The Legal News.

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CONTRACTS IN FRAUD OF CREDITORS.

The judgment of the Court of Queen's Bench in the case of *Kane & Racine* clears up a question as to which considerable uncertainty and confusion have existed. Misled, probably, by some of the older decisions in appeal, in which the opinions of the Judges were divided, the Superior Court, in several cases in which a deed between his debtor and a third party has been opposed to a creditor, has referred the latter to the revocatory action to set aside the transaction of his debtor, and has not allowed him to allege the fraud by a pleading in the case in which the alleged fraudulent deed has been produced. In the case of *Kane & Racine* this was done by the Court below, although the sale from the debtor to the third party was only evidenced by a private writing between them. That the members of the profession were thrown into some perplexity by the decisions on this subject, may be inferred from the fact that a bill was introduced, during the last session at Quebec, by Mr. Racicot, for the purpose of enabling deeds in fraud of creditors to be attacked in contesting the declarations of garnishees, or in contesting oppositions made by third parties, without the necessity of having recourse to a revocatory action. (See 2 Legal News, p. 258.) That bill was dropped, and it is well perhaps that it was not passed, since the judgment of the Court of Queen's Bench and the observations of the learned Chief Justice not only show that the question is already settled by the jurisprudence of the Province, but the rule is laid down in a clearer and more satisfactory manner than was done by the bill in question. The Court holds that where the creditor who is complaining of a deed passed in fraud of his rights has not been a party to the deed, he may invoke its nullity in any proceeding in which the deed is opposed to him. But where the creditor has been himself a party, he must bring the action *révocatoire* in order to have the deed annulled, before he can exercise any right which he abandoned or ceded by the deed. This is a clear and intelligible rule, and seems much more reasonable than that which would suffer the creditor to be frustrated in the prosecution of his right, by the production of a private writing of uncertain date, and of the existence of which he may have been ignorant until it was disclosed to him in the contestation.

INSCRIPTION IN REVIEW.

The case of the *Montreal & Ottawa Forwarding Co.* v. *Dickson*, of which a note appears in this issue, involves a question of procedure of considerable importance, which is worthy of special attention. It was a case where the defendant pleaded an exception to the form which was dismissed, and he filed an exception to the judgment. Subsequently, on the merits, judgment was rendered dismissing the action without costs, and the defendant, being dissatisfied with the adjudication as to costs, inscribed the case in Review. At the hearing in Review he was desirous of bringing up the interlocutory judgment dismissing the exception to the form, but the Court held that he had no right to do this, because the inscription in Review was general, and did not mention specially that the revision of the interlocutory judgment was also sought. This is extremely important, because under 37 Vict. c. 6 (Que.), the judgment of the Court of Review is final where it confirms the judgment rendered in the first instance, and thus by the inadvertence of the attorney, or even by a merely clerical error in the inscription, the suitor may be deprived of the right of getting an interlocutory judgment revised. It is to be remarked that no review could have been had on the interlocutory judgment at the time it was rendered, and therefore when the case was inscribed on the final judgment, there was some ground for supposing that an inscription generally would be sufficient to cover all the interlocutory orders or judgments which had been rendered previous to the final decision. It might be well, perhaps, in laying down a rule of the stringent nature here referred to, to permit the amendment of the inscription where considered necessary.

MARRIAGE WITH DECEASED WIFE'S SISTER.

Mr. Girouard, M.P. for Jacques Cartier, has introduced a measure in the House of Commons to legalize marriage with the sister of a

deceased wife. The bill, we notice, has been withdrawn in order that its terms may be altered. As first introduced it contains only two sections, which are as follows:—

1. "Marriage is permitted between a man and the sister of his deceased wife or the widow of his deceased brother, provided there be no impediment by reason of affinity between them according to the rules and customs of the church, congregation, priest, minister or officer celebrating such marriage.

2. "All such marriages thus contracted in the past are hereby declared valid, cases (if any) pending in courts of justice alone excepted."

This measure has been long and strenuously advocated in England (where a society exists for promoting the desired change in the law), and it will be remembered that last Session, in the House of Lords, it received the support of both the Prince of Wales and the Duke of Edinburgh. (See 2 Legal News, p. 184.) The arguments urged against these marriages are well known, but we have never been able to consider them perfectly satisfactory.

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, February 3, 1880.

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

KANE (plff. contesting below), Appellant, and RACINE (*tiers saisi* below), Respondent.

Sale in fraud of creditors—Nullity may be invoked by creditor who was not a party thereto, by a pleading, on contestation of opposition or of declaration of garnishee, or on intervention, &c.—When all the parties to the fraudulent deed need not be summoned.

The appeal was from a judgment dismissing a contestation of a declaration made by a garnishee.

On the 13th November, 1877, Marie Louise Lesage (Mad. Fournier), a debtor of appellant, sold a piano and other articles, to the value of $428, to the respondent, in payment of a debt due by her to respondent.

The appellant being informed that Mad. Fournier was making away with her effects in fraud of her creditors, caused a *saisie-arrêt* before judgment to be issued on the 16th November.

The respondent, summoned as *tiers saisi*, declared that he owed the defendant nothing, and had nothing belonging to her in his possession. The appellant proceeded against the defendant and obtained judgment on the 4th April, 1878, for $226.16. He also contested the declaration of respondent, alleging that he had in his possession a piano which belonged to the defendant.

The respondent admitted by his answers that he had the piano, but alleged that he had bought it from defendant, and he produced a writing *sous seing privé*, by which the piano and certain other articles were sold to respondent by defendant in payment of what she owed him.

The appellant then asked that the sale of the piano be declared null, as having been made by defendant in fraud of her creditors' rights at a time when she was insolvent, as respondent was aware.

The evidence showed that defendant became an insolvent under the Act, about two months after the sale. She then had several thousand dollars of liabilities, and no assets, except some bad debts. It also appeared that at the time respondent bought the piano, the defendant was notoriously insolvent. The respondent admitted that for a month or two he had been endeavouring to collect his claim, and that, learning that the defendant had sold articles to other creditors in order to pay them, he had taken the piano and other effects in settlement of his claim, he giving for the effects their full value.

Sir A. A. DORION, C.J., said fraud was fully established, both by the notorious insolvency of the defendant and by the circumstances of the sale, which were sufficient to show that respondent knew, or had reason to know, that his debtor was insolvent and *en déconfiture*. The Court below did not decide the question of fraud. It dismissed the contestation of the appellant on the ground that he could not by an answer ask for the nullity of the sale *sous seing privé* made in fraud of his rights, that he should have resorted to an *action révocatoire*, and have called into the case all who were interested in contesting his demand.

Is it true that a creditor, against whom a contract made in fraud of his rights is set up, is obliged to bring a revocatory action to set it

aside, and that he cannot invoke the nullity of the *acte* by exception? For the affirmative the case of *Chaillé & Brunelle* is cited, 6 L.C.R. 489. In that case the plaintiff Chaillé had seized a boat. The defendant's brother claimed it by opposition in which he alleged that he had bought it and was in possession at the time of the seizure. The Superior Court set aside the seizure. In appeal, Chief Justice Lafontaine and Judge Aylwin were of opinion to reverse the judgment, and Justices Caron and Duval to confirm it. The Court being equally divided, the judgment was confirmed, and one of the *motifs* was that the plaintiff should have had recourse to the *action révocatoire*. The case of *Masson & McGowan*, Q. B. 19 Dec. 1870, might also have been cited. The Court of Appeal, by three to two, reversed the judgment of the Superior Court, (1 L.C.L.J. 63; 2 Ib. 37,) on the ground that the plaintiff should have proceeded by *action révocatoire*. There is also the case of *Lacroix & Moreau*, 15 L.C.R. 483, in which the Court was divided. There have been several decisions in the same sense in Louisiana. But no authorities are cited in the reports of the cases decided either here or in Louisiana, and it is impossible to discover on what grounds the judges based their opinions. Against these decisions may be cited the cases of *Cummings & Smith*, 10 L.C.R. 122; *McGinnis* v. *Cartier*, 1 L.C.L.J. 66; *Lepage & Stevenson*, 17 L.C.R. 209; *Hans & D'Orsennens*, Review, 1870; *Brown & Paxton*, Q.B. 1875; *Paré & Vachon*, Q.B. 1875; *Rickaby & Bell*, 2 Supreme C. Rep. 560; and *McCorkill & Knight*, Q.B. 1877, confirmed by the Supreme Court. In all these cases the nullity of the *acte* made in fraud of the creditors was invoked by contestation of opposition to annul or to withdraw, except in the case of *Paré & Vachon*, in which it was opposed by answer to a peremptory exception, and in *Bell & Rickaby*, by exception to a petition in intervention. The Court of Appeal has also decided in the same sense in the cases of *Leclaire & McFarlane*, 12 L.C.R. 374, *Lambert & Fortier*, Q.B. 1875, and *Boyer & Duperreault*, Q.B. 1876. In these cases, creditors opposed by contestation of declaration of garnishee, the nullity of *actes* passed in fraud of their rights, as was done in the present case.

There can be no doubt, therefore, that the established jurisprudence in this Province is opposed to the judgment of the Court below. This jurisprudence is based on the ground that deeds in fraud of creditors are foreign to them, and that usually they only become aware of their existence when they are invoked against them; and it is also based on the universally admitted principle of French law that a right which may be invoked by action, may always be invoked by exception. Here the respondent produced a sale *sous seing privé*. What action could the appellant bring to annul a sale of which he did not know the date, the conditions, and perhaps even the existence? Suppose the sale had been verbal, as it might have been, would it be possible for a creditor to proceed by direct action? The appellant had nothing to do with this sale so long as the respondent did not invoke it, and as soon as it was invoked, it was competent for the appellant to plead that the sale was in fraud of his rights, and to ask that it be annulled. See Dalloz, R.A., vo. Vente, pp. 847, 8, Note 2. Dalloz, R.P. 1832, 1, 135, and Sirey, 1827, 1, 53; 1861, 1, 452.

The other ground on which the contestation was dismissed by the Court below was because all the interested parties had not been summoned on the contestation. This as well as the preceding objection, doubtless arises from confusing the demand of a creditor to annul an *acte* in fraud of his rights with the action *en résolution* which one of the parties to a deed may bring to rescind it for error, deception or fraud. In the former case the creditor complains of a deed made by third parties to his prejudice, and to which he never assented. The debtor and third parties who have transacted with him have concurred in a fraud. They have committed with regard to the creditor a *quasi délit* which has prejudiced him, and they are jointly and severally bound to repair the fault. (3 Bedarride, de la fraude. Nos. 1433, 1434.) Now, actions on a joint and several obligation may be brought against any of the *obligés* that the creditor chooses. If, however, the reparation sought consists not in damages, but in the cancellation of a deed and the recovery of properties alienated, the person in possession must be made party to the contestation.

In the case of the action *en résolution*, he who has been party to the deed has given a consent from which he must be relieved before he can exercise any right contrary to the stipulations contained in it; and as contracts can only be

dissolved in the same way that they are made, and in the presence of all the parties, it is absolutely necessary that he who wishes to avail himself of a right which he ceded or abandoned by a deed should commence by summoning all those with whom he contracted, that is to say, all the parties to the deed. By paying attention to this distinction between the two demands, it is easy to see why the right of property in a thing alienated in fraud of creditors may be disputed with any fraudulent holder of the thing, without calling in all those who participated in the fraud, whilst in the other case, proceedings must be taken against those who were parties to the contract. Moreover, when in the course of a suit, the court perceives that a third party whose interests may be affected by the contestation, has not been brought into the case, it ought to order that he be brought in, and not dismiss the action. Here the contestation is between the creditor who complains of the fraudulent sale made to his debtor, and the purchaser who participated in the fraud. That is sufficient, and the contestation will be maintained.

Tessier, J., sent in a dissent, on the ground that Racine was in good faith.

The judgment is as follows :—

"Considering that the appellant has established by legal evidence that on and before the 13th of November 1877, the said appellant was a creditor of Marie Louise Lesage, defendant in the court below, for the sum of $226.16, for which sum he recovered judgment against the said Marie Louise Lesage on the 4th of April, 1878, with interest on the said sum from the 16th of November 1877, and costs of suit;

"And considering that on the said 13th of November 1877, the said Marie Louise Lesage, being then notoriously insolvent, and unable to pay her debts, sold to the respondent a certain rosewood piano manufactured by 'Miller,' in payment of an antecedent debt, to wit, in part payment of a sum of $428, which she then owed to the respondent;

"And considering that such sale was not made in the ordinary course of business, and that from the circumstances attending the sale, the respondent knew, or had reason to believe, that the said Marie Louise Lesage was then insolvent and unable to pay her debts;

"And considering that the sale so made is null and void as being in fraud of the other creditors of the said Marie Louise Lesage, and of the appellant in particular;

"And considering that it was competent for the said appellant to contest the validity of the said sale on a contestation of the declaration made by the respondent as *tiers saisi*, as was done in this cause, without proceeding by an *action révocatoire*;

"And considering further that in contesting a sale made by his debtor in fraud of his rights, and to which he was not a party, the appellant was not bound to summon in the cause all the parties to the sale, and it was sufficient for him to join issue with the party found in the actual possession of the goods and chattels or other property so fraudulently conveyed;

"And considering that there is error in the judgment rendered by the Superior Court sitting at Montreal on the 20th of May, 1878;

"This Court doth reverse the said judgment of the 20th of May, 1878, and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and declare the said sale of the 13th of November 1877, null and void, as having been made in fraud of the rights of the appellant, and doth order that within fifteen days from the service of a copy of this judgment, the respondent do deliver unto the sheriff in and for the district, or to any bailiff committed to receive the same, the said rosewood piano manufactured by "Miller," which the said Marie Louise Lesage has conveyed to the said respondent as aforesaid; the said piano to be sold and the proceeds paid and distributed in due course of law, unless within the said fifteen days the respondent do pay to the appellant the said sum of $226.16 with interest thereon from the 16th November, 1877, and the costs incurred on the said judgment rendered on the 4th of April 1878, in favor of the said appellant against the said Marie Louise Lesage; and in default of the said respondent delivering the said piano, or paying the said debt, interest and costs as aforesaid, within the said delay of fifteen days, the said respondent is hereby condemned to pay to the appellant the said sum of $226.16, with interest thereon from the 16th of November 1877, and costs as aforesaid, to be levied out of the goods and chattels and other property of the said respondent;

"And the Court doth further condemn the respondent to pay to the appellant at all events, in any of the aforesaid cases, the costs incurred in the contestation of the respondent's declaration as *tiers saisi* in this cause, as well in the Court below as on the present appeal. (The Hon. Mr. Justice Tessier dissenting.)

Doutre & Doutre for Appellant.

Forget & Forget for Respondent.

D. Major counsel.

ROLFE et al. (petrs. in Court below), Appellants, and CORPORATION OF TOWNSHIP OF STOKE (respdts. below), Respondents.

Appeal to Queen's Bench from judgment of Circuit Court in proceeding under Art. 100, *Mun. Code—Assessment roll—Essential formalities to be observed.*

The appellants complained of a judgment of the Circuit Court, District of St. Francis, dismissing their petition to annul an assessment roll made for the Township of Stoke for the year 1878.

The respondents contended that there was no appeal from the judgment (See 2 Legal News, p. 103). They further contended, on the merits, that the judgment dismissing the petition was correct, because the appellants were not prejudiced by the irregularities of which they complained.

Sir A. A. DORION, C.J., said the appellants had proceeded under Art. 100 Municipal Code, which authorizes the Circuit Court to set aside an assessment roll on account of illegality, in the same way as it may set aside a municipal by-law. Under Art. 735, any person who considers himself wronged by an assessment roll may ask the Council to revise it, and if he is not satisfied with the decision of the Local Council, he may appeal to the County Council under Art. 927. There is also an appeal to the Circuit Court from any decision pronounced by a justice of the peace in proceedings under the Municipal Code, as well as from any decision of a County Council with reference to a *procès-verbal* made and homologated, or a repartition amended by such council, sitting otherwise than in appeal, M. C. 1061, 1062; but there is no appeal from a judgment of a Judge of the Superior Court rendered in virtue of these two articles. (Art. 1077.) Art. 1033 C.C.P. which is part of Chap. 10, of Title 2, declares that there is no appeal from a judgment rendered under the provisions of that chapter in matters relating to Municipal Corporations and offices. The respondents invoked these two articles (1077 M.C. and 1033 C.C.P.) to prove that there was no appeal in this case. This was an error. Art. 1077 M. C. applies only to judgments rendered by a Judge of the Superior Court when he sits in the Circuit Court on an appeal brought before him under Arts. 1061 and 1062 M.C.; and Art. 1033 C.C.P. refers only to special proceedings which take the place of proceedings on *quo warranto, mandamus* and writs of prohibition.

The petition of appellants did not come under any of these categories. It was an original proceeding under Art. 100 of the Municipal Code, to set aside an assessment roll, and as an appeal is not prohibited from judgments on these proceedings, such judgments come under Art. 1142 C.C.P., which gives an appeal to the Court of Queen's Bench, from any judgment of the Circuit Court when the amount demanded exceeds $100, or affects the future rights of the parties. Here the judgment involved rights exceeding $100, as well as rights in the future. This Court had already decided in the cases of *McLaren & Corporation of Buckingham* (21 June, 1875), in *Corporation of County of Brome & Cooey* (21 Sept. 1878), and in *Montreal Cotton Co. & Corporation of Salaberry* (Sept. 1879), that there is an appeal from such judgments of the Circuit Court in municipal matters when the proceedings have been taken under Art. 100 Municipal Code.

On the merits, the appellants complained of a great number of irregularities, among others that the assessors were not legally appointed, were not duly qualified, and had deposited the roll on the 22nd June, 1878, without having attested it. Art. 365 M. C. authorizes the Municipal Council to appoint three valuators, who must act together, and two alone cannot make an assessment roll, (Art. 733). The roll before it is deposited must be signed and attested by at least two of the assessors and by the secretary-treasurer or other person who shall have acted as their clerk. In this case the Municipal Council appointed three assessors, but one being absent and unable to act, the

Mayor appointed a third who made the roll with the other two, and on the day that the roll was homologated, the council ratified the nomination made by the mayor. The roll being made by only two assessors competent to act, was not in accordance with the law, and must be declared null. Moreover, the roll was not attested by the assessors or by their clerk before it was deposited. It was no more than a piece of blank paper, and no one was bound to contest such a document. It was only on the day it was homologated that it was attested and sworn, and only then could those interested be called on to contest it. The signature and attestation of the clerk were not made until after the roll was homologated. These were radical nullities, and could not be disregarded under Sec. 16 M. C., which refers only to objections of form, and not to matters affecting the substance, like those complained of here It is of the essence of a municipal assessment roll that it be made by three valuators named by the council, and that it be signed and attested, otherwise it is not an assessment roll at all.

The judgment dismissing the appellants' petition is therefore reversed.

The judgment is as follows:

"Considering that the petition of the appellants to set aside the valuation roll for the year 1878, for the township of Stoke, was an original proceeding initiated in the Circuit Court under the provisions of Article 100 of the Municipal Code, and that the judgment rendered on the said petition is appealable under the general provisions contained in Art. 1142 of the Code of Civil Procedure, this court doth reject with costs the motion made by the respondents to dismiss the appeal;

"And considering that Isidore Gadbois, who acted as one of the valuators in preparing the said assessment roll was not appointed by the Council, which Council had alone, under Art. 365 of the Municipal Code, a right to appoint valuators, but was appointed by the mayor of the municipality who had no such right;

"And considering that the said valuation roll was neither signed nor attested by the valuators until the day it was homologated or approved of by the Council, nor by the Secretary-Treasurer until after its homologation;

"And considering that the proper appointment of valuators by the Council and the proper attestation of the assessment roll by the valuators, or by at least two of them, and by the Secretary-Treasurer who assisted them in the confection of the said roll, are essential to the validity of an assessment roll, and cannot be considered as mere formalities which may be dispensed with, under Art. 16 of the Municipal Code;

"And considering that there is error in the judgment rendered by the Circuit Court for the district of St. Francis, sitting at Sherbrooke, on the 10th of December, 1878;

"This Court doth reverse and set aside the said judgment of the 10th of December, 1878, and proceeding to render the judgment which the said Circuit Court should have rendered, doth adjudge and declare the assessment or valuation roll of the Township of Stoke for the year 1878, made by F. H. Lothrop, I. Gauthier, and Isidore Gadbois, and adopted by the Council on the 17th of July, 1878, null and void, and doth set aside the said assessment roll, and doth condemn the respondents to pay to the appellants the costs incurred on the petition of the appellants as well in the Court below as on the present appeal; (but without the costs of printing the interrogatories and answers on *faits et articles*, which should not have been included in the appendix to the factum.)

Brooks, Camirand & Hurd for Appellants.

Hall, White & Panneton for Respondents.

COURT OF REVIEW.

MONTREAL, December 29, 1879.

JOHNSON, JETTÉ, LAFRAMBOISE, JJ.

THE MONTREAL & OTTAWA FORWARDING CO. v. DICKSON.

[From S.C., Montreal.

Inscription in Review—Interlocutory judgment—An inscription in review, in general terms, from a final judgment does not submit for review an interlocutory judgment not referred to in such final judgment, and especially when the inscription for final hearing in the Court below did not refer to any interlocutory judgment rendered in the case.

JOHNSON, J. In this case the judgment of the Court below stands,—that is to say, the final judgment dismissing the action, but without costs; indeed, the inscribing party

seemed to almost admit that this was inevitable of itself; but he insisted that an *exception à la forme* that had been dismissed, and as he contends, unjustly dismissed, can be brought before us now. We are against this pretension. We are far from saying that the *exception à la forme* could not, or ought not to have been considered with the final judgment, if it had been urged at that time; but we see the inscription for hearing on the merits limited merely to that, and not including the exception. There is merely the usual inscription for hearing on the merits of the *fond;* and the judgment does not mention, nor will we presume, against its contents, that the form on which the party now wants to insist was ever brought before it. There is an exception filed to the judgment dismissing the plea as to the form; this shows that the party excepting to it did not acquiesce; but as long as he refrains from bringing it directly in question either by the terms of his inscription here, or in the Court below, we cannot see that we ought to interfere.

Judgment confirmed.

Coursol, Girouard, Wurtele & Sexton for plaintiffs.

Davidson & Cushing for defendant.

SUPERIOR COURT.

MONTREAL, February 16, 1880.

WILSON v. LA BANQUE VILLE MARIE.

Interest on deposit ceases from date of acceptance of check by which such deposit is transferred to another party, though the check be not then presented for payment.

The plaintiff, a merchant having a deposit account with the defendants, claimed the sum of $168.98 as the balance due him, including interest at a stipulated rate of six per cent. The defence of the bank was that only $18.89 remained due, which it tendered. The question between the parties arose as to the interest on $15,131, amount of two checks, one for $10,000, presented August 7, and the other for $5,131, presented August 8, and certified good by the bank, but not paid until October 8 following. The plaintiff contended that he was entitled to the interest until payment, while the bank said the interest stopped at the time the checks were presented and certified.

MACKAY, J., maintained the pretension of the defendants, and gave judgment only for the amount tendered. The grounds of the judgment were that the two checks drawn by the plaintiff were certified good by the defendants in the usual course of banking business, and the amounts were charged to the drawer, the holders of the checks taking possession of them so certified. As between plaintiff and defendants, the operation was much the same as if the bank had paid the money instead of certifying the checks. The obligation of the bank then was to pay to any holder of the checks who asked for the money, and it had afterwards paid the amount to a third party. The plaintiff ceased to be entitled to any interest after the funds had been so withdrawn from his name.

The judgment is as follows:—

"Considering that the two checks drawn by plaintiff upon defendants were certified good by defendants' Bank in the usual course of banking business and the amounts charged to the drawer, the holders of the checks taking possession of them certified as aforesaid; and all the money of plaintiff in the Bank was necessary to meet the said accepted checks, which the Bank became liable for to any person who, afterwards, should present and ask payment of said certified checks;

"Considering that, as between plaintiff and defendants, the operation was much the same as if the Bank had paid him the money, instead of certifying his checks and delivering them to the then holders of them, who took them away;

"Considering that the defendants' obligation afterwards was to pay to any holder of the checks, and they have paid them to a third party, such holder, to wit, the Compagnie de Prêt, and the defendants have been freed from obligation whatever, and now have in their own possession the said two checks of plaintiff;

"Considering that the original contract by the Bank to pay plaintiff interest on deposits ended upon the Bank's certifying his checks, charging them against him as aforesaid, and that no new contract has supervened, and that plaintiff shows no cause for his present claim against defendants;

"Considering finally the plaintiff's action and *demande* unfounded and unproved save only to the extent allowed by defendants' pleas: doth adjudge and condemn the defendants to pay to plaintiff the sum of $18.89 offered by said defendants, and doth dismiss plaintiff's action and *demande* as to the surplus, with costs," &c.

Archambault & David for plaintiff.

Trudel, DeMontigny, Charbonneau & Trudel for defendants.

MONTREAL, January 31, 1880.

STATE v. THE CITY OF MONTREAL.

Work and labor—Defence on ground of overcharges —Remarks on effect of resolution of committee of City Council.

JOHNSON, J. This is an action for $377, balance of an account for work done and materials furnished. The plaintiff is a roofer and plumber, and was employed to do things pertaining to his trade, and the whole charge made exceeded eleven hundred dollars. The contestation is only as to seven of the items in an account of forty-one items, certified by the defendants' own inspector of buildings; but the market committee, when the time came for a final settlement, appear to have found some objection to these items, and the defence of the Corporation to the present action is, that this committee passed a resolution that the charges were too high, and offered what they thought right both to the plaintiff and to his attorneys, and this offer is repeated with the plea. Well, any one, of course, can pass a resolution not to pay his debts, or to get his creditors to reduce the amount of them; but there are two parties to be considered. The plaintiff, in his turn, seems to have passed a resolution to go on with his case, notwithstanding the counter resolution of his debtor. The case was treated at the hearing as one of evidence with respect to the fairness of some of the charges, and so perhaps in some cases it might be. I do not mean to say that if you neglect to make a bargain, you can always reduce your tradesman's charges by a few cents, by the evidence of rival, or perhaps inferior tradesmen. I don't say that: I am rather against that. I think if I choose to go to Poole for my coats, without asking for his prices, I must pay Poole's prices, and not those of his cheap and excellent rivals who are content to undersell him. But what I do mean to say is that a corporation, or any other debtor, must not only resolve that they want to get off cheaply, but they must answer an action like this, if they want to prove exorbitant charges, by saying that those charges are exorbitant, and that is just what the defendants have *not* said here; and I can make no difference between them and anybody else. I can't say when a man is sued for a tradesman's bill that he can plead—not that it is improperly and dishonestly overcharged; but that his servants met in the kitchen, and said so. He must aver the overcharge as a fact, independently of what others may say. If the Market Committee is infallible, of course the Corporation will never want any evidence at all but the resolutions of their committees. But if the Corporation has only the same rights as others in matters of procedure, it must plead in the same way that others do, and they must say that a thing is so before they can prove it. Therefore, there is really no issue here as to whether these items are overcharged or not, and the evidence on this head is thrown away. The only point in issue is whether the Committee resolved that some items are too high. I see that they did, but this is no answer to the action; and I must give judgment upon the plaintiff's evidence, and the certificate of the Inspector, for the amount asked.

Judah & Branchaud for plaintiff.

R. Roy, Q.C., for defendants.

LIBEL IN WAY OF PROFESSION.—The English Exchequer Divsion in *Botterill* v. *Whytehead*, 41 L. T. Rep. N. S. 588, held that to impute to a person actually employed to execute certain work, that he has no experience in the work in which he is so employed, is a libel upon that person in the way of his profession or calling, and that it is no justification to say that such person cannot show any experience in work of the kind which in the opinion of the person making the imputation was requisite; that a man who receives information which if true is injurious to the character of another, is not justified in publishing that information to the prejudice of that other merely because he believes it to be true.