty-two, at the city aforesaid, in the District aforesaid, did feloniously forge "a certain bank note purporting to be a bank note of the Bank of Montreal, a "bank incorporated by law in this province, for the payment of two dollars to "the bearer thereof on demand *with intent to defraud*, against the form of the

* Under the Vexatious Indictments Act, 24 Vic., ch. 10, no indictment shall be presented or found, unless preferred by the direction of a Judge, or, &c., &c., &c. 9 Cox, C. C. p. 430.

† Cons. St. of Canada, ch. 99, sec. 29.

Regina vs. Hathaway.

"statute in such case made and provided and against the peace of our Lady the "Queen, her crown and dignity."

The prisoner, having been found guilty, moved by his counsel for arrest of judgment on the following grounds: "1st. Because it does not appear upon the "indictment in this cause found that the said J. Hathaway committed the for- "gery charged with intent to defraud any person or body politic or corporate in "the said indictment specially named.

"2nd. Because it is not laid in the said indictment that the forgery of the "said note was by the said J. H. perpetrated with the intent of defrauding any "person or body or joint stock company specially named therein."

Judgment.—The Court orders that the prisoner take nothing by his motion.

Kerr, counsel for prisoner.

(P.R.L.)

MONTREAL, 6TH OCTOBER, 1862.

Coram MONDELET, J., BERTHELOT, J.

Regina vs. *Sénécal.*

HELD:—That upon an indictment for false pretences, the prosecutor is not bound to deliver to the defendant the particulars of the crime charged against him.*

This was an indictment for false pretences. On the 2nd October, 1862, the defendant moved "for particulars of false pretences, to be relied on in "support of the indictment."

This motion was opposed by the counsel for the private prosecutor.

The judgment of the Court was rendered as follows:

"The Court having duly considered the motion, heard the parties thereon, "and on the whole duly deliberated, pronounced the following judgment: it is "considered that the said defendant take nothing by his motion, and reject the "same."

Cassidy, counsel for prosecutor.

Kerr, counsel for defendant.

(P.R.L.)

MONTREAL, 14TH OCTOBER, 1862.

Coram MONDELET, J., BERTHELOT, J.

Regina vs. *Sénécal.*

HELD:—That the defendant is not *in all cases* of acquittal entitled to a copy of the indictment laid against him.†

The defendant, having been indicted and tried on a charge of false pretences, was acquitted. On the 11th October, 1862, he moved the Court by his counsel for copies of indictment and papers.

Judgment. "The Court having considered the application of the defendant "for copies of the indictment and papers in this case rejects the application."

Kerr, counsel for defendant.

(P.R.L.)

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* *Vide* Consolidated Statutes of Canada, ch. 99, secs. 29, 51, 61. Lord Campbell's act by Greaves, pp. iii, iv and v.

† Sed *vide* 1 Lewin's C. C., p. 205, and note 3, Cox's Crim. C., p. 5-4, T. R. 693. 10 B., and C. 70.

CROWN SIDE.

MONTREAL, 7TH OCTOBER, 1862.

Coram MONDELET, J., AND BERTHELOT, J.

Regina vs. *Sénécal.*

AMENDMENT.

HELD:—That upon an amendment of the indictment at the trial, no postponement of trial will be granted if the prisoner is not prejudiced in his defence.

Upon the examination of one of the witnesses on the part of the prosecution, it appeared that the property mentioned in the indictment for false pretences belonged to a partnership instead of to H. R., one of the partners, and thereupon the counsel for the private prosecution moved to amend the indictment by adding after the words "the property of the said H. R." the words "and another," which motion was in the following terms: "Motion on behalf of the "private prosecutor H. R., that the indictment in this cause be amended by the "addition of the words 'and another' next after the words 'the property of "the said H. R.,' the said amendment being requisite to render the said indict-"ment in accordance with the proof in this case, the whole upon such terms as "this Honorable Court may think reasonable."

The counsel of the defendant opposed the application, and objected to the granting thereof.

The Court granted the motion, and ordered that the amendment be made without prejudice to the defendant's rights, and it was made as follows on the margin of the indictment, "and another."

"The above words were added at the time of defendant's trial by order of "the Court upon the motion of Mr. Cassidy for private prosecutor."

(Signed) E. C., C. C.*

The amendment being made, the Court called upon the defendant's counsel to state whether the amendment, as permitted, interfered with his line of defence, and whether he had anything to urge with reference thereto, in order that the Court may do justice thereon. The defendant's counsel declared that he was seriously prejudiced by the amendment being allowed, and that he was taken by surprise, the allegation of property being changed in a most material manner by the amendment, and made application for the postponement of the trial until the first juridical day of the next term of this Court. The counsel for the private prosecutor opposed the application of defendant's counsel for a postponement of the trial.

Judgment.—"The Court having heard the counsel on both sides, orders that "the trial of the defendant do proceed, inasmuch as the amendment in the opinion "of the Court occasions no prejudice to the defendant."

Cassidy, counsel for private prosecutor.

Kerr, counsel for the defendant.

(P. R. L.)

* Cons. St. of Canada, ch. 99, secs. 77, 78, 79, 80, 81, 82 and 83. Lord Campbell's act by Greaves, p. 6.

Vide Regina *vs.* McDonald; October, 1856, in accordance with the provisions of ch. 99, C. L. C., sec. 81, the amendment was made as follows: "Amendment endorsed "on this indictment by order of the Court pursuant to the statute, to wit * * * * "and no postponement being asked by the prisoner, it is ordered that the trial do proceed "before the jury sworn to try the issue joined between the crown and the prisoner."

CROWN SIDE.

MONTREAL, 6TH OCTOBER, 1862.

Coram MONDELET, J., BERTHELOT, J.

Regina vs. *Driscoll.*

STEALING MONEY.

HELD:—That the species of coin or the nature of the Bank notes need not be alleged in any indictment for the larceny of money.*

The prisoner was charged upon the following indictment: "The jurors for our "Lady the Queen upon their oath present that Jeremiah Driscoll, late of the "city of Montreal, in the District of Montreal, laborer, on the eighth day of "August, one thousand eight hundred and sixty-two, at the city aforesaid, in the "District aforesaid, did feloniously steal a certain sum of money: to wit, to the "amount of one hundred and forty dollars, lawful current money of Canada, "the property of one J. B., against the form of the statute in such "case made and provided, and against the peace," &c., &c. The jury returned a verdict of guilty. It was objected on behalf of the prisoner that he could not be convicted, inasmuch as the indictment charged him with stealing "money" without any particular description of the money so stolen. The prisoner by his counsel moved, on the 30th September, 1862, "that the verdict in this cause "rendered be set aside and a new trial ordered, for the following amongst other "reasons: 1st. Because it was not proved at the trial that the bank notes which the "said defendant was accused of stealing nor any one of them were or was genuine. "2nd. Because the existence of the banks, of which the notes were pretended "to have been issued, was not proved. 3rd. Because no proof was made of the "value of the said bank-notes or any of them. 4th. Because it was not proved "that any money was due on the said bank-notes or any of them, and remaining "unsatisfied. 6th. Because the evidence shows that the money stolen was bank-"notes if anything at all, whilst the indictment charged theft of coin."

The prisoner further moved by his counsel "that the judgment in this cause "be arrested for the following reasons." 8th. "Because the indictment in this "cause is faulty and defective, inasmuch as the species of 'money,' whether "bank-notes or coin, which the said defendant was thereby accused of stealing "is not therein specified."

After argument, the Court rendered the following judgment:

The Court, having duly considered the motions made in this cause for a new trial, to set aside the verdict and in arrest of judgment, heard the parties thereon, and the whole duly considered, pronounces the following judgment: It is considered that the prisoner take nothing by his said motions, and doth reject the same.

The *Honble. J. J. C. Abbott*, Sol.-Gen.

Kerr, counsel for prisoner.

(P.R.L.)

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* *Vide* Lord Campbell's act by Greaves, p. 21.
1 Leading Crim. C., 574. 7 Cox, C. C., p. 183.
2 Parker's Crim. Rep., p. 37.
4 Wheeler's Crim. C., p. 418, and 2 Wheeler's Crim. C., p. 621. Cons. Statutes of Canada, ch. 99, secs. 32 and 60.

COURT OF QUEEN'S BENCH.

MONTREAL 4TH JUNE, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

No. 9.

WALTER WARDLE,

(*Plaintiff in Court below,*)

APPELLANT;

AND

THE VERY REVEREND JOHN BETHUNE,

(*Defendant in Court below,*)

RESPONDENT.

HELD:—That a builder is responsible for the sinking of a building erected by him, on foundations built by another, but assumed by him both in his tender and contract, without protest or objection, although such sinking be attributable to the insufficiency of such foundations and of the soil on which they were built and liable to make good at his own expense the damage thereby occasioned to his own work.

This was an appeal from an interlocutory judgment rendered by the Superior Court at Montreal on the 24th day of February, 1862.

The action was brought to recover, amongst other sums, a balance claimed to be due to the appellant on his contract with the respondent for the erection of Christ Church Cathedral.

The foundations of the building had been previously erected by another contractor but were assumed by the appellant at a certain figure in his tender and contract, without protest or objection. The main issue raised by the pleadings was as to the liability or otherwise of the appellant for the sufficiency of the foundations of the tower and spire and of the soil on which they were built.

The following is an extract from that part of the judgment of the Superior Court having reference to the main issue thus raised:—

"The Court, * * * * * considering that the plaintiff by his tender "for constructing, building and completing Christ's Church Cathedral mentioned "in the pleadings in this cause, dated 29th July, 1857, and further by the con- "tract and agreement in pursuance of said tender by and between the plaintiff "and defendant, dated 15th August, 1857, plaintiff's exhibit No. 1, and the "specifications in said contract referred to as thereunto annexed and forming "part thereof, did accept, approve of and allow the sum of £1750 for the found- "ations of the said cathedral, as and where the said foundations then were; "considering moreover that the said plaintiff did not either by the said tender "or by the aforesaid contract and specification modify or diminish his liability "in law for the defects of the soil chosen for the site of the said cathedral church, "or for the insufficiency of the foundations for the sum so accepted, approved "and allowed for by him the said plaintiff, and upon which he subsequently, in "pursuance of said tender, contract, and specifications erected and built the "said cathedral church; and seeing also that by the aforesaid contract and "agreement the said plaintiff did not abandon or waive his right of legal war-

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"ranty against and upon the part of the said plaintiff as to the fitness of the "soil and the sufficiency of the said foundations: seeing that the sinking of the "tower and spire of said cathedral church is not only clearly established and "proved by the evidence of record, but that the same was caused by the unfit- "ness and defects of the soil and by the insufficiency of the said foundations; "and that therefore he the said plaintiff is liable according to law, the evidence "adduced and his own admissions of record, for the sinking of the tower and "spire of the said cathedral church as alleged in the pleadings and shown by "the testimony in this cause, although there was an architect charged with the "superintendance of the said cathedral church and the construction thereof, "and is likewise responsible for all delays, defects, damages, extra works, costs "charges, materials, and expenditure caused by and resulting from the sinking "of the said tower and spire, and consequently that he the said plaintiff cannot "by law and according to the evidence of record claim indemnity from the defend- "ant for any delay or damages to him caused by the sinking of the said tower "and spire, nor for any extra work, expenditure or materials by him made and "employed in and about the said cathedral church or any part thereof by reason "of the sinking of the said tower and spire."

The respondent having by his pleas claimed to offset any balance really due the appellant on his contract by what it would cost to repair the damage caused by the sinking of the tower and spire and to place the building, tower, and spire in the state and condition in which they ought to be under the contract and specifications, the Court, *avant faire droit* on this point, ordered an *expertise*.

BADGLEY, A. J., giving the judgment:—This contestation has arisen out of the erection of Christ Church Cathedral which the appellant by contract, dated the 15th of August, 1857, agreed to build and complete and to deliver to the respondent, the Rector of the parish of Montreal not later than the 1st of August, 1859.

During the progress of the work and after a considerable portion of it had been done, the tower, which was in course of erection, subsided a good deal, causing serious damages both internally and externally, to the work already done, and which was repaired and renewed by the appellant at the cost of several hundred pounds, which he seeks to recover by this action against the respondent together with a further sum for extra work, and an additional sum for short measurement and for damages suffered from the Caen stone furnished to him by the respondent.

At the date of the contract the foundations of the building generally had been laid, including that of the tower..

It was agreed by the contract that the work should be executed in the most substantial and workmanlike manner and in the best style of workmanship, that all the works should be according to the plans, &c., and in strict conformity with the specifications annexed to the contract to form part thereof; that the contract should not be invalidated by reason of additions to or omissions from the specifications or details, but the amount of these should be ascertained and added to or deducted from the contract price or estimate which must be in full of all demands whatever for the entire completion of the works, and which from their

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commencement until their final completion and acceptance should be at the care and risk of the contractor; that the rector was not to be accountable for any part of these works or for any material or thing connected with them which might happen to be lost, damaged or destroyed in any manner, but which loss and damage the appellant agreed to sustain to the entire exoneration of the rector, and to repair and replace, at his own cost and expense, such part as might be lost, damaged, or destroyed, and moreover to maintain the whole work complete and perfect in all its parts to its completion and for one year after its delivery and acceptance as finished and completed. It was also agreed that no allowance should be made to the appellant for extra or additional work unless agreed to in writing, but not to entail greater or less expense than the works intended before the deviation and that an estimate *pro* or *con* of addition to or alteration from the plan during the work should be made by the architect and contractor and a memorandum of the cost to be added to or deducted from the original tender should be signed by both the contracting parties and attached to the contract. The appellant agreed to furnish all the required materials except the Caen stone, which was to be supplied by the respondent, and to take as it stood and allow for the work done on the area floor, namely, the foundation of the building *in situ*. It was also agreed that the contractor should furnish an estimate and tender for the whole work, that is, the entire building and allow thereout for the work already done; and finally, that he was to complete and deliver the whole by the 1st August, 1859.

The appellant tendered as follows:—"I undertake to provide all labor and "materials required to build Christ Church Cathedral according to the draw- "ings and specifications, &c., for £30,600, the above sum includes work already "done in foundations which I value at £1,750; the contract settled the full price "at £30,100, inclusive of the valuation of the work done, mentioned above.

"The work done on the area floor as it stands, of the specifications and the "work already done in foundations" of the tender, refer to the same object, the foundations of the building *in situ* generally, including that of the tower.

It must be apparent from the foregoing that the entire building done and to be done entered into the agreement with the contractor, and was covered by the full price for the whole tendered for according to the requirements above, and which was fixed at the contract price including the allowance as above stated. It is also manifest that the appellant assumed and was liable at his own cost and expense for any damage or injury done to the works during their progress to completion, and until the acceptance of the finished building, and that no allowance for extra work was to be made without a specific agreement therefor with the respondent.

But in addition to these express covenants of the contract, the appellant, as contractor and builder, was subjected to the obligations of law attaching to such undertakings, and which likewise entered into his engagement, rendering him liable not only for the actual material work done by him but also for the basis and foundations on which he built. The law considers the fitness of the ground for the superstructure and the sufficiency of the foundations on which it is to be raised, to be objects exclusively and peculiarly within the builder's art, making him the legal, as in this case he was, the contractual, guarantee for the stability of

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the work; because, apart from the mere personal interest of the individual for whom he builds, the public are interested that the builder should possess scientific knowledge of his art and should apply it to their assurance and protection against damage and injury from the insufficiency or instability of the building by him undertaken to be constructed at the place agreed upon. " Cette garantie " est fondée sur ce que celui qui se charge d'un ouvrage doit le savoir exécuter. " Il est donc juste qu'il soit responsable des fautes qu'il commet dans son tra- " vail par négligence et même par ignorance. Celui qui bâtit ne pourrait pas " s'excuser sur la mauvaise qualité du sol, il doit la reconnaître et user tous les " moyens que son art indique pour y remédier." 2 vol. Lepage, Lois des bâtiments, page 3. And Sourdat and the authors generally who treat the subject confirm the above, and qualify the builder's negligence in this respect as a *quasi delictum*. " Ce qui embrasse tous les défauts de construction, vice du sol. &c., " &c. These and other citations of like nature and character are common in the books and manifest the inflexible legal warranty attached to the builder for all these defects and generally for all defects attributable to his negligence or his ignorance, *imperitia culpæ adnumeratur*. Troplong, in his treatise of Louage 3 vol. no., 994 says: " Et d'abord le vice du sol qui vient à entraîner la ruine " de l'édifice doit évidemment être imputé à l'entrepreneur. Il est vrai que le " sol est fourni à ce dernier par le propriétaire, et que la loi décharge l'ouvrier " quand la perte a été occasionnée par le vice de la matière qu'on lui a donnée " pour la travailler. Mais il faut remarquer qu'il doit connaître son art, c'est à " lui à étudier le terrain, et à savoir s'il présente une assiette assez solide pour " recevoir une construction. Le propriétaire ignore les règles de la bâtisse, et a " besoin d'être éclairé par lui, et celui-ci ne peut dès lors trouver que dans sa " propre imprudence la cause de la ruine."

The jurisprudence, of Lower Canada, in complete harmony with our common law has definitely fixed and established these principles, and the familiar case of Laurie and Brown has been long acknowledged by the profession in this province, as I may say the leading case on the subject of the builder's responsibility, not from its consecration of new principles of law, but because that responsibility raised and contested in that case was thoroughly investigated by a searching examination of the legal authorities upon the subject, and the judgments of the Court of original jurisdiction and of the provincial appeal were concurrent; the law and the jurisprudence existing before these decisions being thereby settled and having since constantly prevailed.

The builder's guarantee and his legal responsibility for his proficiency in the art which he professes to practice is not susceptible of doubt, and he is therefore presumed by the law to know the nature of the ground to be built upon, its capability to receive and sustain the foundations of the building, their required area and extent as well as construction, and their specific sufficiency to support the superstructure according to the greatness and size of the building, to be erected upon them. In the preparation or adoption of foundations for works of large description, where heavy masses and constructions are to be supported and borne, it is an elementary principle in building that the solidity and extent of the foundations must be in proportion to the magnitude of the contemplated

building. Hence, the responsibility of the builder is fixed, and the presumption of law is therefore always against him; it was so held in the above cited case, "le constructeur est responsable de tous les vices qui peuvent se rencontrer et "qu'il ne prouve pas provenir de force majeure ou du fait même du propriétaire." Citing Lahaie, p 447 and 2 Lepage, des Batiments p. 77—In 6 vol. Merceadè, p. 569, it is laid down, "que nulle loi ne permette aux hommes de "l'art de faire sciemment une construction qui ne doit pas tenir."

In cases of this description no implication of guarantee by the proprietor can possibly exist, and he can only be held for his conventional engagements, because the public interest and safety extend the builder's responsibility beyond the mere terms of his contract, and the law establishes a guarantee against him which absolutely prevents the possibility of such implication as against the proprietor. The law presumes that a builder has fully and carefully satisfied himself with the basis taken up by him on which to raise his superstructure, and in the public interest holds him for the legal presumptions and their attendant consequences of negligently adopting without examination or sufficient calculation, unfit ground and inadequate foundations whereon to erect a costly public edifice, simply because both soil and foundations were already *in situ*.

Nor is this strict legal responsibility of the builder in any degree relaxed or invalidated by reason of the employment of an architect to oversee the work, because the importance of protecting life and property is so grave, that the rule of law against the builder is held to be strictly reasonable even in such a case, the builder not being bound to follow the directions and instructions of an architect, unless they are quite consistent with the safety of the work; whilst it is manifestly his business to see that all necessary precautions are taken to insure its stability. See Nouv. Denizart, Verbo. Batiment, Nos. 2, 3, 5, 7—Duvergier Louage, Nos. 3, 5, 7. Instead of diminishing the builder's responsibility the law casts a similar one upon the architect also, rendering both jointly and severally liable to the proprietor, enabling the latter to prosecute at law both or either of them, and if himself proceeded against at law, by the one, authorizing his calling the other into the cause for his protection and relief as his guarantee against the demand. See Répertoire de jurisprudence, Verbo architecte—See also case of Laurie and Brown. Nouv. Denizart, Verbo. Batiment, Nos. 3, 5, 7, 9. 2 Lepage, p. 77.

The appellant in his factum submitted to this Court, has conceded the law and the jurisprudence above stated, as well as the principle laid down in the case of Laurie and Brown. He admits that "the builder and architect are liable as "being, both of them, guilty of negligence as men of art, who had seen the "ground, and had an opportunity of exercising their judgment, their joint and "several liability from want of skill, default, negligence of each, and from a de"parture from the rules of art which each was bound to know. There is in "every case of the kind a personal and individual fault of omission or com"mission." And he supports his admissions by the following amongst other "elementary authorities which he affirms will not be disputed."

"L'ouvrier *qui a mal travaillé* doit les réparer (ces défec[illegible]és à ces frais.") 2 Nouv. Denis v. Batiment, No. 11, p. 302.

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" Il est de principe que celui qui entreprend quelque ouvrage doit répondre " des défauts qui proviennent *de son ignorance;* il doit être instruit de ce qui " concerne sa profession, et s'il ne l'est pas, c'est sa faute." Imperitia culpæ " adnumeratur." Royer, Dict., vr. *Architecte*, page 281, No. 21.

" Ceux qui entreprennent quelque travail ou quelque ouvrage doivent de plus " répondre des défauts *causés par leur ignorance*, car ils doivent savoir faire ce " *qu'ils entreprennent*, et c'est leur faute s'ils ignorent leur profession. Domat, " Loix Civ. liv. 1, tit. 4. Sect. 8, No. 1.

" Cette garantie est fondée sur ce que celui qui *se charge* d'un ouvrage doit le " savoir exécuter. Il est *donc* juste qu'il soit responsable *des fautes qu'il commet* " dans son travail par négligence et même par ignorance. Celui qui bâtit ne " pourrait pas même s'excuser sur la mauvaise qualité du sol, il doit la récon- " naitre et user tous les moyens que son art indique pour y remédier." 2 Lepage 93.

As these admissions prevent all doubt on the subject of the builder's legal responsibility, so the plain and precise covenants of his contract make the appellant fully responsible under his agreement. Under either or both he must be assumed to have acquainted himself with the intended structure in all its details, to have considered the foundations and work done as well as the ground upon which they were placed and on which the building was to stand, and for all which he was required to tender a full price. By so tendering moreover, he must also be assumed to have considered and adopted the work already done as sufficient, and to have valued and allowed for it as a part of his contract; if he neglected these necessary precautions, and assumed, without examination or consideration, as good and solid what was bad and defective, and whereby damage ensued to his own work, his default and negligence became his own *quasi delectum* and were as inexcusable as if he had, according to Marcadé, " *fait sciemment une construction qui ne doit tenir.*"

The appellant argues, however, in his factum, p. 13, that without examination or *inspection of the ground or work done,* " *he had a right to assume, because* " *the work was already there, that it was well done, and that the foundations were* " *sufficient for the support of the tower which formed part of the original plan.*" This fallacy is offered in excuse for his neglect and error upon the important matters of the sufficiency of the foundations and the natural fitness of the ground, but it is against every principle of law, and against the stipulation of the contract, and is as unfounded as the alleged implication of guarantee by the respondent, his reason being simply because both ground and foundations were *in situ* at the making of the agreement. It is also necessary to add that the respondent could not be held under any such an implication, that he could only be liable and responsible for his positive contractual engagements, and that no guarantee of any kind upon this point by him can be found in the terms of the contract.

It manifestly follows from all this, that the appellant was bound at his own expense and to the entire exoneration of the respondent, to repair and replace all parts of the work which might become damaged, injured or destroyed until the completion of the building and its acceptance by the respondent as stipulated by the agreement.

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Now it appears that whilst the work was in progress, considerable injury and damage were occasioned by the sinking of the tower so far as erected, to work already done upon the building, both internally and externally. The architect Scott in his testimony proves its extent, "sometime in "the fall of the year 1858, as the tower was being built, the foundations sank, "say to the "extent of about one inch and a quarter, and as the tower was proceeded "with, it continued from time to time to sink, until the total sinking of the "tower (and the parts connected with it) amounted to about five inches "in all, up to the present time. In consequence of this, the sinking of the "Caen stone arches in connection with the tower, aisles and nave and chancel "gave way, owing to the unequal pressure thus thrown upon them, and a variety "of repairs was thereby rendered necessary, and which were done as shewn by "the plaintiff's exhibit No. 6, in this cause fyled." And Hutchinson, the appellant's foreman of the stonecutters, also explains it: "*During the progress of the "work and to the best of my recollection before the tower was finished the tower "showed symptoms of sinking, and the work of putting on the spire was stopped "for about two months to see if it would settle further.* The effect of that sinking was to crush all the arches connected with the tower, cracked the walls "above the large arches between the nave and tower, and thus threw more "weight upon the columns which were of Caen stone which were thereby "crushed in part. The repairs to these parts were all done by the plaintiff and "are charged for in the account, plaintiff's exhibit No. 6, now shown to me."

This testimony in a general way, shews the nature and extent of the injury, and the respondent has, in addition, completed the facts of this part of the case by proving the cause of the sinking of the tower, which he has shown by witnesses of acknowledged ability and skill in architecture, and amongst others by Messrs. Keefer and Cumberland of Toronto, who ascribe it to the badness of the soil, and the insufficient area of the foundations on such a soil. Mr. Keefer testifies as follows: "In the month of May last, I and Mr. Frederick Cumber-"land of Toronto, architect, examined the said building, and the soil on which "it is founded, at the request of the defendant, principally with a view to "ascertain the cause of the sinking of the tower, and to make such suggestions "as to the steps which might be necessary to prevent further sinking and "spreading, as we might think valuable. In the course of our examination we "bored through the soil immediately behind the cathedral, and examined the "soil as far as could be seen in two holes that had been previously dug near the "foundations of the tower, and we also bored in the cellar of the cathedral as "far as was practicable. We also examined the area of the foundations of the "tower, and we also examined the plans of the building. We found the tower "had sunk since it was erected, and that the portion facing St. Catharine street "leans towards the street. The two piers facing St. Catharine street appear to "have sunk more than the others, and the one of those two nearest University "street more than the other.

"The first effect visible from the sinking of the tower was that the nave aisle, "arches and columns had been disturbed and damaged, and that the transept "walls had been moved. The chancel arch also had been damaged, as well as

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"the arches connecting the tower with the transept walls. On the outside the "walls and roof adjoining the tower had been beat down by the settlement, and "the transept gables slightly overhanged. I do not recollect, without seeing the "plan, that any injury to the buttresses had been occasioned by the settlement.

"In my opinion the cause of the sinking of the tower was the insufficiency "of the foundation of the tower. The foundation of the tower on such a soil "ought, in my opinion, to have been deeper and broader, and likewise artificially "prepared." And his colleague witness, Mr. Cumberland, fully concurs with him. In addition to them, the architect Scott says: "*That the immediate cause of the "sinking of the tower was too great weight, on a small area, I mean the foun-"dations were too small for the superstructure.*" In another place, he ascribes the sinking to "bad soil."

The evidence of Messieurs Appleton and Maxwell two experienced building contractors is also fully corroborative.

The testimony is conclusive that the tower was erected not only upon bad soil, incapable of sustaining the weight, but especially upon inadequate and insufficient foundations, thereby causing the damage to the appellant's work, and the "need of all the repairs which were done" as stated by the witness Hutchinson, the cost of which, the appellant seeks by this action to receive from the respondent, but for which he agreed to be personally liable, by his contract.

It only remains to add, that the appellant did not test the sufficiency of the soil nor did he calculate the sufficiency of the foundations *in situ*, and the architect was equally negligent as to both: the Appellant argues as stated in his factum, that he took for granted the sufficiency of both because they were there already; and in his special answer pleaded by him, he admits quite explicitly, "that he had nothing to do with any calculation of the sufficiency of "foundations." and it is proved *that in fact he never saw the said foundations.*"

The appellant's action is for £5000, whereof in round numbers one half is for alleged extra work, including the cost of the contested repairs, and the other half for short allowance on measurement of Caen stone furnished for damages from its bad quality. There are two counts, one upon the contract, compendiously embracing both divisions of the claim, with all their possible incidents for the value of extra work done, and the other a species of *quantum meruit*.

Now the certified claim for extra works, after deducting from it the following sums, namely £727. 10s. 9d, charged in bill of particulars. App. exh[illegible] £6. 19s. 9d, in No. 7, and £5. 0s. 3d, in No. [illegible], together £739. 10s. [illegible] form the charge for the repairs contested, shews the balance repr[illegible] the remaining items of the gross amount properly chargeable under the contract for actual extra works tendered for and agreed upon, which has been admitted without objection by the respondent and credited in account, and therefore forms no part of the present contention, which the respondent specially restricts to those repairs agreed to be done by the appellant himself, at his own cost as contractor and builder [illegible] as above to £739 10 9d.

The figures are not disputed: the issue upon this part of the demand is simply upon the alleged liability of the respondent for the cost of these repairs.

It is clear that the appellant does not rest his claim upon the contract, which

both by its stipulations and by the law applying to it, is adverse to his pretensions: It is clear also that these contested repairs are not within the class of extra works specially referred to in the contract, which, required a special estimate and agreement to be made. Not resting upon either, the Appellant goes beyond both and claims under an alleged additional agreement made with him by the respondent or under his authority, and hence he asserts and particularly, only in his special answer, that all these repairs "*were done by the express directions of the defendant and building committee,* "*and on pledge of payment* "*therefore before the said work was commenced or done*;" in support of which he produces and files copy of a resolution of the committee of the cathedral adopted on the 24th August 1859, but which he has not declared upon at all, or in any way substantially averred as a special contract entered into with him for these works, nor as a part of his ground of action. But it is a clear principle of law and procedure, that a special contract should be averred and declared upon as such. The copy produced is under date of 22nd October, 1859, and is as follows:

"That Mr. Wardle be authorized to repair the damage caused by the sinking "of the tower, and also to replace such work as shall be decided by the architect "to be necessary *in consequence of failure of stone already placed in the build-* "*ing, all such to be considered as extra work, and to be charged accordingly.* "The general question of *waste in the stone* as imported not to be affected by "the resolution.

(Signed) JOSEPH DRAKE,
Ch. Ch. Vestry, 22nd Oct. 1859. "Secretary Building Committee."

This document having been produced as evidence by the appellant, but without declarative averment or explanation, of course became subject to proof showing the *res gestæ*, the circumstances under which it was adopted by the committee, and the extent to which it was intended to apply. The appellant has not proved either, and it was clearly within the right of the appellant, as he demanded permission to do, to prove those circumstances and to explain the extent, the object and intent of the Committee at the time.

The architect Scott, in his examination in chief as respondent's witness, says: "Being asked to state the precise circumstances under which the resolution plaintiff's exhibit No. 12, was passed, I have to explain that when it became necessary to *repair the damage caused by the sinking of the tower, the plaintiff expressed* the wish that the work should be stopped until he could come to an understanding with the committee. *A conference was then held between the plaintiff, the defendant and myself, when the plaintiff stated that he thought the cost of the work would not exceed, judging from appearances, seventy to eighty pounds, but that he could not give a tender until he took out the injured stone.* I communicated this to the committee, stating at the same time, that according to my calculation the cost would be two hundred and fifty to three hundred pounds. As far as I remember the committee insisted that the plaintiff was responsible for the work." And upon his subsequent cross-examination as the appellant's witness, he answers: "*I consider that the committee passed such* "*resolution on that understanding, but as I acted as architect I gave the appro-*

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"*ximate price named by Wardle*, and added that it might exceed it if, when the "work was taken down, it should be found worse than shewn externally, my own "opinion being that it would not cost more than the amount so named, namely, "two hundred and fifty to three hundred pounds, but we found the excess of "the price charged to result from the greater breakage of the stone than when "first looked into."

Several members of the committee, including the Bishop of Montreal, and the chairman and secretary of the committee, have likewise been examined as witnesses upon this point of the case, and their concurrent testimony materially conflicts with that of the architect in several important particulars. The Bishop testifies:—"We found that the work was being delayed in consequence of the "sinking of the tower, and upon inquiry being made of the architect, why it was "not proceeded with, he informed us that Mr. Wardle refused to make good "some damage that it was necessary to repair, and that he should not proceed "to do it unless he was enforced to do so by some legal measures; we inquired "what the matter in dispute might be expected to cost; when Mr. Scott, the "architect, stated something under a hundred pounds, I think about eighty. "We were anxious for no delay in the work, and preferred paying any such sum "as that to risking any stoppage; it was upon that understanding that I, "myself, moved the resolution in question, which I believe was unanimously "agreed to. At a subsequent meeting Mr. Scott stated, as I remember, that "he thought the cost might be one hundred and twenty pounds, and, at another "meeting long after, to the best of my recollection, after Mr. Wardle had sent "in a charge for the same, which we demurred to as most exorbitant, and wholly "unexpected by us, he then mentioned or named the sum of three hundred "pounds as the probable amount which Mr. Wardle himself had named as the "outside cost of the work."

This testimony is corroborated by that of the other members of the committee, and proves that the architect *then* and *there* expressly confined his report to the contractor's refusal to make the repairs except at his price as stated by the architect, of £70 or £80, and that he did not state to the committee his own estimate of £250 or £300 for the cost of the repairs. Finally, that the committee agreed to the contractor's approximate price as so communicated to them from himself, which moreover conformed with the sum stated by him at his conference with the respondent, and adopted the resolution as a mere compromise in the very loose terms in which it was drawn, and without conception of any cost beyond the £100 which they were willing should be given to the appellant for the completion of repairs, as extra work, to prevent further delay in their use of the church which delay had at that time far exceeded the limited period agreed upon for its completion. It is clear, that the evidence of the architect is not reliable, and appears to have been put in with the purpose of favoring the contractor, by endeavoring to create the belief that the resolution was based upon his estimate of £250 to £300, instead of upon the contractor's approximate price of £70 or £80. The object of the architect has not been attained, and the proof fixes the resolution as based upon the contractor's statement of price communicated to the committee.

The resolution is manifestly prospective only, and contemplates work of repair and replacement to be done for which they were willing to compromise "whilst "insisting," as Scott testifies, "that the contractor was liable for the work," a liability which they maintained until the end, as appears by the evidence of the Hon. Chairman of the committee, as follows: "who being asked upon the "general bill of particulars for extra work, including the repairs, certified by "the architect."

"Did you accept of this certificate, or on the contrary did you object to it? "and state, as well as you can recollect, what passed between you or the committee, "and Mr. Scott in relation thereto."

Answer.—"It was the practice of the committee on receiving accounts for "work done at the cathedral, to hand them to Mr. Scott, the architect, for exam- "ination and report. Having repeatedly understood from Mr. Scott that he "considered Mr. Wardle, the contractor, liable for the damages occasioned by "the sinking of the tower, I asked him how he could certify the charges for "repairs contained in that account as being correct, in contradiction to his "expressed opinion as to the plaintiff's liability; to which he replied in sub- "stance, that in stating the account to be correct, he meant it to apply only to "the examination of quantity and value, and not to the liability of the com- "mittee for the payment of such repairs."

It is not credible that known business men such as the members of the committee should strenuously insist all along upon the appellant's liability for these repairs and replacements at his own cost, and at the same time agree to allow him to charge any unascertained quantity as extra work, and to any amount for which he might obtain a certificate from the friendly architect. The evidence is clear that this was not the object or intention of the committee, although Scott, in his evidence, declares that "all these repairs were done under and in con- "sequence of the resolution." The appellant, it will be remembered, alleges in his special answer that they were done by *express directions of the respondent and committee, and in pledge of payment therefor before the said work was commenced.* It is shewn however by the record that both the declaration of Scott and the allegation of the Appellant in his special answer are contrary to fact.

It must be observed that the tower commenced to sink in October, the fall of the year 1858, and continued to subside for some time afterwards, occasioning from the first, necessary repairs and replacements. The resolution was adopted on the 24th of August, 1859. Now the appellant's statements and accounts of extra works, exhibits 6, 7, 8, exhibit the several specific portions of extra work, including therein the disputed repairs, comprising the said sum of £739 10s. 9d., as all charged under their respective specific dates or within specific intervals of dates. Amongst the items for these disputed repairs, a very large proportion are charged under dates long anterior to the date of the resolution, or commencing at dates anterior and terminating shortly after, showing plainly that the contractor appreciated his position under the contract and commenced his repairs immediately upon the occurrence of the damage from the first subsidence of the tower and continuing, them as they were needed, without directions from

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the respondent or committee or their pledge of payment, and without considering them as extras, or making any estimate therefor.

The sinking commenced in October, 1858, and the appellant's statements afford the following particulars:—

The specific items of repair as charged under specific dates, viz.:—

From 22nd Oct. to 17th Dec., '58	$53.16
" 5th Nov. to 31st Dec., '58	48.00
" 14th Jan. to 2nd Dec., '59	1264.63
" " " "	5.00
" " to 28th June, '59	37.63
" 22nd April to 6th May, '59	30.00
" 6th May to 9th Sept., '59	120.41
" 3rd June	19.00
" " to 19th June, '59	58.29
" 29th July to 4th Nov., '59	36.96
" " to 9th Sept., '59	81.76
" " to 7th Oct., '59	19.60
Without date	17.00
For Caen stone used in repairs	274.56
	$2066.00

Equal to £516. 10s. 0d.

Forming a very considerable portion of the amount in contestation, and by the appellant's own statements, certainly not within the resolution. The remaining items are certainly charged at dates subsequent to that of the resolution, but no proof has been adduced to show when they were actually commenced or done: they are all in the same category with those above detailed and of the same character, and it is not unfair to assume that all of them had been commenced before the adoption of the resolution.

It is strange that in no part of his case, either in his declaration or pleadings, or in his written or verbal evidence, has the appellant particularly referred to this resolution in support of his demand, except producing it as evidence, whilst he constantly objected to the evidence given by the members of the committee in reference to it, because he alleged that Scott had no authority to bind him by his statements to the committee, and because of his the appellant's absence from the committee at the time. These objections go to the legal existence of the resolution as a special contract: it certainly was not a contract formed and established under the agreement between the contractor and the respondent, and going to set aside the special convention of the parties in their contract that the contractor should at his own expense repair and replace damage done during the progress of the work to completion, it must therefore be considered very strictly, and should be, of the same legal character with the original convention, which it clearly is not, inasmuch as it wants all the legal requisites to make up a legal special contract, whilst it is not proved that the appellant either agreed thereto or knew anything about it until the 22nd Oct., 1859, the date of the copy which he has produced in the cause.

Taken as a compromise, as it was originally intended and considered, the respondent may equitably be accountable to the appellant for the £100 which the

committee were willing should be allowed to him, but not as a special contract between the parties, nor can it be used as such to relieve him from his special obligations to repair and replace the loss, injury, and damage suffered by his works during the progress of the building.

Builders frequently endeavour to cover their errors of calculation or their losses on their contract by charging a large amount of extras. The appellant was aware that the limited time of completion had expired, and calculated, by stopping the work and preventing the use of the church, that he would compel the committee to come forward with some satisfactory amount in his favor. In this he has failed, and must be content with what the committee, by way of compromise were willing to allow him.

The next item of charge, to an amount of £2586 0s. 7d., has reference to the alleged wrong measurement of the Caen stone, and the excess over the rate of waste specified in the tender, as well as for damages for time and labor caused by the bad quality of the stone. This sum is also objected to by the respondent. The difficulty as to the proper mode of making the measurement, depends upon, and is regulated by the terms of the contract and specifications. They are as follows:

"*The stone will be furnished to the contractor, on the ground at the rate of "three shillings and nine pence* (3s. 9d.) *per cube foot measured in the block "on the ground, who will have to check account given him of the quantity before "proceeding with the work, and accept or otherwise the bill of quantity;* the "contractor will have to state, in his tender, what percentage he has allowed for "waste (but which will not necessarily be allowed him, unless special agreement "is come to) of cutting, he, after having accepted bill of quantity, will have to "undertake all charge of, and be made responsible for all stone; as the stone is "used in the works and paid for, he will be charged for it, including percentage "for waste at the above rate.

"Within one week after tender is accepted, the contractor will have to furnish "the architect with a statement of the number of cube feet of stone he will require, "also (if any) any special size, and should that quantity fall short of completing "the building through miscalculations, or otherwise of cutting the stone to ad-"vantage, or exceed the quantity required so that it should be thrown on the "hands of the committee, being the building committee of said cathedral, he "will, in either case, have to pay for any loss or losses the committee may sus-"tain through him. In case extra quantity is required, contractor will have to "give the architect at least four months' clear notice before he will require it, so "as to have it provided, and prevent the stoppage of the works."

These terms specifically stipulate that the stone shall be furnished to the contractor on the ground at 3s. 9d., per cube foot measured in the block on the ground; he was to check the account given to him of the quantity before proceeding with the work, and to accept or otherwise the bill of quantity. The stone therefore was to be measured on the ground in the block, and the cubical contents settled, to be charged to him. Now, under this mode of measurement he admits the quantity to be 24,999 cubic feet, which, by his statement of measurement, he credits to the respondent in his bill of particulars at 20,483 cubic feet,

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forgetting that in his final statement of 16th February, 1860, Record paper 104 he makes the quantity to be 22,245 cubic feet and in no way explains how he makes the difference. He cannot evade the terms of the contract in this respect by which the respondent's measurement must be adopted, nor can the latter be bound to any modification or diminution of this part of the contract by any representations made to the contractor by the architect without the written consent and agreement of the respondent. The claims (for damage) for extra cost of labor on the Caen stone from its bad quality, is out of the question. Scott says:—

"Before the tender fyled as the plaintiff's exhibit No. 3 was sent "in, there was one or two cargoes of the Caen stone on the ground which the "plaintiff, as was understood, had a right to operate on before making his tender "and which he did so operate upon. Of the cargoes which arrived subsequently "some were worse and some were better; on an average they were of the same "quality as those originally on the ground."

The contractor therefore knew the stone and made his calculations of waste, and of the cost of labor upon it. His being required to give in an estimate of the waste was to draw a line between the estimates of the contractors for acceptance of their tenders, but as his tender was for a block sum, whether the waste was great or small, was of no consequence. The stone, such as it was on the ground, was measured and accepted by him, and was used and applied in the building. The calculation in this respect is altogether a matter for the contractor, and must have entered into his considerstion in making up his block tender. It is not a little strange also that in his final settlement, made up on the 16th February, 1860, Record paper 104, the charge is "extra labor upon bad Caen "stone supplied, £375 0s. 0d.," a sum which he has now increased and raised to £1277 7s. 6d. also without explanation therefor. There is nothing in the record to justify this demand, nor the following items of £146 17s. 11d., for time of foreman, &c., nor £1161 16s. 1d. for other damages of which there is no proof.

The credits of the account for payment in cash and bonds are admitted, the insurance charge deducted, appears to be sustained by the agreement in the contract, and the deduction of $20.05 is also correct. Under all these circumstances, therefore, the balance at the credit of the appellant appears to be correctly stated by the respondent at $1795.36, against which the respondent is justified in setting off amounts paid for repairs upon the structure and such other damage as he may establish under his plea of compensation, which being a plea to the contract appears to be properly before the Court as a plea of reconvention to the appellant's demand. Therefore, upon the whole, the judgment rendered by the Superior Court, less the £100 above mentioned, should be sustained.

MEREDITH, J.—The facts of this case, and the principles of law applicable to them, have been so fully and so carefully explained by my brother Badgley, that I think I may confine myself to a succinct statement of the grounds upon which I rest my opinion as to the more important questions involved in the present controversy.

It is obvious that the parties to an agreement for the erection of a building such as that in question, contract in some respects, upon unequal terms.

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The builder is presumed to know the dangers incident to the carrying out of his contract, and how those dangers ought to be guarded against. Whereas the proprietor is not supposed to be skilled in such matters. Partly on this account, and, and partly, from motives of public policy, to prevent the erection of badly constructed, and therefore dangerous buildings, our law has subjected masons and other contractors to certain obligations of an exceptional nature.

The rules of law as to these exceptional obligations, in so far as they are applicable to cases such as the present, are clearly laid down in the judgment pronounced by Mr. Justice Day, in the well-known case of Brown and Laurie. And that judgment which was confirmed in appeal, is, I believe generally considered by the Bar and the Bench, as a correct exposition of the law on this subject. In that case Mr. Justice Day observed "this warranty is equally "binding whether the destruction, or damage of the building, arise from the "builder's carelessness in the erection of it, or from putting it upon an *unsound* "*foundation*." And with reference to the question: whether the employment, by the proprietor, of an architect, under whom the builder worked, would relieve the latter from liability? the same learned judge said: "This is the "most favorable aspect of the case for the plaintiff, because if the proprietor "choose to employ a skilled party, like an architect, to look after his interests, "it seems only reasonable that the builder should be relieved from liability; but "here again the law is against him, and holds him jointly and severally liable "with the architect."

Mr. Chief Justice Rolland, than whom on a question to be decided, by the law of France, as established in this country, a higher authority cannot be cited, maintained the same doctrine, and in the course of his judgment observed: "Dans le cas actuel le propriétaire a contracté, directement avec le "constructeur, qui s'est obligé de suivre les plans d'un architecte, et par là est "devenu responsable conjointement et solidairement avec le constructeur, car "tous deux devaient connaître leur art, et le propriétaire qui veut bâtir n'est pas "censé connaître si le sol est de nature à supporter les fondations."

Since the decision in Brown and Laurie, several important cases have been decided in France involving questions such as that which now engages our attention. And I shall refer to two of those cases, as showing that the doctrine laid down, as already mentioned in our Court, is still strictly enforced in France, under the code; which, as to this matter, is founded on the old law of France.

The first judgment to which I desire to refer is that rendered in the case of Gauderfils vs. Bourgeois et al—decided by the Cour Impériale de Bastia on the 7th of March, 1854. The heading of that *arrêt* is as follows:

2° "L'architecte est responsable des vices de construction de bâtiment par "lui construit, lors même qu'il n'a bâti que sur le plan, et d'après les indications "données par le propriétaire, et avec les matériaux fournis par lui, et qu'il lui a "signalé d'avance les vices et les dangers de la construction."

The second considérant in that judgment is as follows:

"Considérant que la responsabilité des entrepreneurs, constructeurs et archi-"tectes repose sur un principe d'humanité, et qu'elle est par cela même, d'ordre "et d'intérêt publics; qu'en cette matière, l'intérêt privé est lié à l'intérêt géné-

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" ral, se trouve placé sous sa sauvegarde, et doit recevoir devant la justice une " égale protection ;

" Considérant que le constructeur, ou entrepreneur, est responsable, alors " même qu'il aurait bâti *sur le plan* et les indications *du propriétaire*, avec les " matériaux fournis par celui-ci et qu'il lui aurait *signalé les vices et les dangers* " *de la construction projettée.*"

This judgment, in so far as it declares that, even if the builder notify the proprietor of the danger to be apprehended, that will not suffice to shield the builder from responsibility, is not opposed to the decision in Brown and Laurie, but simply goes beyond it, still however in the same direction.

The other modern French judgment to which I desire to refer, was rendered by the Cour Royale d'Aix as recently as the 16th January, 1858; and it is interesting as referring to the established jurisprudence. The general considerants are as follows:

" Attendu que d'après les termes de l'Art 1792, code Nap., la responsabilité " pèse sur l'architecte ou l'entrepreneur, et qu'il a été décidé *par la doctrine et* " *la jurisprudence* que la responsabilité de l'entrepreneur, ne cesse point lors " même qu'il se serait conformé à un devis vicieux.

" Attendu que le devoir de l'architecte, comme de l'entrepreneur, est d'éclai- " rer le propriétaire sur les vices du devis, et des plans qu'on veut lui faire exécu- " ter, de même que sur ceux du sol—que dans l'un et l'autre cas il y a une parité " de motifs pour que sa responsabilité soit engagée, si les vices de la construc- " tion, comme ceux du sol, causent la ruine de tout, ou de partie de l'édifice " dans le délai déterminée."*

On the part of the appellant, however, it is contended that the foregoing authorities are inapplicable in the present instance, because the foundations of the cathedral were not built by him; but after giving to this, as I think, the most important part of the case, much anxious consideration, I am of opinion that according to our law, it was the duty of the appellant, before putting up such a building, as the cathedral and tower in question, to ascertain, as he could easily have done, whether the foundation and the soil upon which it was built, were sufficient to support the superstructure; and that the appellant is liable for the damages resulting from his having failed do so.

I do not question the doctrine contended for by the defendant that " Le " dommage causé à autrui ne peut être un principe de responsabilité qu'autant " qu'il provient d'un acte, d'une omission, ou d'une faute de celui à qui on l'im- " pute."

On the contrary I hold it to be elementary that no man can be liable for damages exclusively attributable to the act of another. But where I do differ from the appellant is, as to the pretension advanced in his factum, upon which,

* Journal du Palais, vol. 19 for year 1858, p. 1223, see on this subject in addition to authorities cited in Brown and Laurie: Journal du Palais, vol. 32, p. 372, arrêt of Cour de Cassation 11th March, 1839, Cour Royale de Bourges. Pasicrisie Française, 1842, 2 part., page 73, 27th Nov., 1840. Journal du Palais, vol. 56, p. 619, arrêt of Cour de Cassation, 9th May, 1851.

indeed, his case turns, namely, "that he had a right to take for granted, that the "foundations were sufficient for the support of the tower which formed part of "the original plan."

I am of opinion that he had not that right. On the contrary, according to the last cited arrêt, that of 1858, it was his duty as well as that of the architect, "d'éclairer le propriétaire sur les vices du devis et des plans qu'on veut lui "faire exécuter, de même que sur ceux du sol." According to the pretension of the appellant he would not be liable, even it were perfectly certain that the area of the foundation was *per se* insufficient for the support of the superincumbent weight; whereas in that case, I think there could not be, even a doubt, as to the liability of the appellant.

I also agree with the other judges of this Court in thinking the judgment of the Superior Court right as to the measurement and alleged excess of waste in the use of Caen stone; and also as to the extra premiums for insurance objected to by the appellant, and do not think it necessary to add to the observations already made as to these points.

There is, however, one point in this case which I cannot view in the same light in which it appears to have been regarded by the learned judge in the Court below. It is as to the effect that ought to be given to the resolution of the building committee, bearing date the 24th August, 1859.

The Honorable George Moffat, the Chairman of the Building Committee, in explanation of the circumstances which led to the passing of that resolution, says:—

"In consequence of the sinking of the tower, and the repairs which it necessitated, Mr. Scott, the architect, was instructed to direct the plaintiff to make "these repairs. The plaintiff refused to do them unless he was authorized to "charge them as an *extra*. I think the question was more than once before the "committee, but I cannot exactly remember how often. Finally, upon Mr. "Scott's representation to the committee, or board, that the repairs would not "amount to a large sum, the committee was induced to pass this resolution, "rather than have a difficulty with the contractor. I cannot, at this distance of "time, recollect the precise amount that Mr. Scott named as the probable cost of "work, but the impression on my mind is that it was very considerably under "one hundred pounds."

Dr. Fulford, the Bishop of Montreal, and Dr. Jones, both members of the building committee, also prove, in effect, that the committee were made aware that the appellant had refused to make the required repairs at his own expense. Thereupon, and in consequence of the representations of their own architect, Mr. Scott, a resolution, in the following words, was adopted by the building committee:—

"That Mr. Wardle be authorised to repair the damage caused by the sinking "of the tower, and also to replace such work as shall be decided by the architect to be necessary in consequence of the failure of stone already placed in the "building, all such to be considered *as extra work*, and to be charged accordingly. The general question of waste in the stone as imported not to be affected "by the resolution."

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After the passing of this resolution the appellant made certain repairs rendered necessary by the sinking of the tower, which, Mr. Scott says, were done by the plaintiff under the resolution, of which the above is a copy.

The charges of the appellant, for the repairs certified by Scott, (deducting $20.5) charged for work which does not appear to have been finished, amount to, say..... $2882 10

But that sum includes charges amounting to $198.32 which, upon the face of the accounts, appear to have been made before the passing of the resolution of the 24th August, 1859, and therefore are not chargeable under it. $ 198 32

The appellant in the said sum of $2882.10, also charges several sums, forming in all $1521.36, for repairs made partly before and partly after the date of the resolution. And as we cannot say what part of the last mentioned repairs was made after the resolution, the appellant, *for the present* cannot have credit for any part of the said sums of..... $1521 36

According therefore to the present state of the record it appears that repairs to the amount of $1162.42 were made after the resolution of August, 1859..... $1162 42 $1719 68

That the charges thus made by the appellant, for the repairs in question greatly exceeded what the building committee supposed they were likely to cost, is beyond doubt. Indeed the evidence satisfies me that the resolution, relied on by the appellant was adopted by the building committee in consequence of their having been led to believe, by Mr. Scott, that the required repairs could be made for a comparatively small sum, such as £80 or £90.

It is obvious, however, that even if, as I believe, the resolution in question was passed on an understanding such as contended for by the respondent, the appellant cannot be bound by that understanding unless he was in some way a party to it.

The members of the Building Committee do not exactly agree as to the statement made by Mr. Scott upon the occasion of the passing of the resolution. Mr. George Smith says:—"Mr. Scott, the architect, made a statement on that "head as coming from the plaintiff;" and the same witness also says "Mr. Scott "stated to us that Mr. Wardle would do the repair for £80 or £90."

Dr. Jones does not recollect that Mr. Scott made the statement as coming from the appellant; on the contrary he says:

"My impression is that the sum mentioned by Mr. Scott was under one hundred pounds. I understood this to be Mr. Scott's opinion, and I did not "understand that he gave the amount as coming from Mr. Wardle. All I recollect his saying about Mr. Wardle was, that he refused to make any repairs."

Dr. Fulford, the Bishop, in answer to the question 21:—"Did you understand "Mr. Scott to say that the plaintiff, Wardle, would do the repairs for the sum "mentioned?"—says.

"I do not remember his mentioning that, he gave us the amount as his own "estimate, which he never corrected afterwards, except as mentioned above."

The Honorable George Moffat, the chairman of the committee, says:—"Mr. "Scott did not, before or at the time of the passing of the said resolution, lay "before the committee, or mention to them, what the particular repairs consisted "of. Mr. Scott did not report to the committee that the plaintiff would do the

"repairs for the sum he mentioned, less than one hundred pounds; he expressed "his own opinion, based, as I understood him to say, upon conversation with "the plaintiff."

This, it seems to me, bearing in mind the evidence of Mr. Scott, is most probably what occurred upon that occasion. But, be this as it may, in order to connect the appellant with any understanding on the part of the building committee we must have evidence, not merely as to what Mr. Scott said to the committee, *but also as to what the appellant said to Mr. Scott*, and as to the latter point we have no evidence excepting that of Mr. Scott, who says:—

"Being asked to state the precise circumstances under which the resolution, "plaintiff's exhibit No. 12, was passed, I have to explain that when it be-"came necessary to repair the damage caused by the sinking of the tower, the "plaintiff expressed the wish that the work should be stopped until he could "come to an understanding with the committee. A conference was then held, "between the plaintiff, the defendant and myself, when the plaintiff stated that "he thought the cost of the work would not exceed, judging from appearances, "seventy to eighty pounds, but that he could not give a tender until he took out "the injured stone. I communicated this to the committee, stating at the same "time, that, according to my calculation, the cost would be two hundred and "fifty to three hundred pounds. As far as I remember the committee insisted "that the plaintiff was responsible for the work."

There is nothing in this evidence tending to show that the appellant was then willing to undertake the repairs for from £70 to £80: it is true that he said "that he thought the cost of the work would not exceed, judging from appear-"ances, £70 to £80"; and if there were grounds for saying that the appellant made this statement, which afterward proved to be erroneous, fraudulently, and with a view of leading the respondents into error, it would be the duty of the court, had the point been raised by the pleadings, to prevent the appellant from profiting by that error.

But there is neither direct proof, nor, under the circumstances of the case, any ground for presuming, that in making the statement proved by Mr. Scott, there was any dishonest intention on the part of the appellant.

Moreover the point is not raised by the pleadings, the respondent having, as I think, very properly abstained from charging the appellant with having made the statement for the purpose of misleading the building committee.

For these reasons I think the appellant has a right to take advantage of the resolution of the 24th August, 1859, according to its terms; and I therefore am of opinion that he is entitled to charge the repairs made after the date of that resolution, and covered by it, as extra work.

This much at least is plain, That, whatever may be the amount claimable by appellant, under the resolution, it cannot be contended that the resolution was intended to be wholly ineffectual.

On the contrary, it is certain from the evidence of the members of the committee, that the resolution was passed upon the understanding that it should give the appellant a right to charge for the repairs as extra work to the extent of £80 or £90; and yet the claim of the appellant had been adjudicated upon ex-

Wardle and Bethune.

actly as if that resolution had not been passed: and I am of opinion that, in this respect, the appellant has reason to complain of the judgment of the Court below.

I have not come to this conclusion, without considering the assertion in the factum of the respondent, that there is no proof to connect the resolution "with "any specific items of charge contained in the plaintiff's statement of account "filed in the cause." But the pretension cannot, I think, be maintained. It is proved, and is beyond doubt, that before the resolution was passed the appellant refused to continue to make the repairs rendered necessary by the sinking of the tower; that in consequence of his refusal, and in order to induce him to make those repairs, the resolution was passed; and that immediately afterwards the respondent continued and completed the repairs, which he had previously refused to make. These facts speak for themselves, and if further evidence as to this point were necessary, which in my opinion is not the case, we have the evidence of Mr. Scott, who says those works were done "on authority of the "resolution or minutes of the committee." It has been contended that no part of the claim for the disputed extra work can be allowed; because a memorandum in writing as to the cost of that work was not made as, it, is said, was necessary under the contract. The answer to that objection is plain and conclusive—viz., that the parties had power by common consent, to deviate from the original contract, and, according to the proof, they appear to have done so, with respect to the repairs in question. I may add, that if the objection now being considered be well-founded it would follow, not that the claim of the appellant should be restricted to about £100, but that it should be wholly rejected.

But although the appellant may have, as I believe he has, a right to charge for the repairs as extra work, it does not follow, as the appellant seems to think, that the respondent was bound to tender the amount thus claimable by the appellant.

The injury caused to the cathedral by the sinking of the tower has been, in part, remedied by the repairs for which the appellant charges.

For the injury thus caused, to the extent that it has been so repaired, it may be contended that the respondent can make no claim. But a great part of the injury caused by the sinking of the tower has not been remedied and cannot be remedied by repairs such as those made by the appellant; and for the injury thus remaining unrepaired, (if our view of the responsibility of the appellant be right) the respondent has certainly a claim for damages, which he has a right to set off by way of compensation against the balance that otherwise would have been payable to the appellant. The respondent, therefore, was not bound to make a tender of the amount payable for the repairs in question; but the appellant has a right to charge that amount as extra work, and it will be available to him towards discharging the claim of the respondent for damages, or otherwise, according to the amount of the claims which the parties respectively may be found to have against each other.

The following was the judgment of the Court of Appeals:

"The Court, * * * considering that there is no error in the judgment "appealed from, to wit: the judgment rendered by the Superior Court for Lower "Canada sitting at Montreal, in the district of Montreal, on the twenty-fourth "day of February, one thousand eight hundred and sixty-two, save and except

" in the particular sum of money and under the considerations hereinafter men-
" tioned, doth affirm the said judgment, save as follows:

" Considering that certain repairs required to be done to the said cathedral
" caused by the sinking of the tower thereof, were under discussion between the
" parties in this cause, but were by law and by the stipulations of the contract
" between the defendant and appellant, at the charge and risks of the said
" appellant, and who was thereby liable to make and complete the same at his
" own cost and expense; considering that the building and finance committee
" for the erection of the said cathedral, acting on behalf of the said defendant,
" he being one of them, by way of compromise between the parties with the
" view to avoid altercation with the appellant, and to prevent delay in the use of
" the said cathedral, and acting under the distinct impression and belief from the
" representations of the appellant, and of the architect employed under the terms
" of the said contract, as to the limited amount of the cost of the said repairs,
" not to exceed four hundred dollars, were willing to allow to the said appellant
" the said sum, for the said repairs to be made by him as aforesaid; and consi-
" dering that the said committee acting as aforesaid, and under the said impres-
" sion and belief did, by their resolution, dated the twenty-fourth day of August,
" one thousand eight hundred and fifty-nine, allow the said repairs to be charged
" by the appellant as extra works. This Court doth allow to the said appellant
" the said sum of four hundred dollars, to be him charged as and for extra
" works, and to that extent doth reform the said judgment of the Superior
" Court, sitting at Montreal, on the twenty-fourth day of February, one thou-
" sand eight hundred and sixty-two, and doth reform the said judgment, in the
" particular aforesaid, thereby making the balance upon the said contract due as
" and for extra work, after deduction therefrom of the charges for insurance as
" in the said judgment set out, the sum of two thousand one hundred and
" twenty-five dollars, thirty-six cents, leaving the same subject to compensation
" as in and by the judgment aforesaid is mentioned and ordered, and this Court
" doth order that each party shall pay his own costs of this Court. (The
" Honorable Mr. Justice Meredith, dissenting as to the amount allowed to the
" said Wardle for work done by him in pursuance of the resolution of the
" twenty-fourth day of August, one thousand eight hundred and fifty nine,
" herein before mentioned.")

Judgment of Court below confirmed and reformed.

A. & W. Robertson, for appellant.

Strachan Bethune, for respondent.

Henry Stuart, counsel.

(S. B.)

MONTREAL, 7TH DECEMBER, 1863.

In Appeal from the Superior Court, District of Montreal.

Coram SIR L. H. LAFONTAINE, BART., C. J., DUVAL, J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J.

No. 62.

HON. GEORGE MOFFATT, *et al.*,

(*Defendants in the Court below,*)

APPELLANTS;

AND

THOMAS S. SCOTT,

(*Plaintiff in the Court below,*)

RESPONDENT.

HELD:—That plans, identified by parties to a contract to build a church and by the notaries, although not annexed to the contract nor specially stated to form part of it, form, nevertheless, an essential part of such contract, and, in the absence of proof that they are the property of the architect, will be deemed to be the property of the church and cannot be revendicated by the architect in the hands of the notary having the legal custody of the contract and being also the depositary of the plans.

This was an appeal from a judgment rendered by the Superior Court at Montreal on the first day of December, 1862, (MR. JUSTICE SMITH, presiding) maintaining an action instituted by the respondent against the appellants.

The appellants (with the exception of J. J. Gibb, notary public, one of them) were the building committee for the erection of Christ Church Cathedral at Montreal.

The respondent was the architect employed in the erection of the cathedral, and who drew certain of the plans which are referred to in the contract for the building of the cathedral, executed between "The rector of the parsonage or rectory and parish church of Montreal" and Walter Wardle. The reference in the contract is as follows: (alluding to the manner in which the work was to be performed) "according to the plans or drawings thereof * * *, made by "Thomas S. Scott, Esquire, architect, and in strict conformity with the specifi- "cations hereunto annexed; and forming part or parcel of the present contract, "which said plans and specifications are identified by the signatures of the said "parties hereto and us said notaries."

The plans in question, instead of remaining in the possession of the notary, got into the possession of the respondent, and, when it became necessary to have the cathedral examined by Messrs. Appleton and Maxwell to ascertain the cause of the sinking of the tower, the committee (presuming that they were rightfully in Mr. Scott's possession) obtained the plans from Mr. Scott, on the understanding that they should be returned to him, after the examination of Appleton & Maxwell should be completed.

Subsequently, Mr. Gibb, the notary, having discovered that the plans ought of right to be in his possession, addressed the following letter to the committee:

"MONTREAL, 20th April, 1861.

"GENTLEMEN,

"Having been always under the impression that the thirty-five plans "referred to in the contract for building the cathedral, were to be deposited in

"the hands of the architect, I have hitherto suffered them to remain in his office, "but I am now advised by Counsel, and my attention being specially drawn to "the point, I perceive that they form part of my notarial minutes, and ought "never to have left my possession. I am now informed that the plans are in your "possession. If so, I have to request you will have the kindness to send them "to my office in the course of the day."

On receipt of the foregoing letter the committee at once sent the plans to Mr. Gibb, and informed Mr. Scott, by letter, on the 7th of May, 1861,—"that when "the plans and drawings were received from him, it was the belief of the com- "mittee that the plans and drawings were Mr. Scott's property, and that a "promise to return them was given accordingly, but it being afterwards fully "ascertained that the notary, Mr. J. J. Gibb, had the sole claim to the custody "of the said plans and drawings, they were now by order of the committee in "his possession."

The respondent, on the pretence that the plans were really his property, brought an action *en revendication* in the Superior Court at Montreal, against the appellants, for the recovery of the plans; to which action the appellants pleaded, in effect, that the plans formed part and parcel of the notarial contract executed by the rector and Wardie, and were in the possession of Mr. Gibb, the notary, who was the legal custodian thereof.

The respondent never even attempted to prove any right of property of the plans in him, and the appellants, by paper thirty-five of the record, established that the plans were the property of the cathedral.

The following was the judgment pronounced by the Superior Court:

"The Court, having heard the parties by their Counsel upon the merits of this cause, examined the proceedings and proof of record and deliberated thereon, doth declare the plaintiff proprietor of the thirty-three plans and drawings of works in and about Christ Church Cathedral, numbered from one to thirty-five, being the plans and drawings following, to wit: No. 1, plan of basement floor. No. 2, ground plan. No. 3, elevation facing St. Catherine street and plan of story over vestry portion. No. 6, flank elevation. No. 7, cross section of nave, aisles, and chancel and vestry. No. 8, section transepts and tower and transverse section of transepts. No. 9, longitudinal section. No. 10, detail section of nave. No. 11, transverse and longitudinal section of transept. No. 12, section and longitudinal of chancel. No. 13, details of vestry. No. 14, aisle windows. No. 15, blank wheel and clerestory window. No. 16, large chancel window. No. 17, transept door-way and side window. No. 18, doorway of vestry passage. No. 19, elevation and section of principal porch. No. 20, side porch detail. No. 21, details of buttresses. No. 22, Angle buttress, nave aisle. No. 23, detail of turret cap. No. 24, cross on west gable. No. 25, piers and arches of nave. No. 26, piers and arches of chancel. No. 27, cornice nave aisles. No. 28, corbel factable transept gable. No. 29, cornice of nave clerestory, full size. No. 30, iron ridge chancel, ½ full size. No. 31, stairs and vestry. No. 32, nave roof details, full size. No. 33, cornice of nave roof. No. 34, chancel roof, full size details. No. 35, details of down spout, full size: and doth condemn the defendants jointly and severally to deliver over the aforesaid plans and drawings to the plaintiff

Moffatt et al. and Scott.

within twenty days after service of this judgment upon the said defendants, and in default of so doing, to pay to the plaintiff the sum of sixty pounds current money of this province with interest thereon from this day, until actual payment and costs of suit; *Distraits* to Messrs. A. & W. Robertson, the attorneys for the said plaintiff."

MEREDITH, J.:—If the plaintiff in the Court below had proved a right of property in the plans in question; and if, in addition to this, the defendants had failed to show that the plaintiff had consented to the plans being deposited in the office of Mr. Gibb, I should have felt no difficulty in maintaining the plaintiff's demand; for it is plain, that if the plans belonged to the plaintiff, the parties to the contract in question could not merely by depositing those plans in the hands of a notary public, deprive the owner of his right of property in them.

In the present case we know that the plans sued for are those according to which the cathedral was erected; and there is no proof that any special agreement was entered into respecting the ownership of the plans, or the place where they were to be kept. We see that they were placed in the hands of the notary at the time of the execution of the contract, and were identified by the signatures of the parties and of the notaries. The plaintiff does not even contend that they were so placed in the hands of the notary, and referred to in the contract, without his consent; and under these circumstances I think it is to be presumed that the plans were regularly deposited in the hands of Mr. Gibb, to remain in his office as part of the contract; and I am further of opinion that the agreement between the architect and the building committee subsequently to the work being done was not of itself sufficient to justify the Court below in ordering the plans to be taken out of the possession of Mr. Gibb; who, according to the evidence before us, appears to be the proper custodian thereof.

Three architects have been examined for the purpose of proving that, according to general usage, the plans prepared for a building by an architect, are the property of the architect, and not of the proprietor of the building. This however I think must depend almost altogether on the nature of the agreement between the architect and the proprietor in each particular case; and I do not think that the testimony of the three witnesses to whom I have alluded, however good their standing in their profession may be, is sufficient to establish a usage binding on the community generally.

It is doubtless true, as these witnesses have said, that an architect has an interest in retaining in his possession the plans which he has prepared. But the proprietor of a building has also an interest in being able to have at least free access to the plans according to which his building has been erected—and in the event of changes, or repairs, being made reference to the original plans might almost be indispensable.

Our attention has been drawn to the circumstance that the plans in the present case are not annexed to what is commonly called the contract, as the specifications are. This perhaps may be attributable to the inconvenience that would have resulted from attaching such a number of plans to the remainder of the contract. But, be this as it may, it is plain from the nature of the contract that the plans form as much a part of it as the specifications—I may add, that the

architect being bound (*garant*) to the proprietors for the sufficiency of his plans, there is at least in some respects, the same objections against allowing an architect to have the exclusive possession of the plans that there would be against allowing contractors to have exclusive possession of the specifications, or against the proprietor of the building having exclusive possession of the contract, binding him to pay the price of the work.

The ground however upon which I concur in the present judgment is that the evidence before us does not establish that the plaintiff is the owner of the plans; and I do not think that the arrangement between him and certain of the defendants justified the Court below in ordering the plans to be removed from the office of Mr. Gibb, where, according to the evidence before us, they appear to have been regularly deposited.

The following was the judgment pronounced by the Court of Appeals:

"The Court * * * * * seeing that the plans mentioned in the plaintiff's declaration were the plans and drawings mentioned and referred to in the contract made and executed on the fifteenth day of August, one thousand eight hundred and fifty-seven, by and between "the rector of the parsonage and rectory and parish church of Montreal" and Walter Wardle, before Isaac Jones Gibb and his colleague, notaries public, as numbered respectively from number one to number thirty-five, which plans, it appears by the said contract, a copy whereof is fyled in this cause, were at the time of the execution of the said contract identified by the signatures of the parties thereto, and of the said notaries; seeing that the respondent hath not proved that he is the owner of the said plans; and that the agreement between him and the finance building committee of Christ Church Cathedral, that the said plans should be returned by them to him, does not of itself give him a right to cause the said plans to be removed from the custody of the said Isaac Jones Gibb in whose care and custody it is to be presumed, in the absence of evidence to the contrary, that the said plans, which are an essential part of the said contract, were legally deposited at the time of the execution of the said contract, and therefore that in the judgment of the Court below, condemning the appellants to deliver the said plans to the said respondent, there is error; doth, in consequence, reverse the said judgment, to wit: the judgment rendered by the Superior Court at Montreal on the first day of December, one thousand eight hundred and sixty-two, and, proceeding to render the judgment which the Court below ought to have rendered, doth dismiss the action and demand of the said respondent against the said appellants; and doth condemn the respondent to pay to the appellants their costs as well in this Court as in the Court below; and, lastly, it is ordered that the record be remitted to the Court below."

Judgment of Court below reversed.

Strachan Bethune, for appellants.
Henry Stuart, counsel.
A. & W. Robertson, for respondent.
(S. B.)

COUR SUPERIEURE.

MONTREAL, 1 AVRIL 1864.

Coram SMITH, J.

No. 2197.

Tourville et al. vs. *Essex.*

JUGE: Que dans les ventes faites par des courtiers (brokers,) il leur est nécessaire de donner un avis écrit (bought and sold notes) tant au vendeur qu'à l'acheteur de la transaction qu'ils ont effectuée pour en établir sa validité en loi. *

Le dix-neuf mai, mil huit cent soixante trois, une action fut portée par MM. Louis Tourville et Louis Gauthier, marchands à commission et associés de la cité de Montréal, contre Jeremiah Essex, commerçant de North Bennington, dans l'Etat de Vermont, Etats-Unis, pour le recouvrement d'une somme de trois cents piastres qu'ils réclamaient pour dommages et intérêts résultant pour eux d'un prétendu contrat que le dit Jeremiah Essex, le défendeur se refusait à exécuter dans les circonstances suivantes, énumérées en la déclaration en cette cause: les demandeurs, marchands à commission, ont, par l'entremise de MM. H. Empey et Cie., courtiers, (brokers) vendu au défendeur trois mille cinq cents minots d'avoine, à raison de cinquante six centins par minot de quarante livres, laquelle avoine devait être livrée au dit défendeur par les dits demandeurs le ou vers le six mai, mil huit cent soixante trois, à St.-Hyacinthe.

A l'époque fixée pour la livraison et depuis, les demandeurs ont sommé le défendeur d'accepter livraison de la dite avoine: il a négligé de le faire. Les demandeurs ont, en conséquence et conformément à l'usage du commerce et à la loi, fait revendre la dite avoine le dix-huit mai, mil huit cent soixante trois, par MM. Sauvageau et Cie., courtiers de cette ville, pour le compte du défendeur La dite quantité de trois mille cinq cents minots d'avoine a été vendue à raison de quarante huit centins par minot de quarante livres et devait être livrée à bord des chars à St.-Hyacinthe, ce qui a produit un déficit de deux cent quatre-vingts piastres sur le prix auquel le dit défendeur l'aurait achetée; laquelle somme jointe à celle de vingt piastres que les demandeurs réclament comme compensation de dépenses nécesssaires pour faire vendre la dite avoine, s'élève à celle de trois cents piastres.

Les demandeurs ont produit avec leur dite déclaration un avis de la vente susdite à eux envoyé par les dits H. Empey et Cie.

Entr'autres moyens de défense, le défendeur allégua qu'il n'avait rien acheté par l'entremise des dits H. Empey et Cie. et nommément qu'il n'avait jamais acheté la quantité d'avoine susdite.

Il fut prouvé à l'enquête que l'usage invariable parmi les courtiers était d'en-

* Story—on Agency, p. 31, ch. 3 No. 28 in fine.

"Hence, when he (the broker) is employed to buy and sell goods, he is accustomed "to give to the buyer a note of the sale commonly called a sold note, and to the seller "a like note commonly called a bought note, in his own name, as agent of each, and "thereby they are respectively bound.

Smith's mercantile law.—p. 497.—2e alinéa:

"A broker also is the agent of both parties, within this section. The mode in which "he binds his principals *inter se*, is by the delivery of bought and sold notes, which "notes constitute the bargain and are the proper evidence thereof, provided always "that they correspond."

voyer également au vendeur et à l'acheteur un avis écrit (bought and sold notes) de la transaction que les premiers ont fait pour les derniers.

Après audition, la cour débouté l'action des demandeurs avec dépens, sur le principe que le défendeur n'ayant pas reçu avis par écrit de l'achat que les courtiers sus-nommés avaient fait pour lui, n'était pas lié et qu'il n'y avait réellement pas de vente, ce double avis étant nécessaire pour sa validité.

Action déboutée.

C. Archambault, avocats des demandeurs.

Senécal, Ryan et DeBellefeuille, avocats du défendeur.

(D. H. S.)

MONTREAL, 23RD FEBRUARY, 1864.

Coram LORANGER, J.

No. 840.

Versailles vs. *Bailey & Kershaw et al., T. S.*

HELD, That a declaration of a *tiers saisi* made before the return-day mentioned in the writ must be accompanied by a bailiff's certificate, showing that notice has been given to the plaintiff or his attorney, at least 24 hours previously, of the intention of the *tiers saisi* to make such declaration before the return of the writ, and that a declaration thus made, without such certificate of previous notice, will be rejected on motion.

This was a motion to reject the declarations of certain T. S., on the ground that they were made before the return day mentioned in the writ, without being accompanied by a bailiff's certificate, showing that twenty-four hours' previous notice had been given to plaintiff or his attorney, as required by the 2nd Subsection of section 138 of ch. 83 of the Consolidated Statutes of Lower Canada.

Per Curiam.—This motion must be granted, the requirement of the statute being peremptory.

Motion granted.

Bondy & Fauteux, for plaintiff.

(S. S.)

CIRCUIT COURT.

MONTREAL, 31ST DECEMBER, 1863.

Coram BERTHELOT, J.

No. 4234.

Aubry et ux. vs. *Denis et al.*

HELD: 1o. That a moveable thrashing machine is susceptible of being brought to a forced sale, by means of a *licitation forcée*.

2o. That a partnership with reference to such machine is dissolved by the death of any one of the partners.

3o. That the purchase, by the widow of the deceased, of her husband's interest in the machine does not constitute a consent to continue the partnership.

4o. That in default of the parties in possession of the machine paying the assessed value of the share of the deceased partner, the machine will be sold by authority of the Court.

This was an action to recover the value of an undivided third in a moveable thrashing machine in the possession of the defendants, and alleged to have been purchased on joint account by the former husband of the female plaintiff, and the

defendants, on the ground that the death of such first husband had dissolved the partnership, and that the plaintiffs were legally vested by purchase with the rights of the deceased.

The defendants pleaded, in effect, that the machine was bought for the joint use of the purchasers; that such a partnership was not dissolved by the mere death of one of the partners, and that if it were, the purchase of the deceased's interest by his widow, the female plaintiff, constituted a consent to continue the partnership.

The following was the judgment of the Court:—"La Cour * * * considérant que la société qui a existé entre les défendeurs et feu Théophile Denis *alias* St. Denis, pour l'usage et l'exploitation du moulin à battre mentionné en la déclaration qui leur appartenait en propriété à cessé au jour du décès du dit Théophile Denis, et que la part indivise qui lui appartenait pour un tiers dans le dit moulin, a été vendue à Angèle Legault dit Deslauriers, sa veuve la demanderesse, lors de la vente du mobilier de la communauté qui avait existé entre elle et le dit Théophile Denis le neuf juillet mil huit cent soixante, et que par le mariage des dits demandeurs, ces derniers sont maîtres de cette part indivise sans aucune restriction à raison de la société qui existait entre les dits défendeurs et le dit feu Théophile Denis, et qu'à raison de ce que dessus les dits demandeurs ont le droit de toucher et recevoir le prix de leur tiers indivis dans le dit moulin dont la valeur à été admise à trente louis courant et dont les dits défendeurs sont en possession et dont ils ont toujours joui depuis le décès du dit Théophile Denis a" condamné et condamne les dits défendeurs à payer aux dits demandeurs la somme des dix louis cours actuel pour leur tenir lieu du prix et valeur du tiers du dit moulin avec dépens de l'action et de la contestation, si mieux n'aiment les dits défendeurs sous huit jours de la signification de ce jugement procéder avec les demandeurs à la vente du dit moulin par encan public vingt quatre heures après avis donné à la porte de l'église de la paroisse de la Pointe Claire après le service divin du matin, un jour de Dimanche, et qu'au refus des défendeurs de ce faire il y soit procédé par et sous l'autorité de cette Cour ainsi qu'il pourra ci-après être ordonné par la saisie du dit moulin ou autrement pour du produit de la dite vente dans l'un ou l'autre cas un tiers être payé aux dits Demandeurs et les deux autres tiers aux dits défendeurs. Les frais de la dite vente devant être partagés et divisés entre les démandeurs d'une part et les dits deux défendeurs chacun pour un tiers.

Et quant aux frais de cette action et de la contestation d'icelle les dits défendeurs y sont condamnés. Judgment for Plaintiffs.

Bélanger & Desnoyers, for plaintiffs.

Denis & Trudel, for defendants.

(S. B.)

COURT OF QUEEN'S BENCH.

MONTREAL, 9TH MARCH, 1864.

Coram DUVAL, C. J., MEREDITH, J., MONDELET, A. J., BADGLEY, A. J.

In Appeal from the Superior Court, District of Montreal.

SARAH JOHNSON ET AL.,
(*Plaintiffs in the Court below,*)
APPELLANTS;

AND

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

STREET—PROPERTY—POSSESSION.

The land of the appellants had been bounded in rear by a lane known as Blache lane from A.D. 1815 till about ten years before the institution of the present action, when the defendant, who owned land on the opposite side of the lane, took possession of that part of the lane between him and the *auteur* of the appellants, and thereby prevented access to the appellants' land in rear from the lane.

Held in appeal, reversing the judgment of the Court below, that the lane was a public street and thoroughfare long before A. D. 1834, the date of the acquisition of the land by the *auteur* of the appellants.

That in the title of the respondent, his property was butted and bounded in front in part by the said street, and did not extend beyond or into or upon the said street; and that he had unlawfully made the obstructions complained of by the appellants without right or title by him so to do, by illegally erecting across the said street a wooden fence and other buildings upon the said street.

That the respondents had a right of action to have the obstructions removed.

The plaintiffs, Sarah Johnson and William Busby Lambe, respectively the widow and heir-at-law of the said James Henry Lambe, appealed against the dismissal of the action which they had brought against the defendant.

The following was the judgment complained of:

The 30th December, 1861.

Present:—The Honorable Mr. Justice SMITH.

"The Court, having heard the parties by their Counsel upon the merits of this cause, examined the proceedings, proof of record, and deliberated, considering that the said "plaintiffs have failed to establish by legal and sufficient evidence the existence of any "title in the plaintiffs, by reason of which the said plaintiffs can claim any right or "title to use the street called the 'Rue Blache,' or to demand the demolition of the "barn and buildings erected by the said defendant in the said street, as complained of, in and by the said declaration.

"And further considering that the said plaintiffs have failed to shew by legal "evidence that the said 'Rue Blache' is a public street or highway destined to the use "of the public, by reason of which and by law said plaintiffs can claim the right to use the said street, and to cause the removal of the fence and buildings complained of by the said plaintiffs, and have failed to show any right in law by reason of which "the said plaintiffs can maintain the conclusions of their said action, the Court doth dismiss the said action with costs *distraits* in favor of Messieurs Dorion, Dorion and Senecal, the attorneys of the said defendant."

The declaration of the plaintiffs set out that on or about the 17th October, 1834, the Honorable Louis Gugy, Esquire, Sheriff of the District of Montreal, granted, bargained, sold and conveyed to the said late James Henry Lambe, his

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heirs and assigns, "a certain lot of ground and premises situate in the St. "Antoine suburbs of the city of Montreal, containing eighty feet, French measure, "in front, more or less, by 180 feet, same measure, more or less, in depth, with "a stone house and other buildings thereon erected, bounded in front by the "main street of the said suburbs, in rear partly by a projected street and partly "by Pierre Hervieux, Esquire, and on one side to the north-east by the said "Pierre Hervieux, and on the other side by Antoine Larocque or represen- "tatives.

"That under and by virtue of the foregoing deed of sale the said James "Henry Lambe became entitled to and entered into possession of said house "and premises, and a right of passage unto, into, over, through and upon a "certain lane, street, or passage at the rear thereof, leading from the said house "and premises into Mountain street in the city of Montreal, and so continued "until the time of his death, &c.

"That on the 17th day of October, 1834, and for thirty years previously thereto, "the said street, lane, or passage was and still is opening into Mountain street, "and extending from Mountain street to the property of the said Pierre Her- "vieux, which street, lane, or passage formed from time immemorial, in part the "rear boundary of the property of the said plaintiffs, and has been from time "immemorial in use by the proprietors of the several lots abutting on the said "street, lane, or passage, and the public generally.

"That the said street, lane, or passage was intended to be continued to Bis- "son street running parallel to Mountain street, but had remained unopened "further than the property of the said Pierre Hervieux. That there was, on "the 17th October, 1834, and for thirty years previously, and is, a gateway "opening from the plaintiffs' premises into the said street, lane, or passage, "which was used by the said James Henry Lambe in his lifetime, and after his "death by the plaintiffs as a passage from the premises of the said plaintiffs, "into, through, over, and upon the said street, lane, or passage to Mountain "street aforesaid, and from thence back again into, through, over, and upon "the said street, lane, or passage to the premises of the said plaintiffs. That "the said street, lane, or passage was, from time immemorial until the illegal "interruption and occupation of the same by the defendant for his private use "freely used and enjoyed as of right by the said James Henry Lambe, and the "several proprietors of lots abutting on the said street, lane, or passage, and the "public generally. That in or about the month of March, 1852, the said "defendant illegally erected, or caused to be erected, across the said lane or "street, a wooden picket fence, together with certain wooden buildings, work- "shops and tenements, and planted within the said enclosure trees and shrubs, "thereby barring the said street, lane, or passage, and occupying the same to the "injury of the said James Henry Lambe and the plaintiffs, and thereby prevent- "ing all access to and egress from the property of the said James Henry "Lambe and the plaintiffs through the said street, lane, or passage to Mountain "street or elsewhere, to the great injury of the said James Henry Lambe and "the plaintiffs, and to the deterioration in value of the said property."

The plaintiffs by their declaration further alleged an agreement *sous seing*

privé of date 1st April, 1852, between the said James Henry Lambe and the defendant, whereby the defendant admitted to the said James Henry Lambe the rights of the latter in the said lane or street, as mentioned above, and promised to remove the obstructions placed there by him, on demand.

Allegation of the making of the will of the late James Henry Lambe (4th November, 1848), whereby he devised to the plaintiff, Sarah Johnson, the enjoyment, during her life, of the above lot of land and its rights and appurtenances, and after her death to his son, the plaintiff, William Busby Lambe, or representatives in perpetuity,

"That on the 26th February, 1854, the said James Henry Lambe died, "without having altered his will, and the plaintiffs accepted the bequests to "them made.

"That the said James Henry Lambe in his lifetime, and after his death the "said plaintiffs, before and at the time of the committing of the grievances by "the defendant hereinafter mentioned, was and were and from thence hitherto "hath and have been, and the plaintiffs still are lawfully possessed of the said "house and premises, hereinbefore mentioned, with the appurtenances, and by "reason thereof and of the premises the said James Henry Lambe during his "life, and after his death the plaintiffs during all the time aforesaid, ought to "have had, and the plaintiffs still of right ought to have, a certain way from the "said house and premises unto, into, through, over, and along the said certain "lane, street or passage, to wit, that certain lane at the rear of the said house "and premises, and from thence unto and into a certain common or public "highway called Mountain street, in the said city of Montreal, and so from "thence back again from the said street called Mountain street, unto, into, "through and along the said lane, street, or passage unto and into the said "house and premises respectively, so in the possession of the said James Henry "Lambe during his life, and after his death and now in possession of plaintiffs "for themselves and their servants on foot, and with horses, carts, waggons and "other carriages to go, return, pass and repass every year, and at all times of "the year, at their free-will and pleasure to the said house and premises with "the appurtenances of the plaintiffs belonging and appertaining; yet the "defendant well knowing the premises, but intending to injure the plaintiffs in "that behalf, and to deprive them of the use and benefit of their said way, "whilst the said James Henry Lambe in his lifetime, and after his death the "said plaintiffs were so entitled and possessed, as aforesaid, to wit, on the 17th "day of April, one thousand eight hundred and fifty-two, and on divers other "days and times, between that day and the commencement of this suit, wrongfully and unjustly placed and erected an open rail fence across the said street, "lane, or passage so opening into Mountain street, and also erected certain "other buildings thereon, and planted trees and shrubs thereon, and that the "said fence stretches across the said lane parallel to and on a line with Mountain "street from the property of the said plaintiffs to the property of the said "defendant, and erected other premises thereon, and those wrongfully kept, and "continued the said fence and premises, trees and shrubs, in the same way as "aforesaid for a long time, to wit, from thenceforth, hitherto, and thereby

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"during all the time aforesaid the said way was and is greatly obstructed and "stopped up; and the said James Henry Lambe in his life-time and after his "death the plaintiffs could not nor can they, the said plaintiffs, enjoy the same "and the said James Henry Lambe during his lifetime was and the plaintiffs "since his death were and are deprived of the use and benefit thereof, to the "damage of the plaintiffs of sixty pounds currency, and the plaintiffs say that "the said defendant promised to remove the said obstructions, fences, and other "buildings, trees and shrubs whenever thereunto requested.

"That on the second day of January, one thousand eight hundred and sixty, "and on divers other days and times, the said plaintiffs required the said defen-"dant to remove the said obstructions, fence, and other buildings, trees and "shrubs hereinbefore mentioned; but the said defendant, not regarding his "promises, hath wholly neglected and refused, and still doth neglect and refuse "to remove the same.

"Wherefore the plaintiffs bring suit, and pray that the defendant may be "summoned to be and appear before this Honorable Court to answer the prem-"ises, and that for the causes aforesaid he may be adjudged, and condemned to "remove the said fence and other premises and trees and shrubs within such "delay as this Honorable Court shall order, and restore to the plaintiffs their "said rights of way into, through, over, and upon the said street, lane or pas-"sage, from the said house and premises to the said street called Mountain "street, and from thence back again into, through, over and upon the said "street, lane, or passage to the said house and premises of the plaintiffs, and "that the said defendant may be adjudged and condemned to pay and satisfy to "the plaintiffs the said sum of sixty pounds with interest thereon from service "of process in this cause, and costs of suit."

The defendant met the action and *demande* of the plaintiffs by an express denial of all the allegations of their declaration, and he further averred that the lane or passage mentioned in their declaration as opening upon Mountain street was a private lane for the use of the adjoining proprietors, that the said lane had never been established or acknowledged as a public street or road by any competent authority; that said lane bounded the land occupied by the defendant, and was never opened further, and that the defendant occupied and possessed the land in question for more than ten years publicly, and without any trouble as proprietor, and had there erected buildings which existed for many years, &c., &c.

The plaintiffs fyled three answers to the defendant's plea. By a first answer they alleged, among other things, that the said street or lane had been from time immemorial and then was a public street, lane, or way, and that the defendant had wrongfully and tortiously usurped the possession thereof, and was then a trespasser.

By a second answer the plaintiffs averred "that the said lane or street was a "public lane or street commonly called and known by the name of Blache street, "set apart to and consecrated as such by public use and immemorial usage as "such; that the defendant was estopped from maintaining that the said lane or "street was a private way, as he falsely pretended, inasmuch as by the *acte* or "deed whereby he acquired the lot of land belonging to the said defendant and

"abutting on the said lane whereon he has usurped as aforesaid, from one Dame "Marie Jeanne Hervieux, residing in the city of Montreal, wife of Robert G. "Greig, Esquire, residing at the same place, thereto present and duly authorized "for the effects thereof, and passed before Montreuil and colleague, notaries "public, on the 4th July, 1844, at Montreal aforesaid, the said lot of land is "therein described as bounded in front '*par la Rue Blache*,' to wit, by the "said lane or street as would more fully appear on reference to an authentic "copy of said *acte* or deed of purchase produced with said answer of the plain- "tiffs; that moreover the said street or lane was in fact a public street or lane "on and over which the plaintiffs had a right of passage at all times, and the "citizens and public had had and enjoyed the same as a public street or "passage from time immemorial; and the plaintiff *d'abondant* alleged that in "the year 1801, and long prior thereto, the said lane was a public street or "lane, and had ever since continued to be such, and then was a public street or "lane notwithstanding the usurpation thereof by the defendant; that in fact "on the map or plan of the city of Montreal, which was made in conformity "with the statute in that behalf, intituled an act to amend an act passed in the "36th year of the reign of His Majesty George III, intituled an act for "Making, Repairing, and Altering the Highways and Bridges within this Pro- "vince, and for other Purposes, and passed in the 39th year of the reign of His "Majesty George III., by Louis Chartrand, Inspecteur des Chemins of the said "city, and now of record; the said lane or street is therein laid down as being "then a public lane or street by the name of the 'Rue Blache,' and that by "reason thereof the defendant and all persons whatsoever had knowledge that "the said lane or street was and is a public street, and were and are bound "thereby, and that the said public street hath ever since continued to be and "was in the year 1801, and long prior thereto, and now is a public street, not- "withstanding the pretended possession and the said usurpation by the defen- "dant."

The appellants adduced evidence of various kinds in support of their demand —plans of the city, title deeds, and testimony of witnesses. Two plans of the city are extant, forming part of the archives of the city, the one of date 1801, made by Louis Chartrand, under authority of 39 George III., cap. 5, §§ 26, 27, Rev. Stat. L. C., p. 361, the other made in 1825, and both of these plans exhibit the lane or passage in dispute, Blache lane, as bounding the property of the appellants in rear.

Two title deeds were also produced by the appellants. The first of these titles was the title deed of the property of the appellants given by the Sheriff to their *auteur*, James Henry Lambe, in 1834, according to which the property was bounded in rear by a projected street, meaning "Blache lane." The second of these titles was the deed by which the defendant acquired his land from Dame Mary Ann Greig *née* Hervieux, according to which his land was bounded in front by "La Rue Blache."

Henri Blache, an old man of sixty-eight, had a distinct recollection of the *Rue Blache* since A.D. 1815, from which time he knew that the property of the appellants was bounded in rear by "Rue Blache," and had an outlet upon the street, till a few years ago, when the defendant blocked it up.

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MONDELET, J.—(Giving the judgment of the Court of Appeals.) Il me paraît qu'en l'absence de titre au terrain (Rue Blache) en question, il ne peut-être regardé comme un terrain privé ou particulier. Il faut que ce terrain ait un caractère quelconque, il n'est et ne peut être amphibie. Je crois donc qu'il appartient à la ville, car la courte possession du défendeur n'a pu évidemment, lui faire acquérir aucun droit, à cet égard. D'ailleurs, dans les titres, et d'après ce que dit le défendeur lui-même, cet espace de terrain a été connu et reconnu comme "Rue Blache" ou 'Blache Lane.' L'ensemble de la preuve des demandeurs, établit le fait assez clairement, pour justifier, la conclusion, que ce terrain n'en est pas un particulier. Dans ce cas là, et vu l'usage qu'on en fesait pour sortir, avant que le défendeur eût bâti là, et obstrué et la sortie et le passage de là à la rue La Montagne, je suis disposé à dire que les demandeurs sont en droit de se plaindre des bâtisses qu'y a érigées le défendeur et d'en obtenir la disparution. Bref, je suis d'avis que le jugement de la cour de première instance doit être renversé, le jugement de cette cour devant être celui qui aurait dû être rendu, devrait être bien motivé, et ordonner la démolition, etc.,

The judgment in appeal was recorded as follows:

The Court, &c. * * * * considering that the said street or lane called *Rue Blache*, mentioned and described in the declaration and pleadings in this cause filed, was a public street and thoroughfare on, and for long previous, to the seventeenth day of October, one thousand eight hundred and thirty four, date of the title of acquisition by the said late James Henry Lambe, of his house and premises in the said declaration mentioned and therein described as butted and bounded by the said street, and was used by him, the said James Henry Lambe, as such public street and thoroughfare, and by his representatives, the said appellants, plaintiffs aforesaid, possessors and proprietors of the said house and premises, until the erection of the obstructions on the said street or thoroughfare by the said respondent, defendant in the Court below, complained of by the said appellants: considering that in the title of the said respondent, produced and filed in this cause, his property therein mentioned acquired by him thereby was butted and bounded in front in part by the said street, and did not extend beyond, or into, or upon the said street: considering, that the said respondent hath unlawfully made the obstructions aforesaid, complained of aforesaid against him by the said appellants, without right or title by him so to do, by illegally erecting across the said street a wooden fence and other buildings and tenements upon the said street, and by planting the same with trees and shrubs: considering, that in the judgment of the Superior Court sitting at Montreal on the thirtieth day of December, one thousand eight hundred and sixty-one, dismissing the action of the said appellants, plaintiffs aforesaid, there is error, doth reverse and set aside the said judgment, and this Court proceeding to render the judgment which the Court below ought to have rendered, doth maintain the said action of the said appellants, plaintiffs aforesaid, and doth order and adjudge that the said respondent do, within twenty days after the service upon him of this judgment, remove from the said street, the said fence and other buildings, and the said trees and shrubs, and restore to the said appellants, plaintiffs aforesaid, their right of way to, and the full and free use of the said street or

thoroughfare from their house and premises aforesaid into, through, over and upon the said street or thoroughfare to the said street called Mountain street, and from thence back again through the said street and thoroughfare to their said house and premises; failing which removal of the said obstructions and of the rendering and restoration of the said rights of way and use of the said street, that the said fence, other buildings, trees and shrubs, shall and may be removed as aforesaid by the said appellants, plaintiffs aforesaid, at the cost and expense of the said respondent, defendant aforesaid, in due course of law, dismissing the demand of the said appellants for damages by them claimed in and by their said action, the whole with costs, &c. Johnson et al. and Chamberlain et al.

Judgment reversed.

Torrance & Morris, for appellants.
Dorion, Dorion & Sénécal, for respondents.
(F. W. T.)

AUTHORITIES CITED BY APPELLANTS.

1. Plans.

Authentic plans, showing size of street, render adverse possession of any portion thereof inoperative. Curasson: Actions Possessoires, p. 202, n. 31.

2. Possession.

Acts of possession and use acquire streets to the public. Troplong, Prescription, Tom. 1, n. 158, p. 234; n. 163, p. 241. Marcadé, Prescription, pp. 52, 53. Nouv. Deu. vo., Chemin, Tom. 4, pp. 524-7, § III., n. 5, § V., nn. 1, 2, 4.

Acts of possession combined, with plans and titles recognizing street, establish its existence as such street. Curasson, Id., p. 240, n. 47.

3. Presumptions.

Use creates presumption of property being in city. Proudhon, Du domaine public, Tom. 2, p. 281, n. 564.

Fencing in of lots, leaving street out of bounds, is presumption of existence of street. Proudhon, Id., Tom. 2, p. 43, n. 353. This authority applies to *culs de sac*.

4. Streets.

Are property of public. Proudhon, Id., Tom. 2, p. 28, n. 346.

5. Prescription.

Les voies, rues, places des villes et villages, sont imprescriptibles. Troplong, Pres. 1, p. 229, n. 156, pp. 234, 6, 243, 7. Pothier, Prescription, n. 7, n. 191, 2. 1. Bourjon, T. 22, § 4, n. 24, cap. 2. 2. Gr. Cont., pp. 498-9, n. 13. Code Civil, Canada, p. 177. Domat, L. 3, T. 7, § 5, n. 2, p. 277. Guyot, Pres., 372, 442, n. 6. Proud. Tom. 3, p. 53-4, p. 256. Dunod, p. 74. 18 Vic., c. 100, § 41, §§ 9.

On the other hand the city acquires a title by prescription to land in thirty years. 118th Art. Cout. de Paris. Although from the title deeds of the parties in the present case, the title of the city is made out apart from the prescription.

6. Right of Action.

The Roman law gave an interdict to the inhabitant deprived of the use of a street. Curasson, Id., p. 209. Fremiaville, pp. 160-1.

To recover the use of a street or other public property, any individual can sue. Curasson, Id., p. 367, p. 369. Pardessus, Servitudes, 2, p. 312. 2 Bing. N. C., 281. Wilkes v. Hungerford Market Co.

7. Damages.

No proof of actual or specific injury is requisite. 2, Starkie Ev., 317, 3rd edn. 2. East. 154, Pindar v. Wadsworth.

MONTREAL, 1st MARCH, 1864.

Coram DUVAL, J., MEREDITH, J., MONDELET, J., AND BADGLEY, J.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

DANIEL HERRICK,
(*Plaintiff in the Court below,*)
APPELLANT;

AND

GARRET SIXBY,
(*Defendant in the Court below,*)
RESPONDENT;

HELD:—1st. That a sale of land by given boundaries, for a fixed sum, although a quantity is stated in the description, is a sale "*en bloc*" or *per aversionem*, and not by measurement.

2nd. The vendor by such a sale conveys all the property within the specified limits, and cannot reclaim any part of it, under pretence of there being a surplus, unless it had been obtained from him by the fraud of the purchaser.

3rd. In such a case the law gives the surplus to the vendee in this respect differing from the *Code Napoleon*, which has established a new rule.

4th. In a conflict of titles between two proprietors of different portions of a lot of land derived from a common *auteur*, the one who traces back his title to the common source, particularly when it appears, or is to be presumed he was the first purchaser, will have the preference over the one who only shows a more recent deed, and in determining the contest the question will be as if it had arisen between the original vendee and the original vendor, bound to make good the description by which he sold.

5th. For determining the extent of the thing sold specific boundaries are to be preferred to an indication of quantity.

Action *en bornage*. Plaintiff alleged proprietorship, by deed from A. Houghton, dated 23rd October, 1855, who purchased at sheriff's sale, 15th August, 1855, part of lot No. 3, on a plan of division of John Ruiter's estate, alleging that defendant had become proprietor of the land to the East, by deed from James Allan, of 17th February, 1848, had encroached on plaintiff to the extent of twenty acres, and that a boundary required to be defined between the parties, concluding for the same to be fixed by a sworn surveyor, with £150 damages for trespass.

Defendant pleads that the whole of lot No. 3, previous to the 3rd March, 1813, belonged to John Ruiter, who on that day sold as a specific property to G. & D. Krans that portion of the lot adjoining plaintiff's land, and that Krans held and possessed by the description given in this deed, as follows:

"About fifty acres of land, situated in the seigniory of St. Armand aforesaid, "known and distinguished by lot No. 3; the said fifty acres or thereabouts, to "extend from the west boundary line of said lot, and on the whole width thereof, "and easterly to the foot of a ledge of rocks which runs across the said lot at a "certain distance easterly of a certain brook which runs across said lot, the south-"easterly boundary of which part is a hemlock tree, which stands on the south-"erly boundary line thereof, and is marked G. & D. K., 1813, with all the build-"ings and improvements thereon, and other the appurtenances and dependencies "whatsoever thereunto belonging or in anywise appertaining.

That being inherited by Miles Krans, he, on the 24th January, 1846, sold by the same description to James S. Allen, who, on the 17th March, 1848, sold by the same description to the defendant, who by himself and "*auteurs*" had possessed by said description ever since the 3rd March, 1813, with the fixed, certain and

obvious bounds mentioned in his deed, one of which, the ledge of rocks, separated his land from the plaintiff's,—that the brook running across the lot easterly of this boundary and the hemlock tree still subsisted, to mark the limits as when first deeded, at which time the land was of little value according to superficial area,—that John Ruiter had not disposed of the remainder of the lot until long after the Kraus purchased, and he was bound first to make good the description by which he sold to them,—that the defendant had not encroached, but plaintiff had done so. Defendant concluded for a boundary according to his titles, and possession to be defined along the foot of the ledge of rocks.

The titles cited in the pleadings were all produced, and the plaintiff fyled a plan purporting to be made by Amos Lay, surveyor, shewing the entire lot No. 3, as falling to John Ruiter, in the division of a considerable block.

The description in the plaintiff's and Houghton's deeds was as follows:

"A lot of land situate in the seigniory of St. Armand, in the district of Montreal, "being part of lot No. 3, on a plan of division of the land of the late John Ruiter "among the heirs of his estate, the said plan made by Amos Lay, surveyor, "and dated the 6th day of December, 1809, containing ninety acres in superficies, "more or less; bounded to the south by the province line, to the west by the re- "maining part of said lot No. 3, owned by Miles Kraus, to the north by Miles "Kraus and James Allen, and to the east by lot No. 4, on the said plan without "any buildings thereon erected."

Considerable evidence was adduced on both sides to show acts of possession immediately west of the ledge of rocks and the brook, but the land being wild it was somewhat conflicting as to the result.

The plaintiff contended for a boundary starting from the hemlock tree, and running at right angles across the lot, parallel to his eastern boundary. The defendant contended that such a boundary would be contradictory of the terms of his title, that among other things it would be wholly westerly instead of easterly of the brook mentioned in his title, and that it should be run from the hemlock tree along the foot of the ledge of rocks.

The Superior Court, Mr. Justice Smith, presiding, on the 27th May, 1862, ordered a surveyor to draw the boundary line according to defendant's title, along the foot of the ledge of rocks as follows:

"That the said surveyor shall more particularly establish and run a line of "division between the properties of the said parties adjoining and adjacent to the "ledge of rocks referred to in the declaration and pleadings in this cause, and "along the base of said ledge, and shall fix and determine the said line by proper "metes and bounds."

And David Vaughan, surveyor, having made a report of a survey along the foot of the ledge of rocks, showing, among other things, that the larger portion of the lot thereby fell to Sixby, and the smaller to Herrick; it was by the final judgment rendered by Mr. Justice Monk on the 31st October, 1862, homologated, and judgment rendered establishing the line so run along the base of the ledge of rocks diagonally across the lot at a distance easterly of the brook, beginning at the hemlock tree marked D. & G. K. on the province line, and terminating on the northern boundary near a stream called the Rock river, as the boundary line

Merrick and Sixby.

separating the portions of said lot No. 3 belonging to plaintiff and defendant respectively.

The plaintiff appealed from the judgments of the Superior Court, which were confirmed by the judgment of the Court of Appeals, Mr. Justice Mondelet dissenting.

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

This is an action of *bornage*, which the plaintiff had the right to institute against the defendant for the settlement of a division line to be run and defined by a legal survey between the adjoining properties.

The evidence in the case shews that unsuccessful attempts were made by both parties to establish the line, both admitting the south-east point of departure to be the hemlock tree marked G. & D. K., 1813, but differing as to its north direction; the plaintiff requiring it to be prolonged parallel with the external west boundary of lot No. 3, as shewn on Lay's map; the defendant requiring it to be run along a ledge of rocks described in his titles and extending obliquely across the lot.

The contestation thus became petitory, and a reference to the titles of the respective parties, and to their legal rights of property in relation to their respective portions of the lot, must be had to solve the difficulty.

It must be observed *in limine* that these portions formed together one lot, the property of Captain John Ruiter, and known as lot No. 3, shown on said map, drawn for the purpose of the partition of the real estate of the previous John Ruiter amongst his heirs, of whom the said Captain John Ruiter was one, and who by the effect of the partition became the owner of the entire lot No. 3, and of the adjoining lot No. 4, as shown on the said map.

This map, plaintiff's exhibit No. 4, Record No. 6, shows the lot No. 3 to be an oblong bounded on the west by a straight line running north and south, on the south by the province line, on the east by the lot No. 4, and on the north by lot No. 2. A brook or rivulet is shown on the map as running across the lot No. 3, from north to south, and the lot is marked 140 acres in superficies. The partition was effected in 1809.

Afterwards, by notarial deed of sale of 3rd March, 1813, Captain John Ruiter sold to George and David Kraus, for the block sum of $750, payment whereof was acknowledged in the deed, "about *fifty acres* of land situated in the "seigniory of St. Armand, aforesaid, known and distinguished by lot No. 3; "the said fifty acres, or thereabouts, to extend *from the westerly boundary line* "*of said lot and across the whole width thereof, and easterly* to the foot of a "ledge of rocks which run across the said lot, at a certain distance easterly of a "certain brook which runs across the said lot, the *south-easterly* boundary of "which part is a hemlock tree which stands on the southerly boundary line "thereof, and is marked "G. & D. K., 1813," with all buildings and improve"ments thereon."

The sale was made by the vendor for himself, his heirs, assigns, &c., with the usual warranty stipulations against mortgages, evictions, &c., and he subjected the land sold to a share proportional to the contents of the said piece of land of the quit-rent charged upon the whole lot, by the deed of Concession from the Seignior. The purchasers took possession, and afterwards were succeeded by

Miles Krans, who inherited from them the said piece of land sold to them as aforesaid.

By notarial deed of 25th Feb., 1846, Miles sold to James S. Allen for £150 the said piece of land which was described in this deed *in ipsissimis verbis* of Captain John's deed to George and David Krans.

On the 17th Jan., 1848, the said Allen sold to the respondent and defendant Sixby, for the sum of £150, the same piece of land under the same description as in the previous deeds, and of which said land Sixby has always since had the possession.

The chain of title from the original owner, Captain Ruiter, to the defendant Sixby is thus complete.

By the original deed of 1813, George and David Krans, their heirs and assigns, became the owners and proprietors of that portion of the lot No. 3, inclosed within the limits described in that deed, namely, the western part extending up to the eastern boundary named in the deed, and Captain Ruiter and his assigns of the eastern part extending from the said last mentioned boundary.

The appellant's and plaintiff's titles are, 1st. A deed of sale from the sheriff of the district of Montreal, of the 15th August, 1845 (No. 5 of Record), to Abel Houghton, of a lot of land described: "A lot of land situate in the Seigniory "of St. Armand, in the district of Montreal, being part of lot No. 3 *on a plan* "*of division of the land of the late John Ruiter, among the heirs of his estate.* "*The said plan made by Amos Lay, surveyor, and dated the 6th December,* "1809, containing ninety acres in superficies more or less, bounded to the south "by the province line, to the west by the remaining part of said lot No. 3, "owned by Miles Krans, to the north by Miles Krans and James Allan, and to "the east by lot No. 4, on said plan, without any buildings thereon erected." 2nd. Conveyance from Abel Houghton of this lot to plaintiff, by notarial deed of 23rd October, 1855 (No. 3 of Record).

The appellant and plaintiff has not produced any title deeds anterior to the sheriff's deed above referred to, which was executed upon an adjudication to Houghton of the lot of land last above described, which had been seized and sold by the sheriff under a writ of *fi. fa. in terris* as in the possession of one Chipman.

In this conflict of title the advantage is manifestly with the respondent, whose title relates back to the original owner through his warranty deed of 3rd March, 1813, to George and David Krans; whilst on the other hand the appellant's title reaches only to the sheriff's decree to Houghton in 1845, without showing that Chipman, upon whom it was seized and adjudicated, had any title or right to the property.

The piece of land, the Krans' purchase and the respondent's property, is described as inclosed within fixed boundaries plainly described on the four sides, with a south east point of departure for the eastern boundary, as follows, "run- "ning north west at the foot or along the foot of a ledge of rocks which run "across the lot at a distance east of a certain brook which runs across the said "lot." The ledge of rocks and brook being natural boundaries can admit of no dispute, and are shown on the map or plan of division mentioned in the sheriff's deed.

Merrick and Sibby.

The appellant's piece of land is described "*as bounded to the west by the re-*"*maining part of said lot No. 3 owned by Miles Krans.*"

Now the *adjudicataire* Hougton could not have been misled either about the brook or the ledge of rocks above mentioned, when he effected his purchase they were shown on the plan, and during the four months preceding the *decret*, required by law for the public advertisement of the property, he was informed that the adjoining portion was the property of Miles Krans, during which time he had every opportunity for ascertaining the extent of his intended purchase. If he did not take the necessary precaution before his purchase he can only blame himself, and if he did, and bought a speculative boundary, he must abide the legal result.

In the contestation as it is the respondent has a right to establish the extent of his land as in a contestation between the original vendor and vendees, the said Captain John Ruiter and the said George and David Krans, as to the extent of their purchase from him.

At the outset it may be stated as established, that the vendor himself having fixed and specified the boundaries of the piece of land which he sold for a block sum, could not by a petitory action merely, without alleging and imputing fraud upon the vendees, deprive them of any portion of the area which he himself had inclosed within his own fixed and specified limits. His deed was perfect, translative of the property from its date, and passed the land inclosed within those limits for a fixed price *en bloc*, which, moreover, he had received. 1 Bourjon Droit commun de la France, p. 476. Toutes les obscurités qui se trouvent dans le contrat de vente doivent s'interpréter contre le vendeur, parce que connaissant sa chose mieux que l'acheteur, c'est à lui à s'exprimer si clairement qu'il n'y ait aucun doute sur l'étendue de la vente et sur l'effet d'icelle: règle prise dans l'équité et dans la raison écrite adoptée; (in notis) quia debuit expertius legem dicere. L. 3—, de factis, arrêt of 11 June, 1708, 6 vol. Journ.:

Again.—The excess is by law the loss of the vendor. "Pothier, Traité de "vente, no. 254, accorde à l'acheteur le surplus, parce que la clause indicative "de la contenance n'est qu'en faveur de l'achetour, c'est le vendeur seul qui "promet et s'engage. L'acheteur par cette clause ne contracte aucun engage-"ment, et par conséquent, ne peut être tenu de faire raison du surplus de la "contenance." And at no. 255, he applies this division to sales *per aversionem*, c'est-à-dire, "où on est convenu d'un seul et unique prix pour tout ce qui était "vendu et non tant la mesure."

Despeisses, pt. 1, tit. I, sec. 5, no. 15, p. 46, says: "même si en faisant "la vente du fonds, le vendeur a fait les limites plus amples qu'elles ne sont, et "qu'après, qu'on évince une partie de ce qui est compris ès dites limites, quoi-"que le nombre des arpents exprimés dans la vente s'y trouve, le vendeur sera "tenu de ce qui a été évincé, et cela, non-seulement lorsque la vente a com-"mencé par la quantité, mais aussi simplement lorsque la vente a commencé par "le corps." And at p. 47, "il est juste que le tout soit au profit de l'ache-"teur qui a été induit à acheter à tel prix, etc., etc. S'il contient plus, le ven-"deur se doit plaindre de lui-même d'avoir vendu pour tel prix pour le tout."

It is manifest that a petitory action for the recovery back of any particular

portion of the limited area sold for the fixed price, could not have availed Captain John Ruiter against his vendees, George and David Krans because it must be remembered, that the sale by Ruiter to the Krans, was a sale *per aversionem* not *tant la mesure;* a block sum, *tel prix pour le tout*, that is for a specific piece of land marked off within visible limits, in fact *un corps certain*.

Now Bourjon, p. says: "lorsque le contrat de vente porte à qui tiennent "ces corps des quatre côtés, abstraction est faite de la mesure; les confins "expliqués, qui forment les limites de l'objet de la vente, prédominent à l'énon- "ciation de la mesure qui n'est que surabondante," and he cites I Henrys, Quæst. 83. Lapeyrère, Lett. v, p. 258. This principle has also been maintained by a judgment in appeal, in the case of Labadie *vs.* Truteau, 3 Lower Can. Rep., p. 155, where "the specification of the contents of the lot being altogether "superfluous in addition to the description given by visible bounds and limits."

In Louisiana, where a similiar jurisprudence prevails, that of French law, this point has been fully discussed and settled in a great number of decisions. 12 Martin, L. R., p. 428, Irving *vs.* McCrummer, held, "to constitute a sale *per* "*aversionem* there must be certain limits or boundaries given, or a distinct or "separate object described, as a field enclosed, an island, &c., because it is "presumed that the parties have their attention fixed rather on the boundaries "than on the enunciation of quantity. 4 Lou. R., 536; 5 Lou., 241. Held, "that the sale of a tract within limits for a fixed price is a sale *per aversionem*, "these circumstances must control the problematical description as to quantity. "This title was clearly translative of property to the whole extent of the limits "given in the act of sale, and the evidence shews that the vendee took posses- "sion under the sale, and there is not any evidence that the possession assumed "was contrary to the will of the vendee; it must therefore be considered as a "civil possession *pro emptore* extending over the whole tract of land as sold by "limits;" and so in Gromley et al. *vs.* Oakey et al., 7 Lou. Rep., p. 457: "This "Court has frequently had occasion to consider the principles which govern sales "of that character, *per aversionem*, and it has been settled in several cases, that "where a sale is made with reference to known and definite boundaries, they "will control the enumeration of quantity."

And in a very esteemed modern French author, Curasson, actions possessoires, p. 462, it is laid down, "si les titres marquent des limites précises, on doit avoir "égard à ces limites plutôt qu'à la contenance, qui dans les actes est presque "toujours indiquée d'une manière incertaine et par aperçu. Le principe que "les confins doivent être préférés à l'énonciation est d'une jurisprudence con- "stante."

And finally, Troplong, vente, 1 vol. p. 439, "La condition de mesurage n'a "pas pour objet de faire savoir ce qui a été vendu, car la chose forme *un corps* "*certain* contenu dans des limites déterminées et dont toutes les parties sans "exception sont comprises dans le marché; sans le mesurage, on sait à n'en pas "douter en quoi consiste l'objet vendu."

The question of excess or its value as equivalent could never be entertained in such a case as this, because this is not a vente *à la mesure*, but of a *corps certain pour prix fixe;* and the principle of law is so positive that it cannot

Herrick and Sixby.

be departed from, it is drawn from the Roman law, which held that all lands conveyed by artificial lines of mensuration are, as the term imports, *agri limitati*, whether the contents in superficies be set forth or not.

The appellant's recourse in argument to the law of modern France under the code with reference to the question of excess, cannot avail, because the code, as Duvergier observes (1 vol. p. 281 (note)), has for France abrogated the old common law, which is still the common law of this province, and as he says: "Il a proscrit les distinctions indiquées dans les anciens auteurs, Voet, Lapeyrère, "Despeisses, etc., etc.," but even he admits that in case of a sale, as above, *de lte immeuble indiqué des quatre côtés, dont le prix est fixé par le contrat non à tant la mesure, mais avec indication de contenance*," in that case, the contenance is subordinated to the limits.

Under all these circumstances of law and fact, the relative absolutely fixed positions of Captain John Ruiter, the vendor, and of George and David Krans, the vendees, under the terms of the deed of 1813, in respect of the lot No. 3, were as follows:

They owned and possessed the eastern part which extended from the external west line of the lot No. 3, across the lot between the west and south line boundaries up to the east boundary, formed by a line running from the said hemlock tree, on the line of the south boundary, and across the lot at the foot or along the ledge of rocks running across the lot to the north boundary line.

The remainder of the lot, forming the western part, from the said lines running at the foot of the ledge of rocks and extending to the east boundary of the lot adjoining No. 4, was the property of Captain John Ruiter.

They, George and David, had absolute property and full possession of their lot as above limited, there being no evidence to show that their possession was contrary to the will of the vendor, and moreover they held by an indefeasible title from him, and were not subjected to diminution in area.

This was the relative position of parties previous and up to the sheriff's adjudication in 1845. Was the position changed by the decree?

The appellant has produced no deed or title anterior to that from the sheriff to Houghton, of a lot of land of the declared contents of ninety acres, being part of No. 3, on a plan of division, &c., made by Lay in 1809, &c., and bounded to the west by the remaining part of the lot No. 3, owned by Miles Krans, &c.

The evidence that parties were in possession after the death of Captain John Ruiter, will not establish title in them, however stoutly it may be asserted; such evidence is not proof of property without production of title known to the law.

The respondent brings into Court a continuity of title by himself and his predecessors for fifty years with possession, a period of time and possession which would secure the property to him even without title; whilst the appellant produces 1st, sheriff's deed of sale of 1845, thirty-two years after the date of the deed of 1813; and 2nd, Houghton's sale to him forty-two years after the date of the deed of 1813.

But the sheriff's adjudication could not give more property than was left to Ruiter after his sale of 1813; it did not assume to sell any property belonging

to Miles Krans, although the adjudication did indicate certain *contenance*, ninety acres, in the adjudged lot.

Herrick and Staby.

The mere indication of contents in a sheriff's or other deed cannot deprive a neighboring proprietor, indicated as the neighboring land owner, of a part of his property, to make up for the deficiency in the indicated contents adjudged by the sheriff. Such a pretension would overturn every title to property and breed interminable confusion; and no law can evict a proprietor from his property to complete the deficient contents of an adjudged lot of land merely because it adjoins his property.

The *adjudicataire* must consider his interests at the *decret*, and protect himself if he should not obtain his quantity, by claiming a diminution in the price of his adjudication, under the claim *quanti minoris*. His remaining passive with less than his quantity of land cannot avail him to take the deficiency from his neighbor. He cannot claim through Captain John Ruiter, or any alleged owner after him until the date of the sheriff's deed, because he must have produced title to do so, but he rests upon the sheriff's deed, which cannot support his pretension, against the respondent: he must therefore be satisfied with the line as drawn by the surveyor according to the title of 1813 and as adjudged upon by the Superior Court, by its judgment in this case, which is confirmed.

MEREDITH, J.—As Mr. Justice Badgley has explained fully the principles of law applicable to this case, I shall confine myself to a statement of my views respecting the more important facts connected with the present controversy. The deed of the third of March, 1813, from John Ruiter, to the *auteurs* of the respondent, was a sale of all the land to be found within certain specified limits; and the question which we have to determine is, as to the site of the easterly boundary line of the lot of land so sold.

The rights of the appellants, whatever they may be, cannot interfere with those of the respondent, because they both claim from the same *auteur*, John Ruiter; and we have before us the sale made by him in favor of the *auteurs* of the respondent, but not the conveyance under which the remainder of the lot was disposed of. We, therefore, must regard the title of the respondent as being earlier than that of the appellant; and consequently hold that the title from John Ruiter in favor of the *auteurs* of the respondent must be satisfied in preference to any conveyance that may have been made subsequently by John Ruiter or his representatives.

Reverting then to the deed of sale in favor of the *auteurs* of the respondent we find the following description of the lot thereby sold:

"About fifty acres of land situate in the Seigniory of St. Armand aforesaid, "known and distinguished by lot number three, the said fifty acres or thereabouts "to extend from the westerly boundary line of said lot and on the whole width "thereof, and easterly to the foot of a ledge of rocks which runs across the said "lot at a certain distance easterly of a certain brook which runs across said lot, "the southeasterly boundary of which said part is a hemlock tree which stands "on the southerly boundary line thereof, and is marked G. & D. K., 1813, with "all the buildings and improvements thereon, and other the appurtenances and "dependencies whatsoever thereunto belonging or in any wise appertaining."

Herrick and Sixby.

The parties are agreed as to the situation of the hemlock tree, forming the south-easterly line of the respondent's lot, the controversy between them being limited as to the course of the line running to the tree.

The pretensions of the appellant are that the line in question ought to run parallel to the ends of the lot, and to form right angles with the north and south lines. Whereas the respondent contends that the said line should run diagonally across the lot, from the southern boundary north-easterly across the lot following *the ledge of rocks* mentioned in the description of the lot sold by John Ruiter to the *auteur* of the respondent.

That description certainly is not clearly worded, but still it seems to me impossible to suppose, that if, as the appellant alleges, the parties intended the line in question should run parallel with the ends of the lot, and at right angles with the north and south lines, that the description could have been worded as it is. Not only is there not one word tending, however remotely, to indicate such an intention, but there are words clearly indicating, I think, a contrary intention. To what purpose did the description refer "*to the ledge of rocks which runs across the said lot*" and specify the situation of that ledge as being "*at a certain distance easterly of a certain brook which runs across the said lot*," if the division was to be a straight line uninfluenced by the course of the *ledge of rocks* so carefully described. The ledge of rocks which runs *across* the said lot cannot, I think, have been referred to for the purpose of determining the south-easterly boundary of the lot sold; for that was placed beyond the possibility of doubt by the hemlock tree marked "G. & D. K." (the names of the purchasers) "1813;" and if the ledge of rocks was not referred to for that purpose, it must, I think, have been referred to as indicating the course of the line.

As I read the description, in the Deed of the 3rd of March, 1813, it gave the *auteurs* of the respondent that part of the said lot lying between the westerly boundary line of the said lot and "the foot of the ledge of rocks which "runs across the said lot at a certain distance easterly of a certain brook, which "also runs across the said lot," the south-easterly boundary of the said lot being the said hemlock tree marked as already mentioned.

The appellant however contends that the deed has its full effect by giving the respondent's lot "*a width to the north side to the foot of the ledge of rocks "there.*" But the "ledge of rocks" *on the north side* at the foot of which the appellant contends the respondent's lot should terminate must be considerably to the *west* of the brook spoken of in the description; whereas the ledge of rocks given in the deed as a description is to the *east* of that brook.

The appellant also contends "that the deed has its full effect by giving the "defendant's lot a width, on the south side, *to the ledge of rocks;*"—as a boundary not across the whole of the lot, but on the south line only, but, as I have already said, it was needless to refer to the ledge of rocks as a boundary on the *south* line, because upon that line the parties had made the hemlock tree, marked as already mentioned, the boundary.

Moreover the appellant, in order to make out a description in accordance with his views, is obliged to refer to *two different ledges of rock;* whereas the deed refers to but *one ledge* of rocks, and speaks of that ledge as running across the lot.

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It is quite true that the line in accordance with the pretensions of the respondent is far from being a straight line; but the parties to the deed of the 3rd March, 1813, were not under any obligation to divide their properties by a straight line; and it does not seem that it was their intention to do so:

Such being my views as to the facts of the case; and agreeing as I do with Mr. Justice Badgley, as to the rules of our law on this subject, I am of opinion that the judgment of the Superior Court, ordering the line in question to be drawn "along the base of the said ledge" ought to be *confirmed*.

Judgment confirmed.

A. & W. Robertson, for appellants.
A. Cross, for respondents.
(E. S. L.)

CIRCUIT COURT.

MONTREAL, 30TH SEPTEMBER, 1864.

Coram MONK, J.

No. 4429.

Dubeault vs. *Robertson*.

AFFIDAVIT.— *Lien* FOR SEAMAN'S WAGES.

HELD 1st. Under the common law of France, which is in force in Lower Canada,—a captain of a barge has a *lien* upon it for his wages as long as he remains on board.

2nd. Under the common law of France in force in Lower Canada the *lien* of a captain of a barge for wages includes the right of seizure before judgment, without the formality of an affidavit as required by Chap. 83 of the Consolidated Statutes of Lower Canada, such seizure being in the nature of a *saisie conservatoire*.

In this case a writ of *saisie arrêt avant jugement* issued on a petition to a judge supported by the following affidavit "Le dit Louis Dubeault étant dument assermonté sur les saintes évangiles dépose et dit que le dit Henry Robertson lui est endetté en la manière mentionnée en la précédente requête et que le déposant a toute raison de croire et croit vraiment en sa conscience que la dite barge "Maud" est sur le point de laisser le canal Lachine, où elle est actuellement, pour se rendre en Haut Canada, dans le but de frauder le déposant de son dû, et que plus particulièrement le dit Henry Robertson a requis ce déposant de laisser le dit navire mais a en même temps refusé de lui payer la dite somme pour gages ou aucune partie d'icelle et ce déposant la signe lecture faite."

Assermenté à Montréal ce dix-neuf août mil huit cent soixante, quatre pardevant moi. (Signé) LOUIS DUBEAULT.

(Signé) J. A. LABADIE, C. C. S.

On the 10th September defendant's counsel made a motion to quash the writ of *saisie arrêt* on the ground of insufficiency of the affidavit.

At argument, defendant's counsel submitted that the law relating to seizures before judgment was defined and expressly laid down in the 83rd chapter of the Consolidated Statutes of Lower Canada. There it would be found that no seizure

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before judgment could issue in any case (except the two cases therein excepted), without an affidavit containing certain allegations therein specified. In the present case the affidavit was defective and faulty, and contained almost none of the necessary allegations. The material allegation that the defendant was immediately about to secrete his debts and effects was entirely omitted. Neither was it stated that the plaintiff would lose his debt or sustain damage. The sole fact which was relied upon in the affidavit was that the said barge was on the point of leaving the Lachine canal for Upper Canada, with the intent of defrauding the plaintiff of his due. Apart from the informality of this statement, its absurdity was manifest. It contained no complaint against the defendant; he did not intend, but the barge intended, a chattel intended. It was quite evident that the *saisie arrêt* must be quashed.

D. Girouard, for plaintiff *contra*. The affidavit is sufficient and more than sufficient, for the seizure is a proceeding under the common law of France in force in this country, and is in the nature of a *saisie conservatoire*. Under the common law no affidavit is required for such a proceeding.

MONK, J. The plaintiff in this cause was the captain of a barge belonging to defendant, and his wages had accumulated. He seized the vessel, saying that he had a *lien* on it for his wages. This could not be disputed. It was stated that the affidavit was insufficient, but this was a *saisie conservatoire*. It was a process under the common law, and no affidavit was necessary.

Motion rejected.

D. Girouard, for plaintiff.
Torrance & Morris, for defendant.
(J. L. M.)

MONTREAL, 31st OCTOBER, 1864.

Coram BERTHELOT, J.

No. 4429.

Dubeault vs. *Robertson*.

HELD:—1st. The captain of a vessel has no *lien* upon the same for his wages.
2nd. A sailor, or seaman, has by the laws in force in Lower Canada a *lien* upon the vessel on which he serves, for his wages, under a recent statute.
3rd. A seaman cannot attach a vessel before judgment for his wages without making the affidavit required in all cases of *saisie arrêt* before judgment, by cap. lxxxiii., secs. 46 or 175 of Consolidated Statutes of Lower Canada.

In this cause a writ of *saisie arrêt* before judgment was issued at the instance of the captain of a barge for his wages, on a petition to a judge, supported by the affidavit recited in the foregoing report.

In his declaration, the plaintiff also set up that he had a *lien* on the vessel for his wages.

The defendant fyled an *exception à la forme* by which he prayed that the writ of *saisie arrêt* be quashed owing to manifest informalities in the affidavit. He also denied the captain's *lien*. The plaintiff replied that the affidavit was sufficient and, in fact, superfluous, seeing that the captain had a *lien* on the vessel for his wages; such *lien* being declared by the common law of France

The attachment was in the nature of a *saisie conservatoire*, and no affidavit was necessary.

Girouard, for plaintiff, submitted the following questions and memoranda of authorities:

1° Le maître du navire a-t-il un *lien* ou privilège sur le navire pour ses gages;

2° A défaut de paiement le navire est-il sujet à la saisie conservatoire?

Sur la première question, il faut avouer que les lois de tous les pays ne sont pas uniformes. En Angleterre, on admet bien le privilège quant aux matelots, mais quant au capitaine ou maître du navire, on le lui nie; car dit-on, il a contracté avec le propriétaire, et il a suivi sa bonne foi et sa garantie personnelle.

Aux Etats-Unis, la question n'est pas encore réglée. On accorde bien le privilège aux matelots, au capitaine pour ses avances et dépenses de voyage; mais pour ses gages, la question est encore ouverte, et il y a des décisions dans les deux sens.

On peut référer à *Kent's Commentaries*, vol. 3, pages 165—167, *Abbott on shipping* pages 183—185, à la note, où la doctrine anglaise et américaine à la fois est développée. En France, sous l'ancien et le nouveau droit, le droit de gage pour les loyers des matelots et du maître n'a jamais été mis en question. Là, point de distinction entre le maître et les matelots; tous sont tenus de sauver le navire et la cargaison pour gagner leurs salaires et tous ont un droit réel, un privilège premier sur le navire, ses agrès, la cargaison et sur tout ce qui en reste après le naufrage même. Valin, dans son *Commentaire* sur l'ordonnance de la Marine, pages 400 et 401, art. 8, livre 3, tit. 4—*Des Loyers des matelots*—l'enseigne en termes exprès; et il est à remarquer que sur cette question, Valin ne cite pas l'ordonnance, mais pose une règle de droit commun de la France, qui vaut règle générale, que les industriels et tous les mercenaires aient privilège sur le chose qu'ils travaillent, ou à l'occasion de laquelle ils donnent leurs services.

"Les conditions du maître et des gens de l'équipage d'un vaisseau," dit Valin est telle que le sort des loyers dépend de la conservation du bâtiment et du fret des marchandises dont il est chargé.

"Ce fret, avec le corps et la quille du navire, ses agrès, apparaux et ustensils, voilà leur gage, et ils n'ont aucune autre assurance pour le paiement de leurs loyers.

"Rien n'est mieux établi, la justice n'y est du tout point blessée, et quand "il en serait autrement, la politique et l'intérêt de la navigation exigeraient "nécessairement que cette loi fut maintenue dans toute sa vigueur." C'était aussi la disposition de l'ordonnance française de 1415, art. 8, 9 et 10, qui permet aux mariniers de saisir même la cargaison en cas de défaut de paiement.—*Cleirac Coutume de la Mer, p.* 351, 503. Cet article est ainsi conçu: "Le bateau est obligé à la marchandise, et la marchandise au bateau, c'est-à-dire, si le marchand ne paie pas le fret, s'il manque au terme et cause du retardement, le *patron ou les mariniers sont privilégiés de faire saisir les marchandises qu'ils ont conduites et vendre jusqu'à concurrence de leur dû.*

2° Maintenant le navire peut-il être saisi pour sûreté du paiement des loyers par saisie conservatoire? Il est impossible de répondre à cette question dans la négative. De droit commun en effet, celui qui a un droit doit avoir une action,

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et cette action, c'est la saisie-conservatoire, par laquelle la cour conserve au créancier privilégié le privilège qu'on menace de lui ravir. Cette saisie ne requiert pas l'affidavit requis par le statut; car ce n'est pas le statut qui l'a créée, mais l'ancien droit français qui n'admet pas d'affidavit. Dans le cas de gage, par l'ancien droit français, il n'était pas même nécessaire d'avoir l'ordre du juge: "*Pour faire une saisie et arrêt valable,*" dit Ferrière, vol. 2, page 1259, no. 2, sur l'art 178 de la Coutume, "*ceux qui ont privilège par la Coutume, la peuvent faire sans commandement, ni permission du juge.*"

Le statut canadien n'a pas plus abrogé la saisie-conservatoire du navigateur sur le navire, ou du voiturier sur la cargaison, qu'il n'a abrogé la saisie-conservatoire du vendeur. Ni l'une ni l'autre n'ont été spécialement réservées mais toutes les saisies-conservatoires, et elles peuvent exister, comme le dit Ferrière, chaque fois qu'il y a privilège sur un meuble à conserver, sont également conservées, suivant cette maxime applicable à l'interprétation des lois statutaires qu'un statut n'est pas censé abroger le droit commun à moins de termes formels ou d'incompatibilité. Mais ici, il n'y a pas abrogation ni incompatibilité; et il faut, de plus, bien observer que l'affidavit requis par le statut est pour la saisie-arrêt contre tous les biens et effets du débiteur accusé d'intentions frauduleuses, et non contre un meuble en particulier et pour cause de privilège. Le statut n'a rien statué sur ce dernier cas, et en conséquence, nous restons régis par le droit commun: tout ce qu'il a fait, c'est qu'au lieu du simple commandement du juge que demandait le droit commun dans le cas de saisie-arrêt basée non sur un privilège, mais sur le recel frauduleux, il a requis en outre le serment du demandeur. Des saisies-conservatoires comme celle du demandeur ont été prises il y a trois ou quatre ans contre les navires, May Flower, Banshee, St. Lawrence Avon, Annuity, etc., C. C., Montréal. D'après les observations de la cour lors de l'argument, le demandeur a cru comprendre qu'elle ne lui niait pas son privilège, mais le droit de saisir autrement que par le statut. Or, le demandeur soutient humblement que chaque fois qu'il y a privilège et droit de retention, il y a lieu à la saisie-conservatoire si on cherche à enlever la possession des biens sujets au privilège. Cleirac, *Coutume de la Mer*, pages 351, 352, dit que le capitaine ou voiturier peut exercer son privilège sur la cargaison pour le fret par la saisie-conservatoire, de même que les charpentiers, calefacteurs et autres ouvriers qui ont travaillé au navire et ceux qui ont fourni des matériaux pour radoubler le vaisseau. Le vendeur aux termes des art. 176 et 177 de la coutume de Paris a aussi le droit de saisie-conservatoire, quoique non réservée par le statut. Le 10 septembre 1860, la Cour de Circuit maintint une saisie-conservatoire "for necessary supplies" à l'équipage Mullins v. McRae et al. Plusieurs saisies-conservatoires contre les navires May Flower, Annuity, Avon, St. Lawrence, ont été accordées par les juges pour les gages des matelots. Quinze saisies furent aussi autorisées le 16 juillet 1860, contre Maxwell pour l'équipage.—Voir l'art. 100, tit. 8, de la Coutume de Paris.

Enfin, cette question a été même décidée dans cette cause en faveur du demandeur par son Honneur M. le Juge Monk, sur une motion du défendeur, et cette décision doit servir aux parties non seulement comme *précédent*, mais encore comme *chose jugée*.

Morris, for defendant, referred to the 83rd chapter of the Consolidated Statutes of Lower Canada, which disclosed the formalities necessary in seizures before judgment in all cases except two, specially excepted. These formalities had not been complied with in the present case, and the seizure ought to be quashed. It had also already been decided that a captain has no *lien* for wages in the case of Jasmin vs. Lafantasie, 7 L. C. Jurist, p. 119.

BERTHELOT, J., in rendering judgment said, in effect, that the principles involved were most important, and of great interest both to the members of the profession and to the community.

The plaintiff was the captain of a barge, which he had seized for his wages. The affidavit on which this seizure issued was totally insufficient according to the terms of the 83rd chapter of the Consolidated Statutes of Lower Canada. But the plaintiff contended that by the common law of France he had a *lien* on the vessel, and that under the same law he could exercise that *lien* by attachment before judgment without affidavit, such attachment being in the nature of a *saisie conservatoire*. The defendant contended that the captain had no *lien*, or, if he had, in any case it was a bare privilege, and should be preserved and exercised in a legal manner, viz., by attachment issued on the affidavit prescribed by the statute. The Court was aware that the points in contest had already come up before another judge, on a motion to quash, and that motion had been rejected. It differed, however, from the opinion of the honorable judge who gave that decision, and believed that no *lien* existed in favor of the captain. Nor was it alone in taking this view. A similar decision had been given in the case of Jasmin vs. Lafantasie, 7 L. C. Jurist, p. 19, cited by the defendant's counsel. The same opinion was held by several of the other judges, and since a period of over thirty years cases had been decided on the same principle. The laws in force in Lower Canada give to the sailor on board of a vessel a *lien* for his wages, and the statute above cited indicates the mode of procedure to make that right available before judgment. In regard to attachments before judgment the statute already referred to is plain; no attachment before judgment can issue without the necessary affidavit, except in cases of *dernier équipeur* and *saisie gagerie*; this was the absolute rule; the exceptions marked the rule. A decision in 1825 before the Court of King's Bench had been shown to the Court by His Honor Mr. Justice Badgley, the reasoning of which is applicable to the present case.

The defendant's *exception à la forme* must be maintained, and the attachment quashed with costs.

D. Girouard, for plaintiff.

Torrance & Morris, for defendant.

(J. L. M.)

The following is the case referred to by the Court:

COURT OF KING'S BENCH.

Reid vs. *Porteous*. October Term, 1825.

The plaintiff in this cause, the master of a ship, had, to secure payment of freight, sued out a writ of *saisie arret* or attachment, to attach, twelve days after their delivery and

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while they still remained in the hands of the consignee, certain goods which he had conveyed from Great Britain to Montreal.

The defendant moved on the fifteenth day of October instant, for a rule to shew cause why the process of attachment issued in the same cause should not be quashed—

And the Solicitor-General and Buchanan, in support of the rule, contended that the master had, by delivering the goods to the consignee, lost his lien for freight.

That by the laws of the province, the master had no right to follow the goods and attach them after he had parted with them..... *Abbott on Shipping*, p. 246.

That granting the right of lien of the master not to have been lost by the delivery yet he could not, by the laws of the province enforce that right by process of attachment.

The Provincial Ordinance of the 27th Geo. III. had prohibited the issuing of attachment against the debtor's effects, unless upon affidavit that the defendant absconded, or was about to secrete his effects, or did suddenly intend to depart the province, and one exception only, that of the case of the *dernier équipeur*, proved the generality of the enactment.

The affidavit filed in this cause contained no proof of the facts required by the ordinance to warrant the attachment.

Beaubien and Badgley, against the rule, relied upon an ordinance of the king of France, of 1681, which gave to the master of the vessel the right of attaching for the surety of freight the goods conveyed, during fifteen days after delivery, if the goods remained in the possession of the consignee. They contended that this French Ordinance had, with other maritime laws, been introduced into Canada, by an *arrêt de réglement*, of 1717, made for the French Colonies, establishing in those possessions Courts of Admiralty, to be governed in their decisions by the Ordinance of 1681, and other parts of the Maritime Law of France. That this was the law of the province, under which the plaintiff had adopted the proceedings under discussion. The law of England could not be cited, it not being any part of the law of the country. Besides, in that country there was a class of men called wharfingers to whom the master might deliver the goods to be kept till payment of the freight. Here we had no wharfingers, and such a law could not be applied to the state of commerce in that country. It was said in reply, that the ordinance of 1681 had never been in force in this country, it having never been enregistered in the Superior Council of Quebec, and at common law in all cases the duration of special liens depends wholly upon the continuation of possession. It required a positive enactment to introduce the *droit de suite* to secure the rights of landlords. But the *arrêt de réglement*, if it could be regarded as of sufficient authority to dispense with the formality of enregistering that ordinance, went to erect courts of admiralty in the colonies whose decisions should be conformable to the ordinance of 1681, and the French maritime law. Those courts of admiralty no longer existed, nor could the jurisprudence which they administered constitute the rules of guidance for any other judicature. It might also be said that this is a right founded on commercial usages, a portion of law liable to occasional fluctuation; usages of so much power that, even in France, they availed to subvert Royal ordinances. If so, they must here look to the usages which obtain in that country, with which we are constantly and solely in commercial relation, and there we find the rules to be directly against the privilege to which the plaintiff has set up pretensions. No argument against that portion of the English law could be derived from the circumstance of there being no persons known by the name of wharfingers in this country. Other depositaries might be found in whose hands the masters of ships might place their goods to preserve their lien for freight.

The defendant in this stage of the proceedings, to produce the quashing of the writ, relied mainly upon the Provincial Ordinance of the 27th Geo. III.

On the 20th the Court gave judgment, quashing the writ and releasing the goods from seizure. Reid, Chief Justice, in delivering the opinion of the Court, said—That they thought the ordinance of 1681 in force in this country, and although it had not been enregistered in the Superior Council, the king of France, as sole legislator, having the

power so to do, had, by the *arret de règlement*, of 1717, introduced that body of law into this country. But though the right of lien to the extent sanctioned by that ordinance did exist in the plaintiff, yet the law, as it now stands in this country, gave him no remedy to render that right available. Dubeau vs. Robertson.

Probably the legislature which made the ordinance of the 27th Geo. III. had not reflected upon the valuable remedies of which the generality of their enactment deprived the subject, but they had, in general and positive terms, prohibited the issuing of attachments, for the recovery of moneys, without the proof of circumstances, which the affidavit in this case did not disclose. It is true the Courts in this country had, without such proof, since the passing of that ordinance, granted process of attachment in cases of *revendication*, but they had done so, upon consideration, that the *saisie revendication* being used to obtain the restitution of property, not pecuniary, was clearly not within the purview of the ordinance.

REPORTER'S NOTE.—Seamen have a *lien* on the vessel for their wages, Dowdeswell's Merchant Shipping Act of 1854 and 1855, p. 83, [illegible]; and *Vide* Interpretation of Clauses, in same book, p. 238, "Seamen shall [illegible] person (except masters)," &c. Mitchell vs. Cousineau *et al.*, 7 L. C. Jurist, [illegible] M.

POUR LE COMTÉ DE HU[illegible]ON.

Coram LORANGER, J.

No. 1218.

McCoy vs. *Dinneen.*

JUGE :—"Qu'un billet promissoire fait et daté à Malone, N. Y., entre citoyens Américains, mais payable au porteur généralement, et passé depuis entre les mains d'un Canadien, doit être payé en monnaie ayant cours en ce pays."

Cette action était fondée sur un billet fait et daté à Malone, N. Y., le 27 février 1863 pour la somme promissoire de $86.00 par J. Dinneen le défendeur, en faveur de Catherine Dinneen, ou au porteur. Le faiseur et le créancier étaient tous deux alors domiciliés à Malone, N. Y., J. McCoy, demandeur, réside en Canada.

Le défendeur plaida, qu'avant l'institution de l'action; il avait fait des offres au demandeur qui était alors porteur du billet, en monnaie ayant cours dans l'Etat de New York, où le billet avait été fait et souscrit, savoir; en *Green Backs* et qu'il était prêt et réitérait de fait ses offres.

A l'audition M. Kerr pour le demandeur soutenait que les offres telles que faites, n'étaient pas légales, que le *papier-monnaie* connu sous le nom de *Green Backs*, ne pouvait être offert légalement en paiement du billet, dans ce pays, parce que notre loi ne les reconnaissait pas. Qu'à tout événement, le défendeur devait offrir au demandeur en paiement du dit billet, la monnaie ayant cours en ce pays, pour le montant du billet, moins l'escompte sur les dits *Green Backs*.

M. Branchaud pour le défendeur, établissait en principe, que pour ce qui concerne l'essence et la nature d'un contrat d'un billet promissoire ou lettre de change, la loi du lieu où ce contrat, billet etc., était passé, devait être la seule qui devait guider la Cour dans sa décision. Que le paiement d'un billet doit être fait en monnaie ayant cours dans le lieu où il a été consenti, quoiqu'il fut payable généralement, et qu'il fut transporté dans un pays où le cours est différent en vertu de cette loi: *lex loci contractus*. Qu'en conséquence le billet qui faisait la base de cette action, consenti et daté à Malone, dans l'Etat de New York, (la législature de l'Etat de New York ayant décrété que des offres de paiement

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faites en papier-monnaie, connu sous le nom de *Green Backs* sont légales et valables dans le dit Etat pour toutes dettes civiles, et cette loi ayant été admise par le demandeur,) tombait sous la puissance de la loi du lieu du contrat, et que partant les offres du défendeur étaient bonnes et valables. Que la chose aurait été différente si le billet eût été fait payable à un lieu indiqué, alors la loi *loci solutionis* aurait prévalu et aurait déterminé le genre de monnaie que le défendeur aurait dû offrir au demandeur, mais comme il n'y avait aucun lieu d'indiquer dans le billet où il devait être payé et que le dit billet était payable généralement la loi *loci contractus* devait prévaloir.

La Cour motiva son jugement comme suit. Le billet est fait et daté à Malone, dans l'Etat de New York par le défendeur, il est vrai, mais aussi il ne faut pas perdre de vue qu'il est payable au porteur. Le défendeur en consentant de payer un tel billet, s'obligerait de le payer en monnaie ayant cours dans le lieu où résiderait le porteur et la loi du lieu du contrat ne peut s'appliquer en ce cas, d'autant plus que notre loi ne reconnait nullement le papier-monnaie en usage dans l'Etat de New York. Le demandeur doit donc avoir jugement pour le montant de son billet, suivant le cours de cette Province et les offres du défendeur devront être déclarées insuffisantes.

Kerr et Nagle, pour le demandeur.

Robertson et Branchaud, pour le défendeur.

(A.B.)

MONTREAL, 30TH NOVEMBER, 1864.

Coram MONK, J.

No. 5210.

Daly vs. *Graham*.

HELD :—The maker of a *bon* made in the United States of America, payable on demand, if sued in Canada will be condemned to pay the full amount of the *bon* in Canadian currency, and a tender of the value of the *bon* at the date of demand in gold, less the discount on American bills, will be declared insufficient.

The plaintiff brought his action on the following note or bon :

SAINT PAUL, July 13th, 1859.

Due Thos. Daly on demand forty dollars, value received.

(Signed,)

D. GRAHAM.

The defendant pleaded that the amount on the face of the note could not be demanded in Canadian currency, and tendered payment both in greenbacks and in their equivalent in gold at the current rate of exchange when the demand for payment was made. In support of his tender and plea, defendant contended that the contract under the *bon* was made in the United States, and the law of the place must govern the contract. The agreement was to pay in the currency of the country where the instrument was made, and in order to succeed in his present demand, plaintiff must show something by which the agreement had been altered or modified. The fact of the defendant removing from the country where the contract was made could have no effect upon it. The plaintiff could

not of himself alter the contract and oblige the defendant to pay in the currency of any other country than that in which he stipulated to pay.

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MONK, J.—An instrument like this *bon*, payable on demand without any place of payment being specified, and floating about from one part of the continent to the other, must be paid in the currency of the place where the action is brought. The tender is, therefore, insufficient, and judgment will go for the amount on the face of the note in Canadian currency. Judgment for plaintiff.

John Monk, for plaintiff.

Torrance & Morris, for defendant.

(J. L. M.)

SUPERIOR COURT, 1864.

MONTREAL, 30TH APRIL, 1864.

Coram BERTHELOT, J.

No. 2420.

Gole vs. *Cockburn.*

HELD:—That an agreement to release the maker of a negotiable promissory note, made after the signing and before the maturing of the note, may be proved by parol evidence.

This was an action against the defendant as the maker of a promissory note for $400, dated the 18th day of January, 1861, payable three months after the date thereof to the order of M. A. Clifford Dodds, who endorsed and delivered it to the plaintiff.

The defendant pleaded, "that on the 18th day of March, 1861, at Montreal, the defendant made his certain promissory note in writing, bearing date at Montreal aforesaid, the day and year aforesaid, and thereby three months after the date thereof promised to pay to the order of M. A. Clifford Dodds in the said declaration mentioned, at the office of The Bank of British North America, three hundred and ninety-seven $\frac{45}{100}$ dollars (to wit, and meaning thereby, three hundred and ninety-seven dollars and forty-five cents) for value received.

That the said note was so made and signed as a renewal *pro tanto* of the note in the said declaration referred to and filed in this cause, and was delivered by defendant to the said M. A. Clifford Dodds, on the express understanding that it was to be applied in that way.

That after receiving said note from defendant, and before the same was discounted, the said M. A. Clifford Dodds obtained the assent of the plaintiff, who was then in her employ, to make use of said note otherwise than by way of renewal of the said note presently sued on, to wit for her own use and profit, on the understanding and agreement then and there entered into between them that the said defendant should be forever released and discharged on the said note so now presently sued on, and that the said plaintiff should only look to her, the said M. A. Clifford Dodds for payment thereof.

That the said note for $397.45, which has since been paid by defendant, and is now herewith filed, was so granted by him upon the faith of the same being applied as such part renewal as aforesaid; and that the application thereof in a different manner as aforesaid, which had the effect of making the defendant apparently liable on two notes instead of one, was made by the said M. A. Clif-

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ford Dodds as aforesaid, with the privity and consent of the plaintiff, and on the express understanding aforesaid, that he, the said defendant, was to be, and be was, in effect, thereby forever released and discharged from all liability to pay the note presently sued on."

At *Enquête* the defendant proved, by parol evidence, the essential allegations of his plea with reference to the agreement to release, under reserve of objection by the plaintiff that such an agreement could not be proved by verbal testimony.

At the argument, *Kerr*, for the plaintiff, relied on the inadmissibility of verbal evidence to defeat the written contract set up in the declaration, contending that a release such as pleaded could only be legally made under seal, and cited Story on Prom. Notes, § 408.

Bethune, for defendant, argued that the agreement to release having been made after the written contract was executed, and not previously or contemporaneously, was susceptible of proof by oral testimony, and cited Goss vs. Nugent, 5 B. and Ad. p. 58.

Per Curiam:—"The Court, * * * considering that the defendant has fully proved and established, by legal evidence, the material allegations of his plea, and that before the note recited in the plaintiff's declaration had become due, he the said plaintiff had been willing to release and discharge the said defendant of all responsibility as to the payment of the said note of the 18th January, 1861, reserving only his recourse against the payee of the said note, that therefore the plaintiff's action is unfounded, doth dismiss said action with costs."

Action dismissed.

Kerr & Nagle, for plaintiff.
Strachan Bethune, for defendant.
(S. B.)

MONTREAL, 30 AVRIL 1864.

Coram MONK, A. J.

No. 607.

Dessaulles vs. *Taché*.

PROCES PAR JURY.—FRAIS.

JUGÉ:—1o. Que le montant du verdict d'un jury, même lorsqu'il est pour plus de 40 chelins sterling règle la classe des frais d'action, si le jugement de la Cour, ratifiant ce verdict, n'a pas statué sur les frais.

2. Que dans ce cas, quoique les frais ordinaires d'action soient réductibles au tarif de la Cour de Circuit, les déboursés nécessités par le procès par jury seront accordés au demandeur.

Cette action avait été portée devant la Cour Supérieure, à St. Hyacinthe, en recouvrement de £500 de dommages pour libelle. Elle y avait été instruite devant un jury spécial qui avait accordé £25 de dommages. Le jugement de la Cour, ratifiant le verdict, concluait comme suit: "En conséquence permet et "adjuge au demandeur de recouvrer la somme la $100, étant le montant des "dommages accordés par le dit verdict au demandeur, etc., etc., et les dépens "dont distraction, etc."

Le Protonotaire taxa les frais suivant la classe du montant demandé dans l'action et non suivant celui du verdict.

De là motion du défendeur, en vertu du ch. 83 des S. R. du B.-C., sec. 151, pour faire reviser cette taxe et demandant " que les frais soient rovisés et " réduits et taxés au montant de frais dus sur une action de la classe déterminée " par le montant pour lequel il y a jugement contre le défendeur, savoir, réduits " aux frais d'une cause de £25."

Le seul juge résidant dans le district de St. Hyacinthe, s'étant recusé, vu que, lorsqu'il pratiquait au barreau, il occupait pour l'une des parties en cette même cause, le dossier fut envoyé à Montréal, conformément aux dispositions du chap. 78 des S. R. du B. C., sec. 20, pour y être procédé sur cette demande de révision.

OUIMET, pour la motion du défendeur, s'appuyait sur le Ch. 82, Sec. 2 des S. R. du B. C., qui dit : " Mais si le montant obtenu est tel qu'il aurait pu être " recouvré dans une cour inférieure, il ne sera alloué au demandeur que les " mêmes frais qui lui auraient été alloués si la poursuite eût été intentée dans " telle cour inférieure, à moins que la cour dans laquelle le procès est intenté " n'en ordonne autrement."

Si l'on prétend, ajoutait-il que cette disposition ne s'applique pas au procès par jury, on trouve au no. 18 du tarif de la Cour Supérieure, que les juges qui ont rédigé ce tariff, avec les pouvoirs nécessaires pour légiférer sur le sujet, ont interprété la loi comme s'appliquant à ces causes-là comme aux autres. " In " actions of damages for personal wrongs (excepting in actions in which the " Court or Jury shall find the damages to be under forty shillings sterling) the " costs to be taxed as of the class to be determined by the final jugement."

DOUTRE. J.—C. R., contre la motion. Si cette question s'est déjà présentée dans ce pays, on n'en trouve pas de trace dans les rapports que nous possédons des décisions de nos cours. Des questions qui se rapprochent un peu de celle-ci ont été agitées dans les causes rapportées aux Décisions des Tribunaux, pour le Bas-Canada, Tom. 9, p. 268, *Ouimet et Papin*; Tom. 10, p. 478, *Kerr et Gugy*. Lower Canada Jurist, Tom. 1, p. 191, *Leduc et Busseau*. La substance de ces décisions ne nous conduit qu'à ceci : C'est que les cours interprètent librement les jugements au regard des frais, quoiqu'il faille avouer que dans la cause de *Ouimet et Papin*, la Cour d'Appel ait cru devoir interpréter la question de frais autrement que la Cour Inférieure, et faire de cette différence d'interprétation l'occasion d'une infirmation de jugement.

Si la cour ou le juge, qui instruit la révision des frais, cherche l'intention du juge qui a adjugé en première instance sur les frais, dans les termes du jugement, le caractère de la procédure doit, en cette cause, suffisamment indiquer l'intention du juge qui a accordé les frais.

La loi ayant donné aux plaideurs le droit de soumettre leurs litiges à un jury, en certains cas, elle a dû vouloir les moyens de parvenir à cette fin, avec les seules restrictions qu'elle y a mises elle-même. L'Acte d'Interprétation (S. R. du C., Ch. 5, Sec. 6) dit : " *Vingtièmement*, et s'il est prescrit qu'une " chose sera faite par ou devant un magistrat ou juge de paix, ou tout autre " fonctionnaire ou officier public, alors la dite chose sera faite par ou devant " celui dont la juridiction ou les pouvoirs s'étendent au lieu où la dite chose " doit être faite, et chaque fois qu'il est donné pouvoir à une personne, officier ou " fonctionnaire, de faire faire aucun acte ou chose, tous ces pouvoirs sont censés " donnés avec l'étendue nécessaire pour mettre la dite personne, officier ou fonc-

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"tionnaire en état de faire ou faire faire le dit acte ou chose." L'alinéa *Vingt-huitièmement* de la même loi dit qu'il sera donné à toute disposition ou prescription de la loi une interprétation large et libérale et qui sera la plus propre à assurer la réalisation de l'objet de l'acte, et de ses dispositions et prescriptions, selon leur vrai sens, intention et esprit.

Partant de là nous sommes légalement obligés de supposer qu'en nous donnant le procès par jury, en certaines matières civiles, le législateur savait qu'il nous donnait une institution anglaise, dont il connaissait le caractère et qu'il nous la donnait avec l'étendue nécessaire pour mettre le plaideur en état de faire cette chose, d'en assurer la réalisation, selon son vrai sens, intention et esprit.

La loi invoquée dit que si le montant obtenu est tel qu'il aurait pu être recouvré dans une cour inférieure, les frais devront être ceux de cette dernière cour, à moins que la cour n'en décide autrement. Eh bien! Aurait-on pu recouvrer $100 devant un jury en Cour de Circuit? Non.

Nous avons reçu l'institution anglaise du jury, et c'est dans la jurisprudence anglaise qu'il faut chercher les principes qui doivent gouverner cette matière. Jusqu'au Statut de Gloucester (13 Edw. 1, ch. 1) on n'accordait aucuns frais d'action ainsi que l'atteste HULLOCK, *Law of Costs*, Tome 1, p. 19, qui signale en même temps le changement opéré par ce statut:

The Statute of Gloucester gave costs in all cases, where (according to its most rigid construction) damages were recoverable either before or by that statute. The amount of the damages to be recovered was totally immaterial, for a recovery of any sort of damages, however small, satisfies the words of the act; but as this general right to costs was found to be productive of several inconveniences, the legislature at length deemed it expedient, in certain instances, to abridge it" Ces inconvénients ont donné lieu au statut 43 *Elizabeth*, ch. 6, (étendu aux actions pour libelles par la 21ème Jacques 1, ch. 16,) dont la section 2, dit: "if upon any action personal, &c., &c., the debt or damages to be recovered, &c., shall not amount to the sum of 40 shillings or above, &c., &c., the judge shall not award to the plaintiff any greater or more costs than the sum or damages so recovered." Hors le cas où le jugement ou verdict est pour moins de 40 chelins, les cours anglaises donnent tous les frais encourus dans l'action.

MONK J. A. La cour est d'opinion que les prétentions respectives des parties sont justes dans certaines limites et exagérées sous certains rapports. D'un côté la loi et le tarif imposent à la cour la nécessité de prendre en considération le montant du verdict pour déterminer la classe des frais; d'un autre côté, le procès par jury étant incompatible avec la classe indiquée par le verdict et le demandeur ayant encouru des frais indispensables pour soumettre sa cause à l'arbitrage d'un jury, la cour ne peut être guidée uniquement par le montant du verdict.

La cour croit donc légal et équitable de prendre un moyen terme et d'ordonner que les frais ordinaires d'action seront taxés comme dans une action pour £25; mais que tous les frais nécessités par l'assignation du jury, sa rémunération, &c., &c. devront entrer en taxe.

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REVENDICATION:—*Vide* LESSOR AND LESSEE.

" :—*Vide* SAISIE CONSERVATOIRE.

SAISIE ARRÊT, *before Judgment*:—The truth of the facts sworn to in the affidavit may be attacked by *Exception à la forme*. (Leslie et al., appellants, and Molsons Bank, respondent, Q. B.)..... 1

" :—*Vide* FRAUD.

" *before Judgment*:—The truth of the facts sworn to in the affidavit can only be attacked by *Exception à la forme*, and so much of a plea to the merits as seeks to put in issue the truth of such facts will be rejected on demurrer. (Chapman vs. Nimmo, S. C.)..... 42

" *before Judgment*, can be attacked by a plea to the merits. (Rodden vs. Ollier, & Baulne et al., T. S., C. C.)..... 134

" :—*Vide* SEPARATION DE BIENS.

" *before Judgment*:—The truth of the facts sworn to in the affidavit may be attacked by *Exception à la forme*. (Giroux vs. Garceau, & O'Brien, T. S., S. C.)..... 164

" :—A declaration of a *Tiers Saisi* made before the return day of the writ, must be accompanied by a bailiff's certificate, showing that notice has been given to the plaintiff or his attorney, at least twenty-four hours previously, of the intention of the *Tiers Saisi* to make such declaration before the return of the writ, and that a declaration thus made, without such certificate of previous notice, will be rejected on motion. (Versailles vs. Bailey, & Kershaw et al., T. S., S. C.)..... 315

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SEAMAN'S WAGES:—A captain of a barge has *not* a *lien* upon it for his wages, and no attachment for wages can issue before judgment, unless on affidavit such as required by Ch. 63 of the Cons. Stat. of L. C. (Do.)..... 334

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