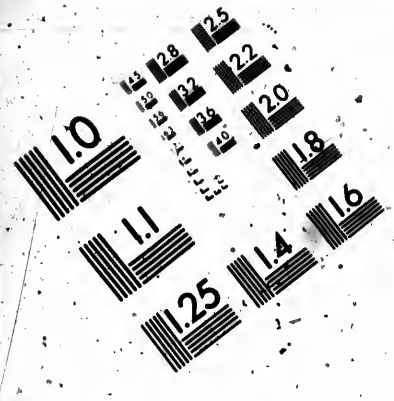

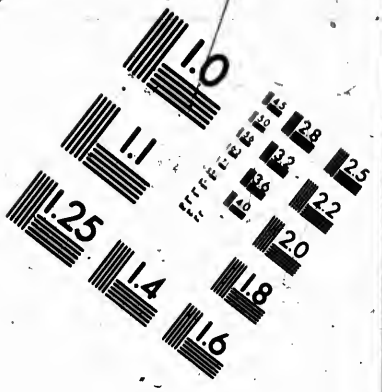

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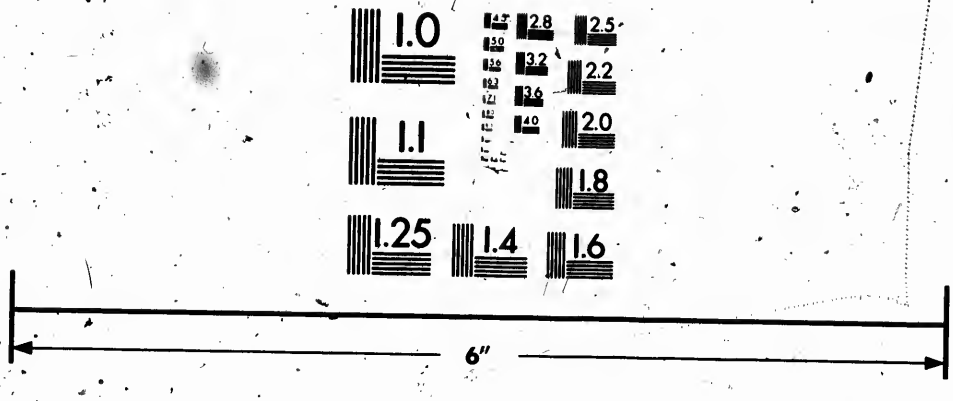

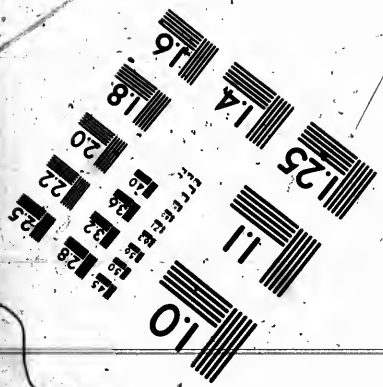

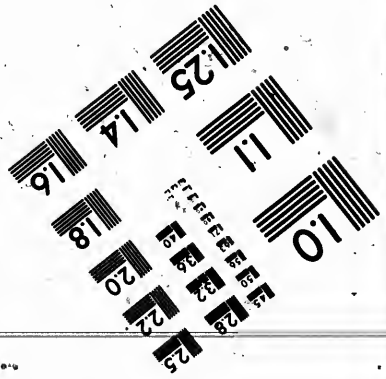

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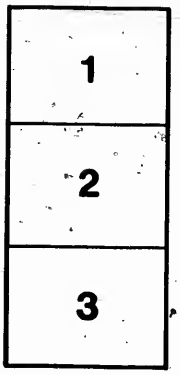

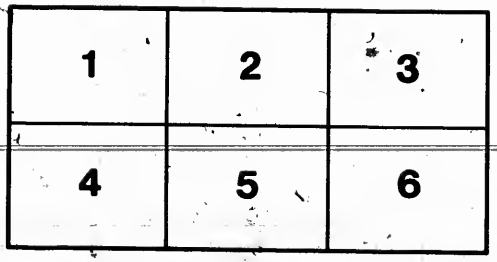

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THE

LOWER CANADA

Jurist.

COLLECTION DE DECISIONS

DU

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VOL. XI.

Editorial Committee:

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

THE INDICES:

BY S. BETHUNE, Q.C.

Montreal:

PRINTED AND PUBLISHED BY JOHN LOVELL.

1867.

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OF THE

LOWER CANADA JURIST.

COMPILED BY

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LOWER CANADA Jurist.

SUPERIOR COURT.

MONTREAL, 26TH FEBRUARY, 1867.

IN CHAMBERS.

Coram MONK, J.

No. 1479.

THE ROYAL INSURANCE COMPANY, *Plaintiff;*

vs.

FRANK KNAPP AND JAMES GRIFFIN, *Defendants.*

HELD:—In the case of a *Capias ad respondendum*, issued for the recovery of the value of certain U. S. Government Securities, alleged to be the property of the plaintiff, and in the possession of the defendants in Montreal, and there illegally detained by the defendants, and secreted by them, so as to prevent their revendication by plaintiff; that on proof that the Securities were stolen by the defendants from the plaintiff in New York, and brought into Montreal, *the cause of action arose in a foreign country*, and consequently the *Capias* will be quashed.

This was a petition presented by each of the defendants to be released from custody, under a writ of *capias ad respondendum*, at the suit of the plaintiff.

The writ issued on the affidavit of H. L. Routh, the manager, in Montreal, of the Company, plaintiff, who swore that the defendants were jointly and severally indebted to the Company in the sum of $214,000 current money of the United States of America, equal to $155,000 current money of Canada, "being "the amount of the several bonds, coupons of bonds, and securities of the Govern- "ment of the United States of America, the property of the plaintiffs, which the "defendants illegally obtained possession of on the 10th December instant, and "which they now illegally hold in their possession and under their control at the "city of Montreal." * * * "That deponent hath personally demanded from the "defendants the restoration of the said bonds and securities, but the defendants "have wholly refused to restore the same or any part thereof to the plaintiffs, and "the defendants still retain and secrete the same from the plaintiffs, so that the "plaintiffs are wholly unable to revendicate or attach said bonds and certificates.

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"That the deponent is credibly informed, hath every reason to believe, and doth "in his conscience believe, that the said defendants are now immediately about "to leave the Province of Canada, and abscond therefrom, with intent to defraud "their creditors, and the Royal Insurance Company in particular; and, more- "over, have secreted, and are secreting, their property, with intent to defraud "their creditors, and the said Royal Insurance Company in particular. And "for reasons of his belief the deponent avers: That the defendants are citizens "and subjects of the United States of America, and are merely here in the city "of Montreal temporarily, that they have no domicile in Canada, nor do they "own any property in Canada, either personal or real; that deponent hath been "informed by John S. Young and John Jourdan, both of New York, police "detectives, that the defendants are professional thieves, and immediately about "to leave the Province of Canada, without any intention of returning thereto; "that deponent hath, moreover, been informed by Anthony B. Macdonald, "insurance agent, of New York, that the defendants are possessed of the afore- "said bonds and securities, which they refuse to give up to the plaintiff's agent, "and that the defendants are secreting said bonds and securities, and secretly "endeavouring to sell and dispose of the same, and convert the proceeds to their "own use and advantage, and that unless the said defendants are arrested under "a writ of *capias ad respondendum*, the said bonds and securities, and the said "debt (the value thereof as aforesaid), will be wholly lost to the plaintiffs. That "deponent saith, that without the benefit of a writ of *capias ad respondendum* "against the bodies of the defendants, and a writ of attachment, *saisie-arrêt* for "the purpose of seizing and attaching such moveable estate and effects as may "be in the possession of the defendants, the plaintiff will lose said bonds and "certificates and said debt, or sustain damage."

This affidavit was made on the 20th December, 1866, and the defendants were arrested on the same day. On the 26th of the same month the defendants appeared separately, and severally moved to quash, on the grounds that the affidavit did not disclose any legal and sufficient grounds of debt against the defendants, and that the cause of action did not arise within this Province.

Judge BERTHELOT dismissed both the motions, holding that the defendants were rendered liable by the fact of their being found here with the property in their possession; that the owner of stolen property had a right of action against the thief wherever he found him with the stolen property in his possession, and that in this case it was not material whether the property was stolen here or in New York.

On the 28th of December, 1866, the defendants presented separate petitions to THE HON. MR. JUSTICE MONK, praying to be released from custody for the following reasons:

"That all the allegations, matters, and things, in the said affidavit set forth, "are untrue, and it is specially denied that any indebtedness exists from "defendants, or either of them, toward plaintiff, or any such cause of action, as "to justify the issuing of a writ of *capias*, because the cause of action set up in "affidavit is not shewn to have arisen wholly within the Province of Canada, as "is required by the statute in that behalf in force in this Province.

"Because the said cause of action in said affidavit set forth is not shewn to "have arisen within this Province; but that, on the contrary, it sufficiently "appears, as is in fact true, that it arose out of the Province, to wit, in the "United States of America, the defendant being in said affidavit alleged to have "recently come into the Province, and the alleged information was derived from "persons in the United States, and therefore the said *capias* cannot be main-"tained.

"Because the matters set up as grounds and reasons in said affidavit are "untrue, and the said plaintiff and the said attorney making said affidavit had "no sufficient information, and swore to no such existing debt, as to warrant the "arrest of the said petitioner, or either of the defendants.

"Because the said defendants were not immediately about to leave the Pro-"vince of Canada, with the intent charged, nor to secrete their estate, debt, "and effects, in any such manner as to warrant a writ of *capias* against them, "nor did any valid cause of arrest exist at the time of the issuing of said writ, "and the said petitioner is entitled to be discharged from custody under said writ.

"Because the said arrest was made from, and by reason of, unfounded, and "false, and insufficient grounds, and the said affidavit is purposely made vague "and indefinite; and because, moreover, the allegations therein are contradic-"tory, and shew (as was the fact) that the defendants were not about to secrete "their estate, debt and effects, or so to abscond from the Province, so as to be "subject to arrest under a writ of *capias ad respondendum*."

The parties having proceeded to proof, the case came on for argument on the 16th of February, 1867.

ROBERTSON, Q.C., opening the argument, contended that no capias could be issued on a liability like this, though there might be a right of action. In England, by 21 Geo. II., cap. 3, it was enacted that in all cases over £10 capias might issue on affidavit of *a right* of action. But in Canada there must be an "indebtedness;" the capias and action are distinct; the capias may be lost, while the action may remain. No judgment could be cited maintaining capias by any higher Court, on a cause of action not founded on indebtedness, on a debt sworn to. He cited the case of Beard vs. Isaac, in Review, decided 30th May last, where a person from Liverpool hired a vessel and cargo, and refused to carry out his contract. A capias was issued charging him with the difference between the rates of freight. Badgley, J., held that in commercial cases, where there is a money loss, on a contract for money value, capias would lie. This went far, but not to the length of saying: "You took and converted my property, e. g., my horse, and are indebted in its value; therefore I have a right to capias." The illegal holding possession of bonds or any personal property in Canada, if a good ground of capias, must cover the principle of illegal possession and holding of real property too. Real property is as much favoured as personal. The capias must be for a debt, and that must be clearly sworn to as a present indebtedness to plaintiff, and even indirectly resulting from *délits*, or even felonies. A capias will not lie by saying: "You attempted to murder me (say in New York); you cut off my arm; therefore, I can capias you." Secondly, there could be no capias on a case of action arising out of the Province. By the Consol. Stat., p. 810, it

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was enacted that "the Court or Judge may order any person to be discharged out of custody, if it be made to appear, on satisfactory proof, that the cause of action arose in a foreign country. In the affidavit and declaration there is but one phrase, one sentence, one cause of debt, one cause of action—illegally obtaining possession and illegally holding, in Montreal. Thirdly, the proof establishes the loss of the bonds at New York. They were missed after an interview of defendants with Macdonald, plaintiff's agent. But this witness does not swear as to the indebtedness of the defendants, or that they took the bonds. Admitting that the bonds were illegally obtained possession of, it must have been at New York. This is shown by plaintiff's witnesses, and the cause of indebtedness as well as of action arises out of Lower Canada. The "illegal holding in the City of Montreal" is not proved. None of the other witnesses examined say the bonds have been seen in this province. Mulvahille's statement of what took place in jail is:—"I asked him (Griffin) 'what have you done with the bonds?' and he answered, 'We got them all right here (Montreal) planted.'" This was the sole evidence, and it was unsupported. Even if it were uncontradicted and the story credible, it would be insufficient. The debt had not been proved, and it should have been clearly proved by the affidavit itself. The plaintiff must clearly show that in this case the Court has jurisdiction. He alleges the secretion of the defendants' effects in the affidavit, but states in it also that they never had any effects, real or personal. Mr. Routh swears that they are "secreting their estate and effects, with intent to defraud their creditors;" that they are citizens and subjects of the United States—merely here in the city of Montreal temporarily; have no domicile in Canada, nor do they own any property, real or personal, in this Province. But all this was very vague, and could not at all induce the Court to hold the defendants in capias. It was urged that holding in Montreal these bonds was, as it were, a new cause of action, and, therefore, a capias would lie. But this holding must be traced back to its inception, and will and must continue to be qualified *by the first possession*, whether legal or illegal. If the defendants on the 10th December, illegally obtained possession of the bonds in question at New York, there was a commenced illegal holding *there;* the *délit* was complete there and commenced there. In other words, the illegal holding commenced at New York, and the coming with the bonds into Canada on the 12th did not change the origin of the *délit*, there was the origin of the cause of action founded on the *délit*. So that if a contract is made at New York, and the debtor comes to Lower Canada, his debt exists, but the cause of action remounts to the original contract. By using the words of the Consolidated Statutes, "no capias on a foreign cause of action," our statute includes both contracts and *délits* as causes of action, and excludes capias in both cases. It was held in Silverman's case, that where a note was given in Montreal for a debt which originated in the States, no capias lay. The note was held to remount to the place where the debt originated; although it was acknowledged here. Now, why should a liability founded on a *délit* committed at New York not be treated as having originated there, and as "a cause of action" probibited? How can it be pretended that an illegal *holding* of bonds or other personal property (which all admit was the consequence of an alleged illegal obtaining possession thereof at New York) can

of itself be treated as a new and independent cause of action, merely by ignoring New York as the place of the *délit*, and alleging a holding in the city of New York. The attempt to restrict the whole action to the holding *in Montreal*, the omission of the place where they were illegally obtained, arise from the wish to get rid of the statute, which prohibits capias on every contract, *délit* or other cause of action originating in a foreign country. In case of a foreign contract the foreign *délit* remains; in case of the *délit* the *liability* remains; the action founded on the *délit* or liability remains, but there can be no capias.

KERR, also for the defendants, said they were arrested under a writ of capias, issued at the suit of the plaintiff upon the affidavit of Mr. H. L. Routh, their agent. Defendants fyled petitions for discharge from custody, and examined Mr. Routh as a witness, who admitted that he knew nothing personally of the facts relative to the obtaining possession of the bonds on 10th December by defendants, or their holding them in Canada; that his knowledge thereof was derived from third parties; but he admitted that the alleged obtaining on the 10th December was an obtaining in New York; as to the other points in his affidavit, with respect to the defendants leaving Canada and secreting their estate, his information was derived from Captain Young, Chief of the Detective Police in New York, and Mr. Macdonald, agent for the plaintiffs in that city. The plaintiffs issued a commission to New York and thereunder examined Mr. Macdonald, Capt. Young and others. By that evidence it may, for the sake of argument, be assumed that on the 10th December at New York a wrongful taking by the defendants of the bonds in question is established; and that afterwards they (the defendants) sought refuge in Canada. There is no proof that the defendants meditated leaving Canada, or had secreted their property, the evidence of Macdonald and Young on those points being hearsay. A person of the name of Mulhaville has been examined, brought up under a writ of habeas corpus from the jail; he deposes to admissions made by Griffin, as to the manner in which the taking of the bonds from the safe in the insurance office at New York was effected, making Griffin the person who walked about the office whilst Knapp engaged Macdonald in conversation; whilst Macdonald deposes that it was Griffin who kept him in conversation whilst Knapp walked about the office. Mulhaville moreover declares that Griffin told him the bonds were here. He also says that he told Payette the jailor that he wished to see one of the plaintiff's agents, and that, in consequence of such intimation, Mr. Perry, the plaintiff's inspector, called upon him. He also deposes that he had not after his return from Court, on the 9th January, asked to see Paxton, and finally he admits that he expects a portion of the reward of $10,000 offered by the Royal Insurance Company.

The first question for consideration is, whether the affidavit upon which the writ of capias was based, being shewn to be the affidavit of a person not having a personal knowledge of defendant's indebtedness to plaintiff,—is not thereby destroyed. And such being the case, whether all the evidence adduced under the commission on that point is not illegal, and should be rejected from the record, and defendants discharged on the ground of want of proof of the existence of a debt by defendants to plaintiff. Under the clause of the statute, the evidence of such indebtedness in the affidavit must be derived from the personal knowledge

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of the person making it. An affidavit to the effect "that defendant is personally indebted to plaintiff in a sum of $80, as the deponent has been informed," is insufficient, and a capias issuing thereon would be quashed on motion. [1. Archbold's P., p 655. Schroeder on Bail, p 42.] In this case, it is true, Mr. Routh swears positively in his affidavit to the facts that defendants obtained illegally the bonds; that they now hold them illegally at Montreal, and have refused to deliever them up; but when examined as a witness, he admits that he never saw the bonds, and has no personal knowledge of the facts he has sworn to, save the making the demand to restore. His allegations are founded upon information derived from others, and the affidavit is of no avail, and consequently there is no proof of the existence of any debt. There is no evidence that the defendants were about to leave the Province, or that they had secreted their estate, &c., with intent to defraud. By the Capias Act it is provided that if a party arrested shows to a Judge of the Superior Court on summary petition, that the cause of action for which he had been arrested arose in a foreign country, he shall obtain his discharge from custody. By the plaintiff it is pretended, that it is a matter of no importance in this case where the larceny or wrongful taking of the bonds occurred. That the wrongful detention and refusal to restore them when demanded, wherever the same occur, gives rise to the cause of action in the place where such illegal detention is continued, although that place may not be the same as that wherein the larceny or wrongful taking of the bonds occurred. That consequently, in this case the wrongful detention and refusal to restore having taken place in Canada, the cause of action did not arise in a foreign country, although the original larceny or wrongful taking was effected in New York. Defendants pretend that the wrongful taking in New York is the cause of action in this case, and that it consequently arose in a foreign country. It becomes necessary, in the first instance, to establish the meaning of the words "cause of action." In cases of contract it is where the contract was made. (Warren vs. Kay, 6 L. C. R., 492; Jackson vs. Coxworthy, 12. L. C. R, 416; 1 Felix, p. 222; Senecal and Chenevert, 6 L. C. J., p 46.) But I go even further, and accept "la jurisdiction spéciale de l'obligation" of the Roman Commentators as the jurisdiction within which the cause of action on that obligation arose. Immediately upon the commission of a *délit*, or wrongful taking of bonds, arises not only the obligation to restore their value on the part of the thief, but also the right of action in favour of the proprietor to recover the bonds or their value. Mackelday Ins. §444, 445, p. 233, n. (4) (13); 2 Savigny Oblig., p. 46, 449; 8 Savigny D. R., p. 231, 237. He also cited from Westlake, Private Int. Law No. 108, 114, 237, and Maine's Ancient Law, p. 358, to show that the forum delicti in every case is the forum of the country within which the délit was committed. That country was the lieu of the *acte obligatoire*, it was there that the obligation was born, and it was there, consequently, that the actions arose, for the action is based upon the obligation, and the obligation, therefore, is the cause of action. A consequence of the admission of this principle is, that when an action is instituted in the forum domicilii of the debtor, grounded upon the commission of a délit in another country, the law of the forum delicti controls the case, so that, amongst other things, what would be a justification in the country where the

délit had been committed, would be a justification in the country where the action is tried. (Lord Mansfield, Mostyn v. Fabrigas, Cow. 175,172.) In contracts it is laid down that when any difficulty arises with respect to the rate of exchange and interest due thereunder, we are to take into consideration the place where the money is, by the original contract, payable; for wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay in order to remit it to that country. In cases of *délit* the principle is the same, and thus the interest is measured by the rate of the locus delicti, and exchange in this case (if judgment were rendered against the defendants) should be so as exactly to replace in New York the bonds wrongfully taken there by the defendants. (Ekins v. East India Co. 1, P. W. 395, 2 Bro. P. C. 382; Westlake, No. 230, 237; Story on Con. of Laws, sec. 307, to 310.) We have then, previous to the arrival of the defendants in Canada, certain rights acquired by the plaintiff against them, and certain obligations by them incurred towards the plaintiff, all springing from the commission by the defendants of a *délit* in New York. The plaintiff, immediately upon the *délit* being committed, had the right of instituting an action similar to the present one against the defendants, not only in the United States, but, according to the principles of international law, wherever the defendants might be found. The obligation incurred by the commission of the *délit* travelled with the defendants wherever they went, and the plaintiff's right to sue them accompanied them in their travels. But the changes of domicile did not create new obligations towards the plaintiff, or new causes of action against the defendants; so that in fact, the holding in Montreal and refusing to restore add nothing whatsoever either to the obligation of the defendants or the right of action of the plaintiff. But by the plaintiffs it is pretended that the holding and refusal here give rise to the cause of action in Canada. But the wording of the plaintiff's affidavit shows that the illegal obtaining on the 10th Dec. in New York, constitutes a portion of the cause of action, for the illegal holding and refusal to deliver, followed there as a matter of course. But if, on the contrary, the plaintiff pretends that the original obligation incurred by defendants by the taking of the bonds is extinguished, where and when did such extinguishment occur; if no satisfactory answer be given, the only conclusion to be arrived at is that it is in full force. The argument insisted on by the plaintiff that because at common law the passage of thieves with their plunder through a district other than the one wherein the larceny was effected justifies the indictment of the thieves therein for larceny upon the principle that every fresh removal is a fresh trespass, and that consequently the defendants' flight to Canada with the bonds was a fresh trespass, giving rise to a new cause of action here, cannot be admitted as sound. At common law the general rule is that an indictment can only be presented in the district wherein the crime was committed. The case of the thief removing with his plunder into another district, and being liable there to indictment, is one of the exceptions to the rule; but it is founded upon a legal fiction of the common law which extends solely to the boundary of the State within one of the districts of which the larceny was committed, and there dies; for it is clear that no indictment can be presented in Canada for a larceny of bonds effected in the State of New York (—2 Russell, p. 331, 332; 1 Archbold P. & P. 69 and notes).

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Under our law no capias can issue in any action, the cause of which arose outside of the limits of the Province of Canada, nor can such action be commenced by writ of capias. Can it be pretended that if a party contracts debts in a foreign country, removes into Canada with his estate and effects, and there gives his creditor a promissory note for the debts so due, dated and payable in the Province, upon which note dishonored the payee takes out a capias, that the defendant is not entitled to his discharge from custody upon the ground that the cause of action arose within a foreign country? The case of Silverman and Jones, decided by Mr. Justice Badgely, is a case in point in favour of discharge. The principle recognized in that case is that rights, which have once accrued, and obligations which have once been incurred properly and well by the appropriate law, are treated as valid everywhere, and that where once an obligation exists, the acts of the party obliged, which, if the original obligation had not been in existence, would have created one exactly similar, are productive of no effect, but leave the original obligation to be the cause of action between the parties; thus it is necessary, in order to discover the cause of action in this case, to fix the period and the place when and where the original obligation by which the defendants become liable to pay to plaintiff the value of the bonds stolen, as prayed for in the conclusions of plaintiff's declaration, was incurred. The period and place when and where the defendants so became liable are easily discovered. No one can doubt that the obligation so to pay to the plaintiff the value of the bonds so stolen, was incurred on the 10th December last, at New York, and consequently the cause of action in this case arose in a foreign country, and the defendants are entitled to their discharge.

Bethune, Q.C., for the Royal Insurance Company, said—From the argument as it has been presented on the other side, and more especially from the argument of the learned Counsel who has last spoken, I think that some of the points may be taken as admitted. The learned gentlemen do not raise the question because the depositions disclose a felony, the plaintiff is therefore debarred of all civil remedy. Consequently, I need not enter into a discussion of that point, though I am prepared to show that whether the facts as established by the evidence disclose a felony or not, the plaintiff was nevertheless presently entitled to exercise his civil remedy.

Both of the learned Counsel have avoided drawing your Honour's attention to the whole of the affidavit of Mr. Routh. They contented themselves with referring to the first paragraph, and would not go on to read what follows, though I asked both of them several times to do so. The paragraph immediately following, and which I wished them to read, shows the way in which this debt originated.

First of all, Mr. Routh swears, that on the 10th Dec. last, the defendants illegally obtained possession of the bonds, and that they have them here in Montreal. This is the portion of the affidavit the defendants' Council read, but the part which follows, and which they abstained from reading, is in these words: "That deponent hath personally demanded from the defendants the restoration "of the said bonds and certificates, but they, the defendants, have wholly refused "to restore the same or any part thereof to the plaintiffs, and the defendants still

"retain and secrete the same from the plaintiffs, so that the plaintiffs are wholly "unable to revendicate or attach said bonds and certificates." The cause of debt is simply this: You, Knapp and Griffin, have here in the city of Montreal $256,000 worth of bonds and securities; they belong to me; you got them in your possession illegally; I say you got them illegally, because I want to negative the supposition that you came by them honestly. The gist of the matter is—and that is our charge,—you have them here in your possession, without lawful title, and retain them against my will, and I challenge you to produce any lawful title you may pretend to have to them. My remedy *in rem* is taken away from me, or rather rendered nugatory, by your action, and, therefore, I want simply the value of my property.

I will now take up a matter of form to which the learned Counsel who last spoke has alone referred. He said, this proceeding must fall to the ground because fundamentally, a debt must be positively sworn to; and, although Mr. Routh, in his original affidavit has sworn to the debt positively, yet, in his examination under the petition, he has admitted his information in this respect was merely hearsay. The learned Counsel then contended, that the evidence of Mr. Macdonald and the other New York witnesses which was intended to supply this apparent defect, was illegal under the circumstances, and that the mere fact of Mr. Routh not being possessed of positive information, of his own personal knowledge, as to the indebtedness, was fatal to the plaintiff's case. Now, Mr. Routh in his affidavit undertook to swear distinctly and positively that the defendants owed this debt. The affidavit, then, being sufficient in this respect, holds the defendants in custody securely under the writ. They then say they are entitled to be relieved from custody, because what Mr. Routh has sworn to is false. On this point my learned friend is technically wrong,—for even if Mr. Routh's evidence under the petition has failed to sustain the positive assertion of his affidavit, yet the issue tendered by the petition being the truth or falsity of the original affidavit, it was competent to the plaintiff to corroborate Mr. Routh's testimony by other evidence. The only effect of Mr. Routh's admissions as to the hearsay character of his information would be to make out a *prima facie* case for the defendants, and compel the plaintiff to do what has been done, namely to prove the precise truth of Mr. Routh's original statement. We are relieved from all anxiety on this point, however, for Mr. Routh's affidavit has not been broken down in the way my learned friend tries to make out. For, although Mr. Routh swears that his information was in the main derived from what Mr. Macdonald and the New York detectives told him, yet, in answer to a test question put by Mr. Kerr, whether or not his information was solely derived from other parties, he distinctly states no,—and adds, that although it was so, in the first instance, his conversation with the prisoners in jail so confirmed him as to the truth of such information, that it enabled him to swear as positively as he had done.

Another point raised by one only of the learned counsel is this: he says there is no satisfactory evidence that these men were going to leave the Province. Well, I may answer, they have put in no evidence to prove the contrary. The plaintiff charges them with being strangers and professional thieves—mere wanderers

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having no fixed place of abode, and certainly none here in Montreal,—and that if they once got out of jail they would immediately leave the Province. Under the issue as tendered by their petition, the defendants were bound to make out at least a *prima facie* case, that this charge was untrue. They should have brought up their numerous host of friends to prove that this was all nonsense; that they, the defendants, were not what we represent, but were good citizens, who intended to make Montreal their permanent place of abode, and that the idea that they were going to leave the country was simply a monstrous proposition. But, instead of doing this, they have wholly abstained from adducing any evidence whatever on the point. Then as to the proof that they were really going to leave, I need only refer your Honour to the evidence of the New York detective Young, who swears positively to the character of these men, and that he gave Mr. Routh the information which he firmly believed to be true, that the moment the prisoners got out they would never be seen here again. Besides that, we have the evidence of Paxton, who says that these men having been a a couple of days in jail, stated that they confidently expected to be released. They were originally arrested on the verbal complaint of the New York detectives, and remanded by Mr. Brehaut, the Police Magistrate, until two o'clock in the afternoon of a given day. Whilst in custody, they conversed freely with Paxton and their fellow prisoners in the same ward, and boasted that they knew all about the law and that they could not be held under the Ashburton Treaty, as the offence was only larceny and not robbery. They got out, and then to their amazement they came back again. The other debtors are surprised to see them return, and then occurs the conversation as to what brought them back. In that conversation they say, Oh! this will be only for a short time. But we were afraid they were going to kidnap us, as somebody else had been kidnapped;—evidently referring to the case of Lamirande. I only mention these points to show that these men were under the apprehension of being kidnapped, and fully intended should they have been released to leave Canada, and thus prevent the possibility of such an occurrence. This makes the case of the plaintiff in this respect as complete as can be, and, in the absence of any kind of evidence on the other side to refute it, makes out much more than a mere *prima facie* case on the side of the plaintiffs. In this way I get rid of the two points which were raised by one only of the defendants' counsel, and which are not really those on which the defendants mainly rely. The true turning point of the present discussion I take to be, whether or not the cause of action arose in a foreign country, and the solution of that question must depend upon the fact whether or not, when Mr. Routh made his affidavit, the bonds and other securities were really here in Montreal. There is to my mind very satisfactory evidence that the defendants are the men who really took the bonds from New York, and that they had them here in Montreal. If I make out this, I make out my case. The pretension of the plaintiff here, is simply this: you, Knapp & Griffin, have here certain bonds, my property, which you refuse to restore to me, and to which I say you never had any legal title. Supposing you stole them. What does that matter? If you bring them here into Canada, that is a new caption. If the theft is committed in one place, and the thief goes to another, he can be indicted there.

This is undoubtedly the law, where the places are within the same sovereignty or government. But the principle of the mere caption is the same, whether the place be or be not under the same sovereignty. Mr. Carter has looked up the authorities on this point, and will cite them to the Court. My simple charge here is, you have got my property, and you have no title to it. I ask you to restore it, and you won't do so. The cause of action, then, is not the stealing of the bonds in New York, but the illegal detention of them here in Montreal. It matters not where the defendants originally got possession of the bonds, it is enough that they have them here; that they have no legal title to them; and that they refuse to restore them. Therefore, all the authorities of my learned friend (Mr. Kerr) as to a foreign debt, fall to the ground. The case is reduced to a more question of evidence, as to whether or not the defendants really brought the bonds into Montreal. On that point I apprehend there can be no kind of difficulty. The facts as they are proved are these. It is in evidence and proved to a demonstration that on the 10th December last the Royal Insurance Company owned and possessed these bonds; that they were contained in a tin box which was deposited in the vault of the Company at New York, and that the New York agent, Mr. Macdonald, had the key of the box in his pocket. Knapp and Griffin came into the office; one of them, it matters little which, engaged the manager in conversation about a life insurance, while the other walked backwards and forwards in the office. Finally these two men went out,—nobody else came in,—and after they went out the bonds were found to have disappeared. The presumption is certainly very strong that these were the men who took them. One of them immediately takes flight the same day to Canada, the other leaves the next day. In a day or two they are followed by their wives. They all take up their quarters at the Ottawa hotel in Montreal, and a New York detective who is here looking after other bond thieves—for unfortunately bond robberies have been pretty frequent of late—telegraphs to detective Young, "Knapp and Griffin are here." Mr. Macdonald, the agent of the Royal Insurance Company in New York, soon after comes here, accompanied by the New York detectives, and he at once recognizes Knapp and Griffin as the two men who had been in the office immediately before the bonds disappeared. What, under the circumstances, is the presumption of law? Why, indubitably that Knapp and Griffin stole the bonds and came on to Canada, carrying their booty with them. Is it to be presumed that after committing such a robbery and laying themselves open to the risk of incarceration, they would leave their booty behind them? Certainly not. On the contrary, the presumption of law clearly is, and the rules of common sense suggest, that in fleeing as they did they naturally carried off the booty which they had risked so much to secure. Following up the narrative of events, we find that the New York detectives who came on with Mr. Macdonald recognize these men and have them arrested. The manager of the Royal Insurance Company here, Mr. Routh, and the New York agent, are then advised to see the prisoners in jail, and demand the restitution of the bonds, in the hope that they might be thus induced to make amends, and if not, that their positive refusal to give up the bonds should be established. Mr. Routh, Mr. Macdonald, and Mr. Perry, the inspector, accordingly visit the jail. The conversation with the prisoners is sworn to by Mr. Routh and Mr. Macdon-

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ald. Paxton, a prisoner who happened to be confined in the same ward, and who has been described by the learned Counsel on the other side as the "man of truth," tells us, that the defendants in speaking of their arrest at that time said it was a mere matter of detention that they expected in a few days to be released. That they knew there was no criminal charge that could get at them, and that the bonds were "planted," and could not be got at. Well, Mr. Routh accosts these men, and says: "We have come about these bonds; you had better give them up and get out of this place." They commence by denying that they ever had the bonds at all. Macdonald says that one of them got angry, and told Mr. Routh he had no business to come there. Then Knapp remonstrated with the other, and said, "There is no use in getting angry; these gentlemen have come here on business." Of course they looked upon it as a mere matter of business, knowing well that they could not be held criminally, and that the bonds were securely "planted." Treating the affair, then, as a sheer matter of business, Knapp says, "What do you value these bonds at?" and thereupon he and Mr. Macdonald go into a minute calculation, establishing some of them to be worth so much, and others so much, and he then asks, "What reward are you offering for them?" "Well," says Mr. Routh, "$10,000 has been offered in New York, "intimating that the Company would be very happy to give that sum. Whereupon Knapp exclaims, "Well, gentlemen, you must take us to be God damn fools to give up such a sum for such an amount." Mr. Routh, in answer to a question put to him by Mr. Kerr, says that they only denied having the bonds once, namely, at the opening of the conversation. Mr. Kerr then asked, Did they not say, "if they had taken?" but this Mr. Routh entirely denied, saying there were no ifs at all about it. Then comes in the additional evidence. We have first the evidence of Mr. Mulvahille, who was confined in the same ward with the defendants, and swears positively as to the conversation between him and Griffin. Griffin said it was better to be there for two months than "up the river for five years." All this time these men were under the impression that their arrest was a mere temporary affair. Mulvahille says that Griffin explained how the whole affair was done, how one of them engaged the "old bloke" (as he called the manager) in conversation about a life insurance, while the other secured the tin box, concealed it under his coat tails, and then walked out of the office. And, in reply to a question from Mulvahille as to where the bonds were, Griffin replied that they were all safe here and were "planted." From Paxton we have somewhat of a similar deposition. Paxton says he had many conversations from time to time up to his examination. The defendants were very frank; they boasted that it was a mere matter of detention; that they expected in a few days to be released, and that they could not be extradited. Knapp told his whole life, showing that he was a regular professional thief. He commenced by selling books at the hotels, and when a customer had not change and gave him a five dollar bill, he would leave the books, which were of little value, and say he would go for change, but never returned. He then went on to say that lately they had given up this small business, and did nothing less than ten thousand dollar jobs. One of them then told the whole story of the robbery. But, says Mr. Kerr, did they distinctly say they were the men. Well, says the witness, they did not distinctly, but the inference on my mind was, that they

did it themselves. My learned friends under such circumstances have been driven to the extremity of saying that Mulvahille was not worthy of belief. But they have wholly failed to point out any material discrepancy in his evidence, and, on the contrary, wherever this man has made a positive statement he has been supported, especially by "the man of truth," Mr. Paxton. My learned friend, Mr. Kerr, contends that the evidence of Payette the jailer contradicts that of Mulvahille, in this, that the latter told Mr. Payette that he had something important to communicate to the Company, and that afterwards he was visited by Mr. Perry. Mr. Payette swears he never communicated this statement of Mulvahille, either to Mr. Routh or Mr. Perry, and it is argued then, that because Mulvahille denied having ever sent a message to the Company otherwise than through Mr. Payette, his evidence generally must be false. Such a conclusion, however, is neither fair nor justified by what really occurred. Why Mr. Perry came to the jail is unexplained, but that is all. He may have come there of his own accord. It is important, however, to note, that Payette confirms Mulvahille in his statement as to what he said to Payette. Is Mulvahille not worthy of belief because he was a debtor in jail for a small sum like $127? Surely such a proposition cannot be seriously urged. He was a pensioner of Her Majesty moreover, which was a certificate of good character in its way. It is made a point, that his wife had sued him for a *séparation de biens*, on account of habitual drunkenness: this is no legal ground for rejecting his evidence. Mr. Reeves, the tailor, who is the creditor that arrested him, has trusted him and accepted an assignment of a portion only of his pension. How is it that this witness has not been contradicted by the famous Col. Brown and other men who were confined in the same ward? Paxton says the bond robbery was a common subject of conversation every day, and yet not one person has been brought up to testify either that Mulvahille's account of such conversations is untrue, or that he and the defendants never conversed together at all. Then there is another presumption arising from Young's evidence. Young says that up to the day of the robbery these men were in very straitened circumstances in New York, and yet when he comes to Montreal, he finds them living in a first-class hotel, and possessed of ample means.

THE JUDGE—How many days after the robbery?

BETHUNE.—The robbery was on the 10th, and they arrived here on the 12th before early dinner. We have these two men then, living in straitened circumstances in New York, up to the time of the robbery, and then coming here living at a first-class hotel and spending money very freely. Mr. Milne, the broker, testifies to having changed some two or three hundred dollars worth of greenbacks for them, and that they told him they had changed some few hundreds more at another place, which they asked him to check over as they thought they had been cheated. The moment this robbery is committed, they become possessed of very large means. Then we find from Mr. Jones the broker, who gives his evidence with a great deal of reluctance, that after the 10th December last strangers were offering 5-20 and 7-30 bonds here in Montreal; these being some of the classes of the bonds stolen. On the whole then, considering that we are dealing with professional thieves who without doubt committed the rob-

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bery in question, that the legal and common sense presumption is that they carried off their booty with them, and brought it here to Montreal, and when we have super-added to that, the quasi admission to Mr. Routh and Mr. Macdonald and the actual admission of these men to their fellow prisoners in jail that they had stolen the bonds and had them here, "planted," Knapp stating that there was only one man in the city who knew where they were,—when we have all these facts, I leave the case with great confidence in the hands of your Honour, feeling assured that professional thieves such as these will not be allowed to escape from their present confinement.

Ed. Carter, Q. C., also for the Royal Insurance Company, said: My learned friend, Mr. Kerr, knowing the difficulty of the position his clients placed him in, has thought proper to preface his address by asking your Honour not to regard his clients as thieves, nor to be influenced by any moral considerations which might be urged to their prejudice. If I find it necessary, in commenting upon the facts, to characterize their act as that of professional thieves, your Honour will understand that it is because the loss which the plaintiffs have sustained has been the result of their criminal act. I purpose abbreviating my argument as much as possible, knowing that I am addressing a Judge and not a jury, and that my object, which is to carry conviction to your Honour's mind, can be best attained by presenting the questions which arise in as clear a manner as I can, and citing such authorities as bear on the subject. The first inquiry is as to the nature of the plaintiffs' claim in this case. The Royal Insurance Company is an English institution, having an office in Montreal and a branch in New York. The evidence discloses the fact that the larceny of the bonds, constituting the subject matter of the claim, was committed in New York, by the two defendants, who immediately sought safety in flight, and, availing themselves of the facilities afforded by our accessible frontier, they took refuge here. The first question to which the Court must direct its attention is one of fact, viz., does the evidence establish that a larceny of the bonds was committed, and whether the defendants were guilty of it? It is contended by the learned counsel, Mr. Robertson, that the evidence fails to establish the fact that the defendants were the guilty parties. I cannot understand how he could assert such a proposition, unless he wishes to ignore all the legal maxims to be found in every work of evidence. If I understand his proposition, it is this—that in a civil case nothing short of direct and positive testimony will suffice.

Mr. Justice Monk, addressing Mr. Robertson: Is that your pretension, Mr. Robertson, and do you consider that stronger evidence is required in a civil than in a criminal case?

Mr. Robertson—That is my pretension.

Mr. Carter—Then I am not mistaken in what I understood my learned friend to urge; and, now that he re-asserts his proposition, I shall show by positive authority, that he is in error, and that the distinction, if any, between civil and criminal cases, is to favour the admission of presumptive evidence, as supplying the want of direct proof in civil cases, whereas in criminal cases such evidence, although admitted, is always received with greater caution. Mr. Carter cited, in support of his pretension, "Best's Principles of Legal Evidence," p.

539; also, the cases of Armory *vs.* Delanoirie, 1 Strange, 505, and Mortimer *vs.* Cradock, 7 Jur. 45. Then as to the fact, the evidence consisted of not only strong presumptive proof, but positive, as derived from the admissions of the defendants, sworn to by two witnesses. It was proved that both defendants entered the Company's office at New York under pretence of effecting an insurance, and that one of them engaged the attention of the manager in such a manner as to divert his attention from the other. Within fifteen minutes after they had left, the box containing the bonds was missed from the safe. No other person entered the office between the time they left and when the loss was discovered. The defendants left New York the same day, and within a few days after, they are found in Montreal with their wives, changing large sums of money, whereas it is proved that, when in New York, they were in needy circumstances. In support of the position Mr. Carter assumed, he cited the following authority to establish that, the loss having been proved, the sudden flight and the change of circumstances of the defendants, coupled with their presence at the Company's office very shortly before the bonds were missed, constituted complete evidence of their guilt; "Best Pr. Legal Ev.," pp. 564, 568 and 569. Then there was additional evidence afforded by the defendants' avowal of the commission of the crime, and the description given of the manner it was accomplished, agreeing precisely with the testimony of the manager as to what took place, to his knowledge, when the defendants were in the Company's office. The next point to be considered is that urged by Mr. Kerr, who pretends that the affidavit of Mr. Routh has been destroyed by his subsequent examination as a witness. The very reverse is the case. Mr. Routh's examination fully corroborates what is contained in the affidavit he made. The authority cited from Archbold by Mr. Kerr does not apply. It is not pretended that the affidavit is defective, but it is said that Mr. Routh has admitted that his knowledge of the Company possessing the bonds was derived from the New York manager, and was, therefore, hearsay. In point of fact, Mr. Routh, while admitting this, has also said that he was confirmed in his belief of what the manager told him, by what the prisoners said to him, Mr. Routh, when he demanded the bonds from them. Assuming even that Mr. Routh had not seen the defendants before their arrest, if the affidavit was otherwise perfect, the question is not what means of knowledge had the deponent, upon whose affidavit the capias issued, but whether the material allegations were true. Take, for instance, the case of a merchant who makes the affidavit of a debt being due to him; if he was examined as Mr. Routh was, he would have to admit that he had no personal knowledge of the sale and delivery which was made by his clerks. But would Mr. Kerr pretend that in that case the capias would fail? Certainly not; the statute requires that the defendant should establish that there was no existing debt, as the sole question is one of fact, does the defendant owe or not?

Mr. Justice MONK—I understand your argument perfectly, Mr. Carter; you need not dwell any longer on that point.

Mr. CARTER continued—The only question which remains for me to discuss, and in fact the only point worthy of consideration, is whether the cause of action arose in a foreign country. The whole of Mr. Kerr's argument is chiefly

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directed to this point, and his pretension is, that in cases of *délits* under our civil law, the right to a civil remedy accrues the moment the injury has been committed, and consequently that the cause of action arises where it has originated. In support of this pretension he has cited several authorities, many of them having no application, and others establishing a principle which favours the right contended for by the plaintiffs, that their remedy by civil action existed. It was contended by Mr. Robertson that the civil remedy could not be exercised. Upon this important point, the defendants' counsel could not agree. There can be no doubt that Mr. Robertson is in error, and I will presently establish that Mr. Kerr commits the mistake of carrying his pretension to the extent which his authorities do not justify.

Mr. Justice MONK, addressing Mr. Robertson—Do you deny the right of the plaintiffs to exercise their civil remedy?

Mr. ROBERTSON—I do.

Mr. KERR—I do not; I admit that the civil remedy exists.

Mr. CARTER—We may, then, take it for granted Mr. Robertson remains alone in his opinion. It is a question that can admit of no doubt. It is a remedy recognized in Criminal Courts, as well as at other tribunals, as your Honor must be aware, that even in criminal cases power is given to a Judge, after conviction, to order restitution. Then as to the other point, it is urged that the cause of action depends upon the place where the wrong was first committed. This I deny, as the real cause of action in this case is the fact that the defendants are here in Canada in possession of plaintiff's property, and withhold it, refusing to restore it. It is a principle of the common law that the owner may follow his property, and every new jurisdiction into which the thief carries it is a fresh caption. This doctrine is applied even to criminal cases, so that the offence is regarded as repeated as a new taking (*cepit*), and a new cause of prosecution established, altogether independent of the original taking. Mr. Carter cited, in support of this proposition, 1 Hawk, ch. 49, sec. 52, Rex *vs.* Parkin, 1 Moody C. C., and authorities cited in the note. In this case the plaintiffs complain that the defendants hold their bonds, and are converting them to their own use. It is the conversion which is the gist of the action. In support of the latter proposition, Mr. Carter cited 2 Selwyn, Nisi Prius, p. 1389.

Mr. Carter also contended that, as regards the remedy, we were to be governed by our law, which [illegible] the right of arrest in civil cases. This is the general rule. [illegible] ptions, and it is for the defendants to show that they come within the operation of one of them. This brings us to the consideration of what cases the statute was intended to except from its operation; and he contended that the only reasonable interpretation of the statute was to hold that foreign debts meant such liabilities resulting from contracts where the implied assent of both parties may be invoked, as controlling their engagements, and the consequences resulting from them. But no such construction could be put upon our statute as that contended for by defendants' counsel to cover the case in question, so as to afford immunity to thieves stealing in New York and seeking safety with their booty by sudden flight into Canada, and then withhold-

ing the property against the real owner, and refusing to restore it. The true doctrine was, that the withholding and conversion of the bonds was a continuance of the injury, giving rise each day to a fresh cause of action. There was here a marked distinction to be made between those *délits* which, being of a personal nature, received their consummation and completion where the injury was inflicted, and the larceny of property, to which the common law applied another rule which is recognised by all systems of jurisprudence, viz., the right of the owner to claim his property or its value wherever he finds it. The learned gentleman continuing, said—I have here before me a number of authorities applicable to the remedy, but, as this point has been conceded, it is unnecessary I should cite them. I will, however, in conclusion, advert again to the evidence, in order to show that the pretension of Mr. Kerr, that Mr. Routh's affidavit has been destroyed by the evidence he subsequently gave, when examined as a witness, is altogether unwarranted. The evidence not only of Mr. Routh, but that adduced in New York, establishes every statement he has made. Even without this additional testimony, Mr. Routh's affidavit is based upon admissions made by the defendants to him—or statements amounting to admissions, when he demanded restitution of the bonds. Then again there was the testimony of the two men confined in the same ward in gaol with them, and which amounted to direct and positive proof, the importance of which the defendants' counsel must have felt, if we may judge by the strenuous, but unsuccessful, efforts they made to impeach it. It was attempted to show that they were not worthy of belief, because they were inmates of the jail. Now, we did not choose our witnesses. The defendants, when sent to jail, met the two witnesses, Mulvahillo and Paxton. The evidence of Paxton was given with a great deal of reluctance. But there is this remarkable coincidence, that while you find these two men relating the story as they had it from the prisoners themselves, it is exactly in accordance with the events as they transpired in New York, of which they could not have had any previous knowledge whatever. There is the stamp of truth on all the statements of these witnesses, and their evidence shows that the prisoners spoke as professional thieves, as men will speak who set the laws of their own, as well as of the country wherein they seek refuge, at defiance. I respectfully submit that a more complete case could not be established before any Court.

KERR, replying, referred to the authority (2 Selwyn, 1389), cited by Mr. Carter as proving the position taken, that in cases of trover, the original finding is mere matter of inducement, the conversion being the gist of the case. From that authority Mr. Carter argues that the conversion duly took place at Montreal, where the demand to restore was made and refused. Ere answering this authority, I might ask how, after his remarks upon our not being in an English Court of Law, where the slightest mistake often defeats the ends of justice, my learned friend cites an authority on the common law in this Court, which is ruled by the principles of the civil law. This is the first time I have heard that the principles of the common law in trover regulate the obligations flowing from *délits* under the civil law. But can it be pretended that, in opposition to the citations from Savigny and other commentators upon the civil

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law, this citation, from Selwyn, writing on the common law upon trover, is to prevail, and the original taking is to be looked upon as a mere matter of inducement. I am prepared to show that the quotation he has given has really no reference to this case. My learned friend says the conversion took place in Montreal. The secreting, the demand to restore, and the refusal, all prove the conversion here; and consequently, as the conversion is the *gist* of the action, the cause of action arose here. I, on the other hand, pretend that when there is a wrongful taking, followed by carrying away of the goods of another who has the right of immediate possession, that is of itself a conversion. (1 Chitty on Pleading, 153.) Thus in cases of larceny, where the property is removed by the thief, here is an immediate conversion of it. Conversion does not necessarily import an acquisition of property in the party converting. In this case, taking it for granted that the bonds were stolen in New York, the conversion by the defendants took place there on their removing the bonds from the office of the plaintiff. A demand to restore and refusal are only necessary to establish the conversion in cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff cannot prove some distinct conversion. (1st Chitty, pp. 156-157, note 2.) In cases of loan or bailment, a demand to restore and refusal are necessary, if the lender or bailer cannot show a distinct conversion; if such distinct conversion is shown, there is no necessity for the demand and refusal. In England, then, under the authority cited, the conversion would be held to have taken place at New York. Why, if the larceny at New York is mere matter of inducement, did the learned counsel insist upon their having so clearly proved that the defendants were the parties who there effected that larceny? Why, if that larceny is a mere matter of inducement, producing no effect upon the case, were they forced to admit that without the evidence of that larceny in New York, given under the commission, the defendants would have been entitled to their discharge, Mr. Routh's affidavit having been destroyed. In leaving the case with your Honour, I believe that you cannot avoid coming to the conclusion that Mr. Routh's affidavit on the subject of the defendants' indebtedness has been destroyed, and that it cannot be bolstered up by evidence in reply. 2nd. That the larceny or wrongfully taking in New York on the 10th December last is the cause of action in this case, that it arose in a foreign country, and that consequently the defendants are entitled to their discharge.

MONK, J.:—This case has been brought up on two petitions to liberate the defendants from imprisonment, under a *capias ad respondendum*, issued at the instance of the plaintiffs on the affidavit to hold to bail, made by Mr. Routh, and which sets forth in substance:

That the defendants are personally and jointly and severally indebted to the plaintiffs in the sum of $214,000 U. S. currency, being the amount of the several bonds, coupons of bonds, and securities, of the Government of the United States of America, the property of the plaintiffs, which the defendants illegally obtained possession of on the 10th December, and which they now illegally hold in their possession and under their control at the city of Montreal. That deponent hath personally demanded from the defendants the restoration of the said bonds and securities, but the defendants have wholly refused to restore the

same or any part thereof to the plaintiffs, and the defendants still retain and secrete the same from the plaintiffs, so that plaintiffs are wholly unable to revendicate or attach said bonds and certificates. That the deponent is credibly informed, hath every reason to believe, and doth in his conscience believe, that the said defendants are now immediately about to leave the Province of Canada, and abscond therefrom, with intent to defraud their creditors, and the Royal Insurance Company in particular; and, moreover, have secreted, and are secreting, their property with intent to defraud their creditors, and the said Royal Insurance Company in particular. And for reasons of his belief, deponent avers: That the defendants are citizens and subjects of the United States of America, and are merely here in the city of Montreal temporarily; that they have no domicile in Canada, either personal or real; that deponent hath been informed by John S. Young and John Jourdan, both of New York, police detectives, that the defendants are professional thieves, and immediately about to leave the Province of Canada, without any intention of returning thereto; that deponent hath, moreover, been informed by Anthony B. Macdonald, insurance agent, of New York, that the defendants are possessed of the aforesaid bonds and securities, which they refuse to give up to plaintiffs' agent, and that the defendants are secreting said bonds and securities, and secretly endeavouring to sell and dispose of the same, and convert the proceeds to their own use and advantage, and that unless the said defendants are arrested under a writ of *capias ad respondendum*, the said bonds and securities, and the said debt (the value thereof as aforesaid) will be wholly lost to the plaintiffs. That deponent saith, that without the benefit of a writ of *capias ad respondendum* against the bodies of the defendants, and a writ of attachment, *saisie-arrêt*, for the purpose of seizing and attaching such moveable estate and effects as may be in the possession of the defendants, the plaintiff will lose said bonds and certificates and said debt, or sustain damage.

This affidavit was made on the 20th December. On the 26th of the same month the defendants appeared separately, and severally moved to quash, because the affidavit did not disclose any legal and sufficient grounds of debt against the defendants, and that the cause of action did not arise within this Province.

Judge Berthelot dismissed both the motions, holding that the defendants were rendered liable by the fact of their being found here with the property in their possession; the owner of stolen property had a right of action against the thief wherever he found him with stolen property in his possession. In this case it was not material whether the property was stolen here or in New York.

In this decision of the learned Judge, I entirely concur, both as to the sufficiency of the affidavit *per se*, and to the right of action against the thief wherever he may be found; nor did I understand the defendants' counsel, in the present instance, to contest very strenuously the right of action merely. I understood them to concede the point, and in any case I entertain no doubt about the law in that respect. The question here, however, is not as to the right of action, but as to the right of arrest and detention under a writ of *capias ad respondendum*, in the face of the facts proved on these petitions. Keeping this distinction clearly in view, I proceed now to inquire into the merits of the defendant's applications.

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Chapter 87 of our Consolidated Statutes provides that—

"The Court, or any Judge of the Court, whence any process has issued to "arrest any person, may, either in Term or vacation, order any such person to "be discharged out of custody if it is made to appear on summary petition and "satisfactory proof, among other reasons, that the cause of action arose in a "foreign country."

Under this provision of the Statute the defendants presented each a petition to be discharged from custody, alleging that the cause of action for which the arrest was made arose in the United States of America and not in Canada; that no such debt as that stated in the affidavit existed; that the defendants were not about immediately to leave the Province of Canada, or to secrete their estate with intent to defraud their creditors; and finally, that the averments of the affidavit were untrue.

Upon these petitions, the plaintiffs and defendants proceeded to proof, and it has been, I think, conclusively established, as stated in the affidavit, that on the 10th of December last, the plaintiffs, who had a branch in New York, were possessed at their office in that city, of the bonds enumerated in the affidavit by Mr. Routh; that on that day they lost possession of the property, and that it is still illegally withheld from them.

The first question of fact to be determined is whether the defendants, as is alleged by the plaintiffs, were the parties who fraudulently took the bonds from the plaintiffs' office in New York. I think it clearly results from the evidence adduced, that on the 10th December the defendants called upon Mr. Macdonald, the plaintiffs' agent in New York, and spoke to him about effecting an insurance upon their lives. The conversation took place in an inner room of the plaintiffs' office, and lasted about twenty minutes, being almost exclusively carried on between Griffin, one of the defendants, and Mr. Macdonald. During all this time Knapp was walking to-and-fro, occasionally passing into an adjoining room, where there was a safe or vault, the outer door of which was open, and the inner one closed. In the inner compartment of this safe, or vault, was a tin box containing the bonds. The defendants finally left, saying they would call again, and in about twenty minutes after their departure, the agent, Macdonald, perceived that the bonds were missing; the box containing them having disappeared.

This occurred early on the 10th, and on the 12th December, in the forenoon, the defendants arrived at the Ottawa Hotel, in Montreal and on the 15th of the same month their wives joined them here. The defendants are proved to have been before this time poor men and professional thieves. On the 20th December they were arrested on the *capias* issued in this cause, and immediately previous to their arrest, and while in jail charged with this robbery, they had the following conversation with Mr. Routh, who visited them with Mr. Macdonald, to demand the restoration of the bonds. Mr. Routh says:

"I went down to the jail previous to the making of my affidavit. When I "saw them I told them I had come down about the bonds; that my advice to "them was to give them up, and get out of that place, the jail; I think it was "Knapp that first spoke to me.

"They both denied having stolen the bonds, or having them in their possession. Afterwards, when the conversation became more free, Knapp said:—"' We are prisoners, and this is not a place to do business in. We shall soon be released, and may then call upon you, and deal or do business with you.'

"He (Knapp) then addressed Mr. Macdonald, and had considerable conversation with him respecting the value of the bonds, upon which he, Knapp, put his own valuation, and then asked me what reward was offered for the restitution of the bonds. I replied ten thousand dollars. He then said, 'Gentlemen, you must take us for *pretty God damn fools* to give up such an amount for such a sum.'

"The other defendant, Griffin, first was angry, but afterwards cooled down, and spoke much to the same effect that Knapp did."

Question by Counsel:—"Did the said Griffin state he had any bonds in his possession, or had taken any?"

Answer.—"He did not distinctly say so."

This testimony requires no corroboration, and if it did, that corroboration is furnished by the evidence of Macdonald, the New York agent. Two men, respectively of the name of Mulvahille and Paxton, were examined by the plaintiffs, and they state that they had a conversation with the defendants in jail. They say the defendants admitted they were the robbers of the bonds, and described, moreover, how the robbery was committed, and that they had the bonds *safely planted here in Canada*.

To this testimony I attach but little importance; it is extremely improbable, and the statements therein made contradict, in some particulars, the evidence of Macdonald, and so far it is unworthy of confidence—it may be true or not. In any case, for the purposes of this decision, even admitting it to be true, I do not regard it as material. The remarks, however, of the defendants to Mr. Routh, taken in connection with certain other portions of the evidence adduced, leave no doubt in my mind of the robbery, or by whom it was perpetrated. As I view the testimony, therefore, I find it proved that the defendants abstracted the bonds in question from the plaintiffs' safe in New York on the 10th December, under the circumstances stated by Mr. Macdonald. On that day they became illegally possessed of this property against the will of the plaintiffs, and the probability is they have the bonds still in their possession, or under their control. It is also proved that they refused to restore them to the plaintiffs, or to disclose where they are, so that the plaintiffs might revendicate them; and upon these grounds mainly, if not exclusively, and under these circumstances, the plaintiffs had recourse to the remedy by "*Capias ad respondendum.*"

Now, as to the right of action in this case against the defendants, as before stated there can be no doubt, and it was also conceded by all the Counsel, except one, Mr. Robertson, for the defendants, that had this robbery been perpetrated in Canada, the remedy by *Capias* would be a proceeding sanctioned by the law. (Upon this point I have no opinion to give, and I studiously abstain from pronouncing any judgment in regard to this view of the law.) But there is something more in this case, and that which gives rise to the whole, or at least the chief difficulty, I have to decide whether the robbery, the conversion, and first

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detention of the bonds, having occurred without the limits of Canada, and within the dominions of a foreign State, the defendants are under our law, upon their refusal to restore the bonds, and their continued and fraudulent detention of them here, liable to imprisonment under *capias*.

That is the real question to be determined in this case. The clause of the Statute invoked by the defendants, in relation to this point, it to the following effect. It has been quoted in part above, but is produced here in order that we may not lose sight of the law we are called upon to interpret and apply.

"The Court, or any judge of the Court, whence any process has issued to "arrest a person, may, either in Term or Vacation, order such person to be dis- "charged out of custody, if it is made to appear on summary petition and satis- "factory proof, either that the defendant is a priest or a minister of any religious "denomination, or is the age of seventy years or upwards, or is a female, *or that "the cause of action arose in a foreign country*, or does not amount to forty "dollars of lawful money of this Province, or that there was not sufficient reason "for the belief that the defendant was immediately about to leave the Province "with fraudulent intent, where that is the cause assigned for the arrest, or that "the defendant has not secreted, or was not about to secrete, his property with "such intent, where that is the cause assigned for such arrest."

This Statute, though enacting general rules and provisions, applicable to arrest under civil process, it will be seen also clearly enumerates the exceptions, among which is found the case of the *cause of action arising in a foreign country*; and I have simply to determine what, in the present instance, is the cause of action according to the technical meaning of the words, and where that cause of action arose. The clause of the Statute above cited settles the rest. Now, according to the plaintiff's own showing, they lost possession of their property by theft or robbery, on the 10th December last, in the City of New York. I think they have also established that the defendants are the robbers—that they fled immediately to Canada,—that they detained the bonds,—refuse to restore them or disclose where they are. Upon the facts thus established in evidence a civil remedy arises. The plaintiffs seek to recover the value of their property by an appeal to our civil tribunals, and commence their proceedings by arresting the defendants under a "*capias ad respondendum*," and I am to determine what is the cause of action in this case. Is it the illegal taking alone? Is it the conversion or fraudulent detention of the bonds, or is it the refusal to return them or to disclose where they are? Are there so many separate causes of action, or do they, all combined, only constitute one, the same, and the real cause? It seems to me these questions can be answered without much difficulty or hesitation, and I am of opinion that the real cause of action is manifestly the illegal taking, coupled with the conversion or fraudulent detention of the bonds. Their refusal to restore them in Canada is no more, in point of law, than the refusal to pay a debt, contracted in New York. I, of course, view this question as one of law merely, and irrespective of the moral considerations which the facts of the case suggest. All that occurred in Canada, so far as we know, or can suspect, is the *continued* detention of the bonds, and the refusal to restore them. This is not the cause of action in this instance. I may reasonably presume, from the fact

that they refuse to disclose where the bonds are, that they have them in their possession, or under their control in Canada,—in other words that they still fraudulently detain them from the plaintiffs. There can be no doubt but that this fraudulent detention constitutes an important element in the cause of action in this instance, as the refusal to pay a debt forms an essential ingredient in the cause of action rising out of a civil obligation or contract. But even so, did this fraudulent detention of the bonds take its origin in Canada, or in New York? Plainly in the latter place. It commenced there,—was simultaneous with the illegal taking, and it was complete immediately upon the perpetration of the robbery. Thus, the illegal taking, the robbery, if you will, occurred in a foreign state—the fraudulent detention therefore began, originated there. It may be remarked, moreover, that in regard to the *continued detention* of the bonds, I am left to deal with presumptions. There is no evidence whatever of a conversion of the bonds in Canada, or elsewhere as a matter of fact, though in contemplation of law it may be said that the conversion took place immediately upon the illegal taking. There is no positive proof that these bonds ever were in Canada. I presume they were, and I presume, moreover, that they are still in the possession, or under the control of the defendants. But on the other hand I have what I may regard as conclusive evidence, as before stated, that the robbery was perpetrated and the illegal detention commenced in New York,—in other words that the entire cause of action arose, originated there, and not in Canada. To hold the contrary, in my judgment, would involve us in difficulties not easily overcome, and in propositions not very intelligible as propositions of law. It was strenuously contended by the plaintiff's counsel that the fraudulent and continued detention of the bonds, coupled with the refusal to restore them, was a new cause of action, arising wherever the defendants went, even if they passed from the dominions of one sovereign state to another. That the mere fact of the defendants being in Canada with their property, under the circumstances disclosed, gave them, the plaintiffs, a right of remedy by *capias*. That although the robbery was perpetrated in New York, the defendants immediately fled to Canada to consummate their villainy there; and there, where the plaintiffs first found them, and where they first became fully aware of their being the thieves, they have a right to the most rigorous remedy the law has placed at the disposal of a creditor. That robbers are an exceptional class of men, and must be dealt with accordingly in an exceptional manner. That the causes of civil actions arising out of crimes or *délits*, should not be dealt with in the same manner as those resulting from civil contracts. That the "lex fori" and not the "lex loci contractus," or in this case not the "lex loci delicti" governs the remedy, and that by the law of Canada, in a case like the present, arrest on civil process would be one of the means which our Courts would sanction in enforcing such remedy. It was also urged that in view of the facts proved, these defendants should not be allowed to evade the operation of our law upon the grounds set forth by their counsel. That, in fact, the cause of action to all reasonable intent, and for the purposes of this case, arose in Canada. No doubt there is much force in all this, but as I view the facts before me, these arguments and these generalities are not decisive. What

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is proved or may be presumed to have taken place in Canada, in regard to this matter, constitutes no new element in the cause of action. The defendants were liable upon civil process in New York, if liable at all, to the same extent, and perhaps in the same way, they are liable here. Their coming to Canada makes no change in their original liability, or in the cause of action. I am not aware of any precedent, nor have we much law, except some elementary *dicta*, to guide us in this matter. But having bestowed upon the case very careful attention, I am forced to the conclusion that the whole cause of action in the present instance, as before stated, arose in New York—that it existed there wholly and entirely before the defendants reached Canada—and that no addition to that cause, nor any modification of it, has taken place since their arrival here. Taking this view of the matter, reluctantly, but without much hesitation, I feel bound to grant the prayer of the petition, and to liberate the defendants. No doubt it is a hard case. Our statute may be defective, but I think not. In any case, I must take it as I find it. I am only the organ of the law, and as such I am bound to interpret it according to my understanding of it, and to apply its provisions with a strict and scrupulous adherence to its letter, where its language is peremptory and unambiguous. In a case like the present, had it been possible for me to entertain a serious doubt,—could I have found in the words of the statute any uncertainty, or that kind of elasticity, if I may so express it, which would have enabled me, in the conscientious discharge of my duty, to refuse the defendants' application, I should have done so. But as it is, the law, and the facts of the case, however atrocious the latter may be, compel me to decide in their favour.

In conclusion, I would remark that our legislature having employed language so intelligible and so decisive, I must assume that the law means precisely what is there so clearly enacted,—no more and no less. And I am of opinion that the letter and the spirit of the law are here in perfect harmony, and that this exemption from arrest on civil process, to be found in the statute, has not been made without good reason. Were it lawful to arrest foreigners here by *capias*, and to detain them in confinement upon civil liability, arising out of crimes or *délits* alleged to have been perpetrated in foreign States, such a mode of proceeding might lead to incalculable abuse and hardship in individual cases, and might moreover be fraught with perilous consequences. I am aware that this is not a case of international law. Neither treaties, nor the mutual comity between nations, come under my consideration. I have nothing to do with either, nor have I to analyze or discuss, *ab conveniente or ab inconveniente* arguments in this matter; but my duty is simply to decide a question of Municipal law; but in doing so, I may state that it is easy to conceive instances where parties might be subjected to long detention upon civil process in Canada, and be afterwards acquitted of the criminal charge in the country where the crime was alleged to have been committed. Besides, it would not be difficult to suppose a variety of cases in which false or doubtful accusations might result in flagrant injustice and mischief, unless special provision existed to avert such consequences.

In my opinion our legislature has wisely guarded against the possibility of such occurrences, and, although, in this case, it is much to be regretted that my

decision should come to the relief of vagabonds and professional thieves; under the circumstances proved, yet, on the other hand, I must look to the statute and to the facts established, and not to the character of the defendants.

It would be in the highest degree dangerous for any court or judge, without the express, the clearest sanction of the law, to establish a precedent such as that contended for by the plaintiffs. The petitions are, therefore, granted.

The following is the judgment, as registered in the registers of the Court:—

"Having heard * * * considering that it results from said evidence "that the cause of action arose in New York, in the United States of America, "I hereby grant said petition, and in consequence set aside the said arrest so "made under said *capias ad respondendum*, and order that the said James Grif- "fin be liberated and discharged from custody under such writ of *capias ad* "*respondendum*, unless detained from some other cause, the whole with costs."

Capias quashed.

Strachan Bethune, Q. C., and
Edward Carter, Q. C., for plaintiff.
William H. Kerr, for Frank Knapp.
A. & W. Robertson, for James Griffin.
(S. B.)

The case was immediately inscribed by plaintiff, for hearing IN REVIEW. [Reporter's note.]

MONTREAL, 26TH DECEMBER, 1866.

Coram BERTHELOT, J.

No. 2695.

McCulloch vs *Routh and Hensman, plaintiff par reprise d'instance, and the Juneau Bank Intervening.*

HELD:—That an affidavit in support of a motion for security for costs, to the effect that the deponent is personally acquainted with the plaintiff *par reprise d'instance* and that "he has no domicile in the Province of Canada, he having since he became a party in the cause ceased to reside therein, and that he is now permanently residing in England as deponent hath been informed and believes," is insufficient, and such motion will be rejected.

John L. Morris, for plaintiff.
S. Bethune, Q. C., for defendants.
F. W. Torrance, for plaintiff *par reprise d'instance*.
Cross and Lunn, for intervenants.
(J. L. M.)

MONTREAL, 20TH FEBRUARY, 1867.

Coram BERTHELOT, J.

No. 2695.

McCulloch vs. *Routh and Hensman, plaintiff par reprise d'instance and the Juneau Bank Intervening.*

HELD:—1st. That a party in a cause whose motion for security for costs has been rejected on account of insufficiency of affidavit, will subsequently, and after the cause has been inscribed for enquête, be allowed to renew his motion supported by further affidavits, and such motion will be granted.

2nd. That a foreign intervening party who had already given security for costs to the plaintiff *par reprise d'instance*, can demand security for costs from the plaintiff *par reprise d'instance*, on producing affidavits to shew that the plaintiff *par reprise d'instance* had left the Province permanently since the institution of the action.

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3rd. That although it appears that the plaintiff *par reprise d'instance* had left the Province permanently before the intervenant came into the cause, the intervenant after the issue on the intervention has been inscribed for *enquete*, will be allowed to demand security for costs from him on affidavit to the effect only that he had left since the institution of the action, not that he had left since the appearance of the intervenant.

4th. That security for costs can only be demanded, by a citizen from a foreigner, but when the foreigner has put in security, he becomes purged from his quality of foreigner and is on a parity with the citizen, and can demand security for costs from the latter, if he changes his domicile to a foreign country pending the action.

The intervenant moved that the plaintiff *par reprise d'instance* give security for costs.

The points of this case are fully exposed by the arguments of the parties as follows:—

MORRIS, J. L. Counsel for plaintiff *par reprise d'instance*—The intervenant's motion is presented under the following circumstances. The plaintiff *par reprise d'instance* is the assignee of the original plaintiffs. He is now prosecuting the suit against defendants. After the *enquête* is nearly closed, he leaves for England on the 19th April, 1866.

After this, on the 26th April, 1866, Intervenant, a foreigner, comes into the cause with his *demande en intervention*. He says the money plaintiff is suing for is his, and asks that the Court declare it to be so. Plaintiff *par reprise d'instance* immediately demands of him security for costs which is put in.

Months afterwards, on the 17th December, 1869, intervenant turns round and asks plaintiff *par reprise d'instance* to put in security for costs. His motion was rejected by the Court on the 26th December, 1866, on the ground of insufficiency of his affidavit.

Issue was then joined on the intervention, and an inscription for enquête fyled.

After all this the present second motion for security for costs is made, supported by additional affidavits.

The plaintiff submits the following as reasons why the motion should not be granted.

1st. A motion for security for costs having already been rejected, it is contrary to law, and the practice of this Court for the party to move a second time, more particularly as the delay of 4 days from the appearance of the party in the cause within which he must move according to the rules of practice had in this instance long since expired.

2nd. That according to law security for costs can only be demanded by a defendant, or by a party in the position of a defendant from a foreign plaintiff or party in the position of a plaintiff.*

The reason of this rule as gathered from the authorities quoted, and from all the commentators is that a foreigner should not be allowed to come into a country and drag a citizen into litigation without giving security that the costs he was creating should be paid. Owing to his foreign residence, the citizen without this would have no security.

Here *quoad* the intervenant the plaintiff is in the position of a defendant. The intervenant by his *demande en intervention* makes a demand which plaintiff has

* 1 Pigeau, 165, 166. Con. Statutes, L. C. 726, Sec. 68.

to resist—which he pleads to. The intervenant is the attacking party, creating the costs, and is clearly a true plaintiff, while the original plaintiff, *quoad* him, being on his defence, is a true defendant.

This is, moreover, proven by the acts of the intervenant who has admitted his quality of a foreign plaintiff by giving security for costs to the plaintiff *par reprise d'instance* when it was demanded.

Applying then the principle of law above stated, the motion ought to be rejected.

3rd. There are only two cases according to law and the practice of this Court in which security for costs can be demanded.

1st. When the plaintiff who brings his action is a foreigner, within four days from the appearance in the cause of the defendant, or party entitled to security.

2nd. When the plaintiff has left the country after the institution of the action on affidavit produced to that effect.

Have either of those two cases been met here? They have not. For, 1st, the plaintiff *par reprise d'instance*, who was a citizen when the action was brought at the time the intervenant came in, was absent from the country. Intervenant should therefore have moved for his security within four days from his appearance, but did not do so. 2nd. The plaintiff *par reprise d'instance* did not leave the country after the intervenant's appearance. There has been no change whatever in the position of the parties since the intervenant came in; and yet nine months afterwards, on the simple affidavit, that since the action was brought, not since the intervention was allowed, this motion is made. Had the affidavits contained the allegations that the intervenant was ignorant, before this, of plaintiff's absence, so as to shew that he used diligence, his motion might have been well founded. But he has not used diligence, for his first motion was made in December last. Why did he not renew immediately instead of waiting two months until after issue was joined and inscription for *enquête*. He ought to have done so if he expected the indulgence of the Court.

CROSS, Q.C.—For intervening party contended.

1st. That his former motion having been rejected on the ground of insufficiency of affidavit, having now obtained fuller, and sufficient affidavits, it was perfectly legal for him to move the Court anew for security for costs, and the right accrued to him *de die in diem* from the continuing absence of the party. The rule was that if a party in a cause left the country, at any time after the suit or proceeding was commenced, it was competent for the opposite party at any time before judgment to move for security for costs. The rule of practice cited by the plaintiffs' counsel limiting the time within which the motion must be made to four days from the appearance in the cause of the party making it, only had reference to cases where the party was described in the writ or declaration as a foreigner.

In other cases the motion might be made at any time, there being no delay rule to exclude the application.

2nd. The pretension that security can only be asked from a plaintiff or party in the position of a plaintiff, if in conformity to the French law, had been extended by our statute, which made a change extending the right to any party in a

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proceeding, or suit therein described, including all parties having suits, actions, or oppositions.

3rd. It was, therefore, scarcely necessary to discuss the question whether the plaintiff *par reprise d'instance* was merely *quoad* the intervening party in the position of a defendant. But it was clear he was a plaintiff, he appeared as plaintiff of record, and as such must give security, having left the country since the action commenced.

John L. Morris, for plaintiffs.

S. Bethune, Q.C., for defendants.

T. W. Torrance, for plaintiff *par reprise d'instance*.

Cross and Lunn, for intervenants.

(J. L. M.)

COUR DU BANC DE LA REINE.

EN APPEL.

MONTREAL, 6 DECEMBRE 1866.

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

No. 6.

JEAN LOUIS BEAUDRY,

vs. APPELANT;

LE MAIRE, LES ECHEVINS ET LES CITOYENS DE LA CITÉ DE MONTREAL, INTIMÉS.

JUGE:—Que le Jugement de première instance renvoyant une inscription en faux sur une défense au fond en droit, doit être rangé dans la classe et dans l'ordre des Jugements interlocutoires à raison de l'influence que ce Jugement peut avoir sur la décision du fond du procès quant à L'AFFAIRE EN LITIGE entre les parties; et l'Appel doit en être interjeté comme d'un jugement interlocutoire. [*]

L'appelant, demandeur en faux en cour de première instance, ayant produit une exception au jugement rendu le 30 novembre 1866, rejetant l'inscription en faux sur une défense au fond en droit, fit motion le 5e jour de décembre 1866, pour une règle contre les Intimés défendeurs en faux à l'effet de donner leurs raisons pourquoi un bref d'appel de ce jugement ne serait pas accordé, en conformité à la section 26 du chapitre 77 des Statuts Refondus pour les Bas-Canada. (*)

La cour sur délibéré a accordé la motion, et l'appel fut permis.

C. A. Leblanc, avocat de l'appelant.

Henry Stuart, avocat des intimés.

(P. R. L.)

(*) Perrault et Simard, Jugé en appel à Montréal.

(*) Ch. 77, Sec. 26, Sous-section 2. "Un appel pourra être interjeté et obtenu en la "manière ci-dessus mentionnée, des jugements interlocutoirés portant exécution, en ordonnant qu'il soit fait ou exécuté certaine chose à laquelle il ne peut être remédié par "le jugement *définitif*, ou par lequel *l'affaire en litige*, entre les parties, peut être *décidé* "*en partie*, ou l'audition et le jugement *définitifs* retardés inutilement."

COUR SUPERIEURE.

JOLIETTE, 20 OCTOBRE, 1866.

No. 264.

Coram LORANGER, J.

Lepage et al. vs. *Chartier.*

Procédure,—Douaire Coutumier,—Prescription Décennale.

JUGE:—1o. Que les réponses faites par un défendeur à des transquestions posées par la partie adverse, sur son affidavit au soutien d'une motion par lui présentée pour obtenir la permission de produire une nouvelle défense, ne peuvent militer contre lui sur le fonds du procès.

2o. Que pour prescrire par dix ans, et faire les fruits siens, il suffit que le tiers-acquéreur ait été de bonne foi au moment de son acquisition; la connaissance des vices de son titre ou de celui de son auteur survenue au tiers-détenteur depuis son acquisition ne peut vicier sa possession.

3o. Que dans une action pour douaire coutumier des enfants, intentée contre un tiers-détenteur, s'il n'a pas été allégué par les demandeurs que leur père n'a pas laissé dans sa succession d'héritages de valeur suffisante pour leur fournir leur douaire, le défendeur ne peut faire rejeter la demande des douairiers, en se fondant sur cette simple omission, il faut qu'il allégue paré exception, et prouve que le pre a laissé dans sa succession des biens sujets au douaire d'une valeur suffisante pour y satisfaire.

Cette insuffisance des allégués de la déclaration doit être attaquée par exception péremptoire; on ne peut s'en prévaloir efficacement par un simple défense en droit, ni *de plano* lors de l'audition.

4o. Que les parts des douairiers qui renoncent au douaire restent dans la succession de leur père et n'augmentent pas celles des autres enfants qui s'en tiennent au douaire.

Les faits de la cause, la plaidoirie, la preuve et les arguments formulés de part et d'autre à l'audition ont été résumés par son honneur le juge Loranger, en rendant le jugement avec une clarté et une précision qui nous dispensent de tout commentaire. Nous reproduisons ici textuellement la dissertation dont le savant juge a accompagné son jugement:

LORANGER, J.—Le 14 octobre 1811, Amable Lepage, agriculteur de la paroisse de St. Jacques, épouse Marie Madeleine Boyd, sans contrat de mariage, et une terre de deux arpents de front sur trente de profondeur, qu'il possédait en la dite paroisse par Donation de ses père et mère devient assujettie au Douaire Coutumier. De ce mariage naissent sept enfants habiles à se porter héritiers de leur père, à sa mort arrivée le 28 juillet 1844.

Un demi arpent de cette terre ayant été aliéné durant la communauté, Marie-Madeleine Boyd, après la mort de son mari, reste en possession d'un arpent et demie de la terre assujettie à son douaire, un tiers de cet arpent et demie appartenant à la succession de son mari demeurée vacante, et les deux autres tiers étant affectés à son usufruit sa vie durante comme douairière.

Le 27 janvier 1851, le tiers de cet arpent et demie, appartenant en propriété à la succession vacante de feu Amable Lepagé, et le droit d'usufruit de la dite Madeleine Boyd sur les deux autres tiers sont vendus en justice, et Etienne Brien dit Desrochers s'en rend adjudicataire. Le 6 mai suivant l'autre demi arpent de cette terre, qui avait été aliéné durant la communauté, est aussi vendu en justice sur le délaissement de l'acquéreur, et le dit Etienne Brien dit Desrochers s'en rend adjudicataire. En vertu de ces deux adjudications Brien dit Desrochers se trouvait avoir acquis toute la terre en question, c'est-à-dire un arpent, en pleine propriété, et seulement l'usufruit de

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l'autre moitié la vie durante de Marie-Madeleine Boyd. Le 26 octobre 1852, il vend en propriété la terre au défendeur Nicholas Chartier quitte et nette, sans mention de douaire, et Chartier s'en met de suite en possession.

Le 11 juillet 1857, Marie-Madeleine Boyd la douairière décède.

Du 26 juillet 1847 au 26 octobre 1849, six des enfants renoncent à la succession de leur père, pour s'en tenir à leur douaire, le septième Marie-Anne Lepage renonce à la fois à la succession et au douaire, déclarant le faire au profit de ses frères et sœurs.

Le 22 juillet 1863, trois des douairiers, savoir Alexis *alias* Alexandre Lepage et Alphonsine *alias* Delphine Lepage, épouse de Narcisse Bourgeois et Domithilde Lepage, intentèrent contre le défendeur une action devant cette cour, se portant douairiers de leur père, et réclamant à ce titre chacun un septième dans la moitié indivise de la terre susdite, et de plus chacun un sixième dans le septième ayant appartenu à Marie-Anne Lepage comme douairière, en vertu de sa renonciation accompagnée de cession en faveur des demandeurs en commun avec leurs frères et sœurs ; et de plus les fruits et revenus perçus par le défendeur sur ces parts indivises de l'immeuble, à compter du décès de leur mère, c'est-à-dire du 11 juillet 1857.

A la demande d'Alexis *alias* Alexandre Lepage, le défendeur opposa d'abord la prescription de dix ans, et offrit de confesser jugement pour la part de Delphine Lepage, avec les fruits accrus depuis la signification, déduction faite des impenses, et une défense en fait dirigée contre tous les demandeurs. Il plaida ensuite une exception subsidiaire fondée sur sa possession de dix ans et sa bonne foi, concluant à ce que la demande pour fruits et revenus accrus depuis la mort de Marie Madeleine Boyd jusqu'à l'assignation fût rejetée, sa prétention étant qu'ayant possédé avec bonne foi, il ne devait les fruits aux douairières que du jour de leur demande en justice. Il se porta ensuite demandeur incident pour réclamer les impenses par lui faites sur l'immeuble avec droit de rétention.

A la première exception les demandeurs (Delphine Lepage prenant acte de la confession de jugement offerte en sa faveur) opposèrent la mauvaise foi du défendeur au commencement et pendant la durée de sa possession, prétendant qu'il avait eu remise du titre d'acquisition d'Etienne Desrochers, son vendeur, lequel titre faisant voir que ce dernier n'avait acquis que l'usufruit qu'avait la dite Marie Madeleine Boyd comme douairière, dans la moitié de l'immeuble, qu'il avait connu l'existence du douaire pendant les dix ans écoulés depuis son acquisition, et que cette connaissance excluait l'idée de la bonne foi requise pour prescrire par dix ans. Sa réponse ajoutait de plus : que pendant la possession du défendeur, Alexandre Lepage était absent du Bas-Canada, ayant résidé dans les Etats-Unis depuis l'acquisition du défendeur, et dès avant, jusqu'à la fin de l'automne 1862.

Pour repousser la prétention du défendeur qu'il ne devait les fruits que du jour de la demand, la réponse à son exception subsidiaire invoquait comme la première sa connaissance de douaire, d'où elle inférait sa mauvaise foi.

A l'enquête l'absence d'Alexandre Lepage fut prouvée ainsi que alléguée par les demandeurs. La possession du défendeur fut admise par les demandeurs, tout en niant sa bonne foi. Le défendeur admit de son côté que le père des

demandeurs Amable Lepage n'avait laissé dans sa succession d'autres biens que la terre en question, sur lesquels les demandeurs auraient pu faire valoir leur douaire, sous réserve des objections qu'il entendait opposer à la preuve de fait non justifiée suivant lui par les allégations de la demande.

Le 16 mai, jour de la preuve des faits ci-haut, moins le fait de l'absence d'Alexandre Lepage, qui avait été établi le 10 octobre précédent, le défendeur fit une motion demandant à produire une exception additionnelle fondée sur un transport fait à Etienne Desrochers, l'auteur du défendeur, par les défenderesses Domithilde et Delphine Lepage de leurs droits et prétentions comme douairières le 6 Août 1856, fait ignoré du défendeur lors de la production de sa défense et qu'il n'avait connu que tout récemment. Cette motion soutenue par son affidavit lui fut accordée, et en réponse à cette exception les demandeurs alléguèrent la nullité de ce transport quant à Delphine Lepage, comme ayant été fait par sa tutrice pendant sa minorité, à son préjudice, et ayant contenu une aliénation de ses droits immobiliers, sans autorisation judiciaire obtenue au préalable.

Sur la production de l'affidavit du défendeur au soutien de sa motion pour permission de produire la défense additionnelle qui vient d'être mentionnée, et qui constatait qu'il n'avait connu le transport que tout récemment, les demandeurs réclamèrent le privilège de tranpquestionner le défendeur qui était présent en Cour sur les faits contenus en son affidavit, ce qui leur fût accordé malgré les objections de son avocat M. Lesage.

La question suivante lui fut posée: Lors qu'Etienne Brien dit Desrochers, votre vendeur, vous a vendu la terre dont il est question en cette cause, et sur laquelle les demandeurs reclament un douaire, le dit Brien dit Desrochers vous a-t-il alors remis les titres et papiers concernant la dit terre, c'est-à-dire ses titres d'acquisition de la dite terre, entr'autres le papier que vous produisez actuellement devant cette cour, qui est un acte de cession par Dame Mary Boyd en faveur du dit Brien?

Le défendeur par le ministère de son avocat s'objecte à cette question, comme ne découlant pas des faits mentionnés en l'affidavit. L'objection fut reservée.

Réponse:—Oui, je le crois.

Re-examiné par Son Procureur:

N'est-il pas vrai que vous n'avez eu la lecture et explication de l'acte en question, et que vous n'avez connu son effet que depuis la production de votre défense?

Réponse:—Oui.

Interrogé par la Cour:

Avez-vous donné cet acte à votre avocat en même temps que les autres quand vous l'avez chargé de dresser votre défense?

Reponse:—Je ne puis le dire.

Le même jour interrogé de nouveau dans le cours régulier de l'enquête le défendeur répondit qu'il ignorait quand le titre d'acquisition d'Etienne Desrochers lui avait été remis. On lui fit la question suivante: Savies-vous dans le temps que vous avez acheté d'Etienne Brien dit Desrochers qu'elle était sujette au douaire des enfants de feu Amable Lepage? Il répondit: Non, si je l'avais su, je ne laurais pas achetée; ce n'est pas moi qui a fait l'achat, c'est mon père pour

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Question :—Quand avez-vous appris cela pour la première fois ?

Reponse :—Presque aussitôt après l'achat de cette terre, j'ai appris qu'il y avait du trouble sur cette terre, malgré que mon vendeur me l'eût vendu quitte et nette. J'en ai parlé dans le temps à mon vendeur, et il m'a dit de ne rien craindre ; qu'il avait payé toutes les parts..... il n'y a pas de risque, ils font cela exprès, ils ne sont pas capables de revenir, et il ajouta : si vous craignez je vais vous donner des suretés. Cette conversation avait lieu à propos du douaire des enfants de feu Amable Lepage, et il me dit qu'il avait achèté toutes les parts des enfants, et qu'il n'y avait pas de moyens qu'ils revinssent sur ma terre ; et là dessus il se fâchait, ajoutant que s'il en était ainsi il me l'aurait dit. J'ai appris cela avant l'expiration de l'année, à compter de l'époque de mon achat.

Le lendemain, 17 mai, les parties furent entendus au mérite, où les questions suivantes furent soulevées.

D'abore, par rapport à Delphine Lopage, ses avocats prétendirent qu'elle devait obtenir gain de cause pour sa part, savoir pour un septième dans la moité indivise de la terre, plus un sixième dans un autre septième, etant celle de Marie-Anne Lepage qui avait renoncé au douaire en faveur de ses co-douairiers, faisant en réalité un sixième dans la moitié ou un douzième dans la totalité de la terre indivise. Que le défendeur avait offert de confesser jugement pour cette quotité, et que les droits de Delphine Lepafie ne pouvaient être affectés par la cession faite è Desrochers par sa mére pendant sa minorité, que cette cession était nulle comme contenant l'aliénation de ses droits immobiliers sans autorité de justice, et avait constitué une lésion à son préjudice.

Sur ce deux points la Cour n'hésite pas à donner gain de cause à la demanderesse Delphine Lepage, la confession de jugement offerte en sa faveur par le défendeur n'a pas été retractée explicitement ; et l'eut-elle été implicitement par la défense nouvelle, la cassion sur laquelle est basée cette défense est radicalement nulle. Par cet acte la tutrice d'unemineure aliène les droits de sa pupille à un douaire coutumier, droits essentiellement immobiliers, et dont l'aliénation sort du domaine du tuteur, qui n'en peut disposer que sur autorisation judiciaire. Le mineur devenu majeur n'a qu'à se plaindre, de semblable aliénation pour s'en faire relever. Elle ne peut même lui être valablement opposée.

Quant à Alexandre Lepage il est également évident que la prescription décennale ne peut lui être opposée, vu son absence continuelle pendant le temps de la possession du défendeur. Cette prescription étant le seul moyen de défense invoqué contre lui, et ce moyen défaill, il doit obtenir jugement pour sa part.

Il n'en est pas ainsi de Domithilde Lepage qui doit succomber dans sa demande, qui doit être repoussée (mettant de côté pour le moment l'exception de prescription décennale) sur le moyen tiré de la cession qu'elle a faite de son douaire à l'auteur du défendeur Etienne Desrochers par l'acte du 6 août 1856. Aussi, en réponse à ce moyen, s'en est-elle rapportée à justice.

Nous verrons bientôt si elle devait également être deboutée à raison de l'exception de prescription decennal, bien que la discussion de cette question ne soit pas maintenant d'un effet immédiat sur le litige, on antant qu'il est necessaire d'adjuger sur le droit des demandeurs à la propriété de l'immeuble sans égard aux fruits. Les demandeurs ayant néanmoins, opposé la mauvaise foi du défen-

deur à sa prescription comme à sa prétention qu'il a fait les fruits siens jusqu'à l'assignation, en considérant la seconde question, nous serons forcément amenés à la solution de la première, l'élément de la discussion étant le même, savoir la bonne ou mauvaise foi du défendeur.

Le défendeur a-t-il possédé avec bonne foi? Voilà le point dont la solution doit décider du sort des deux moyens invoqués par le défendeur. Examinons d'abord la question de fait, et la preuve faite à cet égard. Elle réside exclusivement dans les aveux du défendeur, interrogé comme témoin des demandeurs sur la connaissance qu'on lui impute des droits que les demandeurs avaient sur l'immeuble qu'il a acquis pour être payés de leur douaire. Il a prétendu que les réponses qu'il a données en transquestion sur son affidavit produit au soutien de la motion pour obtenir la permission de produire une nouvelle défense, ne pouvaient militer contre lui sur le fond du procès, et je reconnais son objection comme fondée. En effet, la preuve faite sur un incident comme celui-là ne peut affecter le principal. L'objet de son affidavit était la permission de produire une nouvelle défense. C'était en vue d'accorder ou de refuser, cette permission que j'ai permis la transquestio. Ce serait faire sortir de leurs limites naturelles, les effets de cette transqustion que de les faire rejaillier sur le fonds du droit des parties, et prendre par surprise la partie qui ne pouvait raisonnablement prévoir que l'on préterait une semblable conséquence à ses réponses.

Je n'ai donc aucun égard à ses réponses données sur son affidavit, dont l'effet a cessé avec la libertè qui lui a été accordée de produire une défense nouvelle et je puise dans son témoignage seul donné à la requisition des demandeurs dans le cours régulier de l'enquête la preuve de la connaissance du douaire. Il dit qu'il ignore quand le titre de son vendeur lui a été remis. Il soutient n'avoir entendu parler qu'après son acquisition, du douaire que les demandeurs réclamaient sur sa terre, et ajoute qu'il a reçu des assurances contraires à cette prétention de la part de son vendeur, qui lui a affirmé qu'il l'avait déchargé.

En matière de possession, quelle est l'époque à laquelle doit remonter la bonne foi de possesseur? En quel temps doit-il avoir connu l'empêchement pour être réputé en mauvaise foi?

S'il àtait de bonne foi lors de son acquisition, et qu'il n'ait connu les vices de son titre que plus tard, cette connaissance fait-elle obstacle à sa possession, et à la prescription qui est fondée sur elle?

Le principe en matière de bonne ou mauvaise foi est que c'est à celui qui allègue la mauvaise foi à la prouver. Tel est le sens tevtuel de second paragraphe de l'article 2202 du code civil du Bas-Canada emprunté à notre ancien droit et de l'article 2268 du code Napoléon qui porte que la bonne foi est toujours présumée, et que c'est e celui qui allègue la mauvaise foi à la prouver. L'article 2253 de notre code ajoute: Il suffit que la bonne foi des tiers acquéreurs ait existé lors de l'acquisition, quand même leur possession utile n'aurait commencé que depuis.

L'article 2269 du code Napoléon porte: Il suffit que la bonne foi ait existé au moment de l'acquisition.

Que peut-il y avoir de plus clair pour démontrer que la connaissance survenue au tiers détenieur postérieurement à son acquisition avant ou pendant la posses-

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sion utile ne peut vicier sa possession s'il ignorait quand il a acquis les vices de son titre ou de celui de son auteur. Et tel est le cas du défendeur. C'était aux demandeurs à prouver sa mauvaise foi, sa bonne foi étant présumée, et hormis qu'ils prouvent qu'au moment de son acquisition le défendeur connaissait l'existence du douaire et l'imperfection du titre de son auteur, ce qu'ils ont failli d'établir, ils n'ont point repoussé son plaidoyer de prescriptiou contre l'action de Domitilde Lepage. Aussi j'estime qu'il est bien fondé par rapport à elle, et qu'elle doit être déboutée, tant à cause de cette prescription acquisitive que le defendeur a obtenue contre elle qu'à raison de la cession qu'elle a faite de ses droits à son auteur Etienne Desrochers.

Reste la question de bonne foi par rapport aux fruits et revenus, l'article 411 de notre Code dit que le simple possesseur ne fait les fruits siens que dans le cas où il possède de bonne foi; dans le cas cohtraire, il est tenu de rendre les produits avec la chose au propriétaire qui la revendique. Le possesseur de bonne foi n'est pas tenu de compenser les fruits avec le rembonrsement des améliorrtions auxquelles il a droit. L'article 439 du code Napoléon contient la même disposition. Notre article 412 ajoute: le possesseur est de bonne foi lorsqu'il possède en vertu d'un titoe dont il ignore les vices, ou l'avènement de la clause résolutoire qui y met fin. Cette bonne foi ne cesse néanmoins que du moment où ces vices ou cette cause lui sont dénoncés par interpellation jndiciaire.

L'article 1441, chap. 3e des douaires, titre 4e du 3e livre, statue ainsi qu'il suit: La femme et les enfants sont saisis de leur droit respectif dans le douaire à compter de son overture, sans qu'il soit besoin d'en faire demande en justice; cependant cette demande est nécessuire contre les tiers acquéreurs pour faire courir à leur égard les fruits des immeubles et les intérêts des capitaux qu'ils ont acquis de bonne foi, sujets ou affectés au douaire.

Cet article n'exige donc pas que la bonne foi accompagne la possession; il n'exige la bonne foi qu'au moment de l'acquisition. Comme pour la prescription, il suffit qu'elle existe à l'origine, c'est-à-dire lors de l'acquisition.

Comme nous l'avons vu, le défendeur a acquis de bonne foi, et aux termes des articles ci-dessus, il ne doit es fruits que du jour de la demande.

Tout en admettant que le père des douairiers n'avait pas laissé dans la succession des biens suffisants pour les remplir de leur douaire, le défendeur a tiré un argument contre la demande du défaut d'allégation de ce fait. Les enfants n'ont d'action contre les tiers détenteurs a-t-il dit, se fondant sur la doctrine enseignée par Pothier Douaire, no. 341, que lors que leur père n'a pas laissé dans la succession une quantité suffisante des héritages sujets au douaire pour remplir les enfants douairiers de la portion qui leur appartient dans l'universalité des héritages sujets au douaire. Cette insuffisance de la succession du père est un des éléments essentiels de l'action contre les tiers détenteurs, laquelle ne peut exister qu'à cette condition. Il était donc nécessaire que les demandeurs en fissent l'objet d'une allégation expresse. Je ne puis me rendre à ce raisonnement. En faveur de qui la loi a-t-elle imposé cette restriction à la demande des douairiers? Evidemment, en faveur des tiers détenteurs qu'elle ne veut pas qu'on trouble, si la succession de père, chargée personnellement de faire valoir le douaire, renferme une quantité suffisante de biens qui y sont affectés pour remplir les douai-

riers. Il est de ce droit, créé en faveur des tiers-détenteurs, comme de tous les autres droits créés en faveur des individus, auxquels on peut renoncer, et que l'on est censé abdiquer quand on ne les fait pas valoir. Dans l'espèce, le défaut d'accomplissement de l'obligation qui incombait aux demandeurs de démontrer la carence de la succession de leur père pouvait être dans la bouche du défendeur le sujet d'une exception qu'il n'a pas jugé à propos de plaider, et à laquelle il est présumé avoir renoncé.

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En déclarant bien fondée la demande d'Alexis Lepage et Delphine Lepage à leur part dans le douaire; je n'est pas entendu l'accueillir en entier. Ils réclament un séptieme de leur chef, et en cela, ils ont justifié de leur droit. Mais ils reclament aussi un sixième de la part de Marie Anne Lepage qui a renoncé au douaire en leur faveur. Cette renonciation n'a pu avoir l'effet de faire accroître la part de la renonçante à ses co-douairiers. L'article 1471 du code civil porte: "que les parts de ceux qui renoncent (au douaire) restent dans la succession "et n'augmentent pas celles des autres enfants qui s'en tiennent au douaire."

D'après cet article, il est clair que la part de Marie Anne Lepage dans le douaire est restée dans la succession d'Amable Lepage, et n'a pas accru aux demandeurs Alexis et Delphine Lepage qui ne peuvent la reclamer. Ils doivent donc être déboutés de leurs conclusions à cet égard, et jugement ne doit être rendu en leur faveur que pour chacun un septième dans la moitié de l'immeuble.

Olivier et Baby, avocats des demandeurs.

Lesage et Jetté, avocats du défendeur.

(S.L.)

(INSOLVENT ACT OF 1864.)

MONTREAL, 27th OCTOBER, 1866.

Coram MONK, J.

No. 441.

Exparte Alexander Thurber, an Insolvent, petitioning for confirmation of his discharge;

AND

Law, Young & Co., and other Creditors,

OPPOSING.

HELD:—That the facts proved did not establish "any fraud or fraudulent preference on part of the "said petitioner, an Insolvent, or any matter or thing whereby he could be barred from "obtaining the confirmation of his discharge."

This was an application by Alexander Thurber, an insolvent, for confirmation of his discharge, as contained in a deed of composition and discharge, executed by the required number of his creditors, on the 21st day of October, 1865, before J. H. Isaacson and his colleague, notaries public.

The application was opposed by several of his creditors, on the following specific grounds:

That the insolvent was a bankrupt to his own knowledge, in 1863, and was so continuously up to the time he declared himself to be so, on the 19th of May, 1865.

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That not only was the insolvent to his own knowledge, actually a bankrupt during all the period above mentioned, but his affairs became gradually worse from the date of his balance sheet in 1863, to the time of his actual stoppage on the 19th of May, 1865, so much so, that, in addition to his ordinary discounts at the banks, he was obliged to borrow money during the whole of the above mentioned period at from fourteen to fifteen per cent. discount, and, from the month of July, 1864, to the time of his stoppage at the rate of one-half per cent. to one per cent. per week.

That the insolvent purposely concealed the actual state of his affairs from the said creditors, and even purposely abstained from making a balance sheet, at any time since 1863.

That all the purchases which the said insolvent made from his said creditors were so made during the six or seven months immediately preceding the said 19th day of May, 1865, and some of them within a few weeks of that day.

That when the said insolvent purchased from the said creditors the goods for the price whereof they are creditors in this matter, the insolvent knew or believed himself to be unable to meet his engagements, and concealed the fact from his said creditors with the intent to defraud them.

That the said insolvent, on or about the 18th day of May, 1865, fraudulently disposed of a large quantity of teas, forming part of his estate, to one Andrew W. Hood in the main at cost price, and fraudulently misapplied the proceeds, so that no part of such proceeds have in any way formed part of the assets for distribution in this matter.

That on or about the 18th day of May, 1865, the said insolvent fraudulently preferred Messrs. Prentice, Moat & Co., and P. D. Browne, who were then creditors of the insolvent.

That the said insolvent by certain entries made in his books within a few months of his insolvency, hath fraudulently represented his own wife to be a creditor of his estate, for the sum of three thousand dollars, whereas from his own examination under oath it is established that she never was a creditor of the insolvent for any sum of money whatever.

That in the month of February last, the insolvent fraudulently procured the destruction of a promissory note, signed by Thomas Davidson, of Montreal, merchant, in favour of and endorsed by the insolvent to Henry Thomas, of Montreal, merchant, in order to induce the said Davidson not to oppose the confirmation of the deed of composition and discharge filed in this matter and that the effect of the destruction of said note has been to make the said Davidson withdraw all opposition to the confirmation of said deed.

That throughout the whole of his examination under oath before the assignees, the insolvent has purposely withheld information asked from him, and hath evaded and prevaricated throughout the whole of such examination.

That the said insolvent fraudulently surrendered between the 20th and 22nd days of May, 1865, the following promissory notes, belonging to his estate to the parties primarily liable thereon, namely, a note signed by one George B. Thurber, (a brother of the insolvent,) for $642.25 currency,—a note signed by one A. Préfontaine (a friend of the insolvent,) for $700 currency, a note signed by one

G. B. Plamondon (a brother-in-law of the insolvent) for $900 currency, and a note signed by one E. Lesperance (a friend of the insolvent) for $1600 currency, all which notes were received by the insolvent from said Prentice, Moat & Co. on or about the said 18th day of May, 1865.

That on the 17th day of May, 1865, the said insolvent fraudulently preferred La Banque du Peuple and L. G. Fauteux, or one or other of them, who were then creditors of his, by paying in full a promissory note for $2468 currrency, which became due on that day in the said bank, and on which the said L. G. Fauteux was endorser. Which said note was so paid partly by the proceeds of the discounting of a note of Wm. Nevin & Co. for $842. 25 received by the insolvent on or about the 17th day of May, 1865, from Messrs. Prentice, Moat & Co., and partly also by the money received by the insolvent from P. D. Browne, on or about the 17th day of May, 1865.

That on or about the 17th day of May, 1865, the said insolvent fraudulently preferred Charles Hagar, then a creditor of his, by delivering to him about $2000 worth of teas received by the insolvent from said P. D. Browne on or about the 17th day of May, 1865.

That the said insolvent, on or about the 18th day of May, 1865, fraudulently surrendered a promissory note signed by Mair & Co. of Perth, for about $1000 currency to the said Mair & Co.; the said note being at the time the property of the estate of the said insolvent and having been received by him from said P. D. Browne on or about the said 18th day of May, 1865.

At the argument, *Bethune, Q. C.*, on behalf of the opposing creditors, submitted the following points for the consideration of the Court:—

1. As to actual insolvency in 1863, and presumed knowledge of Thurber that he was so then, and continued to get more and more involved up to stoppage, on 19th May, 1865.

In the balance sheet for 1863 he put down, as *good* assets, book debts (in the main due *prior* to 1859; and *all*, except an amount due by one Bowen since 1862, due since 1861), of which only $1460 have ever been collected; the rest ($9,399.43) being utterly bad.

Vide pages 42 and 43 of Record of Proceedings before Assignees, and the list of those debts.

According to statement B (pages 34 and 35) of Assignees Record, which insolvent admits (page 42), and his bookkeeper since attests to be correct,—the books of the insolvent show *an excess of expenditure over profits* for the year 1863 of $6,705.96.

The insolvent admits (pages 42 and 43), that according to his books, he was actually insolvent in 1863, when he made his balance sheet showing a surplus; but he contends he was not aware of the fact.

It is to be noted that the bookkeeper, who has been examined by the insolvent, does not pretend to contradict this admission.

According to insolvent's own admission, and those of his bookkeeper, the insolvent, from 1863, to his stoppage, was obliged to borrow (in addition to his ordinary discounts at the Merchants' Bank, the Bank of Toronto, the Jacques

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Cartier Bank, La Banque du Peuple, and the City Bank), at the rate of *fourteen to fifteen per cent.* per annum, and from June or July, 1864, at the rate of one and a half to one per cent. per week, *or twenty-six to fifty-two* per cent. per annum.

The result of this excessive discounting is shown by Paper B to be, that the total discounts for 1864 amounted to $9915.74 (those for 1863 being only $5874.79), and for the four and a half months of 1865, they reached the enormous figure of $5647.10, *the gross profits* for 1865 being *nothing.*

Notwithstanding the aid derived from these extraordinary loans, so pressing became the necessities of the insolvent, that on or about the 12th of May, 1865, he sold a large quantity of teas to a Mr. Hood, in the main at cost price: the balance being sold at only one cent. per lb. advance.

On or about the same day he effected a special loan of $3000, for a week, fromt he City Bank, and on or about the 16th May, 1865, he obtained from Mr. Hood two accommodationn otes of about $3000 each. And notwithstanding all these borrowings, he was unable to meet a note due Law, Young & Co. on the 15th of May, 1865, amounting to $3,229.60.

Although payment generally was only stopped on the 19th of May, 1865, yet (as the bookkeeper testifies) the note due Law, Young & Co. "*was the immediate cause of the stoppage.*"

The insolvent has repeatedly stated, in his several examinations, that until the 18th of May, 1865, he had no suspicion he should have to stop payment.

In the face of the foregoing narrative of facts, it is unnecessary to argue that this statement of the insolvent is simply untrue.

It is complained then, in this connexion, that when he purchased from David Torrance & Co. on the 5th October, 1864,—from Law, Young & Co. on the 12th October, 1864, and 30th March, 1865,—from John Redpath & Son on 20th March, 1865, and 20th April, 1865,—from Havilland Routh & Co. on the 10th December, 1864, — from Winn & Holland from February to April, 1865, and on 5th May, 1865, —and from Nelson & Wood on the 19th January, 1865, 9th March, 1865, 20th April, 1865, and 5th May, 1865,—*or at least on some of these occasions,* the insolvent must have known himself to be a bankrupt; and consequently that all, or at least some, of these purchases were a fraud, in terms of sub-section 7 of section 8 of the Insolvent Act of 1864.

Before closing this branch of the case, attention is drawn to the additional fact that in the early part of January, 1865, the bookkeeper, *by direction of the insolvent,* made certain entries in the books so as to make the *wife* of the insolvent appear a creditor of the insolvent, in respect of a matter balanced off in the same books as far back as 1860 or 1861. The insolvent was evidently preparing for a financial crisis as far back as the beginning of January, 1865.

2. The effect of the entries thus made in January, 1865, was to make the insolvent's own wife appear a creditor for $3000 of capital and $1220 of interest (*calculated at 8 per cent.*); whereas, according to the insolvent's examination (pages 43, 44, and 46), the $3000 were evidently a present or advance from the insolvent's father-in law. The idea of the amount being a debt to the insolvent's wife is simply absurd. Moreover, the account originally

opened in the books, as between the insolvent and his wife, was closed in 1860 or 1861, and the attempt to reopen same in 1865 was simply a fraud. The charge for interest at 8 per cent. is also wholly without foundation.

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3. As to the fraudulent preferring of Prentice, Moat & Co.:

According to the insolvent's own examination, he owed Prentice, Moat & Co., on the 16th or 17th of May, 1865, "*from six to seven thousand dollars;*" and by a payment of $2000 (part of the $3000 borrowed specially from the City Bank), and the proceeds of one of the $3000 accommodation notes received from Hood (besides other payments evidently made but not explained),—their claim was reduced to $610.56,—against which they held collateral security, valued by them at $560,—"*thereby reducing their actual claim to fifty dollars and fifty-six cents.*"

It was from Prentice, Moat & Co. that many of the borrowings were had at 26 to 52 per cent. per annum. As an offset to their generosity, the insolvent seems to have felt it proper to protect them against all possible loss.

4. As to the fraudulent preferring of P. D. Browne:

On or about the 18th of May, 1865, the insolvent owed P. D. Browne about $4500 currency; and by handing him one of the $3000 notes received from Hood, and by other payments evidently made, but not explained, the claim of the said Browne became reduced to $842.02.

5. As to the fraudulent misappropriation of the funds arising from the sale of teas to Hood, on the 12th of May, 1865, and which were only delivered on the 18th of that month:

The insolvent, in his examination, asserts, "that the proceeds were applied to "meet current liabilities from the twelfth to the fifteenth of May inclusively."

It is claimed that the forcing off such a considerable portion of his stock, in the main at cost price, and the balance at about one cent advance, and the payment with the proceeds ($2313.71) of current liabilities, at a time when the insolvent must have known himself to be hopelessly bankrupt, was a fraud on the general mass of the creditors.

6. As to the fraudulent preferring of L. G. Fauteux and La Banque du Peuple, or one or other of them:

On the 17th of May, 1865, (two days after the dishonour of the note due Law, Young & Co., "the *immediate* cause of the stoppage") the insolvents paid in full a note for $2468, endorsed by Fauteux, and held by the bank; and this, partly with the proceeds of a note of Wm. Nevin & Co. for $842.25, surrendered by Prentice, Moat & Co., when the payments before mentioned were made to them, and partly by money received from P. D. Browne for the tea surrendered by him, in connection with the payment to him before explained.

7. As to the fraudulent preferring of Charles Hagar:

In the transaction with Browne on or about the 17th of May, 1865, about $2000 worth of teas was surrendered and immediately handed over by the insolvent to Hagar, then a creditor of his.

8. As to the $5000 note of Davidson destroyed by Mr. Thomas:

It is clear, from Mr. Davidson's evidence, and the insolvent's own examina-

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tion, that this was done to withdraw all opposition by him to the composition and discharge.

9. As to the fraudulent surrender of various notes, *after* the insolvent stopped payment:

It is admitted that this was done between the 20th and 22nd days of May, 1865. The promissors of the notes were all either friends or relatives of the insolvent. The pretence is, that they were all accommodation notes (except that of the brother G. B. Thurber for $642.25, which is alleged to have been a renewal note), but of all this there is no satisfactory proof, and such a large amount of apparent assets of the estate should not have been surrendered, under the circumstances, without the consent of the creditors.

10. As to the withholding of information asked for by the creditors:

Throughout the original examination before the assignees there is a general withholding of such information, and a positive withholding of it on the important subject of the proportion of discounts at ordinary bank rates, at 14 to 15 per cent., and at 26 to 52 per cent. per annum, and on the subject of the amount of paper endorsed by his father-in-law, and discountod and retired by the insolvent. [Note.—*None* of this paper has been ranked on against the estate].

11. As to evasion and prevarication:

A careful perusal of the examination of the insolvent before the assignees will abundantly establish this charge.

Abbott, Q.C., submitted the following points on behalf of the insolvent:—

Neither of the circumstances referred to in the first two points establish insolvency. A large amount of bad debts were actually written off in 1863, which, with losses of flour and other goods, made up the excess of expenditure over profits—$6705.96, shown by the books.

These two points amount to this, and no more, namely that by a statement made up by an accountant *two years* after these debts were stated as forming part of Mr. Thurber's assets, it is made to appear that a large proportion of them were bad. But the insolvent himself declares that at the time he believed them to be good. It would certainly be most unfair to base a charge of fraudulent insolvency against a merchant upon the fact that he was mistaken in his opinion of the solvency of some of his debtors.

With respect to the financing at heavy rates, the mode of statement is not accurate. That an occasional temporary loan was made at very high rates is proved. The text of the "point" would lead to the belief that from "June or July, 1864," these were the customary rates, which is not the case. There is not the slightest doubt but that the difficulties of the insolvent were increasing in the winter of 1865, as he failed in May, and his expenses for financing proportionally increased. But is it a fact that every merchant stops, or is bound to stop, payment the moment he finds business bad and money scarce? The knowledge, or even the suspicion of insolvency, is distinctly ignored under oath not only by Mr. Thurber, who is utterly ignorant of the meaning of his books, but also by Mr. Montgomery, who kept them. And no statement account, balance sheet, or other document, was ever drawn up or made, tending to show

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the state of the business, subsequent to the balance sheet of December, 1863, which shewed a surplus. It was doubtless unbusiness-like to neglect the investigation of the affairs of the firm so long, but nothing more can be said of it.

With regard to the points made of the sale of tea at cost price, the advances obtained from Hood and from the City Bank, it is difficult to see to what they tend. Was the tea sold below its value? If selling tea at cost is evidence of bankruptcy, Mr. Torrance himself might now be seeking the discharge of which he is endeavouring to deprive Mr. Thurber. There is nothing to shew that the tea was sacrificed. The paper endorsed by Hood was employed in the corresponding reduction of Thurber's liabilities, in the simplification of the claims of Browne and of Prentice, Moat & Co., and in the payment of current paper; and so with the money from the City Bank. Every one of these transactions is in the natural course of a merchant's business, and they are probably repeated in the last days of the struggle against difficulty of every merchant who subsequently fails. So far from these facts proving the statement of the insolvent, that he did not believe he was insolvent till the 18th May, 1865, and thought he could "pull through," to be untrue, they must produce a strong moral conviction that it was correct. For to what end all his endeavours to keep his name from protest, if he knew he must eventually stop? It is not pretended that he took any money himself, or that he benefited himself one cent by the exertions he made.

The complaint, therefore, that Thurber knew himself to be insolvent when he made purchases from the opposing creditors between October, 1864, and April, 1865, is not proved. That during that time he was pressed for money, paid heavy notes for accommodation, and was obliged to make great exertions and some sacrifices to keep his paper afloat, is true; but no more than this has been proved, or can be deduced from the evidence.

But supposing, for argument's sake, that he did know himself to be insolvent when he made those purchases, still something more is required to render him guilty of a fraud. The statute requires the presence of two elements to constitute this offence: the knowledge of insolvency, and *also the intent to defraud.* The intent is doubtless to be gathered from the circumstances, and the test is the apparent intention of the purchaser, *when he makes the purchase*, to pay for the goods. In the cases under consideration, the insolvent plainly intended to pay for the goods; in fact, he made very large payments on account of them, and continued to pay his bills as they became due, with the sole exception of that of Torrance and Co., up to 18th May. And this latter, it must be remembered, was only a balance remaining of the original purchase, the greater part of which had been paid for—and two-thirds even of this balance was offered by Thurber to the banker who held the bill—the day it became due. The pretension that an intent to defraud is to be gathered from the fact of a purchase being made in the regular course of trade—being two-thirds paid for, two-thirds of the balance being offered, and every nerve strained to procure the remainder—is certainly too much for the credulity of any one, but the most rapacious of creditors.

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It is submitted, therefore, that evidence of any intent to defraud the vendors of these goods, *on the occasion of their purchase*, is entirely wanting.

The idea of a debt to Mr. Thurber is stated to be "*simply absurd.*"

But no attempt has been made to discredit the simple straightforward statement of Mr. Montgomery on this point. The money was advanced by Dr. Davignon, Mrs. Thurber's father, to the previous co-partnership of which Thurber was a member, on condition that it should be placed to her separate credit, and should belong to her individually. When the partnership was dissolved, the clerk placed it to the credit of "Stock Account," because he supposed Mr. and Mrs. Thurber "were all one;" and when the lady's father, finding this out, objected to it, he replaced the amount at her credit. This is the sworn and uncontradicted statement of a most intelligent and quite disinterested witness. In what portion of it lies the "absurdity?" The account was closed erroneously, as is quite plain from the evidence. It would be well to understand how the correction of that entry, as soon as the error was discovered, was "simply a fraud." Though not a "fraud" it is not a particularly honest course on the part of the creditors to endeavour to deprive Dr. Davignon or Mrs. Thurber of their own money for the creditor's benefit, by taking advantage of the error of a clerk in a book entry; and equally hard words might be applied to such an attempt with some reason.

The "absurdity" and the "fraud" of doing them simple justice are easily alleged, but such assertions require a different course of reasoning to establish them from that which has been followed in the case.

The charge of "fraudulent preference of Prentice, Moat & Co." is equally unfounded. As the petitioner is advised, a fraudulent preference necessarily implies a preference *which injures* the estate, or some creditors of it. A reference to the precise details of the transaction, which are all to be found in the cross-examination of the insolvent, when examined as a witness, and in the examination of Montgomery, establishes that the estate did not suffer to the extent of one farthing by the transaction with Prentice, Moat & Co. They appear to have held at the time a large amount of accommodation paper discounted with them by the petitioner, or left with them as collateral. They would have been paid, in any case by means of this paper, and the makers or endorsers would then have ranked on the estate in their stead. By the arrangement made with them, a large amount of this accommodation paper was withdrawn and returned to its makers. Mr. Hood certainly was a loser by the transaction; but so satisfied is he of the good faith of the petitioner, that he is a consenting party to his discharge. But the amount of Thurber's indebtedness was not increased, nor were his assets diminished, by the transaction. If it is intended that this transaction involved a fraud, it would be well to know who was defrauded by it. If no one was so defrauded, or his dividend lessened in the minutest degree, the opposing creditors have no right to complain, and can found no objection to the petition upon it.

The alleged fraudulent preference of P. D. Browne involves a transaction exactly similar to that with Prentice, Moat, & Co., and like that operated no injury to the estate or to any creditors. It is only necessary to read the evidence of

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Montgomery, and the examination of Mr. Thurber as a witness upon this contestation to be satisfied upon both the "points" charging fraudulent preferences.

The "fraudulent misappropriation of the funds" obtained from Hood, consists simply in the payment of the notes of the petitioner and his other ordinary liabilities as they became due. Up to the 18th May, he punctually paid *everything* which became due, except the note to Law, Young & Co. due the 16th May for over $3000, of which he offered $2029 on that day on account, which was refused. On the 18th May he endeavoured to make an arrangement with Mr. Hood to enable him to go on, with a view to which an examination of his books was made by that gentleman, resulting in the advice to him to stop payment, which he then did. Up to this time he and his bookkeeper both believed that he could finally overcome his difficulties, and, consequently, up to that time he had paid every debt he owed, with the one exception already alluded to. If this statement be not true, evidence is useless, for it is solemnly sworn to by both these persons, one of whom, namely, the petitioner is doubtless interested in the result, but the other, Mr. Montgomery, decidedly the most intelligent and best informed of the two, is equally positive and is perfectly disinterested. If he and Thurber have both sworn falsely, the case is at an end; but it would be satisfactory to know upon what grounds they can be held to have done so, except it be upon the suspicion of a minority of his creditors, ingeniously set forth by their counsel. If their statement is true, these "fraudulent misappropriations" will be found to be payments in the ordinary course by a merchant of his ordinary business liabilities as they became due. The sale of one pound of tea partly at cost and partly at one per cent. advance, without a scintilla of evidence to show that it was sold below its value, is here gravely referred to as "a fraud on the general mass of the creditors."

The fraudulent preferring of Fauteux and la Banque du Peuple, *or one or other of them*, is simply the payment of the petitioner's note held by that bank in its ordinary course, and before the stoppage. If it were not for giving a fictitious importance to the pretensions of the opposing creditors, it would scarcely seem necessary to take every one of the petitioner's ordinary liabilities and exalt its payment into a "fraudulent misappropriation" or a "fraudulent preference." They were all so paid, as has already been shewn, and if one was a fraudulent preference, so were all the others, including the large payments on account made by the petitioner to several of the opposing creditors during the winter. Enough has probably been said on this point to make these facts apparent.

The fraudulent "preferring of Charles Hagar" consists in this: the petitioner got an advance from Charles Hagar upon a parcel of tea, then in the hands of Browne for a similar advance upon the agreement that he would relieve the tea by paying Browne with Hagar's money, and then deliver the tea to Hagar, thus simply substituting Hagar as a creditor in place of Browne. If this be what Messrs. Torrance, Law et al. consider "fraudulent," then doubtless they would characterise the swindling of Hagar, by handing over his tea to them, as honest and business like. To be a creditor appears to exercise an injurious effect on the moral perceptions.

The Davidson matter seems to be fully explained. The Davidson note was an

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accommodation note, as he says, for $500, as Thurber says, for $5000. It was held by Mr. Thomas as collateral, but of course was not an asset of the estate. As a contest about the real amount of it was imminent, Mr. Thomas chose to remain satisfied with his other security and to destroy it. How did this injure the estate of the opposing creditors? Unless, indeed, they are prepared to assert that they are entitled to share in Mr. Davidson's estate as well as in Mr. Hagar's too, a pretension which the Court will have no difficulty in disposing of, there would be no difficulty in shewing, by authority if necessary, that, even if Mr. Thurber had held the note himself, he would have been perfectly justified in destroying it, or even of retaining it from his assignee; for an accommodation note forms no part of the estate or assets of an insolvent.

The "fraudulent surrender of various notes" is simply the surrender of accommodation paper, and retired notes to their proper owners. It is said there is no "satisfactory proof" of this. The books prove it; Mr. Thurber swears to it; Mr. Montgomery swears to it; Mr. Plimsoll does not deny it in his statements, and there is no doubt of any kind cast upon it. It is difficult to imagine what would be "satisfactory" to the opposing creditors, but it is hoped that a different appreciation of the record will be obtained from a Court of Justice.

The last two objections seem to require no reply. Every fact, figure and circumstance connected with the estate has been made as clear as noon day, and the attempt to convert the hesitating and imperfect utterances of an unfortunate man, utterly ignorant (as is otherwise proved) of books and bookkeeping, held upon the rack for days by an examination in a foreign language upon details, which he confessed he knew little of, into "evasion and prevarication," is of a piece with the pretension that the regular payment of his ordinary debts was a "fraudulent misappropriation," the delivery over of a security in conformity with his agreement on getting an advance upon it, a "fraud upon the mass of his creditors," the correction of an error by which his wife was robbed of her father's gift to her, an "absurdity" and a "fraud," and the return or destruction of accommodation and retired notes, an offence which is to consign the debtor to perpetual pauperism.

The petitioner finally respectfully urges upon the Court, that he has obtained the consent of more than the majority in number, and more than three-fourths in value of his creditors, to the acceptance of a composition which is proved and admitted to be more than his estate would realise if wound up by the assignee.

The refusal of his application would deprive these creditors of all right to this composition, and consign the petitioner to hopeless beggary, for the gratification of a small minority, which, if it be granted, that minority will receive the same composition as the majority, and thus actually obtain a larger proportion of their respective debts than if their opposition should be successful.

The petitioner therefore respectfully urges that the deed of composition may be confirmed; and if his explanations should be deemed unsatisfactory, he earnestly submits that any impropriety of which he may have been guilty in his anxiety to preserve his credit (of which however he is unconscious) may be held to be sufficiently dealt with by a temporary suspension of his discharge, rather than by the perpetual deprivation of the power of labouring for the support of himself and his wife and family.

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Per Curiam:—This is an application of a bankrupt, under the Insolvent Act, for a confirmation of his discharge. The insolvent made an assignment in 1865, and subsequently, the required proportion of his creditors signed a deed of composition under which he was to be discharged on paying 3s. 9d. in the £, for the payment of which he gave security. He now applied to the Court to confirm the discharge, and the application was opposed by Messrs. Law, Young & Co., John Redpath & Son, and other creditors. There were several grounds of opposition. In the first place, it was alleged that he had made several purchases in contemplation of bankruptcy. Thurber had been doing business here for several years back. He had evidently no knowledge of bookkeeping. On the 30th Dec., 1863, he took stock. At this time he considered himself perfectly solvent. But the balance sheet showed that his solvency depended upon a great many outstanding debts, which could not be considered of much value. He had little or no capital, but, nevertheless, his transactions were very large. During 1864 and 1865, he made purchases from Messrs. Law, Young & Co., and other parties, and the first pretension is that he made these purchases knowing that he was insolvent, and in fraudulent contemplation of bankruptcy. Further, that in 1865, when on the very verge of bankruptcy, and when the clouds were thickening around him, he credited his wife with $3000, with interest. It must be conceded that this had a suspicious look, as well as the circumstance that he made no balance sheet in 1864. But though these circumstances, combined with the fact of his large purchases, and his small amount of capital, seemed to justify the pretensions of the opposing creditors, yet I do not find sufficient evidence to justify me in thinking that at this time Thurber knew himself to be insolvent. During the time he was making these purchases he was borrowing money at heavy interest from brokers, and obtaining large discounts at the banks. The evidence gave a curious insight into the way business was done in Montreal. He thought he would be able to pull through.

He seemed to be a man of great resolution who would struggle to the last. The $3000 was credited to his wife at the suggestion of his bookkeeper. I am firmly convinced, from an examination of the evidence, that Thurber believed he would be able to pull through. I cannot believe that he was aware of his insolvency. Further, it must be taken into consideration that two-thirds of his creditors had consented to his discharge. This was a fact which should have considerable weight, that a number of shrewd business men had signed his discharge, and were of opinion that he should be discharged. There was another fact. A note of his for upwards of $3000 was coming due on the 15th of May. Three days previously, he went to the bank, and offered $2000. The bank said they would not take $2000, but that they would hold the note over for a few days. He struggled hard to the last to maintain his credit. This did not look like the conduct of a man about to make a fraudulent bankruptcy. In order to maintain the pretensions of the opposing creditors, the Court would have to go to the extent of saying not only that he was insolvent, but that he was aware that he was insolvent, and that he made the purchases in contemplation of insolvency. Now, the Court would not go to that extent. The next ground urged was that there had been fraudulent preferences to various parties; but

Thurber and Law, Young & Co.

the Court saw nothing in the transactions complained of, that amounted to fraudulent preference. It was also alleged that an illegal consideration had been given to induce one of the creditors to sign the deed of composition. On examination, however, it appeared that the estate was not injured by this in the slightest degree, and the Court did not think the objection well founded. The Court was of opinion that the opposition to discharge must be dismissed.

The following was the Judgment of the Court as entered in the Registers:—

"The Court * * * considering that the said opposing creditors have failed to establish by legal and sufficient evidence any fraud or fraudulent preference on part of the said petitioner, an insolvent, or any matter or thing whereby he could be barred from obtaining the confirmation of his discharge, the Court doth dismiss the opposition of the said opposing creditors to the petition of the said insolvent for a confirmation by this Court of the said deed of composition and discharge, and the grounds upon which the said opposition is founded, with costs against the said opposing creditors, *distraits* in favour of Messrs. Abbott & Carter, the attorneys of the said insolvent. And the Court, considering that the said Alexander Thurber hath obtained the consent of the majority in number, and three-fourths in value of his creditors, as appears by the said deed of composition and discharge, and considering that the said insolvent hath conformed himself to and observed all the requirements in this behalf, and that the said opposition of said above named opposing creditors hath been dismissed, the Court doth hereby confirm the discharge to the said insolvent, Alexander Thurber, effected by the said deed of composition and discharge under the terms and provisions of the said "Insolvent Act of 1864."'

Insolvent's discharge confirmed.

Abbott & Carter, for insolvent.

Strachan Bethune, Q.C., for opposing creditors.

(S. B.)

MONTREAL, 30TH MARCH, 1867.

Coram MONK, J.

No. 1135.

Stevenson et al. vs. *McOwan.*

HELD:—That a capias may issue on the ground of secretion committed previous to an assignment, after or concurrently with, the making of the assignment.

On the 26th October last, the defendant made a voluntary assignment of his property, under the provisions of the Insolvent Act and amendment, to an official assignee. Afterwards, in the afternoon of this day, the plaintiffs arrested him, under the Consolidated Statute of Lower Canada, Cap. 87, on the ground of secretion of his property. By petition he moved that the capias be quashed, assigning, among other reasons, the fact of having made, previous to the arrest, an assignment of his property as aforesaid.

Popham, for defendant, argued that the Consolidated Statute was repealed by implication, so far as it affects secretion, in a case where a defendant had placed himself under the provisions of the Insolvent Act.

1st. Because the latter being a subsequent law, was framed among other objects, to meet more effectually the purpose for which the Cap. 87 was created;

2ndly. Because a debtor when placed under the provisions of the Insolvent Act is subjected to rules, and compelled to the performance of duties which not only render it impossible for him to comply with the capias Act, but which absolutely declare the performance of other duties, as are demanded of him by the latter, to be fraudulent. For instance, the defendant, under the statute, if he desires release, must give bail. But the giving of bail would, indirectly, be giving the seizing creditor a preference or security over the other creditors, and be thus doing what the insolvent act declares illegal. Failing to give bail, and remaining in prison, the insolvent would render himself unable to comply with the various requirements of the 10th sect. of the Insolvent Act. The Consolidated Statute declares that the defendant shall, within 30 days after judgment, render a statement of his estate, and offer to surrender his property to the seizing creditor. The Insolvent Act declares such conduct to be illegal, and where a defendant has made an assignment, as in this case, it is also impossible. See sect. 2, §2. It may be supposed the defendant has obtained a discharge from the majority of his creditors, representing the requisite proportion of the total amount of his liabilities; and, in that case, he may obtain a discharge form all his indebtedness. If both these acts be concurrently applied, the defendant will, on the one hand, be declared discharged from all his debts under Insolvent Act; while on the other he will be presented with a judgment under the capias Act demanding payment of a claim declared to be discharged by a subsequent statute, or, in default of payment, or of the impossible condition of a surrender of what he does not and cannot possess, to go to jail. These conflicts between the two acts justifies the application to the prior law, of the rule "*Leges posteriores priores contrarias abrogant.*"

Cross, Q. C., for plaintiffs. The Insolvent Acts make no provision for the punishment of secretion by debtor anterior to the assignment, nor do they expressly repeal the statute under which the capias has been issued. The latter cannot therefore be presumed to be repealed by implication. Moreover, the clause in the amendment to the Insolvent Act punishing, by imprisonment, secretion committed *subsequent* to the assignment is an additional inference that the framers of the insolvent laws did not intend to do away with the writ of capias for secretion previous to assignment. It is also unreasonable to argue that a man who has fraudulently secreted his property shall be exempted from punishment by simply making an assignment after the fraud has been discovered, so as to exempt himself from imprisonment. This would be the practical effect of the doctrine of the petitioner's counsel.

Monk, J.:—The question arises in this case, whether a man be arrested under a capias after or concurrently with making an assignment? At argument a decision of Mr. Justice Bertholot's was cited (*Gault et al.* vs. *Drummond*) where-

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in he decided this question in the negative. I am decidedly of the contrary opinion. I believe that the two laws subsist concurrently, where secretion has been committed previous to the assignment.

Petition rejected.

Cross & Lunn, for plaintiffs.
John Popham, for defendant.
(J. P.)

IN REVIEW.

MONTREAL, 22ND DECEMBER, 1866.

Coram SMITH, J., BERTHELOT, J., MONK, J.

No. 37.

Taylor vs. *Mullen*.

HELD:—That the Superior Court has no jurisdiction in revision of a judgment which is not appealable.

On the 23rd November, 1866, the petitioner, Edward T. Tay[illegible] the following motion before the Superior Court, sitting as a Court of Review:—

"Motion on the part of the petitioner that the inscription in this cause made "for hearing before the Court of Review, be set aside and discharged with costs, "for the following among other reasons: Because the petition *requête libellée* in "this cause, and the issues thereon raised, were and could not by law nor could "any judgment rendered thereon, become the subject matter of review before "this Honourable Court, or be liable to be reviewed by the same—the whole with "costs.

SMITH, J. (dissenting).—The question is whether there is a revision of a judgment which is not appealable? I am of opinion that a judgment which is not appealable, is susceptible of revision.

The 27 and 28 Vict., Chap. 39, Sec. 20 and 25 give general powers to the Court of Review. If a suitor is not satisfied with the opinion of one judge, then the law allows him to come before three judges, and it is still before the Court of original jurisdiction: The judgment of the Court of Review is the judgment *définitif* of the Court. So that a revision of the judgment is not an appeal. I concurred in the case of Dubord and Lanctot in refusing the right of review, as I was told that the point had been similarly decided in several cases in Montreal and Quebec. But in looking further into the case now coming up for examination, I see that it is a mistake.

BERTHELOT, J.—Le chapitre 88 des Statuts Refondus pour le Bas-Canada, section 16, a enlevé le droit d'appel sur les requêtes libellées concernant les Corporations de Cité ou les Corporations Municipales. Par l'acte 27 et 28 Vict., ch. 39, la législature a en vue de ne faire reviser que les jugements dans les causes appellables, car il y est dit à la section 39 que l'éxécution et l'appel seront suspendus. La question a déjà été décidée dans la cause *Ex Parte* Spelman et aussi à Québec, en mars dernier.

MONK, J.—It is a question of considerable difficulty and of doubt—unless there is something in the statute which expressly takes away the right of revision; I think that the judgments rendered by one judge should be subject to revision by three judges—yet seeing that the Superior Court in Quebec, and here also, has decided against the right of revision, I am willing to give up the doubts I have, and to concur in the rule already laid down, viz., where there is no appeal there is no revision.

The judgment of the Court of Review is as follows: "The Court, having seen "and examined the proceedings of record and heard the petitioner on his motion "of the 17th November last past, to reject the inscription of the said James E. "Mullen for a revision of the judgment in this case rendered on the 29th of "October last, and upon the whole, maturely deliberated, considering that the "present cause is not one which under the law, could be brought before this "Court in Review, and that this Court has no jurisdiction in revision of the "said judgment therein rendered, the inscription for revision therein is overruled "and set aside with costs."*

Abbott & Carter, attorneys for Taylor.

Devlin, attorney for Mullen.

(P. R. L.)

MONTREAL, 31 DECEMBRE, 1865.

Coram BERTHELOT, J.

No. 500.

JUGE:—Qu'en vertu des dispositions de la section 153, du chapitre 83, des Statuts Refondus pour le Bas-Canada, un témoin peut faire émaner une saisie-arrêt pour le montant de sa taxe.

DeBeaumont vs. *Papineau* et *Gauthier*, demandeur, pour sa taxe de témoin, et *Pratt, T. S.*

Le 26 octobre 1866, le témoin S. Gauthier fut taxé à la somme de huit piastres, cours actuel.

Il avait été assigné de la part du demandeur DeBeaumont.

Le témoin fit émaner une saisie-arrêt pour saisir-arrêter entre les mains de N. Pratt, tiers-saisi, tous deniers qu'il pouvait devoir au demandeur DeBeaumont.

Cette saisie-arrêt fut rapportée le 27 novembre 1866. Toutes les parties firent défaut.

Le témoin inscrivit sa cause pour jugement le 17 décembre 1866.

Le jugement de la cour est en ces termes:

La cour, ayant entendu le dit Séraphin Gauthier par ses avocats sur son inscription pour jugement contre le *tiers-saisi*, (le demandeur ayant fait défaut); examiné la procédure, vû le service personnel fait sur le dit *tiers-saisi*, du bref de saisie-arrêt émané en cette cause à l'instance du dit Gauthier et le défaut par lui

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* Vide.—10 L. C. Jurist p. 81, Ex parte Spelman.—sed contra 10 L. C. Jurist p. 102, Ex parte Beauparlant.

DeBeaumont vs. Papineau et Gauthier.

dit *tiers-saisi* de faire sa déclaration comme tel, suivant les exigences du dit bref, et ayant sur le tout délibéré, déclare la dite saisie-arrêt bon et valable, et condamne le dit Noel Pratt comme débiteur personnel du dit Séraphin Gauthier à raison du défaut susdit, sous quinze jours de la signification à lui faite de ce jugement à sayer à ce dernier la somme de huit dollars du cours actuel de cette province, montant pour lequel le dit Séraphin Gauthier à été taxé comme témoin du demandeur en cette dite cause, le 26 octobre 1867, avec intérêt sur icelle à compter du 12 novembre 1866, jour de l'assignation en vert du susdit bref de saisie-arrêt, pour la dite somme ainsi payée, être à l'acquit de demandeur qui la doit au dit Séraphin Gauthier pour sa dite taxe de témoin. Et la cour condamne le dit Noël Pratt aux dépens des présentes, mais seulement comme dans une saisie-arrêt de la Cour de Circuit pour le montant de huit dollars, y compris les frais et déboursés du prothonotair, du shérif et de son huissier qui sont restreints d'autant.

Lorunger et Loranger, avocats de Gauthier.

(P. R. L.)

MONTREAL, 32 DECEMBRE, 1866.

Coram BERTHELOT, J.

No. 1247.

Beaudry vs. *Brouillet* et vir.

JUGE:—Que le défendeur qui plaide prescription, n'est pas tenu d'opposer cette exception de prescription, avant toute exception ou défense au fond.

Le 26 décembre 1866, le demandeur* fit la motion suivante: "Motion du "demandeur que les exceptions péremptoires opposées en troisième lieu par la "défenderesse, soient rejetées et mises de côté comme étant irrégulières et con- "traires à la pratique de cette cour; 1o. parceque la défenderesse devait oppo- "ser cette exception de prescription qui est une fin de non recevoir ayant toute "exception ou défense au fonds, tandis qu'elle n'a opposé cette exception de "prescription qu'en troisième lieu et après avoir plaidé au fonds. 2o. Parce- "qu'elle contient des allégués contradictoires et incompatibles. 3o. Parceque "la défenderesse ne pouvait nier collectivement et séparément les faits allégués "par le demandeur, comme elle l'a fait, et en même temps admettre l'existence de "la dette en opposant la prescription annale fondée sur le paiement d'icelle. 4o. "Parce que la défenderesse ne pouvait cumuler dans une même défense une "exception de prescription qui est une fin de non recevoir et une exception de "compensation et une dénégation générale qui sont des défenses au fond."

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* Autorités du demandeur.
1 Pigeau, p. 198-199.
Bornier, p. 39, art. 5, tit. 5.
Arcand vs. Massue. Jugé à Montréal le 5 oct. 5841.
Guyot vs. prescription, p. 347.
Forbes vs. Atkinson, Pyke's rep. p. 35.

Per Curiam.—Le défendeur n'est pas tenu de plaider l'exception de prescription avant ses défenses au fond.

Beaudry vs. Brouillet et

Pigeau, 1 vol., p. 203, le reconnait en termes formels.

Motion renvoyée.

Dorion, Dorion et Geoffrion, avocats du demandeur.
A. Belle, avocat des défendeurs.
(P.R.L.)

MONTREAL, 5TH MARCH, 1867.

In appeal from the Superior Court, District of Montreal.

Coram BADGLEY, J., ATLWIN, J., DRUMMOND, J., MONDELET, J.

HENRY W. IRELAND,
(Plaintiff in the Court below,)
APPELLANT;

AND

DAME MARIE V. J. DUCHESNAY, ET VIR,
(Tiers saisie in the Court below,)
RESPONDENTS.

HELD:—A husband cannot be examined as a witness in a cause for or against his wife, even though she is a *marchande publique*, carrying on business through him, her duly authorised agent to that effect under power of ttorney.

2. That a husband of a party in a cause merely brought into it for the purpose of authorising his wife, is not a party in a cause within the meaning of Con. Stat. of L. C., p. 686, sec. 15, and cannot as such be examined as a witness for or against his wife who is a party in the cause.

The judgment of the Court below, on the principal point held in this cause, is reported in 10 L. C. J. 28. Dame Marie V. J. Duchesnay, doing business under the name of Cuvillier & Co., was the *tiers saisi* in the cause, and her husband, Maurice Cuvillier, was also summoned as authorising her. She declared that she owed nothing to defendant, &c.

Plaintiff contested her declaration.

At *enquête* the husband, Maurice Cuvillier, being produced as a witness, deposed that he conducted the business of the garnishee, and that he was acting as her agent to that effect, under a power of attorney. Garnishee's counsel objected to this examination as being disqualified by law. This objection was overruled.

POMINVILLE, for respondents, again urged the objection to the evidence of Maurice Cuvillier, observing that he was not a party in the cause, but solely in it to authorize his wife, and that he could not, therefore, be heard as a witness against his wife.

MORRIS, J. L., for appellant, contended that Cuvillier had a quality of agent for his wife entirely distinct from his quality of husband. He was brought up as a witness in his quality of agent.

It was true the husband could not be examined against his wife, but the wife can be examined against herself, and in this case, as she acted through her husband as agent, his acts were her acts, and it was therefore really she who was examined through her agent. The principle of law was *qui facit per alium facit per se*, or the acts of the agent are the acts of the principal. Sec. 14 of cap. 82

H. W. Ireland and Dame Marie V. J. Duchesnay, et vir.

Con. Stat. L. C. was never intended to apply to cases of this kind. It was intended in the ordinary or domestic affairs of life to obviate the trouble which would arise in families, if husband and wife were allowed to witness against each other. It was never intended to override the principle of the common law, that an agent could be examined in a matter of business against his principal.

This was a most exceptional case, and one offering a fair opportunity to interpret the law in such a way as to prevent the fraudulent abuse of it.

Here a man was adopting the too common practice of doing business in his wife's name, and now sought shelter under an alleged law to prevent his affairs from being examined into. If the Court were to adopt such a view it would be opening the door to unlimited fraud.

BADGLEY, J.—In this cause the plaintiff, a judgment creditor of one William Maume, caused a writ of attachment *saisie-arrêt* to be issued, attaching moneys and goods in the hands of Cuvillier & Co., represented by Marie V. J. Duchesnay. Service was made upon her, and it was also made in the usual form upon her husband, Maurice Cuvillier, she being *separée de biens*, by her marriage contract, and carrying on business as a *marchande publique*. Madame Cuvillier made her declaration, declaring that she owed the defendant nothing, but that, on the contrary, he was indebted to her in a large sum of money. The plaintiff took exception to this, and contested the truth of the declaration, relating in detail a number of transactions between Cuvillier & Co., and Maume. There is one difficulty between the parties which we are called upon to decide *in limine*.

The plaintiff has examined Maurice Cuvillier as witness against his wife. Now under the common law of the country, and under the public policy of the country so far as we understand the public policy, a husband and wife cannot give evidence for or against each other. This objection was raised at the *enquête*, but was overruled. We differ from the Court below on this point, and hold that, both by the common law and by public policy, husband and wife cannot be examined for or against each other. There is another point, Maurice Cuvillier was brought up and examined as a party in the cause. But he is not the "party" contemplated by the statute. The statute (Con. Stat. L. C. cap. 82, sec. 15) says, "any party in a [illegible] may be summoned and examined by any other party in the same cause." But Maurice Cuvillier is not a party in this cause within the meaning of the statute. He is brought in solely for the purpose of authorising his wife. Therefore, upon both grounds, we think his evidence must be rejected and dismissed from the record.

The judgment was *motivé*, as follows:

The Court * * * considering that the said Maurice Cuvillier, the husband of the respondent, is not a party to this cause, considering that the said Maurice Cuvillier has been adduced and given evidence in this cause on behalf of the appellant against his wife upon the contestation raised by the appellant, notwithstanding the objection by the respondent made *in limine* to the examination of the said Maurice Cuvillier as such witness; considering that by the law in force in Lower Canada, the husband cannot give evidence in civil matters for or against his wife; considering that the objection so made to the examination of

the said Maurice Cuvillier should have been maintained by the Superior Court, and that there was error in allowance of such testimony, this Court doth sustain the said objection, and doth reject from the record of this cause, the deposition made and filed therein by the said Maurice Cuvillier as such witness; and considering that, save as aforesaid, there is no error in the judgment rendered in this cause by the Superior Court, doth confirm the said judgment with costs.

H. W. Ireland and Dame Marie V. J. Duchesnay, et vir.

Judgment of Court below confirmed.

Torrance & Morris, for appellant.

COUR DU BANU DE LA REINE.

MONTREAL, 14 JUILLET, 1848.

Coram ROLLAND, Juge en chef, DAY, J., SMITH, J.

No. 939.

Lussier vs. *Archambeault.*

MARIAGE—EMPECHEMENT DIRIMANT.

JUGE:—Que dans une action en nullité de mariage entre deux catholiques, fondée sur un empêchement d'impuissance, le tribunal civil ne peut pas prononcer la nullité du mariage avant qu'un décret de l'autorité ecclésiastique ait préalablement déclaré nul le sacrement.

2o. Que le terme de trois ans fixé par les lois à l'action en nullité de mariage pour cause d'impuissance n'est pas absolu.

3o. Que lorsque le mari poursuit son épouse, celle-ci n'a pas besoin d'être autorisée pour ester en jugement.

Le 14 septembre 1846, Lussier intenta devant la Cour du Banc de la Reine à Montréal, une action pour faire déclarer nul le mariage qu'il avait contracté avec Marie Archambault, le 12 septembre 1826. Dans sa déclaration il alléguait :

Qu'en contractant cette alliance, il avait eu l'espoir de jouir de tous les avantages attachés au mariage et nommément des douceurs de la paternité ; que, néanmoins cet espoir a été cruellement déçu par suite de l'incapacité et de l'impuissance absolue de la défenderesse à accomplir les fins de cette union, incapacité dont le demandeur n'avait aucun motif de soupçonner l'existence.

Qu'à l'époque où le prétendu mariage du demandeur avec la défenderesse fut célébré, celle-ci était affligée d'un vice naturel de conformation qui s'opposait à ce qu'elle put contracter valablement un mariage, étant par suite de ce défaut corporel absolument incapable d'en remplir le but, comme de satisfaire aux devoirs qui découlent d'un semblable engagement, en sorte que le demandeur n'a jamais pu consommer le dit mariage.

Qu'après avoir cohabité avec la défenderesse sans que cette consommation ait pu avoir lieu et étant constant que l'état physique de la défenderesse ne put permettre qu'elle puisse jamais avoir lieu, le demandeur a cessé depuis longtemps sa cohabitation avec la défenderesse, d'après les recommendations de ses pasteurs spirituels. Que l'incapacité de la défenderesse subsiste toujours et qu'il n'est pas possible d'y remédier. Que l'union du demandeur avec la défenderesse ayant été dès l'origine entachée d'un vice et d'un empêchement qui l'ont toujours rendue nulle, le demandeur est bien fondé à en poursuivre la nullité.

Lussier vs. Archambeault.

Pour toutes ces raisons, le demandeur concluait à ce que la défenderesse fut assignée à comparaître devant la Cour pour voir, dire et adjuger que leur prétendu mariage était absolument nul et de nul effet, et qu'il serait permis au demandeur d'en contracter un autre, s'il le jugeait à propos.

La défenderesse ayant fait défaut à cette action, le demandeur procéda *ex parte*.

A l'enquête, MM. Wolfred Nelson et Basile Hyacinthe Charlebois, tous deux docteurs en médecine, donnèrent un témoignage identique et déposèrent que le 3 novembre 1846, à la demande de Mgr. de Montréal, sur la requisition du demandeur et du consentement de la défenderesse, ils firent ensemble un examen attentif de la personne de la défenderesse, et constatèrent que les allégués de la déclaration du demandeur, concernant le vice de conformation de son épouse, étaient vrais et exacts, et que celle-ci était physiquement et absolument incapable de concourir aux fins du mariage, qu'elle l'avait toujours été, que ce défaut était naturel et n'avait pû être produit par un accident.

Ce fut toute la preuve du demandeur.

En Bas-Canada, l'évêque n'a pas de juridiction contentieuse; aussi le demandeur avait-il crû devoir s'adresser immédiatement au tribunal civil pour faire jurtsdiction sur le lien, ni sur les conditions essentielles du mariage, dont la connaissance est réservée aux juges d'église, le demandeur, arrivé à cette période de la procédure, fit motion pour que la Cour renvoyât les parties devant les autorités ecclésiastiques pour faire prononcer par elles la nulité du sacrement de mariage.

A l'audition, M. *Cherrier*, C. R., cita sur la question de la compétence de l'autorité ecclésiastique, Durand de Maillane, *Dictionnaire de Droit Canonique*, Vo. Impuissance, t. III, p. 267, 269 et 270; Pothier, *Du Contrat de Mariage*, t. III, p. 338, édit. in 4o; Code matrimonial, t. II, p. 649, 659. Sur la question, si le demandeur était encore recevable après 21 ans à réclamer contre son mariage, il dit qu'on voit, après plusieurs années de cohabitation, des mariages être dissous pour cause d'impuissance, ce qui est très-juridique dans le cas d'impuissance absolue, qui est celle dont il s'agit dans la présente cause. En effet, il ne peut y avoir eu de mariage, et la cour ne fait, par son jugement, que le déclarer. A proprement parler, elle ne rompt pas un mariage, puisqu'il n'a jamais pu exister.

Quant à l'autorisation de la femme, dit M. Cherrier, elle n'est pas requise, quand c'est le mari qui poursuit. Ainsi jugé le 23 juillet 1847, dans une cause de Narcisse Pigeon vs. Cécile Pigeon.

Rolland, juge en chef, prononçant l'interlocutoire, le 1er avril 1848, sur la motion du demandeur, dit;

"C'est une action de la part du mari pour faire déclarer nul son mariage pour cause d'impuissance de sa femme. La femme assignée a fait défaut. La première chose à considérer, c'est le défaut entré, et s'il est valable.

"Nous avons déjà jugé dans la cause de Pigeon vs. Pigeon que la femme assignée par son mari est autorisée à défendre. La difficulté ici vient de ce qu'elle n'a pas comparue. Cependant il faut décider qu'elle est *rectaincuriâ*?

"La seconde question, ou plutôt l'obstacle aux conclusions de la demande, vient de ce que, chez les catholiques, le mariage étant un sacrement l'autorité civile n'en peut prononcer la dissolution, et ne fait que donner l'effet civil après que

a sentence a été prononcée par le tribunal compétent, en approuvant cette sentence en autant que besoin est. Le demandeur s'est fait une objection pour la résoudre, c'est la prescription qu'on aurait pu proposer. Mais voir Lacombe, Jur., Can., Vo. Empêchement, sect. V, dist. XII, no. 3, p. 278, et l'arrêt de Soefve qui y est cité. L'on nous propose de rendre un interlocutoire par lequel il serait dit: "Considérant que le demandeur ne peut obtenir les conclusions de sa demande "sans avoir préalablement fait dissoudre son mariage par l'autorité ecclésiasti- "que, ordonne, avant faire droit, (la preuve est déjà faite et la cause est entendue "au mérite), que le demandeur se pourvoie devant cette autorité de la manière "qu'il avisera à l'effet, etc., etc.

"Aux Trois-Rivières, une semblable action fut intentée, mais seulement après sentence de l'évêque qui déclarait le mariage nul pour cause d'impuissance de la femme. La preuve de ce vice fut faite également dans l'action civile, et les conclusions de sa demande en furent accordées.

"Dans la cause actuelle, voici le jugement interlocutoire de la cour:

"La Cour, etc., considérant que le demandeur ne peut obtenir les conclusions de sa demande sans avoir préalablement fait dissoudre son mariage par l'autorité ecclésiastique, ordonne, avant faire droit que le dit demandeur se pourvoiera devant cette autorité de la manière qu'il avisera, à l'effet de faire procéder à la dissolution de son dit mariage, si la dite autorité juge convenable de le faire, pour les causes et raisons alléguées par le dit demandeur, pour ensuite et en conséquence de la décision qui émanera de l'autorité susdite, être procédé par cette Cour à adjuger finalement sur la présente demande et action du demandeur, en et de la manière qu'il appartiendra, dépens réservés."

En conséquence de ce jugement, le 14 avril 1848, le demandeur présenta à Sa Grandeur Mgr. Bourget, évêque de Montréal, une requête par laquelle, après avoir allégué les principaux faits de sa déclaration, il conclusit à ce qu'il plût à Sa Grandeur de vouloir bien déclarer son prétendu mariage avec la dite Marie Archambault nul et de nul effet à toutes fins que de droit.

Le 1er juillet 1848, Mgr. Bourget rendit son décret conforme aux conclusions de cette requête.

"Ignace Bourget, par la miséricorde de Dieu et la grâce du St. Siége Apostolique, Evêque de Monréal.

"Vû la requête de Joseph Lussier, cultivateur, demeurant sur la paroisse St. Denis dans le district de Montréal, en date du quatorze avril dernier, Nous exposant que le douzième jour de mois de septembre de l'année mil huit cent vingt six, il contracta dans la dite paroisse St. Denis, avec Marie Archambault, un mariage nul et invalide, à raison d'un empêchement dirimant d'impuissance absolue, et vû les dépositions des sieurs Bazile Hyacinthe Charlebois et Wolfred Nelson, médecins de cette ville, pour ce assermentés, en date l'une du dix-septième jour de janvier dernier et l'autre du dix-neuf du même mois, par lesquelles il appert que la dite Marie Archambault est vraiment impuissante et absolument incapable d'accomplir les devoirs du mariage.

"Nous, le saint Nom de Dieu invoqué, et de l'avis de Nos Vénérables Frères, les Chanoines de notre Cathédrale, avons réglé, statué et ordonné; réglons, statuons et ordonnons ce qui suit:

Lussier vs. Archambault.

"1° Nous déclarons le susdit mariage contracté par le dit Joseph Lussier avec la dite Marie Archambault nul et invalide, à cause de l'empêchement d'impuissance dont est atteinte la dite Marie Archambault.

"2° En conséquence, nous permettons au dit Joseph Lussier, de convoler, s'il lui plait, à d'autres noces; et nous autorisons le curé de la paroisse où il se trouvera pour lors avoir son domicile, à recevoir son consentement de mariage avec toute autre fille ou veuve qu'il voudra choisir pour épouse, et à leur donner la bénédiction nuptiale.

"3° Nous exigeons avant tout que le dit Joseph Lussier s'adresse à l'autorité civile, pour la supplier de vouloir bien reconnaître la présente dissolution de son prétendu mariage avec la dite Marie Archambault pour les effets civils.

"4° Nous déclarons la dite Marie Archambault inhabile à convoler à d'autres noces; et défendons à tout prêtre d'assister à son mariage, si aucun autre elle prétendait contracter à l'avenir.

"Sera la présente ordonnance signifiée aux deux parties intéressées ci-dessus mentionnées et au curé d'icelles.

"Donné à Montréal, sous notre seing et sceau et le contre-seing de Notre S. Secrétaire, le premier jour de juillet de l'an mil huit cent quarante huit.

"Place † du sceau (signé) † Ig. Ev. de Montréal,
Par Monseigneur,
(contresigné) A. Lacombe, Acol. S. Secrétaire.

Sur motion du demandeur, il lui fut permis de produire ce décret dans la cause, comme formant partie du dossier, et le 14 juillet 1848, la Cour rendit son jugement final dont voici le texte:

"La Cour, ayant entendu le demandeur *ex parte* par ses avocats au mérite, la défenderesse ayant fait défaut, examiné la procédure et la preuve et les pièces produites, et vu le jugement interlocutoire rendu en cette cause le premier avril dernier, ordonnant, avant faire droit, que le dit demandeur se pourvoirait préalablement devant l'autorité ecclésiastique pour faire dissoudre son mariage avec la dite défenderesse, et ayant aussi vu et examiné le décret ou ordonnance de Sa Grandeur Monseigneur l'Evêque Catholique Romain du diocèse de Montréal en cette province, en date du 1er juillet 1848, déclarant nul et invalide le dit mariage et établissant la nullité du dit mariage à raison d'un empêchement dirimant d'impuissance absolue de la part de la dite défenderesse; et sur le tout mûrement délibéré; considérant que le dit demandeur a établi en preuve les allégués de sa déclaration, adjuge et déclare que le mariage célébré entre le dit demandeur et la défenderesse le 12 septembre 1826 est nul et de nul effet et comme non avenu quant aux effet civils, à toutes fins que de droit, à raison de l'empêchement dirimant d'impuissance de la part de la dite défenderesse, et permet au dit demandeur de contracter un autre mariage, s'il le juge à propos; le tout sans dépens."

Jugement pour demandeur.

Cherrier & Dorion, avocats du demandeur.

(E. LEF. DE B.)

SUPERIOR COURT, 1867.

(Insolvent Act of 1864.)

MONTREAL, 12th APRIL, 1867.

Ex-parte Tempest, an Insolvent petitioning for his discharge,

AND

DAME MARIE V. J. DUCHESNAY et vir,

Opposants.

HELD.—1st. That he who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency.

2nd. That while the vendor on credit takes the risk of the subsequent insolvency of his debtor he is not supposed to contemplate the escape or the bankruptcy of his debtor, by reason of a state of insolvency actually existing at the time of the purchase.

3rd. That where a party buys goods on credit, knowing his affairs to be in a bad state, although he may have no intention of defrauding the vendor, yet in the eye of the law he does a wrong, and having subsequently declared his insolvency, the Court will be justified in suspending his discharge for a period, under the discretionary power.

The facts of this case appear fully by the judgment of the Court as follows:

Monk, J.—This is an application by William S. Tempest, an Insolvent, for his discharge from the Court, under a provision of the Insolvent Act of 1864, which gives him the right to make such application in the event of the requisite proportion of his creditors not consenting to his discharge. In this case, not only do they not consent to it, but a number of them appear and contest his application, and they do so substantially upon three grounds. These are:—

1st. That he fraudulently retained and withheld from the Assignee moneys belonging to the estate, and especially a sum of $332.32;

2nd. That the firm of Elliott & Co. purchased goods on credit from the Messrs. Thompson, knowing themselves to be insolvent at the time, and concealing the fact from the vendors, *with the intent to defraud them*, Mr. Tempest being a member of that firm at the time, and it being contended that he participated in the alleged fraudulent act; and

3rd. That the firm of Elliott & Co. had given a fraudulent preference to Mr. Herbert Elwell, by delivering to him all the negotiable paper held by them at the time of their failure; and also by permitting him to appropriate, in advance, notes not then actually received, and, moreover, that these preferences had been given with Mr. Tempest's full consent and participation.

The questions which arise upon this petition, therefore, are among, and in fact are, the most important which can arise in a similar case, and I may add that they are of paramount importance in the perpetually recurring controversy between debtors and creditors, as to the good faith and legality of the acts of the former, when insolvency is imminent. It may, perhaps, be unnecessary for me to remark to the Counsel concerned for the petitioner, and for the contesting parties, that the Court has examined this case under a deep sense of the responsibility which rests upon its decision, and with a due appreciation of the importance of this matter, as well in regard to the commercial community generally as to the particular interests of the individuals between whom this contest has

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arison. The record discloses with sufficient certainty and clearness the material facts of the case, and which are relied upon by the contesting creditors. Indeed, I may say at once and without hesitation, that with the exception of one or two incidental points of, perhaps, minor importance, and upon which there is some dispute, the counsel differed rather as to the effect of a certain state of facts, not strenuously controverted, than as to the exact nature—the precise character of the facts themselves. I shall proceed to advert to these facts and to discuss them in the order in which I have stated the propositions to which they apply.

Upon the first point, then, it is alleged that Mr. Tempest fraudulently retained, and still withholds, from the assignee, the sum of $332.32, which he received from debtors to the estate.

Now, as a matter of fact, it would appear he did receive a much larger sum than this, in the interval between the serving the writ of attachment, and the appointment of the assignee. But Mr. Tempest states, and it is, moreover, proved, that the whole of the balance, and perhaps a portion of the very sum in question, was applied to the purposes for which it was remitted to the insolvents; namely, to aid in retiring paper then lying in the banks under discount. There was also a small sum applied to paying insurance on the goods of the firm. But there is a portion of the sum complained of as being withheld, to the retention of which very grave objections may be urged. It is not necessary that I should offer any opinion as to how far those persons who remitted to the insolvents, after the publication of the notice in the *Gazette*, have relieved themselves from liability by so doing. Their action in this respect appears to have been admitted—sanctioned in fact—and it was, no doubt, done in good faith, and in the interest of the estate. About two-thirds, however, of the sum in question was retained by the insolvents for their personal expenses.

Now, upon this point the statute is precise, is free from all ambiguity. It expressly provides that the appointment of an assignee in compulsory liquidation, vests in him all the estate and effects of the insolvent *from the date of the issue of the writ*, as fully and as completely as if, at that date, a voluntary assignment had been made; and a voluntary assignment absolutely vests in the assignee to whom it is made, and from the moment of its execution, all the estate and the assets of the insolvent, of every description. It is plain, therefore, that the insolvents had no right to receive, much less to retain and convert to their own use, the moneys remitted to their firm, after the service of the writ in compulsory liquidation. With these facts and the law before me, I can have no hesitation in deciding that the petitioner, who appears to have taken charge of this money, and from whom a portion of it was obtained by his partner when the latter required it, received it illegally, and that he withholds it from the assignee without the sanction of law. So far the case is clear enough, but the presence of the element of fraud is not so manifest—is not so indisputably established. There does not appear to have been any concealment from the assignee of the fact of the reception of the money, though there was apparently some reluctance at first, to give the details of it. The petitioner seems to have taken advice upon the point, and to have acted upon that advice. And the purposes for which the money was retained, according to the evidence adduced, are

undoubtedly as unobjectionable as can be conceived, compatibly with the retention of the property of others. Upon this point, therefore, the court is of opinion that the money was illegally retained, but I do not consider it to be proved that it was so retained fraudulently. And if this were the only point submitted to me, I should probably grant the discharge, but I should suspend it until the money was refunded to the assignee.

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The second point is one of the most vital importance to the commercial community; but as I have no precedent, and indeed no previous expression of judicial opinion to guide me, I feel some hesitation in deciding it; and obviously the question is one of considerable difficulty. I have the advantage, however, of a precise detail, a clear description of the facts, chiefly from the petitioner's own lips, and I am therefore not embarrassed by controverted matters of fact, which [illegible] permit the judgment of a court to rest purely and exclusively upon [illegible].

[illegible] circumstances are as follows: in the Spring of 1864, the firm of Elliott [illegible], trading at Montreal, was composed of Mr. Elliott and of the petitioner. [illegible] time previous to that date, a Mr. Rudger had also been a partner in the firm, and during their connection with him and up to April, 1864, there seems to have been great carelessness, or, at all events, little method in the way their accounts were kept. At that time, however, as it would appear, in contemplation of an arrangement with Mr. Elwell, and of which I shall have occasion to speak hereafter, a trial balance of their books was made, by which it appeared that their assets were deficient above $20,000, and there was then a large indebtedness to the Messrs. Shaw, in England, which did not appear in their books. There were, moreover, other matters which do not clearly appear, and consequently, by reason of the facts just mentioned, Mr. Tempest says, "our position would have appeared much worse than it does by the balance "sheet." In fact, he states that "by adding to the deficiency exhibited by that "sheet, the amount due C. & J. Shaw, we should appear to be, and were $50,000 "short. Our liabilities were then about $113,000, our assets, after deduction of "our own accounts, were about $62,000."

In April, 1864, then, the firm of Elliott & Co., were in a state of absolute and to all appearance hopeless insolvency. It is true that the debt due the Shaws was not being pressed, and they had reason to believe that the payment of this liability would not be harshly, or speedily enforced, and they secured not only the indulgence, but, to some extent, the assistance of Mr. Elwell, who was then a considerable creditor. This double object was attained by taking Mr. Elwell into their office as a clerk, upon a salary of $1000 per annum, and by making him a promise that he should retain all their negotiable paper as collateral security for his debt. But these arrangements did not diminish their liabilities, nor do they appear to have been at any time so advantageous, or so decisive, as to secure them any definite temporary immunity from pressure.

During the summer and autumn of 1864, the position of the firm does not seem to have materially changed, for by the trial balance sheet of the 31st Dec., 1864, they still appear to have been about $50,000 deficient, taking the Shaw debt into account. And here it is to be remarked, that the partners were kept

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thoroughly informed of the state of their affairs by monthly balance sheets, made with more or less regularity. These balance sheets appear to have varied but little in their results. About the month of March, 1865, news came from England that Mr. Shaw was dead, and that the orders of the firm for spring goods would not be filled. Upon the receipt of this intelligence, the firm decided to stop payment, and appear to have announced that decision to their creditors about the 18th of that month. A balance sheet was subsequently made, bringing down the balance to the 31st March, 1865, and as that was based on the actual taking of stock of the effects of the firm, its results may be supposed to approach nearly to accuracy, and to exhibit pretty clearly the real state of their affairs. By the sheet prepared under the circumstances to which I have just adverted, it was shown that the actual deficiency amounted to the enormous sum of $79,990. 67 or about $25,000 advance upon the loss or deficiency exhibited by the balance sheet of December, 1864. The explanations which the petitioner has attempted to give of this sudden and disastrous diminution of assets are unsatisfactory; in fact they leave the matter unexplained. It may be said, however, and indeed it appears so to me, that this rapid change for the worse in the assets of the firm was more apparent than real, that it was caused by or resulted from the fact, that in former balance sheets, the balance of their merchandise account was in great measure, if not entirely fictitious from the irregular entries with which it was overlaid, and for which it is remarkable. Besides, the bad and doubtful debts seem to have been assumed as worth par. These circumstances combined would seem to afford an approximate explanation of the discrepancy, if I may so term it; while at the same time, they render more assured and more conspicuous the entire and irremediable insolvency of the firm during the year preceding the crash. Notwithstanding the state of affairs, of which they could not have been ignorant, during all this period Elliott & Co. continued their business in the usual way. They bought and sold on credit, and late in the year 1864 they made large purchases from Thomson and Co. on long terms of credit, and which had not matured when they stopped payment. Mr. Elliott states that when he made these purchases, the credit of the firm was excellent; that he gave the vendors no intimation of the actual state of their affairs, and that Mr. Tempest was consulted by him in every case before making the purchases in question.

These are the circumstances under which I am called upon to apply the terms of the clause of the Insolvent Act, which provides that a trader who purchases goods on credit, knowing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor, and who shall not afterwards have paid the debt, shall be guilty of fraud. Now it would be idle to deny that some of the elements of fraud contemplated by this clause, and which it regards as essential, are present in these purchases from the Thomsons. It is clear, it is in fact beyond controversy, that, knowing themselves to be unable to meet their liabilities, they purchased goods on credit, concealing from the vendors the fact of such inability, and they have paid for the goods so purchased. But the question which creates the difficulty in my mind is this: had Elliott & Co. at the time the intention of defrauding the Thomsons?

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In answer to this enquiry, it may be stated at once, that there is no proof in the record that when they made these purchases they entertained the deliberate intention of not paying for them; and I do not feel justified in saying—I cannot say, as a matter of fact, that the impression produced on my mind by a perusal and careful consideration of the testimony adduced is that they had such an intention. The fact appears to be that they went on with their trade without considering the question how far their actions were likely to result in loss or injury to others, and that with the knowledge that their affairs were in a ruinous condition—in fact rotten to the core, and that their commercial existence hung by the merest thread, they continued incurring liabilities under cover of a seeming—a delusive prosperity, which they themselves well knew to be utterly groundless. It is with great pain that I consider myself bound to speak in these terms of this case—but I do so conceiving it to be my duty, and believing also that an explicit and decided expression of the views of the court upon this mode of doing business—this species of conduct must in the end be beneficial. There can be no evasion, no softening down by mitigating presumptions, in the adjudication of this cause. The facts are before me, they are clear and the law is peremptory, and in view of both, the Court is of opinion, that he who buys goods on credit impliedly assures the vendor, if not of the actual sufficiency of his assets to meet his liabilities, at least that there is a reasonable probability of such sufficiency; and further, that while the vendor on credit takes the risk of the subsequent insolvency of his debtor, he is not supposed to contemplate the escape, or the bankruptcy of his debtor by reason of a state of insolvency actually existing at the time of the purchase; that he who knowing the insufficiency of his assets and the impossibility of payment except from the spoliation of others,—he who in fact incurs liabilities of the description of those under consideration, perpetrates a great wrong in the eye of the law. There may not in such a case be an actual, a palpable intention to defraud any particular individual, but there is so reckless a disregard of the rights of those persons generally with whom he deals as to render a man who so acts deserving of severe reprobation, and so far as a matter of fact, established by the evidence of record, I find the petitioner amenable to censure. Even to this extent, it is not without regret, the Court expresses this opinion of the petitioner's conduct; and in doing so, I may add that I should hesitate to adjudge, upon the evidence before me, that in the purchases in question, there was an intent to defraud the Messrs. Thomson: I incline rather to the belief that there was no such deliberate intention. But even so, I entertain so strong an opinion of the impropriety of the petitioner's conduct in this respect, and also of the disastrous consequences to honest traders of the power of conducting business in this manner with impunity, that if this were the only point in issue between the parties, the Court, in the exercise of the discretion which the statute confers upon it, would mark its reprobation of such conduct by suspending the petitioner's discharge for such period of time as would appear to be an adequate vindication of honesty and fair dealing.

But the third objection urged in the terms of the act against the application of the petitioner seems to preclude the exercise of any discretionary power on my part to relieve him finally from his liabilities. He is charged with having granted,

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or concurred in granting, a fraudulent preference to Mr. Elwell, of whom I have already spoken. That he did so both by handing him over the negotiable paper of the firm in contemplation of insolvency, and by conspiring with him (Mr. Elwell) to enable him to get possession of other negotiable paper which was expected, but not actually received, at the time the creditors of the firm were called together. The circumstances under which the transactions with Mr. Elwell took place are of a very peculiar and exceptional character, and require some description in order that my view of their effect may be fully understood.

About the time of the trial balance of April, 1864, Mr. Elwell, as before stated, entered into the employ of the firm of Elliott Co., and was made acquainted at the time with the unfavourable result shown by that balance, as well as with the additional debt due the Shaws. On the 21st April, 1865, the day of the meeting of creditors previously called, a large number of notes, comprising the entire amount of bills receivable then held by the firm of Elliott & Co., were stated to be in the hands of Mr. Elwell as collateral security for his debt. In the words of Mr. Tempest himself, all the notes "which do not appear by the Bill book to have "been disposed of are in the hands of Mr. Elwell," except those given to certain firms whom he names. The circumstances under which Mr. Elwell acquired these notes cannot be more clearly described than in the language of the petitioner himself. He says:—

"Being asked who gave the said notes to Mr. Elwell, I say that he has always received them for the last nine or ten months. What I mean is, that whenever they came into our office, they were taken charge of by him in the ordinary course. This has been the regular practice in our office for the last 9 or 10 months, and all the notes appearing by the bill-book to have been received by us during that time have followed that course. It commenced on the 3rd May, 1864, since which time he kept our bill-book and cash-book, and superintended the keeping of all our other books. We gave him a salary of $1000 a year. It was his particular business to receive, take care of, and enter all cash and bills received, and to see that the other books were kept properly. Nearly all the entries in the bill-book since May 3rd, 1864, are in his handwriting, and also a great number of entries in the cash-book during the same period. Since the 1st Sept. last, all the entries in the cash-book are by him. The entries in our discount-book since May, 1864, are also nearly all made by him. The notes which appear in the statement A, as being held by him as collateral, were received by him in the same manner as all other notes received in our business since 3rd May, 1864. I swear that I delivered to Mr. Elwell with my own hand, as collateral security for the said debt of $14,328.76, the notes mentioned in this statement A, as being held by him as collateral.

Q.—Which of the two statements that you have just made, respecting the reception by Mr. Elwell of the said collateral notes, is the true one?

A.—I swear they are both perfectly correct. A few days before we suspended payment, he brought these notes to me in a bundle, which I perfectly understood contained all the notes in the premises, and asked me if I had a large envelope. I took them from him, passed them into a large envelope, sealed it up, wrote his name on it, and handed it back to him. I cannot state the exact date on which

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this took place, but it must have been either on or after the 20th April last, as I perceive by the bill-book that the entries of the said notes in the bill-book are made in his handwriting down to the 20th April inclusive. There was a meeting of our creditors held at our office on the 21st (or thereabouts) of April last, at which meeting there was a discussion about these notes given to Elwell. The writ of attachment was served the next day. I swear that the notes in question were handed over to Mr. Elwell before the day of the meeting of creditors. Mr. Elwell was perfectly aware that we had called a meeting of our creditors for the following day. In fact, he knew as much about our business as we did ourselves. To the best of my knowledge and belief, the said notes were placed by me in the said envelope as already stated. I think our firm stopped payment about the 18th of March last.

If confirmation of this statement made by Mr. Tempest himself were necessary, it is furnished by Mr. Elwell. He declares that he knew during the whole of 1864 that the firm were over $40,000 worse than nothing, and that he was perfectly aware of the stoppage and of the meeting of creditors that had been called in consequence.

The debt for which the collateral security was given amounted to about $14,000, besides endorsement which Mr. Elwell had given for the accommodation of the firm, and the greater portion of this debt had accrued previous to July, 1864, Mr. Elwell having, as he expressed it, been advancing to them for some years before he entered their employ.

It would appear, therefore, from the statement of the parties to the transaction, that Mr. Elwell received from the petitioner on the eve of the meeting of creditors a large amount of negotiable paper belonging to Elliott & Co., and endorsed by them as collateral security of a pre-existing debt; that when he received it, he, Elwell, knew that the firm was insolvent, and that he would therefore obtain an advantage at the expense of the other creditors; and finally that it was so given to him by the petitioner himself with that intention. These facts would bring the petitioner strictly within the provisions of the Insolvent Act, § 8, p. 1 and 4. But it is contended on his behalf that they may be sustained by other circumstances which give Mr. Elwell a valid title to that negotiable paper before it was handed to him on the 20th April, or, at all events, a lien upon it. He alleges that by the terms of his agreement with Elliott & Co., in April, 1864, he was to enter their employ, keep or superintend their books, receive their negotiable paper and the like, with a salary of $1000 per annum; and that he was to retain and hold all negotiable paper as security for his advances to them, as well in the future as those previously made, which were considerable; and in fact the negotiable paper was received and was held by him from the time at which it was received as such security.

This pretension may be considered from two points of view, namely, as to its legality, and then in regard to its truth. If the agreement were proved, and had been carried out by the reception of Mr. Elwell, on his own account, of all the negotiable paper of the firm, it is probable that the agreement would have been regarded as a fraud upon the creditors of the firm, in view of the knowledge of Mr. Elwell of the insolvency of Elliott & Co., and of the fact of his

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debt being pre-existent, to say nothing of the secrecy of the transaction, which was calculated to mislead—in fact, to deceive third parties, and to lead them into error as to the position and resources of Elliott & Co. But in point of fact, it is not proved that such an agreement, if made, was ever carried into effect. It is true that Mr. Elwell became the clerk of Elliott & Co., and that their negotiable paper passed through his hands; but there is no proof that he ever held it as pledge until it was delivered to him on the 20th April, 1865, by the petitioner. Previous to that day he took care of it, had it in his charge; namely, in the office of the firm and in their safe, and in a box, in which, though he claimed it as his, he also kept small change, checks, and other matters belonging to the firm; while he thus had the custody of their negotiable paper, the firm used it, discounted part of it, and pledged part of it to Messrs. Hagar and others, as appears by the bill-book, kept by Mr. Elwell, and by the deposition of the petitioner. In fact, so far as can be discovered or ascertained from the record, Mr. Elwell exercised no right of ownership over any part of this negotiable paper, till he had it personally placed in his hands by Mr. Tempest the day before the meeting of the creditors. This distinction is indicated by Mr. Tempest himself in the extract from his examination already read, in which the reception of the paper as a clerk, and the delivery of it to him as collateral security, are spoken of as independent occurrences.

Under these circumstances, the Court is clearly of opinion that the possession of Mr. Elwell previous to the 20th April was that of a clerk merely, without any legal right of lien or other right in the negotiable paper in his custody, as it is above established in evidence; and that he became possessed of it as security for his claim only when it was handed to him on the 20th April by the petitioner. And I am further of opinion, that the petitioner, by so delivering it to him gave him a fraudulent preference within the meaning and intent of the Act.

There is, moreover, another circumstance somewhat extraordinary in connection with this charge of fraudulent preference, and which cannot be passed over without notice. In a species of blotter purporting to contain a list of good debts due to the firm, the amount of those debts was entered as being $7,277.67; while in the statement submitted at the meeting of the creditors they are entered as amounting only to $1,602.05, the deficiency being $5,675.62. This discrepancy is accounted for by Mr. Elwell in the following manner. He says: I am aware that in statement A I am charged as having received as collaterals over $9,000 of bills receivable, but in this sum was included about $2,000 which I had not received, but which were to be given to me by the defendants when they came. In statement A, therefore, the entry is made as if the bills had been actually received and delivered to me. The accounts were rendered, and the debtors were requested to send down notes for the amount, and I had an understanding with the defendants that when they came, they were to be given to me. It is that arrangement which creates the discrepancy between the total amount of good debts as shown by statement A. That discrepancy amounts to $5,675.62 currency, of which notes to the amount of $3,600 were received and are in the bill book, and the remainder are what I was intended to receive. Mr. Tempest, one of the defendants, was aware of all this; Mr. Elliott took very little interest in

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it. So that if this statement be correct, not only the amount of notes actually on hand, but those that were expected to arrive, were to be given to Mr. Elwell; and, to conceal this arrangement from the creditors, these expected notes were entered in the statement submitted to the creditors as if they had been actually received, and a corresponding amount deducted from the good debts. These circumstances, though apparently of minor importance, should not be overlooked in the consideration of this case.

The petitioner seeks to throw the responsibility of this most reprehensible exhibition of accounts upon Mr. Elwell. He states that the account A, in which it occurs, was made out under the direction and personal superintendence of Mr. Elwell, and that he himself did not see it till it was in the hands of the creditors—in fact, that it was not furnished when they assembled, and that it was submitted and read without his having had an opportunity of making himself acquainted with its contents. He himself has given evidence upon this point, and his statement that he had not seen the account A before it was shown to the creditors is corroborated by Mr. Elwell and Mr. Douglas, the book-keeper. But the material question for my consideration is not whether he agreed to the statement A, but whether he agreed to the expected notes being taken to account by Mr. Elwell as if they had been received; and upon this point the evidence appears to bear strongly against the petitioner. Mr. Elwell distinctly states that although the petitioner did not agree to the entry in the form in which it was made, yet that he knew all about the transaction itself; and although it was attempted to put the construction upon this statement that it was made as applicable to the arrangement generally with Mr. Elwell, and not to this particular transaction, yet the declaration of Mr. Elwell himself, making the distinction between Mr. Tempest's knowledge of the entry and his knowledge of the fact, combined with the statement of Mr. Elliott's comparative ignorance of it, appear to negative this construction. It is, moreover, scarcely credible that Mr. Tempest, who was the office man of the firm, should not know whether his good debts amounted to $1,500 or to $7,000—and whether Mr. Elwell held notes to the amount of $7,000 or $9,000 as collateral security. Upon the whole, and after a careful consideration of the testimony adduced on this point, I incline to the belief of Mr. Tempest's knowledge of the transaction as embodied in the report submitted to the creditors, and I find it extremely difficult to bring myself to the conclusion that he was ignorant of it.

There were one or two incidental points raised by Counsel at the argument which may as well be disposed of, and which require but few remarks and no discussion. It was objected that the state of the affairs of insolvents as submitted by their books, and the manner in which these books were kept, and the entries made in them, could not be referred to by the contestants, because it was not expressly alleged in the contestation that the books of Elliott & Co. were irregularly or erroneously kept. If, indeed, these matters had been referred to, and made the subject of discussion, as constituting a special and substantial ground of objection to the discharge—I should not have bestowed upon them any attention, unless they had been set forth by express allegation. But under the contestation and the issue joined, they are admissible in evidence to show

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that the firm of Elliott & Co. were insolvent long before they stopped payment, and that, moreover, they were aware of the fact.

It was also objected that the examination of the Petitioner could not be made use of as evidence against him in this contestation, but I am clearly of opinion that such a pretension is wholly untenable.

In conclusion I have only to add that after a most careful consideration of the law and all the facts of this case, I am, with much reluctance, forced to the conclusion that this application must be refused, and it is rejected accordingly.

Petition rejected.

A. & W. Robertson, for Petitioner.

J. J. C. Abbott, Q. C., for Opposants.

(C. L. M.)

MONTREAL, 28th FEBRUARY, 1867.

Coram BERTHELOT, J.

No. 1348.

Campbell vs. *The Liverpool and London Fire and Life Ins. Co.*

HELD:—In the case of a fire policy of buildings described as dwellings, endorsed to the effect, that any change of occupation, by which the risk is increased, must be notified in writing to the Insurance Company and endorsed on the policy, and that in default thereof the Insurance shall be null and void, that the change of occupation into a tavern, without notice to or consent of the company, renders the policy void, notwithstanding an intermediate change of occupation into a vinegar factory, may have been sanctioned by the Company, and a special jury may have found that the risk of the tavern was not greater than that of the vinegar factory.

This was a motion by the defendant, for judgment dismissing plaintiff's action *non obstante veredicto*, and a motion by plaintiff, for judgment on the verdict, according to the conclusions of the plaintiff's declaration.

The plaintiff sued to recover from the defendant the sum of £875 currency, as the value of certain premises in Belleville, C. W., insured by the defendant, under a policy of fire insurance, in favor of one John C. Franck, and assigned to plaintiff, and which had been destroyed by fire.

The defendant pleaded, amongst other things, that one of the conditions of said policy and endorsed thereon was the following:—"II. That in case any "alteration or addition be made in or to any risk on which an assurance has "been effected, whether such alteration or addition do consist in the erection on "the premises of apparatus for producing heat, or in the introduction of articles "more hazardous than may be allowed in the policy, or change in the nature of "the occupation, or in any other manner whatsoever, by which the degree of "risk is increased, and a consequent additional premium would be required, and "whether such insurance has been effected on the building itself, or on goods, "wares or merchandise deposited therein, and the assured shall not have given "notice thereof respectively to the said company, or its agent, in writing, and "unless such alteration or addition shall be allowed by indorsement on this "policy, and such increased premium paid as may be required, such policy or "insurance shall be null and void."

That in the month of [illegible] 1864, the building at the corner of Front

Street, in the said policy, firstly described, and which was the building destroyed by the fire in the said declaration referred to, ceased to be occupied as dwellings, as described in said policy, and as it was represented by John C. Franck in the said policy mentioned to be occupied at the time he originally effected the said insurance, and from the said month of January, 1864, continuously until the occurrence of the said fire, the whole or a portion of said building was occupied as a tavern, and that the said fire originated in the part of the said building so occupied as a tavern.

That the said change of occupation materially increased the degree of risk originally assumed by the said policy, and the said company would have been consequently entitled, had the fact of such change of occupation been made known to the said company, either to cancel the said policy altogether or to exact an increased or additional premium of insurance, but the said company was never notified by the said John C. Franck, or otherwise made aware of such change of occupation, and was at all times wholly ignorant of the fact, until after the occurrence of the said fire.

And that by reason of the said several premises, and by law the said policy of insurance became and was and is null and void.

To this plea the plaintiffs replied specially, to the effect, that before the building was occupied as a tavern, it was occupied as a vinegar factory, with the knowledge and consent of defendant, and that such occupation was more hazardous than that of a tavern.

And to this answer the defendant replied to the effect, that the only change in the nature of the occupation in the premises ever notified to the defendant was the making therein of vinegar by the German process, which required very little heat and in no way increased the risk.

The case was tried before a special jury, who gave in the following findings to the questions submitted to them by the Court.

Number One:— Were the buildings and premises mentioned in the said policy transferred to the plaintiff by the said John C. Franck, in the month of August, one thousand eight hundred and sixty-four; and was such transfer absolute and unconditional, or was it made as security for a debt due to the plaintiff, by the firm, of which the said Franck was a member, and subject to cancelation upon payment of that debt?

Answer:— Yes.

Number Two:—Did the said Company, or its agent at Belleville, know, on the fourth day of November, eighteen hundred and sixty-four, that said John C. Franck had so transferred the said building or property to the plaintiff; or did the company, defendant, or its said agent, only become aware of that fact after the occurrence of said fire?

Answer:— Not aware till after the fire.

Number Three:— Did the said policy of insurance, according to the laws of that part of this Province, heretofore constituting the Province of Upper Canada, become null and void, by reason of the said transfer, under the circumstances found by you in your answers to the foregoing questions, or was the same,

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according to such laws, legally renewed, on the said fourth day of November, eighteen hundred and sixty-four?

Answer:— Was not null and void, but was legally renewed.

Number Four:— Did the said John C. Franck, on the seventh day of December, eighteen hundred and sixty-four, and in what manner, transfer the said policy of insurance to the plaintiff; and was such transfer agreed upon between plaintiff and said Franck at the time of said sale?

Answer:— Yes, it was transferred by endorsement on said policy, and was agreed upon between Franck and the plaintiff on the day of sale.

Number Five:— Was the said transfer signed or notified to the said company, or its said agent, at Belleville, at any and what time, and how, before the occurrence of the said fire; or did the said company, or its said agent, become otherwise; and when, and how, aware of that fact, before the occurrence of the said fire?

Answer:— No.

Number Six:—Was the said building, or a portion thereof, occupied as a tavern, from the fourth day of January, one thousand eight hundred and sixty-four, up to and at the time of the said fire; and did the said fire originate in the portion of the said premises so occupied?

Answer:— Yes.

Number Seven:— Were the buildings and premises, or part of them, with the knowledge and assent of the defendant, occupied as a vinegar factory at some, and what time after the date of said policy, and up to the fourth day of January, one thousand eight hundred and sixty-four, when they were first occupied as a tavern, and was the risk of fire in such vinegar factory as great as it was in such tavern?

Answer:— It was occupied as a vinegar factory by and with the consent of their agent at Belleville for some time previous to the fourth day of January, 1864, and the risk of fire in such factory was as great as it was in the tavern or saloon.

Number Eight:— Was the company or its agent at Belleville aforesaid notified, or aware, before the occurrence of the said fire, and how, of the occupation of the said buildings and premises as a tavern?

Answer:— There is no evidence of the Company's having been notified of its being occupied as a tavern, but we think the agent was aware of it.

Number Nine:— Did the said occupation of said building as a tavern increase the degree of risk caused by the occupation of said building as a vinegar factory, so as to entitle the said company to an increased or additional premium of insurance.

Answer:— No.

Number Ten:— Was John Plimsoll appointed official assignee to said John C. Franck on the twenty-ninth day of March, one thousand eight hundred and sixty-five, under the provisions of the Insolvent Act of eighteen hundred and sixty-four; and did said John Plimsoll, as such official assignee, notify the defendant on the eighth day of April last, that he claimed payment of the loss by said fire?

Answer :—Yes.

Number Eleven :—What was the amount of the loss and damage caused to the said building by said fire?

Answer :—Three thousand one hundred and eighty-seven dollars.

Number Twelve :—Did said plaintiff, after the occurrence of said fire, notify the defendant of the fact, and of the amount of loss claimed by him; and did he furnish to the defendant all necessary preliminary proofs of such loss?

Answer :—Yes.

Number Thirteen :—Did the defendant, after becoming aware of the transfer of the said building, and of the said policy to the plaintiff, notify plaintiff of the company's reasons for refusing to pay his claim?

Answer:—He did not.

Number Fourteen :—Did the defendant first object to pay only on the grounds of plaintiff not being in possession of the policy; and afterwards, when he found it, did the defendant only object to not having been notified of its transfer?

Answer :—Yes.

And to which questions and answers ten of said jurors have agreed.

The defendant subsequently moved in term, that judgment should not be rendered and pronounced, in favour of the plaintiff, on the verdict and findings of the jury, but that, on the contrary, such verdict and findings should be set aside and held for nought, and that, notwithstanding such verdict and findings, judgment should be entered up and recorded, in favour of the defendant, in terms of the pleas fyled by the defendant, and this for the following reasons:—

"Because, at the said trial the said defendant fully and satisfactorily established "in evidence the essential allegations of the defendant's said pleas; and more "particularly, fully and satisfactorily established, that at the time of the destruc- "tion by fire of the premises described in the policy in this cause fyled, the said "premises were occupied as a tavern, and had been so occupied since the month "of January, 1864, and that the fire originated in the portion of such premises "so occupied as a tavern; that no notice in writing or other notification what- "soever had been ever given to the Company, defendant, of the change of occu- "pation of the said premises, from dwellings as stated in the policy, to a tavern; "that such change of occupation to a tavern had materially increased the risk "by fire, and entitled the said Company (had the fact of such change of occu- "pation been made known to the said Company) either to cancel the said policy "altogether, or to exact an increased or additional premium of Insurance; and "consequently that the said policy became, and was, and is absolutely null and "void."

"Because the findings of the said jury to the seventh, the concluding part of "the eighth, the ninth and last questions submitted to them at the said trial "were and are manifestly wrong and against the weight of evidence, and alto- "gether against law and justice."

"Because, according to law and the evidence adduced at the said trial, the "said jury ought to have found that the only change in the nature of the occu-

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"pation of the said premises ever notified to the said company, defendant, was "the making therein of vinegar by the German process which required very little "heat, and in no way increased the risk by fire.

"Because, according to law and the evidence adduced at the said trial, the "said jury ought to have found that the risk of fire in a vinegar factory such as "the defendant's agent had consented to was not so great as in such tavern afore-"said.

"Because, according to law and the evidence adduced at the said trial, the said "jury ought not to have found that they thought the agent was aware of the "change of occupation to a tavern."

"Because, according to law and the evidence adduced at the said trial, the said "jury ought to have found that the occupation of said premises as a tavern increas-"ed the degree of risk caused by the occupation of said building as a vinegar "factory, so as to entitle the said company to an increased or additional premium "of insurance."

"Because, according to law and the evidence adduced at the said trial, and the "findings of the said jury, any benefit or claim which might or could be legally de-"manded under said policy became and was vested at the time of the institution "of this action in John Plimsoll, official assignee, duly appointed to John C. "Franck, in whose favour said policy was originally granted, and that plaintiff "consequently had not and has not any right of action whatsoever under and "by virtue of said policy or any transfer thereof, against the said defendant."

"Because, according to law and the pleadings in this cause and the evidence "adduced at the said trial, and the verdict and findings of the said jury, the final "judgment to be rendered in this cause, on such verdict and findings, ought to be "entered up and rendered in favour of the said defendant, and the action of the "said plaintiff hence dismissed with costs."

The plaintiff moved, at the same time, that judgment should be recorded in his favour, on the verdict and findings of the jury, according to the conclusions of the plaintiff's declaration.

BERTHELOT, J.—Le demandeur poursuit comme étant aux droits de J. C. Franck sur une police d'assurance du 4 novembre 1865 sur une bâtisse y désignée, comme étant de quatre logements, au coin des rues Pinnacle et Front Street, à Belleville, H. C., pour $3,000.

Cette bâtisse fut détruite par un incendie le 13 janvier 1865.

La défenderesse ayant refusé le paiement de la perte, le demandeur l'a poursuivie le 7 Juillet 1865, et entre autres plaidoyers, le seul qui fasse l'objet de la présente contestation, est celui par lequel la défenderesse invoque la seconde condition stipulée au dos de la police ou contrat d'assurance, par laquelle il était stipulé que s'il y avait aucun changement d'occupation des bâtisses louées qui pût augmenter le risque que l'assuré serait tenu d'en donner avis par écrit à l'assurance, et de payer un preminm additionnel, faute de quoi le contrat d'assurance serait nul.

Il n'y a aucun doute qu'une pareille condition est une clause de contrat qui doit être observée strictement.

Au plaidoyer le demandeur a lié contestation en répondant qu'il n'y avait pas eu de changement dans l'occupation pour augmenter les risques et que la défenderesse n'avait eu aucun droit à une prime additionnelle.

Que depuis l'assurance effectué, divers changements d'occupation avaient eu lieu du consentement de la défenderesse, entre autres que ces bâtisses avaient été occupées comme manufacture de vinaigre immédiatement avant leur occupation comme auberge, et qu'elle avait sanctionné cette occupation comme manufacture de vinaigre, qui, par sa nature, était plus dangereuse qu'une auberge.

Que la défenderesse ou son agent à Belleville, savaient que les dites bâtisses étaient occupées comme auberge, et que le 4 novembre 1864, l'assurance fut renouvelée sur paiement du même premium.

La contestation a été soumise à un jury sur une suggestion de faits embrassant toute la contestation et plus spécialement sur les deux points qui sont maintenant l'objet de la seule contestation, savoir : 1o. Si l'occupation des lieux comme auberge augmentait les risques, et 2o. si la défenderesse avait directement ou par son agent à Belleville, M. Chandler, sanctionné et reconnu cette occupation à tel point, qu'elle ne peut plus invoquer la seconde condition ci-dessus mentionnée.

Dix des jurés ont répondu à la 7me question : Que les bâtisses avaient été occupées comme manufacture de vinaigre, longtemps avant le 4 janvier 1864, et que le risque était aussi grand que celui d'une auberge.

Ce n'est pas ce qui pouvait servir de règle décision entre les parties, car l'assurance aurait pu permettre une manufacture de vinaigre ou fermer les yeux sur ce fait, et il lui était parfaitement libre, et c'était son droit de se plaindre de l'occupation par une auberge.

C'était elle seule qui était juge du plus ou moins de risque qu'elle pouvait avoir à courir par l'introduction d'une auberge, et tant qu'elle n'en était pas informée par écrit ou qu'elle ne faisait pas un acte équivalent à une reconnaissance du fait, elle était toujours dans son droit.

A la 8me question : Was the company or its agent at Belleville aforesaid, notified or aware before the occurrence of the said fire, and how, of the occupation of the said buildings and premises as a tavern, dix des jurés ont répondu :

"There is no evidence of the company having been notified of its being occu-
" pied as a tavern, *but we think the agent was aware of it.*"

Cette dernière partie de la réponse est peu satisfaisante et exprime beaucoup de doute dans l'esprit de ces dix jurés.

A la 9me ils ont répondu : Que la substitution d'une auberge à une manufacture de vinaigre, n'augmentait pas le risque de manière à justifier une augmentation de premium.

J'ai déjà dit que c'était à la demanderesse seule à décider de ce plus ou moins de risque.

Les différentes réponses du jury ayant été favorables au demandeur, la défenderesse s'est mise dans la nécessité de demander par une motion, que, sans égard au *verdict* et aux réponses du jury, jugement soit rendu en cette cause en sa faveur.

De là deux questions à déterminer et en fait.

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En droit.—A qui appartenait de déterminer et de dire si l'occupation par une auberge était plus dangereuse et donnait lieu au paiement d'une prime additionnelle.

Le renouvellement de l'assurance par le paiement de la prime en novembre 1864, doit être regardé comme une nouvelle assurance prise ce jour là.

Quelques autorités feront voir quel était le devoir de l'assuré qui doit être supposé avoir donné, ou qui aurait dû au moins donner ce jour là, une description constatant une nouvelle occupation,

Pothier, No. 196 : " L'obligation que la bonne foi impose aux parties, de ne " rien dissimuler de ce qu'elles savent sur les choses qui sont de la substance du " contrat, ne concerne ordinairement que le for de la conscience. Il en est au- " trement de l'obligation qu'elle impose à chacune des parties, de ne pas induire " l'autre *en erreur* par de fausses déclarations sur les choses qui sont de la *subs-* " *tance* du contrat ; celle-ci concerne *le for intérieur*.

" Ces fausses déclarations peuvent donner lieu dans le for extérieur à faire " prononcer la *nullité* du contrat.

" Cela a lieu quand même l'assuré aurait fait *sans mauvaise foi* cette fausse " déclaration, *étant lui-même* dans *l'erreur*. Car il y a cette différence dans tous " les contrats intéressés, entre le cas auquel l'une des parties ne dit pas ce qui " est, et le cas auquel elle dit ce qui n'est pas.

Dans le premier cas elle n'est pas tenue si elle ne le savait pas, mais dans le second cas elle est tenue, si ce qu'elle a dit ne se trouve pas véritable et a induit l'autre partie en *erreur ; debet præstare rem ita esse ut affirmavit.*

Boulay—Paty sur Emérigon, vol. 1, p. 14 et 17.

On est coupable de dol vis-à-vis des assureurs non-seulement lorsque, pour se procurer des assurances ou pour les inviter à se contenter d'une *prime moindre*, l'on affirme ou l'on fait entendre des faits contraires à la vérité, mais encore lorsque l'on dissimule des circonstances graves qu'il leur eut été important de connaître avant de souscrire la police.

Quenault, No. 373 : L'erreur qui tombe sur la substance de l'objet du contrat est en effet par elle-même une cause de nullité. Or, on doit regarder comme substantielle dans le contrat d'assurance, toutes les *circonstances* qui peuvent *augmenter* ou changer les risques dont se charge l'assurance. *L'opinion* du risque est ce qui détermine le *consentement* de *l'assureur*.

Si la spécification de la chose assurée et des risques, faite par l'assuré dans la police, n'en a donné qu'une fausse opinion à l'assureur, l'assurance doit être annullée, *comme n'ayant été consentie que par erreur*.

Enfin, je citerai de *Boudousquié*, no. 115.

L'assuré doit donc déclarer à l'assureur la nature des objets qu'il fait assurer, celle des constructions, la désignation des bâtiments, les *professions* qu'on y exerce, les denrées ou matières *hasardeuses* qui y sont renfermées ; leur communication, leur rapprochement ou leurs réunions avec d'autres bâtiments ou d'autres objets d'un risque plus grave.

C'était donc en loi et en droit à l'assuré de déclarer le changement de *profession* ou le changement d'occupation survenu dans ses bâtisses lors du renouvellement de l'assurance en novembre 1864.

C'était aussi à l'assurance seule en loi et en droit de déterminer si elle chargeait une prime plus élevée pour une auberge que pour un logement ou une manufacture de vinaigre.

Et maintenant sur la question de fait, et l'enquête faite devant le jury.

Il a été *manifestement* prouvé que l'occupation d'une maison comme manufacture de vinaigre ne donnait pas lieu à une augmentation de prime, et par conséquent il n'y avait aucune induction à faire contre la défenderesse ou son agent de ce qu'elle avait su qu'antérieurement à l'occupation comme auberge, les bâtisses avaient été occupées comme manufacture de vinaigre.

Il a également été prouvé au-delà de tout doute par différents agents d'assurance, que l'occupation comme auberge entraînait toujours une augmentation de prime, et je dois dire que c'est une chose très-généralement connue de tous ceux qui ont des bâtisses à faire assurer.

Reste la considération du fait que M. Chandler, l'agent de la défenderesse, savait ou devait savoir au jour où il a consenti le renouvellement de l'assurance en novembre 1864, que la propriété ou partie de cette propriété était occupée par le nommé Crouet, comme auberge ou *saloon*, ce qui suivant, le demandeur, ferait perdre à la défenderesse tout l'avantage qu'elle veut tirer du changement d'occupation des lieux et de l'absence de toute notification par écrit à elle faite de ce fait. Là-dessus, nous avons, pour l'appréciation du fait, le témoignage de M. Chandler, dont le caractère n'a pas attaqué et il s'exprime en ces termes :

" Two or three days after the fire, I first heard of the said premises being " occupied as a tavern, I swear I never heard of it, never had any intimation of " it ; did not know of it in any way before.

" Had Mr. Franck notified me in writing or informed me of a change of occu- " pation in the said premises, and that there was a tavern there, I should have " charged extra and notified the office in Montreal of it. I would have charged " him, had it been left to myself, 7s 6d, extra, or 10s, according to the new " tariff."

Ce langage si formel de M. Chandler est en quelque sorte confirmé ou appuyé par le témoignage de M. Franck sur le même fait.

" It is not at all likely that I sent, I may say I never did send a notice in " writing to the company that the house in question was occupied as a grocery " and saloon."

I gave no notice in writing to that effect.

I *think* I gave a verbal notice. I would not *positively* swear I *did*.

La continuation du témoignage de M. Franck sur ce point fait voir qu'il n'a aucun souvenir d'avoir donné cet avis, ni du lieu où il l'aurait donné, et il termine par cette expression "*I cannot call the fact to mind at all.*"

Il y a cependant la dernière partie de la réponse des dix jurés ou la huitième question ci-dessus posée. Cette partie de cette réponse est aussi faible que la partie ci-dessus rapportée du témoignage de M. Franck. Elle n'en est que la suite ; car il n'y a rien dans la preuve qui put justifier cette réponse en présence du témoignage si formel de M. Chandler sur ce point.

Il est à bien remarquer que M. Chandler, l'agent de la compagnie, a excipé de

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ce qu'il ne lui avait pas été donné d'avis par écrit de la nouvelle destination ou occupation des lieux dès la première conversation qu'il eut, après le feu, et peu de jours après, avec le frère du demandeur, M. A. A. Campbell.

Ce dernier rapporte leur conversation à ce sujet.

D'après tout ce qui est rapporté ci-dessus, il faut nécessairement en venir à la conclusion que la défenderesse et son agent, M. Chandler, n'avaient jamais été notifiés par écrit suivant la seconde condition au dos de la police.

Il n'y a aucune preuve que M. Chandler connut que l'auberge de Crouet avait remplacé la manufacture de vinaigre. Et quand bien même il l'eut su, cela n'était pas un empêchement pour la défenderesse d'invoquer la seconde condition de la police d'assurance qui imposait à l'assuré une obligation formelle de notifier tout changement dans les lieux assurés, qui était de nature à augmenter les risques de l'assurance.

Voir Quenault, pages 62, 63, 64 ; no. 74, 75.

Quant aux *waivers*, résultant de ce que l'assurance n'avait pas fait d'autres objections, c'est sans importance.

Il n'y avait rien pour empêcher la défenderesse d'invoquer d'autres raisons, d'après le principe du droit français qui veut que le débiteur puisse en tout état de cause opposer toute exception ou moyen d'exception qui lui survient.

D'ailleurs, dans la cause de *Barsalou* vs. *Royal Insurance*, il a été jugé que quand bien même il l'aurait su, cela ne dispensait pas l'assuré de donner la notification requise et par écrit.

By the judgment of the court, the defendant's motion for judgment, dismissing the plaintiff's action, *non obstante veredicto*, was granted, and the plaintiff's motion, for judgment on the verdict was rejected, with costs.

Judgment for defendant *non obstante veredicto*.

Hon. J. J. C. Abbott, Q. C., for plaintiff.

Strachan Bethune, Q. C., for defendant.

(S. B.)

MONTREAL, 30 MARS 1867.

Coram BERTHELOT, J.

No. 1613.

Joly vs. *Les Syndics de la paroisse de Ste. Marthe.*[a]

JUGE :—Que les Syndics pour la construction des églises, etc., élus avant la mise en force des Statuts Refondus pour le Bas-Canada, (ch. 15, sec. 21), ne forment pas une corporation.

Le demandeur réclamait la somme de £145, balance due en vertu d'un marché qu'il avait passé avec les Syndics, pour la construction d'une église et sacristie en la paroisse de Ste. Marthe, le 8 février 1860, Mtre. Lefebvre, N. P.

Les Syndics furent poursuivis comme corps politique et incorporé sous le nom de " Les Syndics de la paroisse de Ste. Marthe."

Les défendeurs produisirent une exception à la forme en ces termes : " Que " les défendeurs sont erronément désignés et assignés par le bref d'assignation

[a] Vide 8 L. C. Jurist, p. 117, Ducharme vs. Morison.

"et la declaration du demandeur en cette cause sous le titre de "Les Syndics "de la paroisse de Ste. Marthe, un corps politique et incorporé par la loi, dans "le comté de Vaudreuil dans le district de Montréal." Que le douze mai 1857, "et en vertu de l'ordonnance, 2e Victoria, ch. 29. Joseph Cyr, Antoine "St. Denis, Joachim Richer, Patrick Beirne et Octave Farand, tous cultiva- "teurs de la paroisse de Ste. Marthe susdite, dans le district de Montréal, ont "été dûment élus Syndics pour la construction d'une église, presbytère, etc., "dans la dite paroisse et que le quatre juin de la même année, leur élection a "été dûment confirmée par les commissaires pour l'érection civile des paroisses "pour le diocèse catholique de Montréal et que les sus-nommés occupent encore "et depuis lors la dite charge, mais que les Joseph Cyr, Antoine St. Denis, "Joachim Richer, Patrick Beirne et Octave Farand ne forment pas une corpo- "ration et ne sont pas un corps politique et incorporé par la loi et ne peuvent "pas être assignés et tenus de répondre à la demande du demandeur, ni ester en "justice sous le nom collectif de "Les Syndics de la paroisse de Ste. Marthe."

Le jugement de la cour maintient l'exception à la forme et est motivé comme suit:

La cour après, avoir entendu les parties par leurs avocats sur l'exception à la forme faite et produite par les défendeurs à l'encontre de l'action du demandeur, et avoir mûrement délibéré, considérant que les défendeurs qui sont poursuivis comme corps politique et incorporé ne pouvaient pas avoir d'existence comme tel en vertu de la section 21e du chapitre 18, des Statuts Refondus pour le Bas-Canada, à la date de l'acte ou marché du 8 février 1870, reçu devant Mtre. Antoine Lefebvre et son confrère, notaires, sur lequel est fondée l'action du dit demandeur, la renvoyé et déboute, la dite action avec dépens.

Exception à la forme maintenue. . .

Girouard, avocat du demandeur.

Jetté et Archambault, avocats du défendeur.

(P. R. L.)

COURT OF QUEEN'S BENCH.

MONTREAL.

(En appel de la Cour Supérieure du District de Montréal.)

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

JOSEPH L. DE BELLEFEUILLE, *et al.*,
(Demandeurs en Cour Inférieure,)
APPELANTS;

ET

CHARLES A. M. GLOBENSKY, *et al.*,
(Défendeurs en Cour Inférieure,)
INTIMÉS.

JUGE:—Que l'un de plusieurs propriétaires indivis troublé dans la jouissance de la propriété indivise par son co-propriétaire indivis, a l'action en complainte pour faire cesser le trouble.

M. le juge Badgley, en rendant le jugement de la Cour du Banc de la Reine, a résumé les faits de cette cause d'une manière extrêmement lumineuse et a savamment discuté la question de droit qu'elle soulève. Nous nous contenterons

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donc ici de renvoyer aux remarques de l'honorable magistrat et de dire que cet appel avait été interjeté d'un jugement rendu le 28 juin 1861, par M. le juge Monk et dont voici le texte:

"The Court having heard the parties by their counsel upon the merits of this cause, examined the proceedings and evidence of record, and having deliberated thereon. Considering that in the *Acte d'accord pour tenir lieu de partage entre les deux familles Dumont and de Bellefeuille, de l'augmentation de la seigneurie de Mille Isles*, referred to in the pleadings produced in this cause as Defendant's exhibit number four, dated 27th December, 1843, and passed before Globensky and colleague notaries public, the following clause occurs and is therein and thereby agreed upon as part of said acte d'accord: "Quant aux moulins qui se "trouvent par la ligne commencée être érigés sur la partie échue à la famille "Dumont, il est entendu que les revenus du moulin à farine, resteront en com- "munauté, c'est-à-dire, que la famille Dumont en percevra les deux tiers, et la "famille de Bellefeuille le troisième tiers, jusqu'à ce que la famille Dumont "rembourse à la famille de Bellefeuille le tiers de la valeur des dits moulin et "de ses ustensiles tournants et travaillants, au dire d'experts choisis par les dites "familles Dumont et De Bellefeuille, et que le moulin à scie restera au profit de "la famille de Bellefeuille jusqu'à ce que la famille Dumont lui ait remboursé et "payé la valeur de la dite bâtisse et de ses dépendances aussi au dire d'experts "choisis par les dites familles de Bellefeuille et Dumont."

"Considering, that by law, the breach of said stipulation does not render the said defendants liable to be impleaded in an action *en réintegrande;* Considering, moreover, that it appears by the evidence adduced, and by the admissions contained in the plaintiff's declaration that no *partage* of the mill, premises, and dependencies mentioned in the plaintiff's declaration had ever been made, entered into, or effected by the said plaintiffs and the said defendants, or by their predecessors, *auteurs;* Considering, on the contrary, that it results from the evidence adduced that the said mill, premises, and dependencies, mentioned and described in the plaintiff's declaration were, at time of and previous to the institution of the present action, the property of the said plaintiffs and the said defendants, and were by them held *par indivis*, and the revenues thereof were to be divided into the proportions and appropriated as in, and by, the said *acte d'accord* was agreed upon; and moreover, considering that by the *bornage* and division of the continuation of the said seigniory of Mille Isles, it appears that the mill in question is built upon, and is situated upon that part of the continuation of the said seigniory which belongs to the said defendants in pursuance of said *bornage* and division. Seeing, therefore, that no action such as that instituted by the plaintiffs against the defendants, in the present instance, would, or can by law, be maintained against defendants, for the causes, matters and things set forth, and contained in the plaintiffs' declaration. Considering that the plaintiffs have failed to prove the material allegations of their declaration, and that the defendants have established by legal and sufficient evidence the averments of the pleas *exception péremptoire* by them filed and pleaded in this cause, and that the said pleas styled *exception péremptoire* are well grounded in fact and law, doth maintain the said pleas of the said defendants, and doth dismiss the plaintiffs' action with costs."

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Le premier mars 1864, M. le juge Badgley, rendant le jugement de la Cour du Banc de la Reine, s'exprima comme suit :

By the will of the late Mr. Dumont, proprietor of the seigniory of Mille Isles, and the continuation thereof, dated 11th October, 1805, he devised that property to his son and daughter, with substitution to his grand and great-grand children, and directed it to be divided between them, according to law, by arbitrators, to be appointed by the devisees. At the outset it is proper to state that the respondents, defendants, represent the descendants of the *grevé*, the son, and known as the Dumont family; and the appellants, the plaintiffs, those of the daughter, *grevée*, and known as the De Bellefeuille family.

On the fourth of July, 1807, agreement to effect partition was executed, and arbitrators were named.

On the fourth and fifth of January, 1808, the award of arbitrators was rendered, whereby, among other things, the continuation of the seigniory was divided into two portions respectively, of two-thirds and one-third—the former for the Dumont family, the latter for the De Bellefeuille family. The former to have the lands to the north-east, with two-thirds of the *domaine*, namely, eight arpents in front by thirty in depth, with all the buildings erected on this portion; and the latter the lands to the south-west, with one-third of the *domaine*, namely, four arpents in front by thirty in depth, with all the buildings erected on the said latter portion.

In an action of partition, in which the two interested families were represented a judgment by consent was rendered on the 12th October, 1839, which ordered the division line between the two portions to be established by a surveyor, and Laurier was named therefor.

The surveyor proceeded with his operation, and drew the line to some extent in the said continuation of seigniory, when on the 27th December, 1843, by deed of agreement, the parties having declared their intention to have and enjoy their respective portions apart and separate, adopted the division line commenced by Laurier, in its then extent, and agreed that it should be extended to the seigniorial line, and at the same time recognized the family portions of two-thirds to the north-east of the line, and one-third to the south-west of the line, as directed by the award.

It was also specially agreed between them as part of this final settlement of their respective portions, and the following clause occurs and is therein and thereby agreed upon as part of said *acte d'accord* :—"*Quant aux moulins qui se trouvent par la ligne commencée, être érigés sur la partie échue à la famille Dumont, il est entendu que les revenus du moulin à farine resteront en commu-nauté, c'est entendu que les revenus du moulin à farine resteront en commu-nauté, c'est-à-dire que la famille Dumont en percevra les deux tiers, et la famille De Bellefeuille le troisième tiers jusqu'à ce que la famille Dumont rembourse à la famille De Bellefeuille le tiers de la valeur des dits moulins et ses ustensiles tournants et travaillants au dire d'experts choisis par les dites familles Dumont et De Bellefeuille, et que le moulin à scie restera au profit de la famille De Bellefeuille jusqu'à ce que la famille Dumont lui ait remboursé et payé la valeur de la dite bâtisse et ses dépendances aussi au dire d'experts choisis par les dites familles De Bellefeuille et Dumont.*"

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On the sixteenth September, 1844, Laurier completed the *bornage* by the prolongation of the line, previously commenced by him, to the line of the seigniory, as shewn in his *proces verbal*. From this time the two families appear to have held the flour-mill jointly, and to have taken and received its revenues, harmoniously according to their respective proportions, until the twenty-first of January, 1856, when a protest was made by the Dumont family against the De Bellefeuille family, alleging that, by refusal of the latter to name *experts* to value the flour-mill, the former tendered to the latter a sum of money as the one-third of said value; required the latter to appoint and agree upon *experts* to establish the valuation, and on their default so to do within fifteen days, that the former would withhold the entire revenues of the mill from the latter.

On the twenty-first of May, 1856, the miller, Marier, having, by the defendants, directions, refused to pay over to the plaintiffs their usual share of the revenues, the defendants having assumed the entire control of the flour-mill, the plaintiffs protested against the miller, requiring him to render account of the revenues of the mill from the eighth of March then last; and on the twenty-ninth of May, 1856, the plaintiffs protested the defendants, requiring them to meet the plaintiffs in the mill, on the third of June following to establish their division of the revenues, and to intimate their insistance upon entrance into the mill.

Nothing came of these protests and counter-protests, except the usual result, a suit at law, instituted by the plaintiffs against defendants, in which the former allege their possession of the mill *par indivis* with the defendants, receiving therefrom one-third of its revenues; that they were troubled in their possession by defendants, which possession they had held for more than ten years, to the 21st January, 1856, of one-third thereof, and that the trouble was done within a year and a day of the institution of the suit; wherefore they prayed the ordinary conclusions of a possessory action, the maintenance of their possession, the cessation of the trouble, and £200 damages.

The pleading of the defendants is substantially petitory, advancing title under the will and agreement above detailed, claiming absolute property in the mill in question, and alleging their sole possession of it; finally objecting that the special agreement in the *acte d'accord* was not a real right in the mill or its revenues, but only personal for a division of the latter. Wherefore *actio non*.

It is in evidence that the plaintiffs were in possession of the mill on the 21st January, 1856; that several years before, the plaintiffs and defendants, together, joined in a contract of engagement with Marier, the miller, whereby he was to work the mill for them, receive the revenues, and pay them proportionally to the respective parties; that the miller had acted under that engagement for five years; that before the said date, 21st January, the plaintiffs had always been in the peaceable possession of the said mill as co-proprietors with defendants, receiving their share of revenue, when, about that time, the defendants ordered the miller to pay no more of the revenues to plaintiffs as before, which he obeyed, the defendants assuming the entire control, ordering that the plaintiffs *n'avaient plus d'affaire dans le moulin*.

It is elementary to say that a partition of realty effected and completed by the definition of limits and boundaries makes the previous proprietors *par indivis*

separate proprietors of their respective portions as settled by the terms of their deed of partition. The agreement or *acte d'accord* in this case, which related back their several titles to the common title under which they jointly held the property, would, notwithstanding, be subject to the legal effect of any special stipulation or condition contained in it, whereby the entire separate portion, or any part thereof, might be affected, controlled, or limited in possession or enjoyment by the party to whom it had fallen by the agreement or *accord*. Without such a special reservation or limitation, the possession would necessarily have been as absolute as the title; but with such a special agreement in the *acte d'accord* for the partition generally as regarded the flour mill, it is necessary to ascertain the legal effect in connection with the circumstances of the case, as shown in evidence, and affecting the defendants.

Now the *acte d'accord* between the parties did establish the partition of the respective lots; but, at the same time, it declared that as to the mills, which, by the line, had been found to be erected upon the portion fallen to the Dumont family, it was agreed that the revenues of the flour-mill *resteront en communauté*, shall continue in common; that is to say, the Dumont family *percevra*, shall take and receive two-thirds, and the De Bellefeuille, the other one-third, until, &c.; and that the saw-mill *restera au profit de la famille De Bellefeuille*, shall continue for the sole profit of the De Bellefeuille family, until in both cases, the happening of certain conditions, namely, not only the ascertainment of the expected value of the two mills, but still more, the actual payment by the Dumont family to the De Bellefeuille family of one-third of the value of the flour-mill property, and the entire value of the saw-mill property.

The legal interpretation of the special stipulation is in itself; the effective words of the stipulation are in the continuance of the possession and enjoyment which the plaintiffs, at the date of the *acte d'accord*, had jointly with the defendants in the flour-mill until the accomplishment of the stipulated conditions as to the value of the properties respectively; and the same stipulation, which continued to the plaintiffs the entire possession of the saw-mill for their sole profit, continued to them the joint possession of the flour-mill for their perception of the one-third of its revenues. It is not easy to discover a different application for the legal limitation of property as it relates to the flour-mill than as it relates to the saw-mill.

Where parties agree to take and receive the revenues of real property according to certain proportions for each, without any stipulations as to the possession by either of the common producer, they hold as joint tenants in possession, [illegible] having a *jus in re* to the extent of his share; and so, in this case, the parties themselves so considered their possession, because Marier asserts that they mutually engaged him to take charge of the flour-mill, the common object, and to receive for them the common revenues. "Les fruits de la chose possédée, dit Curasson (*Actions Possessoires*, pp. 812-13), sont divisibles; mais cette division matérielle des fruits n'est possible qu'après que les fruits ont été cueillis; jusque là, la possession a été un fait commun, s'appliquant à toute la chose commune et à chaque partie de cette chose; la possession, quand la part de chacun n'est pas matériellement faite, est donc une chose essentiellement indivisible."

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The right of the plaintiffs truly is not that of absolute proprietors, but it is that of " possesseurs précaires, qui jouissent en vertu d'une concession, mais qui ne dépouillent pas absolument le propriétaire, et laissent entre ses mains un droit supérieur que le concessionaire doit respecter ; et cependant, il ne faut pas prendre à la lettre ces termes de la loi à *titre de propriétaire*, à *titre non précaire*, pour en conclure que les possesseurs dont on vient de parler ne peuvent exercer l'action possessoire : pour être privé de cette action, il faut n'avoir aucun droit réel dans la chose. Il n'en est pas de même de l'usufruitier, de l'usager, du possesseur d'une servitude légale ou conventionnelle, etc. Ceux-ci, ne possédant pas, il est vrai, comme propriétaires absolus, ne pourraient agir au possessoire pour se faire maintenir dans la possession à *titre de propriété*, mais ils n'en ont pas moins un droit dans la chose, *jus in re ;* la propriété est démontrée à leur égard, en quelque sorte, et tout en reconnaissant un droit supérieur, ils ne sont pas moins admis à l'action possessoire." (Curasson, *Actions Possessoires*, p. 37 et suiv.)

Curasson has extracted the above almost entirely from Troplong, *Traité de la Prescription*, and adds : " La possession se continue telle qu'elle était à son principe : c'est par son origine que sa qualité demeure fixée et nul ne peut s'en changer la cause à lui-même ;" and Troplong himself admits that this possession *jus in re* " est chez nous l'opinion la plus *répandue :* elle est enseignée par MM. Poncet et Duranton : on la trouve dans tous les livres et dans tous les arrêts ; Domat, guide assez ordinaire de nos auteurs modernes, en est le partisan." But, notwithstanding, he combats all this legal host, this universal jurisprudence, and asserts that it is a *mere fact*, and yet after exhibiting his usual controversation against every legist and every *arrêt*, he concludes : " Maintenant, si l'on nous demande dans quelle classe nous rangeons les actions possessoires, nous répondrons sans hésitation et sans scrupule, que nous les considérons comme dans la famille des actions réelles " (Troplong, *Presc.*) and Curasson (*Act Poss.* p. 811) says : " Notre droit n'admet pas les subtilités du droit romain, et la cour de cassation a toujours admis la complainte dans le cas de possession commune. Cela nous paraît exact. Ainsi, si deux cohéritiers, propriétaires d'une maison qu'ils se sont divisée, sont convenus de jouir en commun de la cour qui en dépend, et que l'un d'eux soit troublé par l'autre dans cette possession commune, il pourra se plaindre : car, quelque soit l'étendue, la nature de sa possession, exclusive ou commune, du moment qu'en fait elle existe, s'il est troublé dans cette possession, il doit être admis à demander qu'on le maintienne dans son droit de possession tel qu'il l'exerçait, et c'est avec raison que la cour de cassation a décidé qu'il pouvait en ce cas intenter l'action possessoire contre son co-possesseur qui le trouble ou qui essaie de s'attribuer la possession exclusive de la chose commune ;" and the same author says at page 812 : " En principe, l'action possessoire ne peut appartenir qu'à celui qui a la pleine disposition de la chose, qui est maître de la chose. Mais il est de principe aussi, que chaque propriétaire d'une chose indivisible peut intenter toutes les actions relatives à cette chose, comme un seul est tenu pour tous. La question est donc de savoir si la possession d'une chose indivise est une chose indivisible. L'art. 1217 du *Code Civil*, répute indivisible la chose qui, dans sa livraison, ou le fait

qui, dans l'exécution, n'est pas susceptible de division, soit matérielle, soit intellectuelle. Or, cela peut-il se dire de la possession? Les fruits de la chose possédée sont divisibles; mais cette division matérielle des fruits n'est possible qu'après que les fruits ont été cueillis: jusque-là la possession a été un fait commun s'appliquant à toute la chose commune et à chaque partie de cette chose: la possession, quand la part de chacun n'est pas matériellement faite, est donc une chose essentiellement indivisible."

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Savigny, (*Traité de la Possession*, p. 570) dit: "Toute construction est considérée comme partie du sol sur lequel elle repose, et sa propriété comme sa possession sont intimement liées à la propriété et à la possession du sol. La seule séparation possible consiste en une espèce particulière de *jus in re*, que le propriétaire peut transmettre à un autre. Celui qui a ce *jus in re* n'est pas plus possesseur que propriétaire de la maison, mais il a une *juris quasi possessio* et par là, les actions possessoires. Cette *juris quasi possessio* a une très-grande ressemblance avec la possession des servitudes personnelles, parce que, comme celle-ci, elle dépend de la possession naturelle de la chose elle-même. Il n'existe aucune différence quant à l'acquisition et à la perte de la possession, et en existât-il dans les interdits, elle n'est du moins pas pratique." (De la possession en loi romaine.)

The right of the possession of the plaintiffs under the circumstances of the case, whether it be a mere fact or of law, whether settled and stipulated for by the *acte d'accord* as a limitation of the full and absolute property in the mills, until the arrival of the contingency of their exported values of their properties being ascertained, and the completion of that contingency by the payment of the agreed values by the Dumont family to the DeBellefeuille family, or whether considered legally as a *jus in re*, according to the current of legists and of jurisprudence, was in the plaintiffs a *jus in re* in the flour-mill in question in this case, which they had substantially possessed and enjoyed before, and at the date of the *acte d'accord*, Dec., 1843, and which under that *accord* they continued to possess until the defendant's *trouble* in January, 1856. That possession was manifestly sufficient to give them possessory rights and to enable them to maintain them by a possessory action, and although the case does not present the features of absolute possession required to sustain an action of *réintegrande* as considered by the judge of the Superior Court, it does possess the attributes and privileges of an action *en complainte*, and therefore the absolute dismissal of this action does appear to be incorrect.

MEREDITH, J.—I concur.

MONDELET, J., *dissentiens*.—Après avoir lu tous les documents, pièces et preuve, je n'hésite aucunement à dire que, dans mon opinion, les appelants n'avaient aucun droit d'intenter contre les défendeurs une action en réintegrande, attendu qu'il a été constaté que le moulin à farine dont il est question, est situé dans la partie de l'augmentation de la seigneurie des Mille-Isles qui est, d'après le partage fait subséquemment à l'acte d'accord du 27 décembre 1843, et l'opération de l'arpenteur Laurier, dans le lot des défendeurs; les appelants, en conséquence, n'ont eu aucun droit ni au fond, ni à la possession du moulin en question. Les demandeurs n'ont droit qu'à un tiers des revenus, ce qui n'a aucun caractère de droit à la réalité, mais donne lieu, tout au plus, à une action per-

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sonnelle contre les défendeurs pour le tiers des revenus du moulin, si ces derniers sont en défaut d'accomplir, à cet égard, leurs obligations envers les demandeurs.

Je pense donc que l'action des demandeurs a été bien et dûment déboutée, par le jugement bien motivé de la cour de première instance, qui devrait être confirmé.

Le jugement fut motivé comme suit:

The court * * * considering that on and for many years previous to the twenty seventh day of December, one thousand eight hundred and forty-three, to wit, the date of the said notarial act filed in this cause, namely, *the vote d'accord pour tenir lieu de partage entre les familles Dumont et DeBellefeuille de l'augmentation de la seigneurie de Mille-Isles* referred to in the declaration and pleadings in the said cause filed, the said families of Dumont and DeBellefeuille were the legal owners and possessors *par indivis* of the said augmentation which under and by virtue of the stipulations contained in the said notarial act the said two families did agree to divide and partition among them according to their respective rights under and by virtue of the will of the late Louis Eustache Lambert Dumont, their common ancestor and devisor; and considering that it was specially and expressly stipulated by the said families parties thereto, now represented by the respective parties in this cause, to wit the Dumont family represented herein by the respondents, defendants in the Court below and DeBellefeuille family, by the appellants plaintiffs in the court below, in manner following that is to say, : "*Quant aux moulins qui se trouvent par la ligne commencée être érigés sur la* "*partie échue à la famille Dumont, il est entendu que les revenus du moulin à* "*farine resteront en communauté, c'est-à-dire que la famille Dumont en percevra* "*les deux tiers, et la famille de Bellefeuille le troisième tiers, jusqu' à ce que la* "*famille Dumont rembourse à la famille de Bellefeuille le tiers de la valeur des* "*dits moulins et de ses ustensiles, tournants et travaillants au dire d'experts, choi-* "*sis par les dites familles Dumont et DeBellefeuille et que le moulin à scie res-* "*tera au profit de la famille De Bellefeuille jusqu' à ce que la famille Dumont* "*lui ait remboursé et payé la valeur de la dite bâtisse et ses dépendances aussi* "*au dire d'experts choisis par les dites familles DeBellefeuille et Dumont.*"

Considering that in and by the said special stipulation and agreement above mentioned, the said DeBellefeuille family, to wit, the said appellants, had in law the possession of and a possessory right *jus in re* in and to the one undivided third part of the said flour-mill in the said special stipulation mentioned, the object of contestation in this cause, whereof the said appellants could not legally be troubled, *troublés*, and whereof they could not legally be divested, by the respondents representing as aforesaid the said Dumont family, except after the entire fulfilment of the condition in respect of the said flour-mill stipulated in the said special agreement or by a judgment rendered therefore by a court of competent jurisdiction: Considering that the said respondents did on the twenty-first day of January, one thousand eight hundred and fifty six, illegally and wrongfully trouble, *troubler*, the said appellants in their lawful possession of the said one undivided third part of the said flour-mill and did illegally and wrongfully dispossess and divest them of their said possession and possessory right therein: Considering that the said possession and possessory right of the said appellants was sufficient

in law for the maintenance of their possessory action, by them in this cause instituted against the said respondents; Considering that the said appellants have a right to have and receive the one third part of the revenues of the said flour mill so long as their said possession and possessory right shall exist: Considering that in the judgment pronounced by the Superior Court for Lower Canada, at the city of Montreal, on the twenty-eighth day of June, one thousand eight hundred and sixty-one, whereby the said action of the appellants, plaintiffs aforesaid, has been dismissed, 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 maintain the said action of the said appellants, plaintiffs in the court below, against the said respondents, defendants in the court below, and doth declare that the said appellants, plaintiffs aforesaid, are and were the legal possessors of and had a possessory right in the one undivided third part of the said flour-mill situated at Saint-Jérôme, on the North-River, in the village and parish of Saint-Jérôme in the said seigniory of Mille-Isles, mentioned and described in the said declaration in this cause filed, and inasmuch as the said respondents did on the twenty-first day of January, one thousand eight hundred and fifty-six, illegally and wrongfully trouble, *troubler*, the said appellants in their said possession and possessory right aforesaid, and did illegally and wrongfully dispossess and divest them thereof, this court doth order the said respondents, defendants aforesaid; to render and restore to the said appellants, plaintiffs aforesaid, the full and entire possession of the said one undivided part of the said flour-mill, within twenty days after service upon the respondents aforesaid of this judgment, and upon their failure so to do, that the said rendering and restoration to the said appellants of the said possession shall be effected in manner provided by law, and that the appellants, defendants aforesaid, thereafter do not trouble, *troubler*, or molest the said appellants, plaintiffs aforesaid, in their said possession and possessory right of the same, and the court doth further order, for the purpose of ascertaining the amount of the said revenues which the said appellants, plaintiffs aforesaid, are justly entitled to have and receive from the respondents, defendants aforesaid, up to the time of the service of the said judgment, that by experts to be named and appointed by the said appellants, plaintiffs aforesaid, and respondents, defendants aforesaid, respectively within twenty days from and after the signification by the one upon the other of the said parties of this judgment, and on failure and default of either or both of the said parties so to do, then by the said Superior Court or a judge thereof, with power to the said two experts to name a third in case of difference of opinion between the two, the net revenues of the said flour-mill shall be ascertained and established in presence of the said parties or them duly called therefor, and the one third part thereof belonging to the said appellants, plaintiffs aforesaid, shall be settled and determined and shall by the said expertise be awarded to the said appellants, plaintiffs aforesaid, and the said experts shall make and render to the said Superior Court their said report in the premises, without delay, to be then proceeded upon by the said Superior Court as to law and justice shall appertain, with costs to the said appellants against the said respondents in the court below as well as in this court or appeal.

(The Honorable Mr. Assistant Judge Mondelet dissenting.)

De Bellefeuille et al., and Dobensky et al.

And it is ordered that the record be transmitted to the court below.

And on motion of Henry Stuart, Esquire, attorney for the appellants, the Court doth award him distraction of his costs as well in the court below as in this court on the present appeal in this cause.

Henry Stuart, pour appelants.
Cartier et Pominville, pour intimés.
(E. LEF. DE B.)

Jugement renversé.

COUR DE CIRCUIT.

MONTREAL, 30 AVRIL, 1867.

Coram BERTHELOT, J.

No. 1789.

Smith et al., *and Ogilvie* et al.

HOMOLOGATION DE PROCES-VERBAL.—APPEAL.

JUGE:—Que des juges de paix auxquels un procès-verbal de cours d'eau est soumis pour homologation, doivent prendre la preuve par écrit, s'il y a *opposition* à l'homologation.

Le ch. 30 de la 24ème vict. devenu le ch. 26 des Statuts Refondus du Bas-Canada, accorde un droit d'appel du jugement des juges du paix, homologuant un procès-verbal de cours d'eau.

Les appelants s'étaient opposés à l'homologation d'un tel procès-verbal et sur leur contestation une preuve orale avait été reçue par les juges de paix; mais ces derniers avaient refusé de prendre cette preuve par écrit, quoiqu'ils en eussent été requis.

De là l'appel jugé comme suit:

La cour, * * * considérant que par les dispositions du ch. 30 de la 24ème vict., les appelants avaient le droit de se porter appelants du jugement dont est appel, et que pour l'exercice effectif de ce droit d'appel, il était nécessaire que les dits juges de paix eussent procédé à prendre ou faire prendre par écrit l'enquête qui a été faite devant eux, sur la contestation entre les dites parties à l'égard du procès-verbal de cours d'eau, rendu par les dits intimés et mentionné au dit jugement et à la procédure. Considérant que les dits juges de paix en refusant de ce faire ainsi que mentionné au dit jugement, ont contrevenu à la loi dans une contestation mue devant eux qui était sujette, à appel, a cassé et annulé le dit jugement avec dépens contre les dits intimés, fixés et taxés à 50 o/o en sus de tous déboursés depuis le dit jugement du 15 février, et a en outre remis les parties dans l'état où elles étaient avant le dit jugement. Et en outre, conformément à la clause 12 du statut suscité, a ordonné que le dossier et la procédure restent au greffe de cette cour, savoir cette partie d'icelle qui est cassée par le présent jugement, sauf aux parties à procéder ultérieurement là et comment il pourra appartenir.

Appel maintenu.

Doutre et Doutre, pour appelants.
Bélanger et Desnoyers, pour intimés.
(G. D.)

COUR SUPERIEURE.

MONTREAL, 30 NOVEMBRE, 1865.

Coram BERTHELOT, J.

No. 1140.

[redacted]*art, Syndic à faillite* et al,

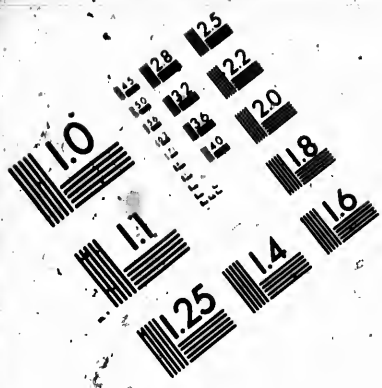
JUGE:—Que sous [redacted] concernant la faillite 1864, et d'après la loi, Stewart, [redacted] défendeur [redacted] syndic à la faillite de J. C. Booth, être poursuivi pour les dettes, [redacted].

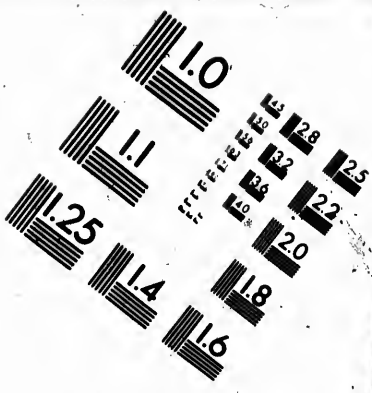
Le demandeur [redacted] sa déclaration que par acte du 19 juin 1856, il avait vendu à Ansel [redacted] John C. Booth un lot de terre situé à Chambly pour la somme de £550 que les acquéreurs promirent payer *conjointement et solidairement*; qu'Ansel Booth était mort, après avoir fait un testament instituant sa femme légataire universelle en usufruit; que l'autre acquéreur John C. Booth étant tombé en faillite, le défendeur Stewart avait été nommé syndic et que le dit J. C. Booth avait fait cession universelle des biens, le 29 november 1864, entre les mains du dit syndic. L'action était donc portée contre la légataire universelle d'Ansel Booth et contre le syndic à la faillite de J. C. Booth, contre lesquelles l'action concluait à une condamnation conjointe et solidaire.

Stewart plaida, ès qualité: "That under and by virtue of the said insolvent act of 1864, and by law, the said defendant Stewart is only vested with the estate and effects of the said John C. Booth, for the purpose of administering and realising them for the benefit of the creditors of the said J. C. Booth, in conformity with the said act: that he cannot by law be held and is not liable for any of the debts or obligations of the said John C. Booth, and specially that he cannot by law be sued, held liable or condemned as he is sued and as the plaintiff by his action concluded against him."

A cette défense, le demandeur répondit en droit, que le dit Stewart représentant à toutes fins que de droit le dit J. C. Booth l'action était bien portée contre lui et que sa défense devait être rejetée.

J. DOUTRE, Q. C., pour demandeur, soutint, à l'audition que la loi sur la faillite ne pouvait avoir l'effet que lui attribuait le défendeur; qu'en règle générale, les créanciers devaient se présenter devant le syndic pour participer dans la liquidation, mais que la condition des créanciers privilégiés et hypothécaires n'était pas affectée par cette loi, lorsqu'ils ne pouvaient pas y trouver un recours aussi direct et facile que devant les tribunaux ordinaires. Pour dépouiller les tribunaux ordinaires de leur juridiction sur les biens du failli, il faudrait trouver dans cette loi, des dispositions bien explicites qu'elle ne contient pas. La sect. 2, no. 7, définit l'effet de la cession volontairement faite par le failli, effet que l'on peut assimiler à celui de la mort naturelle, quant à la transmission des biens—le syndic tenant lieu de l'exécuteur testamentaire, la section 3, no. 22, donne à la nomination du syndic, en cas de liquidation forcée, le même effet qu'à la cession volontaire; la sect. 4, no. 7, investit le syndic des pouvoirs *actifs* du failli;—même sect. no. 9, on lit: "en son nom et qualité, le syndic pourra pour-





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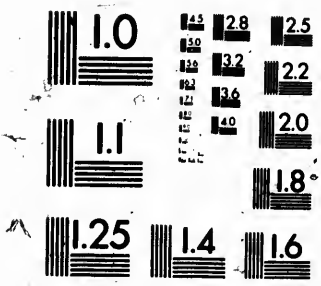

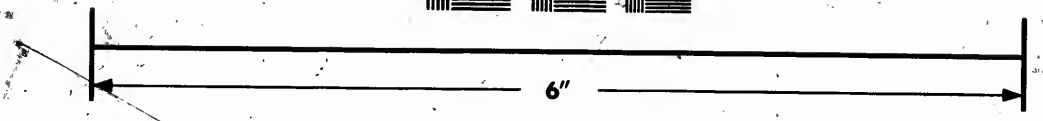

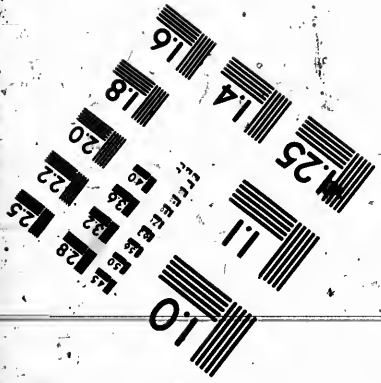

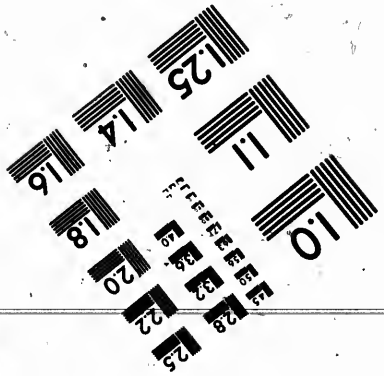

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suivre le recouvrement de toutes les créances du failli, et soit comme demandeur ou *défendeur*, il pourra prendre toutes les mesures que le failli pourrait avoir prises à l'égard des biens, etc.," ce qui implique évidemment que le syndic peut-être constitué *défendeur*.

Quand on arrive à la manière de disposer des immeubles du failli, on voit de suite que le législateur n'a pas dû songer à placer le créancier privilégie ou hypothécaire sous le régime de cette loi. La section 4, no. 13, après avoir dit que le syndic procèdera à peu près comme le shérif, donne au syndic le pouvoir de retirer l'immeuble de la vente, s'il ne rapporte pas un prix suffisant, dans l'opinion du syndic, qui peut ensuite vendre cet immeuble sous telles directions qui lui seront données par les créanciers. Par le no. suivant, (sect. 4, no 14), le syndic peut, dans telle vente, accorder les termes de crédit qu'il juge convenables, sous l'approbation des créanciers. Quels sont maintenant les créanciers qui vont ainsi juger de la suffisance du prix et des termes de credit à donner? La sect. 11, no. 2, met toutes ces questions sous le contrôle des créanciers ordinaires, pourvu que leur créance respective excède $100. Pour faire voir les conséquences du système de la défense, il n'est pas nécessaire de sortir du cas actuel. J. C. Booth a fait une cession volontaire, mais le seul bien qu'il avait à céder consistait dans l'immeuble vendu par le demandeur et possédé indivisément par le failli et le répresentant d'Ansel Booth. Le demandeur, d'après la défense, verrait donc son gage tomber sous le contrôle des créanciers chirographaires du failli, qui dicteraient au syndic quand il devrait vendre, pour quel prix et à quelles conditions ou termes de paiement! Première conséquence. Supposons maintenant que le demandeur, au lieu de poursuivre pour son prix de vente, ait porté l'action en resolution, faute de paiement du prix. Si le syndic ne peut être constitué défendeur, ainsi qu'on le prétend, le vendeur n'aurait personne contre qui il pût porter son action. Seconde conséquence. Il en est une autre aussi importante qui reasort de cette instance. Le demandeur a deux débiteurs solidaires, dont l'un est en faillite. En supposant qu'il veuille bien se pourvoir devant le syndic, pour la part du failli, il est bien évident qu'il est obligé d'avoir recours aux tribunaux ordinaires contre l'autre défendeur. Si donc le système de la défense est fondé, le demandeur devra multiplier les frais et faire opérer deux décrets, l'un par le ministère du syndic, l'autre par celui du shérif, pour arriver à toucher son prix de vente. Dans la plupart des cas, les frais de cette double opération emporteraient la valeur du gage hypothécaire.

Ce système est certainement trop absolu, et il faut y apporter les tempéraments qui ont lieu en France sous l'opération des lois de faillite. Voici en quoi consistent ces temperaments:

RENOUARD, traité des faillites, Tom. 1er, p. 308.

"Que les actions contre la faillite doivent être intentées contre les syndics, suivant les règles ordinaires de la procédure, c'est ce qui ne saurait être l'objet du plus léger doute; mais la procédure à suivre pour les actions dans la faillite a besoin d'explications.

"La loi a établi, en cas de faillite, certaines formes particulières pour la constatation et la reconnaissance des droits des créanciers qui doivent composer la masse. Si chaque créancier devait pour faire admettre son droit, obtenir un

jugement de condamnation, les tribunaux seront encombrés de procès, même pour les questions les moins contestables, et les frais, s'ils étaient mis à la charge de la masse, absorberaient l'actif de la faillite; s'ils étaient laissés à la charge des créanciers, ils dévoreraient tout ou partie du dividende à espérer, et souvent le dépasseraient de beaucoup. C'est pour éviter ces intolérables inconvénients que les formes particulières de l'admission des créanciers par la vérification et l'affirmation ont été instituées.

"Dépend-il d'un créancier de se soustraire à ces formalités, et d'agir directement, par voie principale, contre les syndics pour faire reconnaître sa créance, sans s'être préalablement astreint aux opérations de la vérification? Je pense que cette question doit être résolue par le principe que l'intérêt est la mesure des actions.

"Ouvrir a chacun l'arène judiciaire pour faire vérifier directement sa créance par les tribunaux au lieu de se soumettre préalablement suivant les règlements que la loi a pris soin de loi déterminer dans l'intérêt de tous, à la vérification des créanciers, ce serait renverser la sage économie de la loi et aggraver le désastre des faillites sans procurer aucun avantage individuel aux prétendants droits.

"Si donc un individu se disant créancier du failli, au lieu de se présenter pour faire vérifier sa créance, assigne les syndics avant la clôture des opérations de vérification, ceux-ci pourront le faire déclarer, quant à présent, non recevable, et le faire condamner à supporter personnellement les frais frustratoires de sa demande irrégulière. Ce n'est, pendant cette période, que lorsqu'une créance a été contestée à la vérification qu'il y a lieu de saisir du litige les tribunaux.

"TOUTEFOIS, ce n'est pas là une règle absolue. J'ai dit que la question me paraît dominée par le principe que l'intérêt est la mesure des actions. Si donc, un créancier prouve qu'il a un intérêt légitime et actuel à agir par action individuelle, comme s'il s'agit, par exemple, d'interrompre une prescription, les tribunaux devraient le déclarer recevable."

En limitant ainsi les poursuites contre le représentant du failli, on n'a jamais songé à porter atteinte aux privilèges et hypothèques. Les droits privilégiés sur les meubles ont subi un léger temps d'arrêt dans leur exercice, par l'effet de l'article 450 du code de commerce, cité par Renouard, tit. 1, p. 382: "Toutes voies d'exécution pour parvenir au paiement des loyers sur les effets mobiliers servant à l'exploitation du commerce du failli, seront suspendues pendant trente jours, à partir du jugement déclaratif de faillite, sans préjudice de toutes mesures conservatoires et du droit qui serait acquis au propriétaire de reprendre possession des lieux loués. Dans ce cas, la suspension des voies d'exécution établie au présent article cessera de plein droit."

"On voit, dit Renouard, Tom. 1, p. 387, par la discussion de cet article, que l'on ne serait pas fondé à interdire aux créanciers privilégiés le droit de donner cours aux poursuites par eux commencées, ou mieux de commencer individuellement des poursuites après le jugement déclaratif de faillite, à raison de leur privilège. Cette interdiction du droit de poursuite, en faveur de laquelle M. Dalloz s'était prononcé, avait été consacrée par un arrêt de la cour de Poitiers, contrairement à la jurisprudence la plus généralement admise; on invoquait à l'appui les motifs que je viens de faire connaître comme étant ceux qui avaient dicté le

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projet primitif du gouvernement; on ajoutait que l'ancien article 533, conforme au nouvel article 551, en autorisant le paiement des créances privilégiées sur les premiers deniers rentrés, leur donnait une suffisante garantie, et réglait le mode d'exercice de leurs droits.

" Ce système a été rejeté par la rédaction définitive de l'article 450. A l'argument de l'article 551, on pourra désormais répondre victorieusement comme le faisait le jugement infirmé par la cour de Poitiers: " Que si cet article détermine un mode de paiements des créanciers privilégiés dans les faillites, il ne s'applique qu'au cas où les créanciers de cette espèce n'ont pas exercé directement leurs droits sur les corps certains soumis à leur action; que tout ce qui résulte de l'article, c'est qu'il y a pour ces créanciers deux modes de paiement, et qu'ils peuvent recourir à l'un ou à l'autre suivant leur choix.....La rédaction de ces divers articles a cela de décisif, quant à la question qui nous occupe, qu'elle reconnaît ces droits comme préexistants, et n'entend nullement les conférer exceptionnellement, ni à raison des hypothèques, ni à raison des loyers ou du gage. Je conviens que de puissants motifs pouvaient déterminer le législateur à statuer autrement, et à faire exception, en cas de faillite, aux règles ordinaires sur les privilèges; mais il a connu et entendu ces motifs et n'a point voulu s'y arrêter. Pour le jurisconsulte, dont le devoir est d'être esclave de la loi et d'interpréter fidèlement son texte, la question ne peut pas être douteuse."

Au reste, le code français a laissé peu d'occasions à l'interprétation des juges. L'article 571 du code de commerce consacre la disposition suivante: " A partir du jugement qui déclarera la faillite, les créanciers ne pourront poursuivre l'expropriation des immeubles *sur lesquels ils n'auront pas d'hypothèques*."

" L'art. 572 dit: " s'il n'y a pas de poursuite en expropriation des immeubles, commencée avant l'époque de l'union, les syndics seuls seront admis à poursuivre la vente; ils seront tenus d'y procéder dans la huitaine, sous l'autorisation du juge-commissaire, et suivant les formes prescrites pour la vente des biens des mineurs."

Renouard, Tom 2, p. 320, après avoir cité ces deux articles, dit: " De cet article, (572) comme du précédent, il résulte fort nettement que les créanciers ayant hypothèque sur l'immeuble peuvent, *jusqu'à l'union*, en poursuivre l'expropriation; sauf à procéder contre les syndics à partir du jugement déclaratif. A la page 318, (Tom. 2), l'auteur avait déjà dit: " C'est devant le tribunal civil que l'expropriation sera poursuivie." La limite imposée par l'article 572 ne s'applique qu'aux créanciers qui n'ont pas d'hypothèques sur les immeubles, l'action de ces créanciers devant les tribunaux civils est maintenue jusqu à la déclaration de faillite, mais prohibée après cette époque. Quant aux créanciers hypothécaires, ils agissent contre le failli jusqu'à la faillite et contre le syndic après cette époque.

Les mots *union des créanciers* et *jugement déclaratif*, dont se servent le code et les commentateurs, sont expliqués à la p. 127 du Tom. 2me de Renouard: " La phase de la procédure qui commence au moment où il devient certain qu'il n'y aura point concordat, et qui se termine avec la liquidation, s'appelle *l'union des créanciers*. Depuis le jugement déclaratif jusqu'à l'assemblée qui a délibéré sur un concordat, les créanciers avaient été unis, avaient formé une masse, avaient

agi collectivement par l'intermédiaire et avec la représentation de syndics. Toutefois la langue légale ne donne point au lien d'intérêt commun qui unit la masse pendant cette première période le nom *d'union*; elle réserve cette expression pour l'époque qui suit le refus de concordat."

Le mécanisme de notre loi sur la faillite n'est pas toute-à-fait le même que celui du code de commerce, mais sur la matière en débat les principes du code s'accordent avec notre droit et doivent recevoir la même application. Il faut donc conclure, avec les deux systèmes, que l'action du créancier hypothécaire est en tout temps recevable, contre le failli, jusqu'à la cession volontaire ou la nomination du syndic, en cas de liquidation forcée, et contre le syndic après cette époque.

Per Curiam.—Notre loi sur la Faillite ne contient pas de disposition qui permette de poursuivre contre le syndic le recouvrement d'une dette due par le failli, devant les tribunaux ordinaires; en sorte que nous devons présumer que le législateur a voulu contraindre tous les créanciers à se pourvoir devant le Syndic soit pour en recevoir un dividende si la dette est chirographaire, soit pour y faire procéder à la vente de l'immeuble hypothéqué, si la dette est hypothécaire. L'esprit de la législation sur ce sujet se trouve indiqué dans Bédarride, Faillites et Banqueroutes, sur l'art. 443 du Code de Commerce, T. 1er., p. 105, No. 85, et dans Renouard, Traité des Faillites, Tom. 1er, p. 308, dans les termes suivants:

"Dépend-il d'un créancier de se soustraire à ces formalités et d'agir directement, par voie principale, contre les syndics pour faire reconnaître sa créance, sans s'être préalablement astreint aux opérations de la vérification? Je pense que cette question doit être résolue par le principe que l'intérêt est la mesure des actions.

"Ouvrir à chacun l'arène judiciaire pour faire vérifier directement sa créance par les tribunaux au lieu de soumettre préalablement suivant les règlements que la loi a pris soin de déterminer dans l'intérêt de tous, à la vérification des créanciers, ce serait renverser la sage économie de la loi et aggraver le désastre des faillites, sans procurer aucun avantage individuel aux prétendants droits."

La Cour, appliquant ces principes à cette cause, est d'opinion que la défense est bien fondée en loi et renvoie la réponse en droit.

(Réponse en droit rejetée.)

Doutre et Doutre, pour Demandeur.
J. J. C. Abbott, Q. C., pour Syndic.
(J. D.)

COURT OF QUEEN'S BENCH. (CROWN SIDE.)

MONTREAL, 3rd May, 1867.

Coram DRUMMOND, J.

REGINA *vs.* ROY, *et al.*

HELD—1st. That in an indictment for conspiracy, an offence prohibited by penal law must be set forth either in the averment of the end or means.

2. To "cheat and defraud" private individuals, the sole object alleged to be had in view by the defendants, is not necessarily a penal offence.

3. The count in which the conspiracy is alleged, must state of what thing or things the defendants intended to defraud the creditors.

DRUMMOND J.: I have permitted the Counsel for the defence to develope,

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at full length, their arguments against the validity of the indictment upon which the defendants are now on trial, although they rose merely to object to the admissibility of certain evidence. I did so in the interests of justice; in consideration for the jurors who have already been detained before this Court for an unreasonable length of time,—and because, had any one, as *amicus curiæ*, called my attention to a material error in the indictment [which I had no opportunity to examine before the trial,] at any stage of the case, it would have been my duty to put an end to the proceedings at once. I trust, however, the indulgence thus granted will never be invoked as a precedent.—For, according to recognized practice, the indictment should have been assailed *in limine*, either by a demurrer or a motion to quash—or the defendants should have awaited the close of the evidence for the prosecution, to demand an acquittal.

The indictment, analyzed as to the matters of preamble or indictment,—literally given as to the Chief Count, and the statements of overt acts; runs as follows:

That, at the time of committing the alleged offence, Maxime Olivier David was a trader, within the meaning of the Insolvent Act of 1864, carrying on business at St. Johns, and was indebted to William Stephen & Co. in the sum of $1677.72—unto Amable Prevost & Co. in the sum of $1680.82—and to divers other creditors in divers other sums of money.

That the said M. O. David being unable to meet his engagements, on the 26th January, 1867, made an assignment of all his estate to William Coote, for the purposes of the said act.

That, at the time of committing the alleged offence, the said M. O. David was possessed of divers goods, chattels and effects of the value of £873, forming part of his personal estate.

Next comes the substantive allegation of conspiracy in the following terms:

"That Adolphe Roy, late of the City of Montreal, in the District of Montreal aforesaid, merchant, Moise Keigle, late of the Township of Roxton, in the District of Bedford, trader, and Joseph Cyrille David, late of the parish of St. Gregoire, in the District of Iberville aforesaid, being evil disposed persons and wilfully, wickedly and fraudulently intending to defraud and deprive the said William Stephen and his co-partners, and the said Amable Prevost and his said co-partner, and all the other creditors of the said Maxime Olivier David, of the aforesaid goods, chattels and effects, and of the benefit thereof, did, together with the said Maxime O. David, amongst themselves, to wit, on the 4th day of December, 1866, at the City of Montreal aforesaid, in the District of Montreal aforesaid, unlawfully conspire, combine, confederate and agree together unlawfully and fraudulently to cheat and defraud the said creditors, and all others the creditors of the said Maxime O. David.

Then we find a statement of the means used in furtherance of the alleged conspiracy, viz:

That the said Adolphe Roy, Moise Keigle, Joseph Cyrille David and Maxime O. David, afterwards, to wit, on the seventh day of December in the year last aforesaid, at the town of St. Johns aforesaid, in the District of Iberville aforesaid, in pursuance of and according to the said conspiracy, combination and con-

federacy and agreement amongst them, had, as aforesaid, at the city of Montreal aforesaid, did, at the town of St. Johns aforesaid, in the District of Iberville aforesaid, in contemplation of the Insolveney of the said Maxime O. David, and then well knowing the inability of the said Maxime O. David to meet his engagements, unlawfully and fraudulently cause the said Maxime O. David to execute a certain fictitious sale and conveyance to the said Moïse Keigle of the aforesaid goods, chattels and effects of the value of £872 15s. cy, then being and forming a part of the personal estate of the said Maxime O. David, he, the said Moïse Keigle, then and there signing and delivering to the said Maxime O. David, certain promissory notes payable to the order of the said Maxime O. David, for the aforesaid sum of £872.15s. currency, payable at different periods thereafter, and then and there causing the said Maxime O. David to endorse and deliver over to the said Adolphe Roy four of the said promissory notes for the payment of the sum of four hundred dollars each, to the end and intent that all the creditors aforesaid, and all others the creditors of the said Maxime O. David, should be deprived of the benefit of the goods, chattels and effects, and by the several means aforesaid to cheat and defraud the creditors hereinbefore named, and all others the creditors of the said Maxime O. David, of the said goods, chattels and effects and of the value thereof as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Adolphe Roy, Moïse Keigle, Joseph Cyrille David, and the said Maxime O. David, in further pursuance of the said conspiracy, combination, confederacy and agreement amongst them had, as aforesaid, at the City of Montreal aforesaid, did, at the town of St. Johns aforesaid, in the District of Iberville aforesaid, afterwards, to wit, on the day and year last aforesaid, in contemplation of the insolvency of the said Maxime O. David, and then well knowing the inability of the said M. O. David to meet his engagements, unlawfully and fraudulently cause the said M. O. David to execute a certain fictitious sale and conveyance to the said Joseph Cyrille David of certain other goods, chattels and effects of great value, to wit, of the value of $1,200 current money as aforesaid, and then and there unlawfully, fraudulently and clandestinely did remove and conceal the goods, chattels and effects last mentioned, to the end and intent that the creditors hereinbefore named, and all others the creditors of the said M. O. David, should be deprived of the benefit of the said goods, chattels and effects last mentioned, and, by the several means aforesaid, to cheat and defraud the creditors hereinbefore named, and all others the creditors of the said Maxime O. David, of the said goods, chattels and effects last mentioned to the evil example of all others in the like case offending, and against the Peace of our Lady the Queen, her Crown and dignity."

The reasons for which the defendants ask to quash this indictment, as I have gleaned them from an analysis of the able arguments of their counsel, as well as from the propositions specially enunciated by Mr. Kerr, may be thus concisely expressed:

1st. Because the indictment does not set forth a criminal or indictable offence as the object of the conspiracy, and, in the absence of such averment, does not show that the object in contemplation was attained, or sought to be attained, by criminal or illegal means.

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2nd. Because the means by which Maxime Olivier David's creditors were to be defrauded are not specified in any way.

3rd. Because there is no description of the thing or things of which the creditors of Maxime Olivier David were to be defrauded.

4th. Because the indictment charges one of the defendants, Adolphe Roy, with having cheated himself as well as other creditors, inasmuch as he was one of them.

5th. Because the goods mentioned in the indictment are not specified.

6th. Because it is not alleged that the creditors of Maxime Olivier David were actually defrauded by the conspiracy.

I shall forthwith dispose of the 4th, 5th, and 6th objections by rejecting them. The 4th, because it is evident that the framer of the indictment could not have meant to include Adolphe Roy, one of the persons alleged to have contemplated the fraud amongst the creditors to be defrauded, and that the wording of the count admits of no such interpretation. The fifth, because, in a case of conspiracy, it is not necessary to describe the goods as in an indictment for stealing them. Stating them as "divers goods" is held sufficient. (See Archbold's Criminal Practice, p. 46, Edition of 1862: Woolrych, p. 1060.) As to the 6th ground, it was very properly abandoned by the counsel for the defence. For it is obvious that the crime of conspiracy is completed by the mere combination of persons to commit an illegal act, or any act whatever by illegal means.

Before enunciating my opinion upon the remaining objection, I deem it proper to state in what manner our Courts should allow themselves to be influenced by the decisions of Judges in other countries, where the criminal law of England prevails.

We, the Judges of Lower Canada, are bound to submit our reason to all judicial decisions, which formed part of the jurisprudence of Great Britain at the time when the Public, including the criminal, law of England, took root in this country, by its cession to the British Crown, *ipso facto*.

But, although every day we have occasion to feel grateful to the luminaries of the English Bench for the light they cast upon the intricate path we have to tread in the interpretation of the criminal laws of our country, we are not to be controlled in our decisions by the opinions expressed by them since that eventful period. We meditate upon the modern opinons of English judges, as upon the opinions of eminent Judges in those States of the adjoining Union where the same system prevails,—as written reason,—to be aided, not to be bound, by them.

Conspiracy is an offence at common law, independently of the Statute 33, Edw. I., ch. 2, which, abrogating nothing, and professing merely to add some new provisions and affirm some old ones, is of no practical importance, especially in this case.

Baron Alderson, in Reg. vs. Vincent, C. & P., P. 91, defines it as "a crime "which consists either in a combination and agreement by persons to do some "illegal act, or a combination and agreement to effect a legal purpose by illegal "means."

Lord Denman, in Reg. vs. Seward, 1 A. & E., P. 713, said:—"An indict- "ment for conspiracy ought to show that it was for an unlawful purpose or to "effect a lawful purpose by unlawful means."

And Chief Justice Tindall, delivering the opinion of all the judges of England in the famous case of O'Connell vs. Reg., defined the offence in these words:— "The crime of conspiracy is complete if two, or more than two, should agree to "do an illegal thing; that is to effect something in itself unlawful, or to effect "by unlawful means something which in itself may be indifferent, or even law-"ful."

Bishop, an able American writer on Criminal Law, gives the following concise definition: "A conspiracy is a corrupt agreeing together of two or more persons to do, by concerted action, something unlawful as a means or an end."

All the definitions of conspiracy, including the above, show that the offences of this nature belong to one or other of two classes. The first where the illegal character of the object constitutes the crime. The second, where the illegal character of the means used to attain the end is the constituent feature of the offence. The inference is therefore obvious that in the first class of cases it is unnecessary to state in the indictment the means by which the unlawful end was attained or sought to be reached; while in the second class the means or overt acts must be specially set forth.

This doctrine which I laid down at an early period of the argument was, before the close of the discussion, admitted to be correct on both sides. So that the validity of the first objection, which rests upon the ground that the indictment sets forth no criminal act either as the end or the means, must depend upon the interpretation to be given to the epithet "unlawful" or "illegal" as applied equally to the end and the means in all definitions of the offence. Here lies the great difficulty. Should an indictment be allowed for conspiracy when the object contemplated and the means used involve no breach of the penal laws of the country, even though they violate the moral law?

After a careful perusal of all the authorities submitted to me, I am convinced that if we tolerated such indictments, we would plunge into a sea of difficulties. Every judge would interpret the moral law according to his own views; and discretion, aptly termed the law of tyrants, would be substituted in such matters for those positive laws which are the great safeguard of the people. And I have come to the conclusion that *malum prohibitum* and not *malum in se non prohibitum* is the only foundation either as the end, or the means, upon which an indictment for conspiracy should rest. After the most earnest reconsideration of this question, which is not new to me, I venture upon a definition of the crime of conspiracy, which will be more pointedly applicable to this case, if not to all others, than any of those which I have above set forth. It is this:—

"*A conspiracy is an agreement by two persons (not being husband and "wife), or more, to do or cause to be done, an act prohibited by penal law "or to prevent the doing of an act ordained, under legal sanction, by any means, "whatever; or to do or cause to be done, an act, whether lawful or not, by "means prohibited by penal law.*"

It will be observed by this definition that I do not consider indictable offences, as the *sole* subjects of indictments for conspiracy, but that it includes all offences prohibited by law under a legal sanction, viz: a penalty or punishment of

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some kind, and amongst others, such offences as selling spirituous liquors without license, which, although they may not be *malum in se*—are punishable, through summary process, by fine or imprisonment.

Applying this doctrine to the indictment now under consideration, I must hold it to be insufficient; for, neither in the averment of the end or the means is any offence prohibited by penal law set forth. "To cheat and defraud" private individuals, the sole object alleged to be had in view by the defendants, is not necessarily a penal offence. For the only cheats or frauds punishable at Common law are the fraudulent obtaining of the property of another by any deceitful and illegal practice, or token, which affects or may affect the public, or such frauds as are levelled against the public justice of the Realm.

I also fail to discover in the counts of the indictment alleging the means or overt acts, any offence punishable by the penal laws of the country, either under the common law, or the statute relating to insolvent debtors, or any other statute. In the case of Rex vs. Gill, upon which the learned counsel for the prosecution chiefly relied, the object of the conspiracy was clearly set forth as an indictable offence; that is to say, obtaining the moneys of P. D. and G. D. *by false pretences* to cheat and defraud them, &c.

I would say, moreover, that had I taken a different view of the main question in this case, I would have considered myself equally bound to quash the indictment on the ground that the count in which the conspiracy is alleged does not state of what thing or things the defendants intended to defraud Maxime Olivier David's creditors—an omission which is not supplied by the intent imputed to the Defendants in subsequent transactions. The indictment is, therefore, quashed.

His Honour ordered one of the Jury to withdraw, when some discussion arose as to the form in which the record should be made up by the Clerk of the Crown, and Mr. Devlin asking that the prisoner should be declared not guilty.

His Honour ordered the record to be made in the usual way, and a juror having been withdrawn, the case was closed, and the jury was discharged.

Carter, Q.C., *& G. Ouimet*, of Counsel for private Prosecutor.

Kerr, B. Devlin, W. Dorion, Mousseau & Delorimier, of Counsel for Defendants.

(P. R. L.).

(CROWN SIDE)

MONTREAL, 13TH APRIL, 1867.

Coram MONDELET, A. J.

In re

ROBERT MOOR,

Petitioner for Writ of Habeas Corpus.

The petitioner was convicted by a Court Martial, held at the City of Montreal on the 26th, 27th, 28th and 29th days of March last, and on the 1st and 2nd days of April last, on the following charge: "for disgraceful conduct in having at Montreal, Canada East, sometime between "the 17th January and 16th March, 1867, fraudulently embezzled or misapplied about 500 "cords of wood, Government property, intrusted to his charge as an Assistant Commissariat "store-keeper, and which at the latter date was found deficient," and thereupon, on the said conviction, the Court forthwith sentenced the petitioner among other penalties to be imprison-

ed with hard labour for 672 days. The Court held that, it did not appear that there had been preferred against the petitioner any specific charge, nor any conviction of him upon a specific or positive charge, but a conviction in the alternative, one of the two being no offence created by the 17th article of the Mutiny Act, without any certainty as to either of the charges in the disjunctive, and that this was a matter of substance, and therefore, the warrant of commitment was null and void, and the petitioner who had been committed to prison entitled to be set at liberty.

In re Robert Moore

The facts fully appear from the arguments of counsel and the recorded judgment of the Court given below.

W. H. Kerr for the petitioner, said:—In this case when I had the honour of obtaining the order for the writ of *habeas corpus*, the petitioner was detained under a warrant of commitment signed by Mr. Snow, Deputy Assistant Commissary General. After the service of the writ on the jailer another commitment was left at the jail at ten o'clock the night before last, signed by Sir John Michel, Commander-in-Chief. This second warrant was I believe drawn by the learned Crown Prosecutor, to meet the errors in Mr. Snow's commitment as pointed out in the petition I had the honour of presenting to you. Fortunately time and space were both wanting so that I did not point out all the defects in Snow's warrant; had I done so, no doubt, an attempt would have been made to remedy them. But notwithstanding all the care wasted on the second commitment, it is not worth the paper it is written on. I proceed to point out some of the defects.

1. The charge against the Petitioner and for committing which he has been condemned to 672 days imprisonment, is in the following words: "For disgraceful conduct in having at Montreal, Canada East, some time between the seventeenth of January and sixteenth of March, 1867, *fraudulently embezzled* or *misapplied* about 500 cords wood, Government property, intrusted to his charge as an assistant Commissariat storekeeper, and which at the latter date was found deficient.

Your Honour will observe that the essence of the charge is that the Petitioner fraudulently embezzled or misapplied certain wood. The charge then is in the disjunctive, it is not specific, and in lieu of being found guilty of either fraudulently embezzling or misapplying the wood, he is not found guilty of either charge. The Mutiny Act, Section 17, provides that any officer, &c., who shall embezzle, fraudulently misapply, &c., shall be liable to be tried by Court Martial, and to be punished by penal servitude or imprisonment.

If you admit that an offence, or rather offences in one charge can be laid in the disjunctive, you may have the whole collection of felonies and offences specified in the clause in question, and a man may be convicted of having embezzled or fraudulently misapplied or stolen, or received, knowing it to be stolen, or connived thereat; for if you admit the principle in one instance, why should you not admit it in ten. That in England laying a charge in the disjunctive is not permitted in any case is susceptible of easy proof, and I beg to refer your Honour to Rex v. Morley, 1 Younge & Jervis 221 (Mr. Kerr here read the report), also to Rex v. North, 6 D. and R. 143 (Mr. Kerr also read the report.) In this case, your Honour will observe Bayley and Holroyd, J. J, both say that where the charge is in the disjunctive the objection taken thereto is not one to form, but goes to the substance.

In re Robert Moor.

2. In the commitment it is not alleged that the Lieut.-Gen. Commanding had authority to convene a Court-Martial. Of course, if he had no authority to convene, the proceedings of the Court Martial are null. His being an exceptional jurisdiction, this commitment should show that he had authority to exercise it. The power to convene Courts Martial is not inherent in the Commander-in-Chief; it is only under, and by the virtue of warrant or commission under the Royal sign manual, that he exercises that power. Mutiny Act, § 3. Thus exercising a power, at variance with the common law of the land, and vested with authority which the Courts cannot judicially notice, he is bound to show or rather to allege, that he has the authority to create an independent jurisdiction competent to take cognizance and to punish crime. Rex v. York, 5 Burrows, 2684.

3. The wood is alleged to belong to the Government. Which Government? The Imperial or the Provincial? If the Provincial, it is clear that he cannot be tried by a Court Martial.

4. It is not alleged in the said commitment that the sentence was signed by the President, the proceedings are alleged to have been signed but not the sentence—and as the imprisonment dates from the signing of the sentence, if it has not been signed though it may be confirmed, it is a nullity, and no warrant can be based upon it.

5. The second warrant is supposed to be substituted for the first, in fact in the second it is expressly alleged that the first is irregular and defective in form. Now if one warrant is to be substituted for another, I submit that it must be signed by the same party that signed the first, that under the Mutiny Act the Lieutenant General commanding should have exercised his power of fixing the place of imprisonment, when he confirmed the sentence. Having failed to do so, and that power having been exercised by Mr. Snow, the officer in command, it cannot now be exercised by the Commander-in-Chief.

In answer to the application, *T. K. Ramsay*, for the crown, before entering into the merits of the examination, said he would answer an objection which had fallen from the Court to the effect that the English Parliament had renounced the right of legislating for us in criminal matters. The Quebec Act had given us the English criminal law, with power to alter it, but it had also reserved to itself the power of legislating for the colony, either by express words or even by intendment. So there was no renunciation. But even if there had been, an Act in 1774 could not control the power of all future Parliaments and so bind us now. As a proof of this, only a few weeks ago the English Parliament had taken away the whole of our constitution and given us a new one.

MONDELET, J. Could the English Parliament take away our civil law?

Ramsay,—In strict law, certainly; but it would be oppressive and tyrannical. The warrant had been attacked by two kinds of objections, one class was grounded for discharge on *habeas-corpus*, if well founded; the other was not. Section 30 of the Mutiny Act gave the matters which should appear in an order of commitment of this sort. If these things appeared on the face of the warrant, the *habeas corpus* would not help the prisoner, and he must proceed by way of *certiorari* or error. It was the commitment that was now attacked. The commitment is sufficient. It had been said that the power of the Lieutenant General to con-

vene the Court did not appear; that the Queen's warrant to him should have been set up. There is nothing in this objection; the Commander of the Forces, and the convening officer having taken that quality, is the person who usually and indeed necessarily has that power, and it was no more necessary for him to set up the warrant under which he convened the Court, than it would be necessary for a Justice of the Peace to set out his commission. That this is sufficient appears from the form in D'Aguilar, p. 115. Having established that a legal Court was created, he would proceed to show the five things which should appear by Statute (Mutiny Act, sec. 30) namely,—1st, That this was a military offender; 2nd, the offence; 3rd, the sentence; 4th, the period of imprisonment, and 5th, the day and hour of the prisoner's release. 1st. That prisoner is amenable to the Court appears from section 2. He is accused as a storeman in the Commissariat Department, and he pleaded that he was not guilty and took no exception to the Court. It was therefore out of the question to attempt to alarm society with the idea that public liberty was endangered by the entreprises of Courts Martial. The prisoner had long enjoyed the advantages of his connection with the Commissariat Department; he knew on entering to what he exposed himself, and it was too late to complain of the jurisdiction. Society was the gainer, not the loser, by this military tribunal; without it an army could not exist, and without an army neither could we exist now as an independent people in Canada. 2nd. The offence is set up in the order of commitment; but it is said it is not sufficiently set up; that it is under a disjunctive. This technical rule of the disjunctive has never been applied in charges before Courts Martial, which are not bound by all the subtleties of the Courts. Pipon & Collyer, p. 49, Saunders, No. 407, and indeed all those who have written *ex professo* on Courts Martial. The Counsel for the prisoner cannot show one case where such an objection has ever been made, far less manifested in England. All the cases cited are in the Civil Courts. See also the form D'Aguilar for Mutiny, where the first charge is laid under a disjunctive "Mutiny or cause to Mutiny." 3rd. The offence is also set up, and it is not pretended that if prisoner is amenable to the jurisdiction, and if the proceedings are lawful, that the sentence is incorrect. 4th. The period of imprisonment is set out; and 5thly. The day and hour of the prisoner's release are mentioned. Before sitting down he would refer to the only case of the sort which had come up in this country. It was the case of Private McCulloch, in 4 Lower Canada Reports, 467, arising out of the Gavazzi riots. There the man was discharged, but why? because the offence was a civil and not a military offence. That is very different from this case, which is made expressly a military offence, in precisely the words of the charge. But the case of McCulloch is of this value, that in it Mr. Justice Aylwin lays down the principles I invoke as those which ought to guide the validity of the proceedings of Courts Martial. A little point was also made in the case, that the date of the signature of the sentence was not set out in the commitment. To this there are two answers. It is not required by the Statute, but in point of fact it is in the commitment which gives the date the 3rd of April, on which the President, Colonel Pipon, signed the proceedings, and the proceedings include the sentence.

In re Robert Moor.

PER CURIAM.—This was a matter of great importance, and was very ably argued by the Counsel. The petitioner complained that the warrant whereby he had been committed to the common jail by His Excellency, Lieut.-Gen. Sir John Michel, was a nullity; that he had been convicted of a charge in the alternative. The charge was for having fraudulently embezzled and misapplied, under the Mutiny Act. The petitioner, on conviction of a Court Martial, was sent to jail, first on one commitment, and afterwards another was put in. His Honour would direct his attention to the second commitment (which he proceeded to read.) The objections to this commitment might be classed under five or six heads, the first of which, that the charge was in the alternative, was the most important. The charge professed to be grounded on the 17th article of the Mutiny Act, which provided that any officer or soldier of Her Majesty's army, or any persons employed in the war or other department, who shall embezzle, fraudulently misapply, steal, &c. Each of these were different offences, separated from each other by a comma in the clause. But there was something which was not mentioned at the argument, about the embezzling. The Court Martial had convicted the prisoner of "fraudulently embezzling or misapplying." The thing was absurd. The judgment of the Court Martial was not only in the disjunctive, without any certainty, without any proper legal distinction, but it convicted him in the alternative, in the disjunctive, for two pretended offences, one of which was no offence, namely misapplying; But what offence was it to say he was guilty of "fraudulently embezzling and misapplying?" This second was no offence at all. It followed that the Court Martial had not only convicted in the disjunctive, but of a pretended illegal offence which was no offence at all. The charge was in the disjunctive and alternative, and was illegal and wrong. Surely because a man happened to be a soldier or an assistant storekeeper, it did not follow that his dismissal from the service was to take place in this way, without any certainty in the charge. The soldier was entitled to the same rights as the civilian. If greater precision were wanted in one case more than in another, it would indeed be in the Court Martial rather than in the Criminal Court, for the Court Martial was more summary, and if when a man was once condemned, unless the commitment was shown to be invalid, he had to go to jail. His Honour, therefore, concurred perfectly in laying it down as the ground work of this argument, that there must be a certainty and precision in the charge, because there must be a certainty in the conviction. He referred to the case against North, as showing that the information must contain a specific charge in order that the defendant might know what he had to answer. His Honour cited Mr. Simmons on Military law, page 145, to show that in framing charges, the utmost care must be taken to render them specific, in mentioning dates and places. [Also page 148 and 396.] In the present case, it appeared by the conviction, which he presumed had been correctly set out in the commitment, that the charge was in the alternative—fraudulently embezzling or misapplying, the latter, in itself, being no offence at all, and the Court Martial would have to be taught to charge people legally instead of sending a person to jail for 672 days, dismissing him from the service, and condemning him to make good the value of 500 cords of wood. As to the point that the Lieut.-General

should show his authority, that was not necessary, just as it was not necessary for a Justice of the Peace to show his authority; the first commitment also might be replaced by a second, for it was because the first had not been properly made, that the second D. was put in; and as to the officer signing the commitment, the Lieut. General was Commander in Chief, and commanded all the departments of Her Majesty's Forces in the Colonies.

His Honour then read the formal judgment of the Court, as follows:—

"Considering that in and by the warrant of commitment of the Petitioner to the common jail of the District of Montreal by Sir John Michel, K.C.B., commanding Her Majesty's forces in British North America, bearing date at Montreal the 9th day of April instant, it doth not appear that the said Petitioner is legally detained in the said common jail, but that on the contrary, it doth appear and is manifest that he is detained in the said common gaol, under colour of a pretended legal conviction of a certain Court Martial, held at the city of Montreal on the 26th, 27th, 28th and 29th days of March, now last past, and on the 1st and 2nd days of April instant, before which Court Martial, the said Robert Moor was charged with fraudulently embezzling, or mis-applying about 500 cords of [illegible] of government property entrusted to his charge as Assistant Commissariat store-keeper, and that the said Robert Moor was by the said Court Martial on the 2nd day of April instant, found guilty of the said charge, and that thereupon on the said conviction, the said Court forthwith sentenced the said Robert Moor as in the said warrant of commitment stated, and amongst other penalties, to the following, to wit: to be imprisoned with hard labour for 672 days, and further to be dismissed from Her Majesty's service, and that the said Robert Moor was in consequence committed to the said common jail, by the said Lieut.-General Sir John Michel. Considering further, that it doth therefore appear by said warrant of commitment, that there hath been preferred against the said Robert Moor, before the said Court Martial, no specific charge, and that there hath been no conviction against the said Robert Moor for and on specific or positive charge, but a conviction in the alternative, one of the two being no offence created by the 17th Article of the Mutiny Act, without any certainty as to any or either of the two charges in the disjunctive, and that this is a matter of substance.

Considering that, therefore, the said warrant of commitment is null and void, and of no effect.

It is, by this Court, adjudged, that the said Robert Moor be not detained any longer in the said Common Jail, and that he be forthwith discharged and set at liberty."

Petition granted.

W. H. Kerr, for Petitioner.
T. K. Ramsay, for the Crown.
(F. W. T.)

MONTREAL, 9TH DECEMBER, 1865.

IN APPEAL,

FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

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

NORMAN McPHEE,

(Plaintiff par reprise in the Court below,)

APPELLANT,

AND

SUSAN CLARA WOODBRIDGE,

(Defendant in the Court below,)

RESPONDENT.

The plaintiff brought his action as curator to the vacant estate of the late Duncan Campbell, to recover a specific sum of money from the representative of one of three Executors.

HELD :—(LORANGER, J.) in the Superior Court, inasmuch as Duncan Campbell, by his last will instituted universal and special legatees, to whom Asa T. Alexander, whom the defendant represented, was accountable as one of the executors of the said will; and, inasmuch as there was no proof of record of the lapsing of these legacies, and that the succession of the said Duncan Campbell was vacant, the nomination of the curator was to be regarded as a nullity.

HELD :—ON APPEAL that the legal representatives of the late Duncan Campbell, whoever they may be had no right of action to claim any special sum of money from the respondent as having been received by her late husband, Asa T. Alexander, in his capacity of one of three joint executors of the last will of the late Duncan Campbell, and could only wage their claims if any they had by means of an action against all the executors or their representatives respectively to account for the gestion of the estate by such executors.

This was an appeal from a judgment dismissing an action which was brought by John Rankin, Curator to the vacant estate of the late Duncan Campbell, to recover from the Respondent, moneys which had come into her hands, as part of the estate of the late Dr. A. T. Alexander, her deceased husband, to whom she succeeded as universal legatee, under his last will, of date 31st May, 1851.

The facts stated in the Declaration were, that on the 29th of August, 1832, Lawrence Kidd, Thomas Smart, and A. T. Alexander, as Executors to the last will of the late D. Campbell, sold to J. and D. Torrance a property at Laprairie for £730, whereof £175 was paid, leaving a balance of £555, payable a year after notice given, with interest from the 15th of August, 1832; that the capital remained in the hands of the purchasers from the date of sale up to January, 1858, the interest, for the most part, being paid annually to the vendors, as Executors of Campbell's estate, who were, as such, jointly and severally liable for the same, Smart, however, not having acted after the Execution of the Deed, and having died within a short time after its date. Kidd died 17th of April, 1843, but A. T. Alexander continued to receive the interest up to the time of his decease in January, 1858, and the interest had come into his hands to the amount of £832 10s. cy., and neither of the Executors ever accounted for or paid any of the said interest or moneys to or for the benefit of the Estate of the said late Duncan Campbell, nor his representatives.

Dr. Alexander made his will 31st of May, 1851, before Dupuy and Barbeau, Notaries, constituting respondent his universal legatee, and died on the 27th of January, 1858, leaving his will in force, under which respondent had come into possession of his estate, and had become bound and liable to account for and pay the said interest which fell into her hands, as being in the estate of Alexan-

der, and being due by the Respondent as his representative. That Dr. Alexander had used the moneys from year to year as he received them, and made more profit and interest thereon than the legal interest thereof, and was liable to account for such profits and interest, which use had been continued by Respondent since his decease, who was consequently liable to account for and pay the same, to the extent of the further sum of £750.

Wherefore the Plaintiff demands that the Defendant may be adjudged and condemned to pay and satisfy to him the sum of £1582 10s. currency, with interest and costs.

Plaintiff's productions were:—

1st.—Copy of Curatelle of date 18th of November, 1853.

2nd.—Copy of sale from Executors of Duncan Campbell, to J. and D. Torrance, of date 29th of August, 1832.

3rd.—Twenty-one original receipts for interest, commencing 15th of August, 1834, and ending 20th of August, 1860; the first six being for interest from 15th of August, 1833, to 15th of August, 1840, amounting to £299 14s., are signed "Lawrence Kidd, Executor of the will of the late Duncan Campbell." The next twelve continuing receipts of the interest down to 15th of August, 1857, being for an aggregate of £499 10s., are signed simply "A. T. Alexander," with the exception of that for the year 1856, which is signed A. T. Alexander, Executor of the Estate of the late Duncan Campbell." The next three are signed by John Rankin as Curator.

4th.—Extract *mortuaire* of Lawrence Kidd's death, of date 17th of April, 1843.

5th.—Extract *mortuaire* of Dr. Alexander's death, of date 27th January, 1858.

6th.—Copy of Dr. Alexander's will.

The pleas of the Defendant set up that she was not liable to the Plaintiff, inasmuch as his appointment of Curator was irregular and void, and was made on petition and by the advice of persons having no interest in the Estate. That the Estate of the Testator Campbell was not vacant; that the name of John Rankin had been used by parties desirous of fraudulently intermeddling with the Estate, and as if the Estate had been vacant; that the Defendant was ignorant of what sums of money had been received or disbursed by the Executors, and moreover, that, under the will of Duncan Campbell, he had named universal legatees, to whom or to whose legal representatives alone, the Executors were liable to account for all their acts as Executors when thereto required, and that the Action should have been brought for an account generally of the Executor's *gestion*, and been directed against all the Executors, if, as such Curator, Plaintiff had a right to bring such action. Allegations were made that the Plaintiff's name had been used by persons unknown, who had contrived to get into their hands the capital of the *prix de vente* in question, and had caused a judgment to be got in an Action, No. 1962, brought by Rankin against the said John Torrance and David Torrance, on the 30th December, 1861, for the capital.

Lastly, a *defense en fait*.

A petition was fyled by Norman McPhee, as new Curator, by appointment

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produced, dated 12th of March, 1862, to take up the *instance*, who answered Respondent's pleas to the effect following:—Denying Respondent's allegations, save in what they expressly conformed to the declaration, denying Respondent's right to set up the objections she did, averring that the estate of Duncan Campbell required to be represented, among other things, to make annual payments to special legatees, and that both Rankin and McPhee were responsible parties, having valuable real estate; that it was true the Curator had got Judgment for the capital against Messrs. J. & D. Torrance, and the new Curator had brought a suit to have it declared executory in his favour, and that Respondent's pretensions were unfounded in fact and in law.

The Appellant, by David Torrance, proved the payment of the moneys as per the receipts produced.

The case being heard in the Court below, the Honourable Mr. Justice Loranger presiding on the 30th day of April, 1864, rendered the following Judgment:—

"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 par son Testament solennel reçu le 15 "Novembre 1820, devant Barbeau, Notaire et témoins, le nommé Duncan "Campbell à la succession vacante duquel, le Demandeur, John Rankin, a "intenté la présente demande comme curateur, a institué des légataires univer- "sels et particuliers auxquels feu Asa T. Alexander, que représente la Défen- "deresse, était comptable comme un des exécuteurs du dit Testament—Con- "siderant quil n'existe pas au dossier de preuve de la caducité de ces legs, et que "la succession du dit Duncan Campbell soit devenue vacante, et qu'en l'absence "de cette preuve la nomination du Demandeur principal comme Curateur à la "dite succession, et celle du Demandeur par reprise d'instance, au lieu et place "du Demandeur principal, doivent être traitées comme des nullités.

"Faisant droit sur les défenses de la Défenderesse, lui en adjuge le bénéfice, en les maintenant, et partant, a débouté et déboute la présente demande, et "condamne personellement le Demandeur principal et le Demandeur par reprise "d'instance le dit John Rankin et Norman McPhee, à payer à la dite Defen- "deresse les frais par elle encourus sur la présente action."

Cross, Q. C., for the Appellant submitted, that the motives of the judgment were illogical, irrational and unfounded, and that the conclusion arrived at was therefore illegal and erroneous. The *onus* of proof lay upon the Defendant, not upon the Plaintiff. The Plaintiff, as a duly appointed Administrator, had at least a *prima facie* and presumptive right and possession until divested in due course of law. The demand was for the interest of a sum of money, the capital whereof it was admitted and was proved to have passed into the hands of the Plaintiff as Administrator. It was not competent for the Defendant, a mere debtor to the estate, and without any title to administrative capacity and without any interest in such a defence, to set up the pretension that another had a right to the monies. It was competent for the Plaintiff as Administrator in possession to give the Defendant a sufficient discharge, which was all that interested her. She

had no interest whatever in determining who was a rightful representative, but only who was *de facto* representative. If every representative, when demanding payment from a debtor to the estate, was bound to prove the causes for his appointment, he would be exposed to an endless and interminable task in asserting the most inconsiderable right, and that without any cause, reason, or advantage. The Curator must be presumed to have produced the proof necessary to warrant his appointment at the time it took place, and becoming vested by authority of Justice, remains so until divested by some one having a better title. Should any one pretend to be universal legatee, he could try his title by suing the Curator. If was only the absence of such an existence that permitted the appointment of a Curator, who became possessed by reason of there being no universal legatee or representative, and the proper course to dispute his position, would be for some one having sufficient interest to bring a suit to revoke his title. When so warned, he might be expected to bring forward his justification in answer to a case made out against him. This Court could not be satisfied with a Judgment that leaves the estate in confusion, and a debtor absolved from a large liability. There was another ground referred to in the pleadings, which would not require extended remarks to prove its fallacy, viz.:—That the Defendant was only liable to an Action in the form of an Action to account. In reply, it might be said in the first place, there was no such rule of law whatever, to exclude a specific demand, even where there was a right to an action of account. Again, the greater recourse always included the lesser. Lastly, that it was in fact and name an action to account, but there being but one item or sum of money in question, the conclusions claimed only a simple condemnation for a specific sum, and was the most apt and proper recourse suited to the circumstances. When a single object was sought, of right belonging to the Plaintiff, should there be further liability, the Defendant could not complain of its omission. Should she have any offset *dépenses* or *répriscs*, it was surely simple enough and not unfair to expect her to ask the deductions she might claim. But in fact she was not an Administrator; she succeeded to an estate in which there was a sum of money belonging to another; she was asked to pay over that sum.

Robertson, Q. C., for the respondents submitted that the Judgment of the Court below ought to be maintained.

1. The Estate of the Testator was not vacant, and therefore, the appointment of a Curator, even if regularly made, on petition of creditors or parties interested, was a nullity. The Testator by his Will, after specific legacies to persons named, directed that "as to the rest and remainder of all and singular, his, the "Testator's property and effects, both personal and real, whereof or wherein he "now is, or shall or may be in anywise possessed or interested at the time of his "decease, he, the said Testator, doth will, bequeath and devise the same to be paid, "distributed and divided in manner following, that is to say: An equal fifth "part unto John Campbell and his lawful children; one other fifth part to his "late sister, Janet's lawful issue; one other fifth part to his sister Margaret," &c., hereby constituting them, his said brothers and sisters (named) his residuary devisees and legatees. By this clause, the succession under the

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Imperial Act 14, Geo. 3, the Provincial Statute 41, Geo. 3, c. 4, devolved upon these legatees, without the necessity of any demand *en délivrance*. One of the *considérants* of the Judgment in appeal in the case of Blanchet *vs.* Blanchet, 11 L. C. Rep., p. 204, expressly held that under these statutes, "le legataire universel devient saisi de l'héredité en vertu et par force du testament," and in the recent case of Webb *vs.* Hall, 15 L. C. Rep., p.172, the same doctrine was maintained. If the law throws the succession on the universal legatees, under the Will, their rights cannot be interfered with by an *ex parte* appointment of a Curator to the succession, as vacant. Nor are the executors bound to account to a Curator, without any allegation or evidence that the universal legatees have renounced the succession, or that the legacy had lapsed. The title under which the Executors were named, the Will itself, shows the estate not to be vacant; the Will dated only six years previous to the sale by the Executors, recognizes the brothers and sisters of the testator and their heirs as his universal legatees. Such a state of things shews the succession was not vacant. At the words "Biens vacans," Denisart, p. 514, says: "dans un sens trés étendu on nomme biens vacans tous ceux qui n'ont plus de maitre." P. 514, "Lorsqu'un défunt ne laisse point des successeurs universels appellés par la loi, ou par la disposition de l'homme, ou que ceux qui le sont renoncent, la succession est vacante." The succession of the testator Campbell, in this case, vested under the Will in his brothers and sisters, as his universal residuary legatees, and the executors were, therefore, liable to account to them, and to them alone, the Estate being vacant, 8 Denis. v. *Exécuteur*, p. 231, No. 4. 2. The executors should have been sued together and for an account of the succession generally, and not as in this case, the representative of one executor only. In Dame v. Grey, K. B. H. 1812, *Rev. de juris.* Index, it was held, "that all joint executors who have acted, must in an action of action of account be made parties to the suit, and be jointly summoned as such." It appears from the declaration that all the three executors acted in deed of sale to Messrs. Torrance, and the authority quoted is therefore applicable in this case. "Quand il y a plusieurs personnes chargées conjointement, elles doivent rendre leur compte conjointement, et elles sont tenues solidairement pour le *reliquat*, 8 Nouv. Denisart, p. 234, No. 10. Here the action is not for an account, but for a specific sum alleged to have been received by one executor for Interest, and the Respondent is deprived of an opportunity of rendering a full account, and of obtaining any balance due in case the disbursements exceeded the receipts, there being no *reliquat*, Ib. p. 235, No. 12. 3. The Defendant expressly put in issue the validity of the appointment of the Curator, from the want of interest in Rankin, to have a Curator named, and it is submitted that a nomination by persons picked up in the Court House, cannot be held as a valid appointment, to enable him to bring an action against the representative of one of the executors only. The original Plaintiff admits in his deposition that he acted simply at the request of McPhee, he resigned his charge without rendering any account, and McPhee admits that the legacy of £12 10s. to his wife, given by the Will, has been fully paid, and it appears by the deposition of Torrance that the capital of the *prix de vente* was paid over by him to Rankin, and the universal legatees thereby deprived of the hypothec and security, under the registered deed of sale.

DRUMMOND, J.—The Court does not feel called upon to pronounce any opinion on the plaintiff's appointment as curator. For my own part, it seems to me in most cases the curator ought to be looked upon as the legal representative of the estate till the *curatelle* had been set aside. But there might be cases in which it would be evident that the appointment had been improperly made. The payment must be confirmed on the ground that the action was brought for a special sum. An action could not be brought against an executor for a special sum of money, for, though it might be true that he had received £500, he might have spent £10,000. The proper action was an action to account.

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"The Judgment in appeal was recorded as follows:—

"The Court, &c., &c., &c., considering that the legal representatives of the late Duncan Campbell, who ever they may be, had no right of action to claim any special sum of money from the respondent as having been received by her late husband, Asa J. Campbell, in his capacity of one of three joint executors of the last will and testament of the said late Duncan Campell, and could only wage their claims, if any they have, by means of an action against all the executors or their representatives respectively to account for the gestion of the estate by such executors, and therefore that there is no error in the judgment appealed from, &c., &c. ..... doth affirm the same with costs, &c., &c ..... Judgment affirmed.

Cross & Lunn, for appellant.
A. & W. Robertson, for respondent.
(F. W. T.)

MONTREAL, 5TH MARCH, 1867.

In Appeal from the Superior Court, District of Montreal.

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

LEWIS O. WILSON,

(Plaintiff in the Court below,)

APPELLANT;

AND

JOSEPH DEMERS,

(Defendant in the Court below,)

RESPONDENT.

STATUTE OF LIMITATIONS—DEMURRER.

HELD:—(IN THE COURT BELOW) on demurrer to declaration, that the prescription of a promissory note made in a foreign country, and payable there, is to be governed by the *lex fori* and not by the *lex loci contractus*.

HELD IN APPEAL:—That the declaration contained allegations of fact entirely irrespective of those upon which the *defense au fond en droit* was founded—which allegations could not be disposed of in adjudicating upon the *defense en droit*.

A full report of the case and arguments of Counsel appears 10 L. C. Jur. 261.

The plaintiff appealed from the judgment of the Court below, and obtained a reversal of judgment.

L. O. Wilson and J. Demers.

DRUMMOND, J. (After stating the facts set out in the declaration). The plaintiff, apparently foreseeing the exception that might be set up, has stated his case in such a way as to meet that exception.

The *défense en droit* filed by the defendant is very irregular, being partly an exception and partly a demurrer.

The plaintiff alleges that the law of the place where the note was made or where it was payable, should govern; and then the defendant says, your action is ill founded, because it is not the law of the place where the note was made or where it was payable, but the law of Lower Canada that applies. I am inclined to think, however, that this demurrer, so far as it goes, is good. There is a difference of opinion on this point; but we are all of opinion that the demurrer does not meet the whole case. It does not meet the allegation of interruption of prescription by the defendant's absence; and, therefore, taking whatever view you please of this *défense en droit*, the Court below was in error in dismissing the whole action upon it. The judgment of this Court has been drawn so as to reconcile the slight difference of opinion on the point referred to.

BADGLEY, J.—The declaration sets out defendant's promissory note dated in 1857, in Michigan, and payable at four months from date, and was met by a *défense en droit*, demurrer, which was sustained by the Superior Court, and the action in consequence dismissed; the judgment resting on the ground that the *demande* on the face of the declaration was by law obnoxious to our Statutory Limitation for promissory notes. That may or may not be the case, but the limitation cannot be put in issue by a demurrer.

The essential constituent of limitation, as of our prescription, is time, and without it both words are mere legal abstractions. This time ingredient is a fact which may be legally avoided by other facts in contradiction or waiver of it, and therefore necessitates a special plea of the limitation relied upon, in order to form a bar to the action; for the obvious reason, to enable plaintiff to show in his replication any fact sufficient to avoid the bar. Our own prescriptions required to be pleaded and may not be supplied by the Court, and so in England, the limitation, in like manner, must be pleaded, as shown in the following case, in which "the declaration alleged a promise made at a certain time, for money lent "and after verdict it was moved in arrest of judgment, that the cause of action "did not accrue within six years before action brought. But the plaintiff had "judgment; for though the cause of action appeared to be twenty years before "action brought, yet the plaintiff shall recover, if the defendant do not plead the "Statute, which was made for the use of those who would take advantage of it, "but the Court shall not give the defendant the advantage of it if he will not "plead it." These facts cannot form an issue in law, and the judgment therefore sustaining the *défense en droit* cannot be maintained.

AYLWIN, J.—In one word, the ground of the demurrer is the Statute of Limitations, but the Statute of Limitations could only be pleaded by an exception, therefore, the demurrer is worse than the original declaration.

MONDELET, J.,—concurred in the judgment.

The judgment was *motivé* as follows: "Considering that the declaration con- "tains allegations of fact, entirely irrespective of those upon which the *défense*

"*en droit* is founded, allegations which could not be disposed of in adjudicating "upon said *défense en droit*; considering that the said *défense en droit* is irre- "gular and insufficient; considering therefore that in the judgment appealed "from, there is error, &c., the Court doth reverse and annul the same, &c., &c."

L. C. Wilson and Demers.

Judgment reversed.

J. Popham, for the appellant.
D. Girouard, for the respondent.
(F. W. T.)

MONTREAL, 9TH DECEMBER, 1865.

IN APPEAL FROM THE SUPERIOR COURT, DISTRICT OF MONTREAL.

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

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,
(*Defendant in Court below,*)
APPELLANT.

AND

TIMOTHY CUNNINGHAM,
(*Plaintiff in Court below,*)
RESPONDENT.

HELD:—That a person purchasing from a Railway Company a ticket which is declared to be good for a specified term, enters into a special contract which is at an end as soon as such term has expired; and the holder of a return ticket attempting to return after the expiration of the term for which the ticket was issued, may be lawfully ejected from the train, on refusal to pay full fare.

The judgment of the Superior Court from which this cause was appealed is to be found reported in L. C. Jurist, vol. 9, p. 57.

Messrs. Cartier & Pominville, for appellant, submitted the following factum to the Court.

Le présent appel est interjeté d'un jugement rendu le 31 Décembre 1864 par la Cour Supérieure, à Montréal, renvoyant une motion pour un nouveau procès demandé par l'Appelante qui, par verdict d'un jury donné le 15 Novembre 1864, avait été condamnée au paiement de $100 de dommages et intérêts envers l'Intimé, et accordant la motion de l'Intimé pour jugement selon le verdict.

L'action en Cour Supérieure a été instituée par l'Intimé contre l'Appelante, le 6 Avril 1863, pour $300 de dommages qu'il prétendait lui avoir été causés le 8 Novembre 1861, savoir dix-sept mois avant, par l'Appelante en l'expulsant de ses chars sur son chemin de fer et refusant de le transporter à Acton Vale, lieu de sa résidence.

L'Intimé, dans sa déclaration, alléguait l'existence d'un contrat formel entre l'Appelante et lui pour se faire transporter à bord des chars de Montréal à Acton Vale, et il poursuivait pour violation de ce contrat. Il alléguait, que le 6 Novembre 1861, il avait acheté de la Défenderesse, l'Appelante, un billet de passage, *billet de retour, return ticket*, pour aller de Acton Vale à Montréal et de retour à Acton Vale, la dite Appelante s'obligeant par le dit billet de retour de mener et ramener le dit Intimé dans ses dits chars; que malgré qu'il eut payé pour le dit billet de retour en retournant à Acton Vale, le 8 Novembre 1861, le conducteur du convoi des chars de l'Appelante, refusa comme bon le dit billet qu'il garda

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néanmoins et insista à ce qu'il payât le prix de son passage ou qu'il quitta les chars, et sur son refus de payer, il avait été mis hors des dits chars forcément et avec beaucoup de violence par le conducteur, à un endroit appelé *Charron's Station*, six milles de la Cité de Montréal, ne lui donnant pas le temps d'emporter avec lui ses effets et des papiers d'une grande importance qu'il avait et qu'il n'a pu retrouver depuis: qu'à raison de tout cela il avait souffert des dommages considérables et avait été obligé de payer deux fois pour l'exécution de l'obligation que la dite Appelante avait contractée vis-à-vis de lui, et il concluait à une condamnation contre l'Appelante pour $300.

L'Appelante rencontra cette action par une exception, dans laquelle elle alléguait qu'elle était dans l'habitude d'émettre des billets de retour, *return tickets*, qu'elle vendait à des prix réduits et moindres que pour les billets de passage ordinaire avec l'expresse condition que ces billets ne seraient valides que pendant deux jours, savoir le jour de leur émission et le jour suivant; que le billet que l'Intimé avait acheté le 6 novembre 1861 à Acton Vale pour aller et revenir de Montréal, il ne pouvait s'en servir que les 6 et 7 Novembre 1861, et l'Appelante n'était pas tenue de le transporter dans ses chars après les dites époques, l'Intimé en achetant le dit billet à Acton Vale ayant acquiescé à cette condition qui était imprimée sur le dit billet, il ne pouvait pas s'en servir après le délai mentionné en icelui; que le dit Intimé n'avait souffert aucun dommage, le long espace de temps qu'il avait laissé s'écouler sans se pourvoir en était une preuve.

L'Appelante plaida aussi une défense en fait. L'Intimé répondit que l'Appelante avait souvent renoncé à cette condition imprimée sur les billets de retour, *return ticket*, et avait reçu de d'autres passagers de tels billets comme bons, après la date mentionnée sur iceux; que cette condition était illégale et que de tels billets étaient bons tant qu'ils n'avaient pas été présentés.

Les parties signèrent les admissions qui suivent et la cause fut ensuite référée à un jury.

Les parties en cette cause admettent respectivement ce qui suit, savoir :—

"Que la Défenderesse, le six novembre mil huit cent soixante et un et tous les "jours durant le dit mois, excepté les Dimanches, avait des trains de chars pour "les passagers, parcourant son chemin de fer de Acton Vale à Montréal et de "Montréal à Acton Vale;

"Que le six novembre mil huit cent soixante et un au dit lieu de Acton Vale, "le dit Demandeur a acheté de la dite Défenderesse, un billet de passage pour un "voyage pour aller et revenir de Acton Vale à Montréal et de Montréal à Acton "Vale, sur le dit chemin de fer de la Défenderesse.

"Que ce billet de passage (return ticket) vendu et livré au Demandeur, par la "Défenderesse, était conçu dans les termes suivants:

"'Grand Trunk Railway,
"Return Ticket,
"Acton
"G to
"Montreal,
"First Class.
"Grand Trunk Railway,

" Montreal,
" R to
" Acton,
" First Class.
☞Good for day of date and following day only,
No.
et sur le dos : Nov. 6, 61.

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" Que le prix payé par le demandeur pour le dit billet de passage (return ticket) était de deux piastres cinquante cents qui était alors le prix régulier pour " billets de passage (return ticket.)

" Que le dit jour, six novembre mil huit cent soixante et un, et les trois jours " suivants le taux régulier de billet de première classe à bord des chars de passagers de la défenderesse, de Acton Vale à Montréal, était pour chaque passager " de une piastre soixante et quinze cents et de Montréal à Acton Vale, de une " piastre soixante et quinze cents pour un seul voyage ;

" Que la défenderesse, le six novembre mil huit cent soixante et un, a transporté sur son train de chars de passagers de Acton à Montréal, le demandeur, " avec le billet de passage qu'il avait ainsi acheté comme susdit ;

" Que le huit novembre mil huit cent soixante et un, le demandeur est embarqué à Montréal sur le train régulier du chemin de fer de la défenderesse pour " retourner à Acton Vale et qu'entre la station de St. Lambert et une station " appelée Charron, savoir : à une distance de six milles de Montréal, le conducteur du train lui demanda le prix de son passage de Montréal à Acton Vale ; " le demandeur lui présenta le billet ci-dessus mentionné, acheté par lui à Acton " Vale, le six novembre susdit, lequel billet de passage ou ticket, le conducteur " refusa de reconnaître et accepter en disant qu'il n'était plus valide, qu'il était " hors de date pour ce voyage et qu'il ne pouvait pas l'accepter ; que le demandeur refusa là et alors de payer son passage ; que le conducteur, d'après les " ordres de la défenderesse, lui dit, que s'il ne voulait pas payer en argent son " passage ce jour là de Montréal à Acton Vale, il serait mis hors des chars à la " station voisine ; que le demandeur persista à dire que le billet qu'il offrait " comme susdit, lui donnait le droit d'être transporté par la défenderesse à bord " de ses dits chars, le dit jour, huit novembre susdit et refusa de payer autrement " que par le dit billet (ticket.) Sur ce, à la station voisine, savoir : chez Charron, " le conducteur, agissant d'après les ordres de la Défenderesse, dit au demandeur qu'il avait à débarquer des chars, ce qu'il fit, non pas volontairement, se " réservant ses droits ; que le demandeur a acheté un autre ticket de la Défenderesse et s'est rendu par un autre train de Montréal chez lui à Acton Vale, " et qu'il a été obligé de payer une piastre soixante et quinze cents, en argent, " pour son passage de Montréal chez lui à Acton Vale, par les chars de la Défenderesse et ce, en sus de l'argent qu'il avait payé à Acton Vale, comme susdit."

Lors du procès, l'Intimé se borna à prouver que des personnes étaient passées, à bord des chars du chemin de fer de l'appelante avec des billets de retour (Return tickets) hors de date ; mais il n'essaya pas d'établir que c'était une pratique suivie que l'appelante sanctionnait et approuvait ; de fait il ne pouvait pas faire une telle preuve, car la Compagnie avait toujours donné des instructions

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spéciales à tous les conducteurs de ses chars de ne pas recevoir ni accepter de tels billets après leur date. Ce fait a été prouvé par Moïse Couture, un des témoins de l'Intimé.

L'Intimé ne fit aucune preuve de violence de la part du conducteur, ni il jugea à propos de prouver les autres allégués de sa demande.

De son côté, l'appelante fit entendre le conducteur des chars. Ce témoin, qui depuis longtemps n'est plus au service de la Compagnie, prouva le refus de l'Intimé de payer le prix de son passage, les circonstances sous lesquelles il était sorti des chars et les instructions que l'appelante avait données à tous les conducteurs de ces convois de chars relativement à ces billets de retour (Return tickets). Il jura positivement n'avoir jamais accepté de semblables billets après le délai expiré et avoir remis à l'Intimé le billet que il lui avait présenté. Son témoignage a été corroboré en partie par Amos H. Pyke, témoin de l'Intimé et par John Henry Greglestine, second témoin de l'appelante.

L'Honorable Juge, dans sa charge au Jury, reconnut que la condition mentionnée sur la face des billets de retour (return tickets) que la Compagnie émettait et vendait était valide et légale et que l'appelante avait droit de le faire exécuter; mais il ajouta que si le conducteur sur le même convoi de chars avait accepté comme bons des billets portant la même condition que celui de l'Intimé, il devait en agir de même vis-à-vis de ce dernier et ne pas insister à lui faire payer le prix de son passage de Montréal à Acton Vale et l'Intimé avait alors droit à un verdict en sa faveur.

A la suite des instructions de l'Honorable Juge, neuf du dit Jury rapporta un verdict de $100 de dommages en faveur de l'Intimé.

L'Appelante produisit de suite une exception à cette partie de la charge de Honorable Juge et le 21 novembre 1864 elle fit une motion devant la Cour Supérieure pour un nouveau procès, pour entre autres raisons et les principales, parce que le verdict avait été rendu contrairement à la preuve; qu'un contrat exprès et formel avait été prouvé; et que la charge de l'Honorable Juge était contraire à la loi et avait eu l'effet d'influencer le Jury dans le verdict qu'il avait, rendu contre la dite appelante.

Par jugement du 31 Décembre 1864, cette motion de l'appelante fut renvoyée;—Et c'est de ce Jugement qu'est appel.

L'appelante prétend que son contrat avec l'Intimé ne l'obligeait pas à le transporter après [illegible] mentionnée sur la face du billet de retour qu'il avait présenté au c[illegible] que la Compagnie faisant une déduction sur les prix ordinaires à [illegible] présentent des billets de retours, avait le droit d'exiger qu'ils ne s'en serviraient que durant un certain temps et dans certains cas; que le prétendu usage de laisser passer les passagers avec de semblables billets, lorsqu'ils étaient hors de date, ne pouvait affecter le contrat formel intervenu entre l'appelante et l'Intimé, que tel usage n'existait pas et que si les passagers étaient ainsi passés dans les convois de chars de l'appelante, c'était en violation du contrat, des règlements de la Compagnie, des instructions positives données à tous ses conducteurs de chars et hors de sa connaissance; que l'Intimé ayant refusé positivement de payer le prix de son passage, le conducteur était en droit de le faire sortir des chars; de plus, que le verdict a été rendu sans preuve et est excessif.

L'Appelante réfère aux autorités ci-dessous au soutien de ces propositions. *

Pour toutes ces raisons, l'appelante est confiante que la Cour infirmera le Jugement de la Cour Inférieure et lui accordera sa motion pour un nouveau procès.

Messrs. Perkins & Stephens, for respondent, submitted in effect the same arguments as in the Court below, and the same authorities reported in L. C. Jurist, vol. 9, and further;

1st. That the Company never intended the condition upon local return tickets to be acted upon, but that such return tickets being issued at reduced fares, to force local travel and traffic, such condition was really meant to apply to tickets only issued for a long journey.

2nd. That no instructions were issued to Conductors not to receive such tickets, but after the occurrence to plaintiff, and twelve days after the Company only first issued the following orders:—

Montreal, Nov. 18th, 1861.

MR. MACNAMEE, Conductor:

You are hereby authorized not to accept tickets presented in the Cars for passage *that you consider* out of date, or that have been transferred. If any passenger thinks himself aggrieved by the refusal of his ticket, on application at the Head Office, satisfaction will be given.

(*Signed,*) J. HARDMAN,
(*then Auditor.*)

Thus virtually leaving it to the Conductor's discretion whether or no *and when* to receive like tickets. If accepted by others, they should have been by the Conductor MacNamee, always, as the same day by him of Mr. Mignault.

3rd. The Company was cognizant of and connived at the practice of their Conductors' receiving tickets long after date thereon imposed as valid.

Their Clerk, Greglistine, says: "By the said verification, all used tickets are "returned to the office. All tickets must be returned to Audit Office. If a "ticket out of date had been received by the Conductor, and returned to the "office, it would have to be checked in the office, and would be in the Com-"pany's possession. In 1860 was in Audit Office, knows return tickets out of "date were returned to the office, and the Company discovered this by the "checking of the tickets. It must have been in *consequence of the frequency* "*of these returns* that the instructions were given."

Under any circumstances the Company, appellant, has no one to blame. They did not prove that the respondent had ever been refused passage on return tickets after the date, or any uniform custom or usage, of the refusal of

* Statuts Refondus, Canada, Chap. 66, Sect. 106.
5 L. C. Jurist, page 107. Regina vs. Faneuf.
8 Eng. L. et E. Reports, page 362, Hawcroft vs. G. North, R. C.
1 Allen's Report, 267.
Pothier. Oblig., Nos. 130, 134, 146.
1 Greenleaf on Evidence, page 53, 56, 57 et 59.
2 Parsons on Contract, page 53, 56, 57 et 59.
2 Taylor on Evidence, § 1075 à 1080.

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like tickets, or the required notice in their stations or cars, setting aside a former custom, universal in its application to travellers.

DRUMMOND, J.—The judges of the Court of Appeals are unanimous, we taking a different view of the case from the judges of the Court below, we consider that there was a special contract entered into, voluntarily between the respondent and the Grand Trunk Company. The former was bound to avail himself of the ticket within the time specified. It is true that no notice was posted up, that the rule as to returned tickets would be strictly adhered to, but I do not think that it was necessary for the Company to put up a notice of a rule printed on the ticket. I can account for the verdict only by the strange prejudice which some people have against companies—companies without the existence of which, we should have to return to a state of barbarism. If a conductor did allow persons on certain occasions to pass on a spent ticket, is the fact of a conductor neglecting his duty, any reason why other people should expect to pass on expired tickets?

MONDELET, J.—If the respondent's pretensions were maintained, the result would be the constant evasion of a rule which the company had a right to enforce.

MEREDITH, J.—The evidence in this case instead of establishing a *usage* simply establishes the existence of an abuse. The following is the judgment of the Court.

"Seeing that the verdict of the jury, entered against the appellant, was contrary to evidence.

Seeing that the presiding Judge at the time of the trial should have directed the jury to find a special contract under which the ticket given to the respondent by the appellant was to be "good for day of date, and following day, only," and was purchased on the 6th day of November, 1861, and that the respondent presented his return ticket to the conductor after the period of time elapsed, to wit on the 8th day of the same month, and that the ticket was spent and useless, and that the respondent was properly ejected from the cars of the appellant, and that the charge of the said learned Judge was erroneous in law. Seeing, therefore, that the judgment of the Court below was in error, it is considered and adjudged that the said judgment, to wit, that rendered in the Superior Court at Montreal on the 31st day of December, 1864, be reversed, and proceeding to render the judgment which the Court below ought to have rendered, it is ordered that the verdict be set aside and that a new trial be awarded with costs, as well in the Court below, upon the said trial so set aside as aforesaid, and with costs in this Court.

And lastly it is ordered that the record be remitted to the Court below.

And, on motion of Messrs. Cartier & Pominville, attorneys for the appellants, the Court doth award them distraction of their costs on the judgment rendered this day in this cause."

Judgment reversed.

Cartier & Pominville, for appellants.
Perkins & Stephens, for respondents.
(J.L.M.)

MONTREAL, MARCH 5TH, 1867.

In appeal from the Superior Court, District of Montreal,

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

HENRY MORGAN, et al.,
(*Plaintiffs in the Court below.*
AND APPELLANTS;

JOSEPH GAUVREAU,
(*Defendant and Petitioner in the Court below,*)
RESPONDENT.

INSOLVENT ACT. LIABILITY FOR DEBTS OF REPUTED WIFE.

HELD:—That a man who holds himself out to the world as the husband of a woman with whom he co-habits, will be held liable for her debts as a trader.

On the 23rd August, 1866, the appellant, under the provisions of the Insolvent Act of 1864, (27th and 28th Vic., chap. 17,) sued out an attachment against the defendant as a trader and their debtor. The affidavit upon which, the attachment was sued out alleged *inter alia*:

"That the goods, effects and property garnishing the premises, leased by "said Joseph Gauvreau, have within the past three days, been seized, and now "are under seizure, for rent for a small sum of money, under writ of Saisie "Gagerie, issued from the Circuit Court for the district of Montreal, and said "Joseph Gauvreau neglects to pay and is in arrears for two months rent, as "deponent is informed by Mr. Belle, Notary Public, the landlord; and to the "knowledge of deponent, from personal view and inspection, the stock and assets "in the leased premises are not by any means sufficient to pay the claims of the "Plaintiffs, and other creditors; but are wholly insufficient. The said Joseph "Gauvreau is largely indebted, and insolvent *en déconfiture* and wholly unable to "meet his liabilities and debts, and he has refused to pay plaintiffs, or to settle "their claim and debt, and deponent offered to purchase the stock for plaintiffs, "which said Joseph Gauvreau refused; though the offer was made within the "past month, and the value to be fixed by said Joseph Gauvreau; who after-"wards refused to pay money as promised, and refuses now to pay, settle or com-"promise with plaintiffs.

"That said Joseph Gauvreau, has secreted part of his estate and effects with "intent to defraud his creditors and to defeat their demands against him, and "deponent has this day been informed by one Arthur M. Perkins, of Montreal, "clerk, that said Joseph Gauvreau will, and is immediately about to secrete his "Estate, with like intent.

"That deponent, within thirty days past, for plaintiffs, offered said Joseph "Gauvreau $300 currency, for a horse and buggy, on account of their claim, "which he refused, and said Joseph Gauvreau, as was informed this deponent "last Saturday, by the supposed purchaser, said that said horse had been sold for "the sum of $200 currency.

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"That also the buggy, harness and sleigh of said Joseph Gauvreau, as depo-
"nent is informed by a party, Albert Remillard, has been sent away to the Mile-
"End by said Joseph Gauvreau, and deponent verily believes that, if not at-
"tached forthwith, all the remainder and effects of said Joseph Gauvreau, will
"immediately by him be secreted with intent to defraud and delay."

The writ of attachment was returned into Court on the 1st September, and on the 6th, the respondent presented a petition to the judges of the Superior Court, praying that the attachment be set aside and quashed for the following reasons, namely:

"1. Parce que les demandeurs en cette cause ne sont pas les créanciers de
"votre Requérant le défendeur en icelle;

"2. Parce que votre requérant le défendeur en cette cause ne doit pas et
"n'a jamais dû aux demandeurs en icelle, la somme pour laquelle les dits de-
"mandeurs se prétendent être créanciers de votre requérant, ni aucune par-
"tie de la dite somme;

"3. Parce que votre requérant n'a jamais fait avec les demandeurs aucune
"transaction commerciale de quelque nature que ce soit;

"Parce que votre requérant n'a jamais fait ni tenu personnellement
"aucun commerce, qu'il n'a jamais été commerçant, et que conséquemment on
"ne peut procéder contre lui d'après l'Acte des Faillites de 1864;

"5. Parce que depuis environ cinq ans votre requérant n'a fait qu'exercer
"le métier de chapelier sans faire ni tenir aucun commerce;

"6. Parce que toutes les créances qui peuvent exister contre votre requérant
"ne s'élèvent pas toutes ensembles à la somme de deux cent piastres et que
"votre requérant a toujours été prêt à les payer à demande;

"7. Parce que votre requérant n'a jamais refusé le paiement d'aucune
"somme d'argent due par lui;

"8. Parce que les allégués de l'affidavit produit par les demandeurs en cette
"cause sont insuffisants en loi pour justifier les procédés adoptés par les dits de-
"mandeurs;

"9. Parce que tous les allégués contenus dans le dit affidavit sont faux et mal
"fondés;

"10. Parce que votre requérant n'a fait aucun acte ni commis aucune omis-
"sion dans les trois mois qui ont immédiatement précédé l'émanation du dit
"bref qui put l'assujettir à la loi de Banqueroute, et justifier les procédés adop-
"tés contre lui par les demandeurs."

"11. Parceque les dits procédés ont été employés par les demandeurs, sans
"aucun motif raisonnable, et simplement comme moyens de forcer votre
"requérant à payer en s'abritant sous la procédure de la loi de Banqueroute."

The appellants under the order of Mr. Justice Monk answered in writing—that the averments of their affidavit were true and those of the respondent's petition untrue; and alleged that plaintiffs were as averred in affidavit, creditors of petitioner for goods sold to him and delivered at his request to him and to Mrs. Gauvreau with whom he was commune en biens as the petitioner averred by deed of lease made and passed at Montreal before Mathieu and colleague, Notaries Public, the tenth day of July, eighteen hundred and sixty-five, and the Peti-

tioner had frequently admitted the claim of Plaintiffs and promised to pay the same to them.

"That petitioner was and is a trader as averred, and is indebted as alleged, and leases and leased certain premises in this city from Mr. Belle, Notary Public, for the purpose of his trade, and petitioner acted as averred, and is subject to the Insolvent Act of 1864, and is insolvent, and his estate and effects liable to compulsory liquidation."

The petitioner on the 20th day of September last, produced a "Réplique," and he averred,—

"Que la personne mentionnée dans la dite réponse comme étant Mme Gauvreau et l'épouse du Requérant, n'a jamais été l'épouse du Requérant; qu'ils n'ont jamais été mariés ensemble et que s'il a comparu au bail dont copie est produite en cette cause pour autoriser la dite Dame Gauvreau, c'était pour cacher au public l'état de concubinage dans lequel le dit Réquérant a vécu avec la dite femme qui avait pour nom Flavie Clément dite Larivière, laquelle est décédée dans le mois d'Août dernier.

Que la dite Flavie Clément dite Larivière était commerçante-modiste, faisant affaires en la Cité de Montréal, et que c'est à elle seule, comme le Requérant en a été informé, que les marchandises ont été vendues et livrées par les Demandeurs et que la dite Flavie Clément dite Larivière a aussi fait affaires avec d'autres négociants de Montréal; que le fonds de magasin de la dite Flavie Clément dite Larivère est encore au lieu ou il était lorsqu'ell est morte, contre lequel ses créanciers peuvent agir, mois non contre le Défendeur ou ses biens."

The parties went to evidence and were heard on the merits, and the following judgment was rendered by MONK, J. on the 20th October, 1866:

"The Court having heard the parties by their respective counsel upon the "merits of the said petition of the said Joseph Gauvreau, and the answer there- "to of the said plaintiffs, examined the proceedings, evidence of record, and "having deliberated, considering that the said petitioner hath fully established by "legal and sufficient evidence the material allegations of his petition, and that "the said plaintiffs have failed to establish by legal and sufficent evidence the "matters and things alleged and things set forth in the affidavit fyled in this cause, "and upon which the Writ of Attachment in this cause issued. The Court "doth grant the said petition, doth quash and set aside as illegal, null and void "all the proceedings had and taken in this cause against the said petitioner "upon the Writ of Attachment, and doth order that no further proceedings be "taken upon said Writ of Attachment. And the Court doth grant main levée "to the said petitioner, Joseph Gauvreau, of the seizure made and effected in "this cause, of his goods and movable effects, under and in virtue of the said "Writ of Attachment, and the Sheriff of this District, and John Whyte the "guardian under said Writ of Attachment, are hereby authorized and com- "manded to deliver up the said goods and effects so seized, and attached, and "mentioned, and described in the return of the said guardian, to the said "Joseph Gauvreau, the said defendant."

The plaintiffs appealed from this judgment, and submitted the following points:

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1st. The insolvency of the petitioner.

2nd. That the allegations of their affidavit of the plaintiffs was not rebutted and must therefore make proof. *Préfontaine & Prévost*, 1 L. C. Jur. 104.

3rd. That the petitioner Gauvreau was a trader within the meaning of the Insolvent Act. Ordinance of 1673: Art. 632. Massé Droit Com: pp. 3, 4. Pardessus; Id. p. 1.

4th. That he was liable as their debtor. He called his reputed wife *son épouse commune en biens*, by the lease above referred to. Further, if a man cohabit with a woman and hold her out to be his wife, he is liable for goods furnished to her. Story, Sales, 56 Ed. of 1862. *Watson* v. *Threlkeld*, 2 Esp. 637. *Robinson* v. *Nahon*, 1 Camp. 245.

The pretensions of the respondent were set forth as follows in his factum.

Le Défendeur et Intimé a spécialement établi, et ce d'une manière légale et satisfuisante, qu'il n'est pas commerçant, qu'il ne faisait qu'exercer le métier de chapelier, qu'il n'était pas le débiteur des Demandeurs, qu'il n'avait jamais acheté des Demandeurs les marchandises et effets en question en cette cause, que les dites marchandises avaient été vendues personnellement et livrées à Flavie Clément dite Larivière, connue sous le nom de "Mme. Gauvreau," que la dite Flavie Clément dite Larivière avait tenu jusqu'à son décès, en son propre et et privé nom, un magasin de modes dans les prémisses occupées par l'Intimé; que le dit magasin appartenait complétement à la dite Flavie Clément dite Larivière, que toutes les marchandises vendues pour le dit magasin, tant par les Demandeurs que par les autres créanciers, avaient été vendues et livrées à la dite Dame Flavie Clément dite Larivière; que les dits Demandeurs et les créanciers avaient toujours chargé les dites marchandises dans leurs livres au compte et au nom de la dite Flavie Clément dite Larivière et non au compte et au nom du Défendeur Intimé; que les Demandeurs et les autres créanciers avaient toujours envoyé leurs comptes pour les dites marchandises à la dite Flavie Clément dite Larivière et non au Défendeur Intimé; que les dits Demandeurs Appelants et les autres créanciers avaient toujours donné crédit à la dite Flavie Clément dite Larivière pour toutes sommes d'argent reçues en accompte du prix des dites marchandises et jamais au Défendeur Intimé; que la Flavie Clément dite Larivière avait sur son dit magasin de modes, une enseigne particulière, ainsi conçue *"Mme. Gauvreau, modiste;"* que l'occupation du dit Défendeur consistait à réparer les vieux chapeaux, et qu'il tenait à cet effet une boutique parfaitement distincte du magasin de la dite Flavie Clément dite Larivière, et que le dit Défendeur Intimé avait aussi son enseigne particulière ainsi conçue *"Joseph Gauvreau répare les vieux chapeaux,"* que la dite Dame Flavie Clément dite Larivière était généralement connue à Montréal comme tenant le dit magasin de modes, et pour son propre compte.

Restait la question de savoir si la dite Dame Flavie Clément dite Larivière avait été, comme les Demandeurs l'avait allégué dans leur *réponse* à la requête du défendeur Intimé, *l'épouse commune en biens du* dit Défendeur Intimé. Les Demandeurs appelants ne purent réussir à établir ce fait non plus que tous ceux allégués dans l'affidavit. Ils ne purent même faire preuve que le dit Défendeur et la dite Dame Flavie Clément dite Larivière étaient mariés ensemble. Or,

suivant les principes bien établis de la Jurisprudence, le mariage ne saurait se présumer; il faut qu'il soit établi d'une manière formelle et par un acte public.

D'un autre côté, le Défendeur Intimé, pour dissiper tout doute qui pourrait résulter du fait que la dite Dame Clément dite Larivière était connue sous le nom de "Mme. Gauvreau," prouva, autant qu'il était possible de le faire, qu'il n'avait jamais été marié avec la dite Dame Flavie Clément dite Larivière, et à cet effet il produisit des témoins compétents et aussi l'extrait de naissance d'un enfant qu'il a eu de sa cohabitation avec la dite Flavie Clément dite Larivère, et l'extrait mortuaire de la dite Flavie Clément dite Larivière, lesquels deux extraits sont de record en cette cause.

Les prétentions du Défendeur Requérant et Intimé en cette cause peuvent se résumer comme suit:—

Le Défendeur n'est pas, n'était pas et n'a jamais été commerçant; il n'a pas acheté des Demandeurs les marchandises en question; c'est la dite Flavie Clément dite Larivière qui tenait en son propre nom le magasin de modes en question, et qui a acheté des Demandeurs les dites marchandises pour son propre compte. La dite Flavie Clément dite Larivière n'a jamais été marié avec le dit Défendeur Intimé. Conséquemment le dit Défendeur Intimé ne peut être tenu des dettes de la dite Flavie Clément dite Larivère comme *commun en biens* avec elle et tomber sous le coup de l'Acte des Faillites de 1864. De plus le Défendeur Intimé n'a commis aucun acte ni fait aucune omission qui puissent justifier les procédés contre lui pour le mettre en liquidation forcée, d'après l'Acte des Faillites de 1864.

BADGLEY, J.—This is an appeal from proceedings in insolvency. Upon the 23rd of August, 1866, a writ of attachment issued upon affidavit and filed.

The writ was returned on the 1st of September, and on the 6th the respondent filed his petition to quash. The Act contemplated and provided no other proceeding, the insolvent procedure being necessarily summary; but the appellants answered in writing under a judicial order, and thereupon the respondent opened his *enquête*, and made proof in support of his petition. Whilst the *enquête* was proceeding, the respondent filed a *réplique* to the appellant's answer, but without permission, in which he made allegations which should have been in the petition.

All this is wrong, and should not have been allowed without judicial sanction. The statute gives to the alleged insolvent, power to petition, on grounds shown to quash the attachment, but the delay is strictly limited to five days from the return and not longer; and it is upon those grounds in the petition that the quashing of the writ is sought. The Court has no power to prolong the delay or to allow subsequent allegations of other grounds or facts, which would necessarily set aside not only the statutory delays, but also the petition itself; because the quashing might in fact be made to rest, not upon the allegations of the petition, but upon the new facts set up in a pleading put in at any time afterwards. I think all this proceeding faulty, and contrary to the statutory procedure.

But what are the merits? The writ of attachment issued on affidavit duly made, and under it seizure was made in the respondent's premises of the stock

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of goods in the shop, and other effects as set out in the *procès-verbal* filed of record. The respondent's petition to quash sets out these proceedings and the seizure made in his premises; that the appellants are not his creditors; that he owes them nothing; that he never was a trader but only a hatter, that he did not owe $200. Whereupon he prays that the writ be quashed; that the seizure thereunder be set aside; that *main levée* be granted to him of the effects seized as *his property*. The appellants, as above stated, answered in writing. After this, the respondent files a *réplique* to the answer, in which he alleges that the woman Gauvreau was not his wife: that she traded for herself, and was credited for herself by the appellants and others, and that her stock is there upon which the creditors may act, but not against him.

The two main points are: 1st. Was the respondent a trader? 2nd. Were the appellants his creditors? The first point seems to have been clearly proved.

He and the deceased cohabited for twelve or thirteen years, occupying the same premises all that time. In part of the premises she had a millinery shop, and he in the other part a workshop for the repair and renewal of hats, supplied to him by merchants who furnished goods to his wife. The appellants have also proved his personal purchase of goods for the shop from the appellants and others, ordering them to be sent to the shop; his payments to creditors for goods purchased; his admission of the business being common to both; that the money due for his *specialite* went in deduction of the account for goods purchased for the millinery business; finally, his own admission in a deed of lease of their premises, dated 10th July, 1865, that he was a *commerçant*.

He cannot escape the result of this proof that he is a *commerçant*.

The second point is, was he indebted to the appellants? On this head we have the facts of cohabitation and residence; his application for hat-work and repairs, not to be paid in money to him, but to be credited on the millinery account; his participation in the business in the name of his wife, by buying, selling and paying, all proved by the evidence of record. In addition to this positive testimony, which proves his communal quality as well as his indebtedness to the appellants, we have his own admissions. It has been objected that the entries in the appellant's books are in the name of Mme. Gauvreau.

But this objection amounts to nothing, for the witnesses assert that the entries are always so made where the woman is a milliner, and it is well known that in a haberdasher's shop, where families are supplied, the entries are almost universally made in the name of the wife, not the husband. But, it is objected that she was not his wife. Two clergymen have been brought up, who say that they looked over the parish registers and found no trace of the marriage. But negative allegations and proofs of want of marriage between them cannot be allowed to override their mutual frequent assertions of being man and wife, and his own affirmation and positive admission that she was his wife and that she was *commune en biens* with him. He must be held liable with her for the debts, because she is legally presumed to act for him. It has been held that when a wife living with her husband carries on trade, it is to be presumed that she does so by his authority, and as his agent. It might be different if they did not cohabit. If she were not his wife in fact, his cohabitation with

her, her use of his name, his purchases and sales of goods, &c., make him liable. Even supposing that she was not his wife, she is presumed to be doing business as his agent, and therefore, his liability is unquestionable. He has, moreover, by his petition rendered his position entirely untenable, by claiming the millinery goods seized as his own property, and demanding their discharge from the attachment. The judgment has maintained this demand. We therefore set aside the judgment appealed from.

DRUMMOND, J. The rule of law is well established that where a man and woman live together as man and wife, they are equally liable as if they had been married. A contrary doctrine would lead to the absurd results, that no merchant would give credit to a lady describing herself as married unless she exhibited the marriage certificate. Whether married or not married, Gauvreau and this woman co-habited as man and wife, and the defendant is clearly liable.

AYLWIN, J. In this place I think it is my duty to state that a more infamous attempt to evade liability has never been made within my knowledge. It is a most scandalous, most disgraceful attempt.

The following is the judgment recorded :—Considering that the appellants have established by legal and sufficient evidence, the allegations, matters, and things set forth in the affidavit by them filed in this cause, and upon which the writ of attachment in insolvency issued in this cause; considering that the respondent has failed to establish by sufficient evidence the non-subjection of his estate to involuntary liquidation, and his avoidance of the said allegations, matters and things, in the said affidavit contained: considering that the said writ of attachment was duly issued and the seizure and proceedings thereunder were duly had and made; considering that in the said judgment of the Superior Court there was error, this court doth reverse and set aside the said judgment and maintain the said writ of attachment, &c."

Judgment reversed.

Perkins & Stephens for the appellants.
Labelle & David, for the respondent.
D. Girouard, Counsel.
(F. W. T.)

MONTREAL, 5 MARS 1867.

En appel de la cour supérieure, district de Montréal.

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, J.

WILLIAM SACHE,

(*Défendeur en cour inférieure,*)

APPELANT;

ET

DAME CATHERINE COURVILLE ET AL.,

(*Demanderesses en cour inférieure,*)

INTIMÉES.

ACTE DES LOCATEURS ET LOCATAIRES.

JUGE :—Qu'une personne qui est devenue propriétaire d'une maison durant un bail fait par un autre propriétaire avant lui, peut être condamnée à faire des reparations quoiqu'elle ne fut pas le locateur.

Ce fut un appel intenté contre un jugement de la cour supérieure, (12 avril 1864), par le juge MONK, dans les termes qui suivent :

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" La cour, après avoir entendu les parties par leurs avocats, examiné la pro-
" cédure, pièces produites et preuve, et avoir sur le tout délibéré, condamne le
" défendeur sous huit jours de la signification du présent jugement, à réparer et
" à mettre en bon ordre, les couvertures, portes, chassis, canal ou égout d'ai-
" sances dans la cour appartenant aux prémisses désignées dans la déclaration en
" cette cause, comme suit, savoir: " Une maison en pierre de taille à trois éta-
" ges, no. 10, bâtie sur un emplacement sis et situé au quartier St. Antoine de
" la dite cité de Montréal, tenant par devant à la rue Craig, d'un côté aux
" représentants Painchaud, et de l'autre côté à Olivier Fréchette, avec la cour
" dépendante de la dite maison, la remise et autres bâtisses y construites," et ce
" d'une manière convenable et subatantielle; et dans le cas où le dit défendeur
" négligerait de faire les susdites réparations dans le délai susdit, la cour autorise
" les dites demanderesses à faire telles réparations aux dépens du dit défendeur."

Laflamme, C. R., pour l'appelant, dit que par leur action, instituée dans la Cour Supérieure, à Montréal, le 28 Janvier 1864, les intimées, demanderesses en Cour Inférieure, poursuivirent l'appelant, défendeur en Cour Inférieure, pour le contraindre à faire certaines réparations à une maison qu'elles occupaient, et dont l'appelant était devenu propriétaire pendant le bail en vertu duquel elles en ont la possesion.

Ce bail fut fait entre les intimées comme locataires, et M. John Ostell, alors propriétaire de la dite maison, le 22 février 1862; il fut continué par tacite reconduction, à dater du 1er mai 1863 jusqu'au 1er mai 1864.

L'appelant ne devint propriétaire de cette maison que le 7 Janvier 1864. I cessa de l'être, dans le mois de mars suivant.

Par sa défense l'appelant prétendit que les réparations à la charge du propriétaire avaient été faites; que quant à lui, il ne l'était devenu que depuis le 7 janvier 1864; qu'il n'était pas responsable des faits antérieurs à son titre: qu'il n'avait jamais été mis en demeure, comme propriétaire, de faire aucune réparation à la dite maison, et il nia les faits sur lesquels l'action était basée.

Par la preuve faite dans la cause il appert que le 22 juillet 1863, les intimés avaient protesté le Sieur John Ostell de faire certaines réparations à la dite maison, savoir: à la couverture, à un égout et aux portes et fenêtres, que toutes ces réparations demandées n'étaient que des réparations locatives; que M. John Ostell, le properiétaire avant l'appelant, y avait cependant fait travailler un ouvrier pendant huit jours.

L'action n'allègue nullement et il n'est pas non plus prouvé, que depuis le 7 janvier 1864, époque à laquelle l'appelant devint propriétaire, et avant l'action les intimées l'aient mis en demeure de faire aucune réparation à la dite maison.

Interrogé comme témoin par les intimées, l'appelant déclare, le 16 mars 1864, qu'il n'est plus le propriétaire de la maison; qu'il l'a vendue à un nommé Murray.

Ainsi donc, il a été poursuivi en sa qualité de propriétaire pour une prétendue négligence qui n'est pas prouvée, qui n'est pas sienne; il n'a pas été mis en demeure de la réparer, si elle existe depuis qu'il est devenu propriétaire.

Néanmoins, le 12 avril 1864, près d'un mois après qu'il a cessé d'être propriétaire de cette maison, il est condamné à faire, sous huit jours de la signification

du jugement, des préparations à une maison, où il n'a plus le droit d'entrer, et à défaut par lui de faire ces réparations, les intimées sont autorisées à les faire à ses dépens, quand leur droit d'habiter la dite maison ne s'étend plus qu'à dix jours, terme trop court pour qu'elles puissent le faire d'une manière utile pour elles ; enfin il est condamné aux dépens, malgré qu'il n'ait pas été mis en demeure.

Sous ces circonstances, et vû la loi, l'appelant se croyait bien fondé à demander que le jugement rendu contre lui, dans la Cour Inférieure en cette cause soit renversé.

Ricard pour les intimées dit que la présente action (sous l'acte des locateurs et locataires) était intentée par des locataires contre leur propriétaire pour faire des réparations à la maison qu'elles occupaient.

Le défendeur (appelant) répondit par exception péremptoire que " toutes les réparations dont le propriétaire était tenu avaient été faites par lui, dit défendeur et les propriétaire antérieurs à lui, que partant les demanderesses (intimées) n'ont souffert aucun dommage et que leur action est mal fondée."

Contestation étant liée, quinze témoins de part et d'autre furent entendus et après inscription au mérite, le défendeur fit motion pour amender son plaidoyer, alléguant entr'autres qu'il n'a jamais été mis en demeure de faire aucune réparation, qu'il n'est devenu acquéreur que le 7 janvier et ne peut être tenu de faire des réparations à une propriété ne lui appartenant pas.

Maintenant, sans parler des admissions faites par Sache lui même à Mme. Courville, nous avons prouvé la possession de Sache longtemps avant le mois de janvier par les témoins Quinn, A. Giroux et Paton, ce dernier, témoin de Sache même ; et ses mises en demeure par deux fois ainsi que son refus de faire les dites réparations.

D'ailleurs, il n'y a pas de doute que lorsque l'action a été intentée, le défendeur était propriétaire en possession il l'admet lui-même par ses défenses, et dans l'hypothèse où les mises en demeure antérieures ne seraient pas valables, l'action elle-même est mise en demeure suffisante. Et le défendeur Sache aussitôt le service de l'action ou au moins par ses défenses, aurait dû offrir de faire les dites réparations pour se débarrasser des frais de l'action. Au contraire il dit que la maison est en bon ordre et il nous force d'entrer dans une longue enquête qui prouve que la maison était presqu'inhabitable et spécialement quand l'action a été intentée et Sache n'a pas bonne grâce de venir se plaindre après six semaines de longues procédures journalières qu'il n'a pas été suffisamment notifié! Il devrait donc être condamné à faire les réparations et à payer les frais qu'il nous a mis dans la nécessité de faire, comme l'y condamnait le jugement dont est appel et dont les intimées demandent avec confiance la confirmation.

AYLWIN, J.—This was an action brought under the Landlord and Tenant's Act. The ground upon which this appeal has been brought is that the suit is an action of damages, and that the action has been brought by the plaintiffs against the person who is not the immediate landlord ; that the premises were purchased by Sache, the present appellant, from one John Ostell, who leased them to the plaintiffs. The other pretension of the appellant is that the damaged state of the premises has not been proved. Now, in the first place, the action is

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not an action of damages; it is an action to compel the defendant to repair, and the obligation to keep the premises in proper repair, was equally binding upon Sache as upon Ostell, his *auteur*. Then, as to the state of the premises, there is certainly a contrariety of testimony, but still the evidence is of such a description as to satisfy us that the judgment was right and must be confirmed with costs.

Jugement confirmé.

R. & G. Laflamme, pour l'Appelant.
Louis Ricard, pour les Intimées.
(F.W.T.

MONTREAL, 16 OCTOBRE, 1848.

Coram ROLLAND, Juge en Chef; DAY, J., SMITH, J.

No. 1102.

DAME M. A. E. LEFORD *et vir.*,

vs.

J. B. DESMARAIS, *fils et al.*

JUGE:—Que dans une action dans laquelle le mari intervient pour autoriser son épouse séparée de biens et marchande publique, les conclusion ne peuvent être prises qu'en faveur de la demanderesse.

Dame Marie Antoinette Edesse Leford, marchande publique, épouse séparée quant aux biens de Joseph B. Germain, poursuivait, autorisée par son époux, Jean Baptiste Desmarais et Stanislas Sibert dit Belair, pour une somme de £100 balance d'une obligation consentie par les dits défendeurs en faveur de la demanderesse par acte devant Mtre. Desmarais et son confrère, notaires. La demanderesse avait agi à cet acte par l'intermédiaire de son époux, son mandataire spécial pour cette affaire. La dite obligation était pour des marchandises vendues et livrées au défendeur Desmarais par la *demanderesse* comme marchande puplique et séparée de biens.

Sans égard à ce fait, les demandeurs concluaient dans leur déclaration à ce que "les dits défendeurs fussent condamnés conjointement et solidairement à *leur* "payer la dite somme de £100."

A cette action les défendeurs plaidèrent une défense en droit qui fût déboutée et une exception péremptoire en droit, dans laquelle ils alléguaient que cette action ne pouvait être maintenue à l'égard du demandeur Germain, parce qu'il n'avait aucun intérêt légal dans l'obligation qui faisait la base de l'action; et parce que la demanderesse étant marchande publique, duement séparé de biens, du demandeur, son époux, celui-ci n'était pas justifiable en loi de se joindre à la demanderesse, comme il l'avait fait par la dite action, et encore moins de prendre ces conclusions en sa faveur, à lui demandeur, pour le paiement de la somme réclamée par la dite action.

Le jugement adopta ces prétentions des défendeurs et débouta les demandeurs de leur action sauf à se pourvoir.

"La Cour, * * * Prononçant d'abord sur la défense en droit, la déclare "mal fondée, en autant que la demande est fondée sur une obligation de payer "aux demandeurs, et déboute la dite défense avec £1. 10s. 0d. de dépens. Et

"procédant à juger au mérite, vu l'acte produit au soutien de la demande, con-
"sidérant que dans cette obligation des défendeurs en date du 3 octobre, 1845,
"passé devant Mtre. Desmarais et son confrère, notaires, les défendeurs n'ont con-
"tracté aucune obligation envers Joseph Bolduc Germain, un des demandeurs,
"mais seulement envers la demanderesse sa femme, dont lui s'est dit procureur—
"que, par conséquent, la demande est mal intentée comme en recouvrement d'une
"créance des deux demandeurs, qui n'existe pas—a débouté et déboute les
"demandeurs de leur action, avec dépens, sauf à se pourvoir."

Action déboutée.

Girard & Lafrenaye, pour demandeurs.
A. R. Cherrier, pour défendeurs.
(E. LEF. DE B.)

Lefort et vir., vs. Desmarais, fils et bl.

MONTREAL, 5TH MARCH, 1867.

In appeal from the Superior Court, District of Montreal.

Coram AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, A. J.

PATRICK O'CONNOR,
(*Defendant in the Court below,*)
APPELLANT,

AND

THOMAS W. RAPHAEL,
(*Plaintiff in the Court below,*)
RESPONDENT.

CAUSE OF ACTION—EXCEPTION DECLINATOIRE.

The defendant in Upper Canada consigned to the plaintiff at Montreal, in Lower Canada, 2000 barrels of flour to be disposed of on his account, and after consignment, in anticipation of sale, made a draft in Upper Canada addressed to the plaintiff, requesting him to pay $6000 to his order, which the plaintiff did. The plaintiff brought an action at Montreal against the defendant for the amount of the draft.

HELD:—That the cause of action arose in Montreal.

The respondent was a produce factor at Montreal, and as such received from the appellant a consignment of 2000 barrels of flour to be sold on his account. The flour was sold by the respondent at Montreal, and a sold note duly furnished by him, but before he had received the proceeds of the sale, the appellant, in anticipation of the money being received by the respondent, drew upon him (against the consignment) for $6,000. This amount was paid by the respondent at Montreal, but the proceeds of the flour did not amount to the sum so paid, and the respondent brought his action for the recovery of the amount overpaid.

The respondent's declaration described the appellant as of the town of Paris in Upper Canada, miller and trader.

By this declaration it was alleged that on the 20th May, 1863, the defendant forwarded and consigned to the plaintiff, 2000 barrels of flour to be sold and disposed of on his account. That after the said flour had been so forwarded and consigned the defendant, in anticipation and in view of sale, but before the same was realized, made a certain draft dated at Paris in Upper Canada, addressed to the plaintiff, requesting him to pay $6000 to his order, which was accepted and paid by the plaintiff.

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By his declaration the plaintiff alleged specially that when he accepted and paid said bill, plaintiff was not indebted to defendant in any sum of money, but the same was drawn against the consignment and for the sole accommodation of defendant.

By a second count the plaintiff repeats the above statement with respect to the making of the draft, omitting the consignor, and stating that at the time of the accepting of this draft he had not in his hands any goods or monies of the defendant.

To this action the defendant pleaded a declinatory exception, alleging that he was wrongly impleaded, inasmuch as he had his domicile in Upper Canada and beyond the limits of the jurisdiction of the Court, as appeared by the writ of summons and process in the cause; that moreover it appeared that the cause of debt originated in Paris in Upper Canada, and that the action under such circumstances was cognizable only by the tribunals of Upper Canada.

The parties then agreed to and signed the following admission:

"The parties admit, but only for the purposes of the issue joined on the *Exception Déclinatoire*, that the flour referred to in the plaintiff's declaration was "consigned from Galt in Upper Canada by the defendants to the plaintiff for sale "to be made, and that the same was by plaintiff sold in Montreal; that the draft "referred to in the declaration was drawn after said consignment against the said "consignment of flour, and that the money sought to be recovered by plaintiff "was by him paid upon the said draft at Montreal, and that at all the times "mentioned in the plaintiff's declaration the defendants resided in Upper "Canada.

"That the said consignment, draft or bill of exchange and payment as above "mentioned, set forth in the two counts of plaintiff's declaration, before the third "count thereof, constituted for the purpose of the said exception the sole cause "of indebtedness which the plaintiff pretends to claim from the defendants by the "present action. That the paper writing herewith fyled by the plaintiff and "marked C is a true copy of the sold note of the said flour."

After hearing on the merits of the exception, the Court (Monk, J.) on the 18th June, 1864, dismissed it.

In appeal, *Laflamme, Q. C.*, for the appellant, contended that it was admitted that the draft constituted the only cause of indebtedness of appellant to the respondent. If so the only question was to determine: Where is the contract made between the drawer and drawee on a draft? If it be at the place where it is dated and signed, as appellant asserted, then the judgment of the Court below is unquestionably wrong.

Ritchie, for the respondent, said:

The only question in this appeal was, what was the cause of action? The respondent submitted that the causes—and the only causes—of action were the receipt by him of the flour, its sale and the overpayment made by him, all at Montreal. The draft was not one of the causes of action—it is merely a piece of evidence of the amount paid. The plaintiff's action was complete without it. The fact that the appellant, for his own convenience, gave an order for payment dated in Upper Canada was one of no importance as affecting the question of jurisdiction. The liability of the appellant to make good an amount paid for

him at Montreal, without consideration, arose out of the relations existing between him and respondent, as his agent. It was within the jurisdiction of the Superior Court at Montreal that the liability of the respondent as a factor commenced—that his duties as such were performed and that he paid the sum sought to be recovered by his action in the court below. The position of the respondent could not be made worse than it otherwise would have been, merely because an order affording him ready means of proving the payment made by him in Montreal happened to be dated in Upper Canada.

AYLWIN, J.—This was an action brought in Montreal against the appellant as a person resident at Paris, Upper Canada, The plea is by *exception déclinatoire* to this effect: That the defendant was wrongly impleaded inasmuch as he had his domicile in Upper Canada, and the cause of debt originated there. But it appears that there has been an admission in these words: (His Honour read the admission stated above.) Now, in consequence of this admission, the question does not arise at all, and therefore the judgment was perfectly right, and must be confirmed.

DRUMMOND, J.—I must say that my first impression was that the cause of action arose in Upper Canada, because the draft was signed there; but on looking the case over, and seeing the admissions, it appears clearly to me, that the draft was only incidental, and that the transactions in Montreal really constituted the cause of action.

BADGLEY, J.—O'Connor, a miller and trader at Paris in Upper Canada consigns for sale to Raphael a merchant at Montreal, 2000 barrels of flour, and before their delivery to the latter, by draft dated at Paris, 30th May, 1863, draws upon him at Montreal for $6000, on account of sales payable 22nd June following. The draft is duly accepted by the drawee Raphael and paid at maturity in Montreal. The flour realized less than the amount of the draft by $1500, and the action was brought by Raphael at Montreal against O'Connor at Paris for amount of draft. The appellent pleaded a declinatory exception to the respondent's action. His declaration set out first the transaction as above for the draft and its payment by respondent to appellant's order after acceptance, and second, the common counts, money counts, account stated.

The declinatory exception alleges two grounds; 1st, that O'Connor was domiciliated at Paris in Upper Canada; and 2nd, that the cause of action originated at Paris. The issue is upon these exceptional grounds.

The admissions of fact filed of record declare that the consignment, draft or bill of exchange, and payment of the latter, as set out in counts of declaration, constitute the indebtedness claimed by the action.

Cons. stat,, L. C. cap. 83, sect. 63, provides, "In any suit or action brought against any person who has no domicile in Lower Canada, when the cause of such suit has arisen within Lower Canada, then if such person is a resident of Upper Canada, service may be made upon him in Upper Canada."

The only question is, did the cause of this suit arise in Lower Canada or in Upper Canada. In the first place, the consignment in itself only becomes a cause of action when it is received by the consignee, and can have no application here until receipt as between consignor and consignee, and even then, the

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action so far as the consignment received by the consignee would be hereby the consignor against consignee to account and pay for the goods. This point is not applicable. In the next place, the mere order for the payment of money or draft, only becomes contractual upon its acceptance by the drawee here, and its payment here by the latter is necessarily the cause of action, not the mere order in itself from Upper Canada. It is a blank paper until accepted, then a contract. It is the payment of the money in Montreal by the drawee for the profit and advantage here of the drawer, which makes up the cause, so that the cause of the action being the acceptance here by the drawer and the payment of it here by him, in excess of drawer's fund in hand; that payment constitutes the cause, and absence supports the service of the writ in Upper Canada under the statutory provision, and is fatal to the declinatory exception which has been properly rejected by the court below. My opinion is to confirm the judgment appealed from.

Appeal dismissed.

R. and G. Laflamme, for appellants.
Rose and Ritchie, for respondent,
(F. W. T.)

MONTREAL, 4TH, JUNE, 1867.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, J., AYLWIN, J., BADGLEY, J., MONDELET, J.

THE REVEREND CHARLES FRANÇOIS CALIXTE MORRISON ET AL., (*Plaintiffs in Court below.*) APPELLANTS.

AND

DAME AGATHE DAMBOURGES ET AL. (*Defendants in Courtbelow,*) RESPONDENTS.

WRIT OF APPEAL—COPIES—PRACTICE.

HELD: That the practice of attorneys *ad litem* to certify the copies of Writs of Appeals is justified by long usage and will not be disturbed.

Piché, for the respondents, made a motion to set aside the appeal on the grounds: 1st, that the copy of the writ of appeal had not been signed and certified by the clerk of the Court, but on the contrary by the attorney of the appellants; 2nd, that sufficient security had not been given by appellants. With respect to the first ground, it was urged in support of the motion that the attorney *ad litem* had no authority by law to certify copies of writs of appeals; that the powers of the attorney were circumscribed within limits of drafting and pleading actions as well in demanding as in defending; but that he had no authority whatever to certify any public document such as a writ of appeal, and that in the absence of an express provision in the law delegating this power to the attorney, his signature to the copy of a writ of appeal was a mere nullity, and the writ bearing the same was a piece of blank paper. In support of the motion it was strongly urged that the attorney had not the power to sign a writ of appeal, from the fact that an express provision of law by statute was requisite to

authorise attorneys to sign and certify ordinary writs of summons. On this point the 12 Vict., cap. 38, Consolidated Statutes of Lower Canada, cap. 83, was cited.

On behalf of the appellants, *Dorion, Q.C.*, argued at considerable length that attorneys had the power to certify copies of writs of appeal, and the practice of the Court during the period of over one half century was cited, during the whole of which time it had been the invariable and customary rule for attorneys to certify copies of writs of appeal.

There was no express provision of law which applied either in favour of or against it. With respect to the question of security, the respondents urged that it was insufficient, because the bail bond merely secured the costs and damages and not the amount of the legacies. It was to be remarked that the present appeal was from a judgment of the Superior Court of Lower Canada, for the District of Montreal, rendered a short time ago at Montreal by the Hon. Justice Monk, maintaining the will of the late Col. Boucher to be good and valid. The respondents were legatees for a considerable amount under the will, and the appellants attacked the will to have it set aside, alleging: 1st, that the will was a forgery; 2nd, that the testator was of unsound mind when he made it; and, 3rd, that the will had been suggested by respondents. The Superior Court rejected the pretensions of the appellants on all these points, and maintained the will as good and valid.

Hence arose the present appeal by the latter. The respondents pretended that security ought to have been given for the amount of the legacies.

PER CURIAM:— In deciding these two questions, firstly, with respect to the power of an attorney to sign and certify a copy of a Writ of Appeal, although there was no express provision in any of the Statutes on this point, there existed an invariable rule and practice of over fifty years, during the whole of which, attorneys *ad litem*, one by one, without exception, certified copies of Writs of Appeal. That this being the invariable rule and practice of the Court, the latter could not derogate from it in the present instance, merely upon the application of one individual. Parties never suffered any injustice from this practice. Should the Court of to-day, upon a solitary application, derogate from a practice which had been consecrated by the usage of so many years, and by some of the ablest men both lawyers and judges that the Canadian Bar ever produced—the public would suffer great injustice. Should the Court set aside this practice, it would be obliged to declare that every appeal taken before it during the last fifty years was wrong and subjected to be thrown aside. It would be obliged at this very moment to close the Court of Appeal, and to send every gentleman of the bar then present—some representing very heavy interests—about his business. No, this could not be done. Not only did long usage sanction the practice complained of, but it appeared by induction from the tariff of the Court of Appeal, that the attorney had the right to certify the copy of the Writ of Appeal. In this tariff it was to be found that $1 is to be allowed the attorney for engrossing the copy of the Writ of Appeal, while, on the other hand, there was not one sixpence allowed to the Clerk of the Court. This showed clearly that the power vested in the attorney to sign and certify copies of Writs of Appeal was an

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acknowledged right, if not by an express provision of law, at least by a long use and practice which had at all times been approved and sanctioned by the Court. The motion on this point, therefore, could not be entertained. With regard to the question of security, the Court said that it was needless to expatiate on this point. In the judgment appealed from there had been no condemnation to the payment of any certain sum of money. The security for costs and damages was therefore amply sufficient. The motion of the respondents should be rejected.

Motion rejected.

Piché, for movers.
Dorion, Q.C., contra.
(F. W. T.)

CITATIONS DES APPELANTS AU SUJET DE LA MOTION DES INTIMES.

Suivant la décision dans la cause—*en appel*—de *McNaughton* et *Désautels*, (citée au bas de l'article 1129 du code de Procédure, B. C.,) laquelle décision est fondée sur le droit commun, les intimées étaient tenues de signifier avis de leur motion le 16 mai, 1876, c'est-à-dire, huit jours après leur comparution produite le huit mai.

Dans la cause de *Ross & Scott*, 9 L. C. Reports, 270, la Cour d'Appel a déclaré qu'elle ne donnerait aucun encouragement à de semblables motions.

Les anciennes règles de pratique de la Cour d'Appel, conformes à celles en existence, permettent la signification au procureur *ad litem*, ou au procureur *ad negotia*, en sorte que c'est un *acte* signifié de *procureur à procureur*, et c'est ainsi que la signification s'est toujours pratiquée.

Cette signification est conséquemment bien différente de la signification d'un writ introductif d'une instance, où la partie doit être assignée à personne ou à domicile. Le writ d'appel ne comporte pas une assignation. Par la promulgation du code de procédure, art. 1122, il deviendra nécessaire de prendre une copie *authentique*, mais ce ne sera pas pour la *signifier* au procureur, mais seulement pour la déposer au greffe des appels avec le rapport de l'huissier. La 7me règle de pratique exige que le *writ* soit écrit sur parchemin et signé par l'avocat qui doit ensuite le faire signifier, et l'huissier est tenu de certifier qu'il a exhibé le writ original. La 8me règle reconnait la signification de procureur à procureur, "*as heretofore has been practised.*" Dans les causes de Dawson & Belle, Viger & Beliveau, 6 L. C. J., p. 177, 12 L. C. R., p. 405, et Ross vs. Scott, 9 L. C. R., p. 270, les nullités de la règle de pratique ne sont pas absolues et radicales, et en un tel cas, la Cour permet d'amender sans péremption de l'instance en appel, et le code de procédure en consacre le principe à l'article 1126. Le greffier des appels et son député n'ont jamais certifié la copie du writ en conséquence de cette signification de procureur à procureur.

La pratique a toujours été que les avocats certifieraient les writs d'appel, et comme il n'y a aucune disposition dans les Statuts ou les règles de pratique, qui exige que le greffier les certifie, la pratique doit être suivie, comme ayant réglé cette matière tel qu'il appert aux copies produites.

IN THE PRIVY COUNCIL, 1867..

MARCH 8TH, 1867.

Coram SIR WILLIAM ERLE, SIR JAMES WILLIAM COLVILE, SIR EDWARD VAUGHAN WILLIAMS, SIR RICHARD TORIN KINDERSLEY.

In Appeal from the Court of Queen's Bench, appeal side, District of Montreal.

DANIEL HERRICK.

(*Plaintiff in the Court below,*)

APPELLANT;

AND

GARRET SIXBY,

(*Defendant in the Court below,*)

RESPONDENT.

ACTION EN BORNAGE—BOUNDARIES—QUANTITIES DESCRIBED IN DEEDS—AMBIGUITY—RULES OF CONSTRUCTION—PRESCRIPTION.

Action en bornage to ascertain the boundary line between the contiguous properties of the plaintiff and defendant, which property was formerly one lot, and described as containing between 140 or 150 acres. This was afterwards sold in two lots. The plaintiff's, the eastern portion, was described in the deeds as containing "90 acres, more or less." The defendant's, the western portion, "about fifty acres;" but the descriptions in the deeds did not agree as to the way the line of boundary was to run.

The effect of a surveyor's report, which the Court in *Canada* homologated, was to make a boundary line, by which the defendant got sixty-one acres, and reduced the plaintiff's to eighty-two acres. Upon appeal, HELD: (reversing the Judgments of the Superior Court, and the Court of Queen's Bench), that those Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rule being that, if in a deed conveying land the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what was intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different, the former construction must prevail.

HELD:—Further, that the case differed from a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with a statement that it contained so many acres, "or thereabouts," when, if the quantity was inaccurately stated, it did not affect the transaction.

By the law of *Lower Canada* the term of prescription is thirty years.

To sustain a plea of prescription, the evidence must show peaceable uninterrupted possession and ownership for upwards of thirty years.

The facts of this case are fully reported 8 L. C. Jur. 324.

The present appeal was from the judgment of the Courts below, and was argued by

Manisty, Q. C., and *Wills*, for the appellant; and by *J. Westlake* and by *A. Aitken*, for the respondents.

The appellant's contention was, that the case ought to have been decided upon the deeds alone, or upon the deeds and parol evidence of uninterrupted user; and insisted that the judgment was erroneous, in giving him little more than sixty acres, when he had purchased ninety acres.

For the respondent, it was submitted—first, that *Ruiter's* sale to the *Kranses* in 1813, was a *corps certain*, defined by metes and bounds, and not liable to be affected by an erroneous indication of quantity, and that the Court had properly determined the boundary; secondly, that the respondent and his predecessors in

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title had held the quantity of acres the Court awarded, uninterruptedly, for more than thirty years, in accordance with such boundary, and were thus entitled by prescription.

Sir Richard T. Kindersley gave the judgment of the Privy Council.

This is an appeal from a judgment of the Court of Queen's Bench, of *Lower Canada*, dated the 1st of March, 1864, affirming a judgment of the Superior Court of that Province, dated the 31st of October, 1862.

The action in which these judgments were given was an action *en bornage* by the appellant, to have the boundaries, between two contiguous properties of the appellant and the respondent, ascertained and determined.

The following are the circumstances out of which the action arose:

One *John Ruiter*, who died in or before the year 1809, was the owner of a landed estate in the *Seigniory* of *St. Armand, in Lower Canada*. After his death, his estate was, in 1809, divided among his heirs, according to a plan of partition shewn on a map, made and prepared by one *Amos Lay*, a surveyor. One of the heirs was Captain *John Ruiter*, and by the partition there was allotted to him (besides another piece of land containing about sixty acres, called lot 4 on the map, not in question in this suit) a piece of land distinguished on that map as lot 3, and described as containing 140 acres.

This piece of land, which it will be convenient always to call lot 3 (that being its designation not only on the partition map, but also in the subsequent deeds of both the appellant and the respondent) is in form (speaking with mathematical accuracy) a trapezium, but it is so nearly a rectangular parallelogram, that, for all practical purposes, it may be so considered, and, indeed, it is so represented in some of the maps given in evidence. It is bounded on the south by the boundary line between *Canada* and *Vermont*, which is a straight line running along the 45th parallel latitude, and, therefore, of course, running due east and west; its western boundary is a straight line drawn perpendicularly to the southern boundary; its eastern boundary is a straight line drawn very nearly, though not quite, perpendicularly to the southern boundary line; and its northern boundary is a straight line drawn from the northern end of the western boundary line, and running towards the east, parallel, or very nearly parallel, with the southern boundary. Its length from west to east is greater than its width from south to north. It consisted, at the period referred to, of wild forest and woodland, but it appears that in comparatively recent times some patches of it had been cleared for pasture. It is necessary to observe that, at a point on the southern boundary line of this lot 3, at a distance from the south-western corner of one-third of the whole length of the southern boundary line, a brook crosses the southern boundary, flowing into and diagonally across lot 3, the direction of its course being about N. N. E.; and a little to the eastward of this brook, a ledge of rock runs also diagonally across the whole lot 3, from the southern to the northern boundary, in a direction nearly the same as that of the brook. It is further to be observed, that, by recent survey and measurement, made under an order of the Court below, this lot 3 is found to contain 144 acres and 2 roods.

In 1813, Captain *John Ruiter*, being the owner of this lot 3, sold a part of it, at the western end thereof, to two brothers, *George* and *David Krans*; and by

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a deed, dated the 3rd of March, 1813, he conveyed to them by the following description: "About fifty acres of land, part and parcel of that tract of land situate, lying, and being in the aforesaid *Seigniory* of *St. Armand*, known and distinguished by Lot No. 3; the said fifty acres, or thereabout, to extend from the westerly boundary line of the said lot, and on the whole width thereof, and easterly to the foot of a ledge of rocks which runs across the said lot, a certain distance easterly of a certain brook which also runs across said lot, the south-easterly boundary of which said part of said lot is a hemlock tree, which stands on the southerly boundary line thereof, and is marked G. and D. K., 1813."

It is upon the construction which ought to be put upon that description that the controversy between the parties mainly turns.

The portion of lot 3 thus conveyed to *George* and *David Krans*, afterwards became the property of *Miles Krans*. By a deed, dated the 23rd of February, 1846, *Miles Krans* conveyed it to *James Slade Allan*; and by a deed, dated the 17th of January, 1848, Allan conveyed it to the respondent. In both these deeds, the property conveyed is described in the same terms as those before mentioned to have been contained in the deed of the 3rd of March, 1813.

The remaining portion of lot 3, which was not comprised in the conveyance to the Kranses, afterwards passed from Captain *John Ruiter*, through successive holders, until it became vested in one *George Chipman*; and by a deed, dated the 15th of August, 1845, the Sheriff of the District of Montreal, under a writ of execution sued out by one *Abel Houghton*, against the lands and tenements of *George Chipman*, sold and conveyed to *Abel Houghton* by the following description:—"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 remaining part of the 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 the said plan."

It appears that, in that transaction, *Abel Houghton*, who was the cashier of the *St. Albans* Bank, was acting on behalf of, and as trustee for that bank; and by a deed, dated the 23rd of October, 1855, *Abel Houghton*, on his own behalf, and on behalf of the *St. Albans* Bank, and by virtue of a power of attorney from the bank, sold and conveyed to the appellant the land comprised in the Sheriff's deed, by the same description.

The appellant's case is, that the property comprised in those two last mentioned deeds was the residue of lot 3, not comprised in the conveyance of the 3rd of March, 1813, to the two *Kranses*. He has not, however, proved the conveyances or other instruments by which that residue passed from Captain *John Ruiter*, and became vested in *George Chipman*; and upon that ground an objection has been raised by the learned Counsel for the respondent, that it is not shown that *George Chipman* ever was the owner of the eastern portion of lot 3, and, therefore, that the appellant, not having proved his title to that portion, could not maintain his action. That objection, however, their lordships have no hesi-

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tation in disallowing. It is not suggested that any person has, or claims to have, any right or title to any portion of lot 3, other than the appellant and the respondent. Moreover, the respondent, with the view of proving that the owner, for the time being, of the western portion of lot 3 had exercised active ownership on the portion of land which is in controversy, with the knowledge of, and without objection by the owner, for the time being, of the eastern portion of the said lot 3, called as witnesses in the Court below, *Miles Kraus* and *James Slade Allan*, who had been successively the owners of the western portion; and their evidence shews that *Chipman* was at one time the owner of the eastern portion of lot 3. *Miles Kraus*, after stating that he cut wood on the lot, says:—"During the time I so cut wood on the said lot of land, "to the east of it" ("to the east of it" means the eastern part of it), "now "owned by the plaintiff" (the appellant), "was possessed successively by *John* "*Ruiter*, *John Rhodes*, *Anthony Rhodes*; after which, I think, it went into the "hands of *George Chipman*." *Allan* says:—"Old Mr. *Rhodes*, and Mr. *Chip*-"*man*, and the Bank of *St. Albans* were, one after another, in possession of the "east part of the said lot, to the east of the foot of the ledge of rocks. Old Mr. "*Rhodes* was in possession of it when witness first went there in 1836; afterwards, "*Chipman*, and, subsequently, the Bank of *St. Albans* and Mr. *Chipman*, as I "understand."

Another witness called by the respondent, namely, *Augustin Lavoie*, deposes that the respondent's cows were impounded by *Chipman*, for having trespassed on his part of the said lot ("pour avoir traversé sur sa part du dit lot").

It cannot be doubted that *Chipman* was the owner of the eastern portion of lot 3; and it is to be observed that the description in the conveyance made by the Sheriff to *Abel Houghton*, under the writ of execution against *Chipman*, is an apt and appropriate description of so much of lot 3 as was not comprised in the conveyance of the 3rd of March, 1813, by Captain *John Ruiter* to *George* and *David Kraus*.

And it may be added that the respondent, by his plea, so far from disputing the appellant's title to the eastern portion of lot 3, by strong implication, and almost in terms, admits it; and the plea ends with a prayer that it may be adjudged and ordered that the measure and boundaries of the said lands and properties of the appellant and respondent may be had and made by a sworn land surveyor, to be agreed upon by the parties, or appointed by the Court.

Assuming, then, that the appellant is the owner of the eastern, and the respondent of the western portion of this lot 3,—the question is, what is the right boundary between those two portions?

That question is, in truth, the same as this, what, according to the true construction of the words of description in the conveyance of the 3rd of March, 1813, from Captain *John Ruiter* to *George* and *David Kraus*, having regard to the local features therein referred to, was the eastern boundary of the property thereby conveyed? All depends upon the construction of that deed, and nothing which has since occurred can affect that construction.

The question must now be tried between the appellant and respondent, in precisely the same manner as it would have been tried if the dispute had arisen be-

tween Captain *John Ruiter*, and *George* and *David Kraus* immediately after the execution of the deed of the 3rd of March, 1813.

The appellant insists that, according to the true construction of that deed, the parties thereto intended that the eastern boundary of the portion thereby conveyed should be a straight line drawn from the hemlock tree, situate on the southern boundary line, due north, *i. e.* parallel to the western boundary line, till it meets the northern boundary line. The respondent, on the other hand, insists that the parties intended that the eastern boundary of the portion conveyed should be the foot of the ledge of rocks along its whole course.

Now, whichever of these two views is the right one, it appears from the evidence, that if the appellant's view be adopted, then the effect will be that the portion conveyed by that deed would contain a little more than fifty acres,—agreeing, therefore, with the quantity mentioned in the deed, which is "about "fifty acres" Whereas if the respondent's view be adopted, and the ledge of rocks is held to be the eastern boundary of the portion conveyed by the deed, then the effect will be that portion would contain eighty-two acres, instead of "about fifty." This consequence of the success of the respondent's contention is, it must be confessed, somewhat startling.

Let us now see how the case was dealt with by the learned Judges of the Superior Court, and afterwards by those of the Court of Queen's Bench, on appeal.

In the Superior Court the case was heard before Mr. Justice *Smith*, who decided in favour of the respondent (the then defendant); and made an order, dated the 27th of May, 1862, directing that a line should be run by a sworn surveyor, to be agreed upon by the parties, or (if they could not agree) to be appointed by the Court, along the base of the ledge of rocks as the boundary between the appellant and respondent respectively. We have not the advantage of knowing the reasons for which Mr. Justice *Smith* came to this conclusion. The parties not agreeing on a surveyor, one *Amos Vaughan*, a sworn surveyor, was appointed by the Court; and in obedience to the order of Mr. Justice *Smith*, he drew a boundary line along the base of the ledge of rocks, from the southern to the northern boundary of the lot; and he duly made his report, stating in detail what he had done, which report was filed on the 17th of October, 1862.

On the 31st of October, 1862, the case came again before the Superior Court, on the report of the surveyor, and of two motions by the appellant, that the order of Mr. Justice *Smith* might be revised, and that the surveyor's report might be rejected, and on a motion by the respondent that the surveyor's report might be approved and homologated; whereupon Mr. Assistant Justice *Monk*, before whom the matter came, made an order rejecting the appellant's motions and granting that of the respondent, homologating the surveyor's report, and establishing the boundary as set out in that report.

In the appellant's case on the appeal to the Court of Queen's Bench, some remarks of Mr. Assistant Justice *Monk* on that occasion are set out, from which it would appear that he considered the order of Mr. Justice *Smith* as final, and not as interlocutory, for which reason it was not in his power to revise it, but

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that he used expressions which might lead to the inference that he was not satisfied with the decision of Mr. Justice *Smith*. However this may be, it seems certain that he (Mr. Assistant Justice *Monk*) expressed an opinion in favour of the respondent's case.

The appellant having appealed to the Court of Queen's Bench, the case came on for hearing before that Court, on the first March, 1864, in the presence of Mr. Assistant Judge *Badgley*, Mr. Justice *Meredith*, and Mr. Justice *Mondelet*, and the decision of the Superior Court was affirmed. We have the reasons or judgments of the three learned Judges.

Mr. Justice *Badgley*, in his judgment, seems to assume that the description in the deed of the 3rd of March, 1813, specified all the boundaries of the portion of lot 3 which was thereby conveyed, and in particular, that it specified the ledge of rocks as the eastern boundary; and then he cites several authorities to shew that if, in a deed of conveyance, the description of the piece of land conveyed states its boundaries on all sides, and states also its contents, but states them incorrectly, then that part of the description which specifies the boundaries must prevail, and the specification of the quantity must be disregarded. If the assumption of the learned Judge be correct, there would seem to be no reason to challenge the conclusion. But the assumption that the deed of the 3rd of March, 1813, specifies the boundaries of the land conveyed on all its sides, is simply begging the whole question. The very question between the parties is whether, upon a true construction of the language of the deed of the 3rd of March, 1813, it did make the ledge of rocks the eastern boundary of the piece of land thereby conveyed. And to that question the judgment of Mr. Justice *Badgley* is not addressed. Indeed, it may be doubted whether the learned Judge had not before him by some mistake, instead of a true copy of the description in the deed, some paper which (though purporting to be a copy) was altogether incorrect. For towards the earlier part of his judgment, after a statement of the facts, and observations on the circumstance that the appellant produced no title deed earlier than the Sheriff's conveyance to *Abel Houghton* in 1845, we find this passage:—"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 (misprinted from) the eastern boundary, as follows": (Now, what follows is in inverted commas, as if it was a quotation from the deed.) "'Running north-west' (clearly a misprint for north-east) 'at the foot or along the foot of a ledge of rocks, which runs across the lot at a distance east of a certain brook, which runs across the said lot.'" (After that quotation he proceeds): "The ledge of rocks and brook being natural boundaries, can admit of no dispute, and are shewn on the map or plan of division mentioned in the Sheriff's deed." If the learned Judge was accidentally led to suppose that the passage which he puts in inverted commas was a true copy of the words of the deed, it is no wonder that he made the assumption that in the deed the piece of land was (as he says) "described as inclosed within fixed boundaries plainly described on the four sides."

The judgment of Mr. Justice *Meredith* is not open to the same remark. He discusses the question of the construction of the description in the deed, and

arrives at the conclusion that it was intended that the ledge of rocks should be the eastern boundary. The substance of his able reasoning on the point is contained in the following passage in his judgment: "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, 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. and D. K.' (the names of the purchasers) '1813;' and if the ledge of rocks were not referred to for that purpose, it must, I think, have been referred to as indicating the course of the line."

These observations of the learned Judge seem to present the arguments in favour of the respondent's view as clearly and as strongly as it is possible to put them. Those arguments will be noticed presently.

Mr. Justice *Mondelet* differed from his two colleagues, and thought the decision of the Superior Court ought to be reversed. The reason he assigns is, that the effect of that decision was to give the purchaser eighty-two acres instead of the fifty, or thereabouts, intended for him by the deed.

There being thus two members of the Court for affirmance, and only one for reversal, the decision of the Superior Court was of course affirmed. And from that decision the present appeal is brought.

The question what construction ought to be put upon the language of the description in the deed of the 3rd of March, 1813, in order to determine the eastern boundary of the piece of land thereby conveyed, is certainly one of considerable difficulty, and it is not surprising that there should have been a difference of opinion among the Judges of the Courts below. But, after full consideration, their Lordships are unable to concur in the conclusion arrived at by the majority of those learned Judges.

The language of the deed is extremely indefinite and ambiguous. It is impossible to say that it is quite incapable of the construction contended for by the respondent; but, on the other hand, we are of opinion that it is at least equally capable of the construction contended for by the appellant; and, upon the whole, we think that the latter construction is the one which best satisfies all the language of the deed. By the terms of the deed, the fifty acres of land, or thereabouts, intended to be conveyed, are to extend from the westerly boundary of lot 3 (which, it is to be recollected, is a straight line at right angles, or as nearly as possible at right angles, to both the southern and the northern boundary of the lot) and on the whole width thereof (that is, on the whole width of the lot,)

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and easterly to the foot of a ledge of rocks, &c.; that is, the portion of land intended to be conveyed is to extend from the western boundary line towards the east,—it is to extend on the whole width of the lot, which seems to imply that its width is to be the width of the whole lot,—and it is to extend eastward till you come to the foot of the ledge of rocks, and there you are to stop. Now, it is obvious that, if after first reaching the foot of the ledge of rocks as you proceed towards the east, the portion to be conveyed is carried on still further to the east, so as to make the ledge of rocks its eastern boundary, all that additional part which would be thus included would not be of the width of the whole lot; for in as much as the ledge of rocks does not run direct from south to north, but diagonally towards the north-east,—the width of that latter part of the portion, instead of continuing to be of the width of the whole lot, would be gradually diminishing in width until it terminated in a point at the north-east. It would be too much to say that the language of the deed must necessarily receive the construction, and that it is incapable of any other; but it is not too much to say that it is at least as capable of this construction as of the construction contended for by the respondent.

With respect to the argument, that if the parties had intended the eastern boundary to be that which is insisted upon by the appellant, the deed would not have been worded as it is, but that intention would have been expressed in clear and unambiguous terms,—that argument seems to bear not less strongly against the respondent's view; for it may be asked, with equal force, if the parties intended the ledge of rocks to be the eastern boundary, why did they not express that intention in clear and unambiguous terms. And with respect to the argument, that the careful description of the ledge of rocks running across the lot could only have been introduced for the purpose of indicating the whole course of the ledge of rocks as the line of the eastern boundary,—the answer is, that there was this sufficient reason for describing the ledge of rocks as running across the lot, namely, that (as appears from the map made by *Vaughan*, the surveyor appointed by the Court) there are other ledges of rocks in different parts of the lot which do not run across the lot, and therefore the ledge of rocks in question was described as running across the lot, in order that there might be no doubt which ledge of rocks was intended.

With respect to the argument founded on the mention of the hemlock tree as the south-eastern boundary of the portion intended to be conveyed, it appears to their Lordships that this mention of the hemlock tree as the south-eastern boundary, so far from supporting the respondent's view, affords a strong argument the other way. The position of this tree, the stump of which still remains, appears from the evidence to be near to, but a little to the west of, the ledge of rocks where it crosses the southern boundary. Now, if the ledge of rocks through its whole extent across the lot was intended to be the eastern boundary of the portion conveyed, why was the hemlock tree carefully specified as its south-eastern boundary? Why was not the south-eastern boundary to be the foot of the ledge of rocks where it runs across the southern boundary of the lot?

If the foot of the ledge of rocks was a sufficiently defined eastern boundary

throughout all the other part of its course across the lot, why was it not equally so at its extreme southerly end, where it crosses the southerly boundary of the lot? Why was not that (an imperishable object) to be the south-easterly boundary of the portion of land intended to be conveyed? Why was it thought necessary to select, as the object which was to mark the south-easterly boundary (*i.e.*, the south-easterly corner) of the portion of land intended to be conveyed, so perishable a thing as a tree? Why, indeed, was it necessary to specify any south-easterly boundary at all? Why was it necessary to specify a south-easterly boundary more than a north-easterly boundary?

It seems impossible to account for this careful specification of a particular defined spot as the south-eastern boundary, and the selection of a particular tree to mark that spot, consistently with the theory of the respondent, that the parties to the deed intended the ledge of rocks along its whole course to be the eastern boundary of the portion of land thereby conveyed. But if, on the other hand, we adopt the theory of the appellant, and suppose the intention to have been that the eastern boundary should be a straight line drawn from the southern to the northern boundary line parallel with the western boundary line, then, indeed, we see an obvious reason why it was necessary to specify a precise spot for the south-eastern corner of the portion of land, and why a tree was selected to mark that spot in preference to the foot of the ledge of rocks. For to enable a surveyor or engineer to draw such a line from south to north, it would be necessary to have some precisely defined spot from which the line should start, and that that spot should be marked by a precisely defined object, such as a tree, and not by such an indefinite and uncertain object as the foot of a ledge of rocks where it crosses a boundary line,—for a ledge of rocks does not (ordinarily at least) spring suddenly and perpendicularly from the ground, like a brick wall, so as to enable a person to lay his hand on any precise spot and say, that precise spot, and none other, is the foot of that ledge of rocks where it crosses the boundary line. The provision in the deed, that the hemlock tree should be the south-easterly boundary (that is, should mark the south-eastern corner) of the portion of land intended to be conveyed, is fully and reasonably accounted for if the appellant's construction be adopted; but quite unaccountable according to the respondent's view.

But suppose that, notwithstanding these reasons, the question, what the parties to the deed intended to be the eastern boundary, is still to be considered so doubtful, that neither of the two constructions contended for by the parties has any better claim to be adopted than the other, so far as any arguments can be drawn from that part of the language of the deed which we have hitherto dealt with,—still, even upon that supposition, there is one consideration which seems decisive in favour of the appellant's contention. It is a clear principle that if one part of a deed is so ambiguously worded that it is equally capable of two different constructions, one of which is in accordance with, and the other conflicts with, another part of the deed, about the meaning of which there is no doubt, the former construction must be adopted as the right one. And (as an instance of the application of the general principle) if, in a deed conveying land, the description of the land intended to be conveyed is couched in such ambiguous

Herrick, and Sixby.

terms that it is very doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one of which would make the quantity of the land conveyed agree with the quantity mentioned in the deed, and the other would make the quantity altogether different, the former construction must prevail. Applying that principle to the present case, the deed states the intention to be to convey "about fifty acres." The language of the deed with respect to boundaries is (for the present purpose) to be considered as equally susceptible of each of the two constructions contended for. The effect of the one construction is to make the portion conveyed fifty-one acres, that is, "about fifty acres," the quantity mentioned in the deed; whereas the effect of the other construction is to make it no less than eighty-two acres instead of "about fifty acres." According to the principle before referred to, the former construction must prevail.

Indeed it is impossible to read this deed, bearing in mind the nature and character and condition of lot 3 at that time, without feeling satisfied that the dominant idea and intention of the parties was, that out of this rectangular block of wild uncultivated woodland, which was known to contain about 140 acres, Captain *John Ruiter* should sell and convey to the two *Krauses* about fifty acres at the western end thereof, in consideration of 223 dollars. The question of boundaries was, to their minds, subordinate to that of the quantity. It is not like the case of a conveyance of a certain ascertained piece of land described precisely and accurately by its boundaries on all sides, adding a statement that it contains so many acres or thereabouts,—in which case, if it turns out that the quantity is incorrectly stated, it shall not affect the transaction. It is the case of a conveyance of a certain number of acres, or thereabouts, to be taken out of a larger block of land, and never yet measured off or ascertained, followed by directions, expressed in ambiguous language, as to the mode in which it is to be measured off. And, therefore, none of the authorities, or of the reasons which apply to the cases of clearly described boundaries, accompanied by an erroneous statement of the quantity, apply to the present case.

Their Lordships are of opinion that the construction contended for by the appellant is the true construction, and ought to be adopted.

The respondent went into a good deal of evidence in the Court below, with the view of proving that the possession and enjoyment had always been in accordance with the construction of the deed which he insists upon; but, upon examination, this evidence, so far from establishing a uniform, continuous, uninterrupted possession and enjoyment from the date of the deed, merely goes to show that during the later portion of the period which has elapsed since that date, some scattered isolated acts, few and far between, and not of any important character, nor satisfactorily proved to have been known to the owners of the eastern portion,—have been occasionally done by some of the owners of the western portion of the lot, upon that part which lies between the two boundaries asserted respectively by the appellant and the respondent, such as cutting some wood, or tapping maple trees for sugar,—acts which, in the opinion of their Lordships, can have no effect in determining the rights of the parties under the deed of the 3rd of March, 1813.

Merrick, and Staby.

The same evidence is relied upon by the respondent, to support an objection which he raises to the action, that the appellant is barred by the rule of prescription.

By the law of *Lower Canada* the time of prescription is thirty years. Now so far from proving (to use the language of his plea) "public, open, peaceable, uninterrupted possession and ownership for a period exceeding thirty years" of the part of lot 3 which is in controversy, no one of the occasional acts of ownership deposed to by the witnesses is proved to have taken place at a time nearly so far back as thirty years before the commencement of the action. The plea of prescription entirely fails.

Upon the whole, their Lordships are of opinion that the proper boundary between the two portions of lot 3, belonging to the appellant and the respondent respectively, is a straight line to be drawn from the hemlock tree before mentioned, on the southern boundary line of lot 3, across the lot, parallel to the western boundary line, up to the northern boundary line. They will, therefore, humbly advise Her Majesty to reverse the decision of the Court of Queen's Bench, and to remit the cause to the Superior Court of *Lower Canada*, with instructions to that Court to make such orders, and take such steps, as shall be necessary and proper to make and establish the boundary between the two portions of lot 3, belonging to the appellant and respondent respectively, by a line drawn from the hemlock tree in the manner before mentioned.

The respondent must pay the costs of appeal to the Court of Queen's Bench, and also the costs of this appeal.

Judgment reversed.

Manisty, Q.C., and *Wills*, counsel for the appellant.
Ashurst Morris & Co., solicitors for the appellant.
J. Westlake and *A. Aitken*, counsel for the respondent.
La Penotière, solicitor for the respondent.
(F. X. T.)

SUPERIOR COURT, 1865.

MONTREAL, 18TH SEPTEMBER, 1865.

Coram BERTHELOT, J.

No. 1351.

Tarratt et al. vs. *Foley* et al.

HELD:—That a rule for *Faits et Articles* on the plaintiffs, who by the declaration and writ appear to be residents in a foreign country, cannot be legally served at the office of the Prothonotary.

This was a rule for *Faits et Articles* on the plaintiffs, described in the writ and declaration as residing at Wolverhampton in England; the service whereof was made in the Prothonotary's office.

Tarratt et al. vs. Foley et al.

On the plaintiffs being called on the rule their counsel (who happened accidentally to be in Court) objected to any default being entered against the plaintiffs, on the ground that no sufficient service had been made of the rule.

Robertson, Q.C., for defendants, contended that the service was sufficient, under the provisions of the section 64, of chapter 83, of the Consolidated Statutes of Lower Canada.

The Court held the service insufficient, and recorded the following entry on the rule,—"Plaintiffs called—no default entered, the Court deciding that there "has been insufficient service of the rule upon them."

Rule discharged.

Strachan Bethune, Q.C., for plaintiffs.
A. & W. Robertson, for defendants.
(S. B.)

MONTREAL, 31ST OCTOBER, 1865.

Coram BERTHELOT, J.

No. 1351.

Tarratt et al. vs. *Foley* et al.

Held:—That where a writ of *commission rogatoire* has been addressed to six commissioners, of whom three have been named by each party, and the writ directs that *any two* of the commissioners may execute it, the execution of the writ by two of the plaintiff's commissioners, without explanation why the others did not join, is insufficient.

At the final hearing the defendants moved that the return to the *commission rogatoire* issued in the cause by the plaintiffs, be declared insufficient and the evidence taken thereunder be set aside, inasmuch as the commission purported to have been executed by two of the plaintiffs' commissioners without explanation or certificate that the other commissioners had been in any way notified to attend and had made default.

Per Curiam.—The writ authorizes the execution of the writ by *any* two of the commissioners, and consequently the exigency of the writ has been fully complied with. The motion of the defendants is therefore rejected.

Motion rejected.

Strachan Bethune, Q.C., for plaintiffs.
A. & W. Robertson, for defendants.
(S. B.)

IN THE PRIVY COUNCIL, 1866.

WHITEHALL, DECEMBER 14TH AND 15TH, 1866.

Coram SIR JAMES WILLIAM COLVILLE, SIR EDWARD VAUGHAN WILLIAMS, SIR RICHARD TORIN KINDERSLEY, J. J.

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

BARTHOLOMEW CONRAD AUGUSTUS GUGY,
Defendant and Opposant in the Superior Court,
APPELLANT,

AND

WILLIAM BROWN,
(Plaintiff in the Superior Court,)
RESPONDENT.

LOWER CANADA—OLD FRENCH LAW—JUDGMENT "avec dépens"—COSTS—TAXATION—ATTORNEY ACTING IN HIS OWN CAUSE, RIGHT OF, TO FEES.

By the old French Law prevailing in *Lower Canada*, an attorney acting as such in his own cause, and on his own behalf, is entitled under a judgment in his favour "*avec dépens*," upon taxation of costs, to the same fees as are allowed by the tariff to attorneys in all ordinary cases.

So HELD by the Judicial Committee of the Privy Council on appeal, overruling the judgment of the Court of Queen's Bench (on the Appeal side) in *Lower Canada*, and the authorities relied on by that Court for a contrary rule.

This was an appeal from a decree of the Court of Queen's Bench for Lower Canada, on the appeal side, dated 19th of December, 1862, which reversed a judgment of the Superior Court of the district of *Quebec*, of the 2nd of November, 1861, pronounced by a single Judge on a motion made by the appellant to review the Prothonotary's taxation of a Bill of costs under a prior judgment of that Court awarding him costs generally, "*avec dépens*."

The question raised and adjudicated upon in the Court below was, whether the appellant, who was an advocate and attorney of the Courts, having been a party litigant, and having appeared personally in Court, and conducted his own case, was entitled, under the last mentioned judgment, with reference to the practice and procedure of the Courts in *Lower Canada*, to have allowed on the taxation of costs, against the opposite party (the respondent) certain fees, charged by him in respect of services rendered to himself, as such litigant, in the professional character of attorney.

The taxing officer disallowed those fees; but the Judge of the Superior Court to whom the matter was referred by way of appeal, allowed them. The Court of Queen's Bench, on the appeal of the respondent against that order, revised, the same, adopting the view taken by the taxing officer, and affirmed his order made on taxation. It was against that decree that the present appeal was instituted.

The facts were not in dispute; and those necessary for the consideration of the question were as follows:—

On the fifth of January, 1859, the respondent, by a judgment of the Superior Court at *Quebec*, recovered against the appellant, in an action of debt, the sum of £166 currency, with interest and costs.

Gugy and Brown

On the twenty-fourth of January, 1859, a writ of *fieri facias* was issued out of that Court against the goods and chattels of the appellant, addressed to the Sheriff of the district of *Quebec*, and authorizing him to levy a balance under the judgment remaining unpaid. The return of the Sheriff, endorsed on the writ, shewed that the goods and chattels were seized by him, under the writ; but that he had been prevented selling the same by reason of a proceeding taken by the appellant, described as his "*opposition afin d'annuller.*" This opposition was dismissed with costs.

A writ of *venditioni exponas* was then issued to the Sheriff to sell the goods and chattels so seized. The Sheriff announced the sale, but afterwards made a return to the Court, stating that he was prevented from proceeding to a sale by reason of another "*opposition afin d'annuller,*" brought by the appellant.

On the fourth of September, 1861, the hearing of the last mentioned opposition took place before the Judge of the Superior Court (Mr. Justice *Taschereau*), when he delivered judgment, wherein he stated as follows:— "*Considérant que le demandeur en ne donnant pas crédit au dit opposant du* "*paiement de la dite somme de vingt-neuf louis quinze chelins, a agi contraire-* "*ment à ce qu'il devait faire, la Cour maintient la dite opposition afin d'an-* "*nuller le dit opposant, avec dépens contre le demandeur,*" &c., &c.

Under this judgment, the bill of costs in question was submitted to the Prothonotary and taxing officer by the appellant, who, on the [illegible] October, 1861, recorded the following minute and order in taxation of [illegible]: "The "opposant, *Bartholomew C. A. Gugy*, Esq., having presented his bill of costs "upon the foregoing judgment for taxation, he being the attorney exercising that "office for himself only, wherein he claims to be allowed the sum of £10 as and "for attorney's fees in the said cause; and also another fee of £1 10s. 0d. upon "the defence *en droit* therein adverted to, to both of which the plaintiff, by his "attorney, objecting, considering the ruling of Her Majesty's Court of Appeals, "bearing date the seventh of May, 1861, No. 873, *Gugy*, appellant, and *Fergus-* "*son*, respondent *, as follows, that is to say: 'With costs to the appellant in "'this behalf, as well as in the Court below as in the Court here, in the taxing "'whereof no attorney's or other fees upon any of the proceeding on hearings "'had in either Court shall be allowed to the appellant by his beinga practis- "'ing attorney, and of his having personally conducted his own defence.' It is "considered and ordered that the sums respectively of £1 10s. and £10 be, and "they are hereby severally disallowed, the said opposant being a practising "attorney, and having personally conducted the proceedings in the said cause to "which the said bill of costs relates; therefore, the rest and residue of the said "bill of costs is hereby taxed and allowed at the sum of three pounds fifteen "shillings and nine-pence currency (£3 15s. 9d.), and no more." The two items thus disallowed were described in the bill of costs as fees on *défense en droit*, £1 10s.; attorney's fee, £10.

The appellant appealed from this order to the Superior Court at *Quebec*, and prayed that the above taxation might be annulled, and the Prothonotary's decision

* 11 L. Can. R.

reversed, and that the fees allowed by the tariff and rules of practice of the Court be allowed to the appellant, upon the judgment in his favour.

On the second of November, 1861, the Judge of the Superior Court at *Quebec* Mr. Justice (*Taschereau*) delivered judgment in Appeal, and therein stated as follows*: "*Considérant que la taxe faite par le Protonotaire du dit mémoire "de frais est erroné et contraire au tarif de cette Cour, en ce que le dit Proto- "notaire a retranché du dit mémoire de frais les honoraires dûs au dit opposant, "sur le principe que le dit opposant, qui est un avocat et procureur pratiquant "devant cette Cour, a lui-meme singé son opposition et l'a lui-même conduite à "jugement; considérant qu'en loi un avocat a le droit de conduire lui-même sa "défense devant aucun tribunal et d'exiger les honoraires qui sont le juste sa- "laire de ses troubles et vacations, et qu'en cela la position de son adversaire ne "reçoit aucun préjudice, maintient l'a dite motion, et ordonne qu'il soit et il est "par ces présentes accordé au dit opposant une somme de onze louis dix chelins "pour ses honoraires sur la conduite de son opposition, en sus des autres items "formant son mémoire de frais sur la dite motion.*"

The respondent appealed from this decision to the appeal side of the Court of Queen's Bench for *Lower Canada*. The hearing of the appeal took place before the Justices *Aylwin*, *Meredith*, *Mondelet*, *Berthelot*, and *Badgley*, and on the nineteenth of December, 1862, the judgment of the majority (Mr. Justice MONDELET dissenting) was delivered, to the effect that, as by law and practice, no fees could be allowed to counsel and attorneys in cases in which they act as attorneys of record in the cause, there was error in the judgment of the Superior Court at *Quebec* of the second of November, 1861, by which the appellant had been allowed costs in his favour, and it was ordered and decreed that the judgment be reversed, set aside, and annulled; and it was also adjudged that the bill of costs, by which the sum of £11 10s. currency, was allowed, be rejected, and that the taxation of the Prothonotary be affirmed, with costs to be borne by the appellant, and the record was then directed to be remitted, in order that what law and justice might require under that decree might be done in the premises.

The judgment concluded by stating that, on the motion of the attorneys of the respondent, the Court granted them "*distraction de dépens* in this cause." The appellant applied for, and obtained leave to appeal to Her Majesty in Council from this judgment.

The appellant, Mr. *Gugy*, appeared in person:

First.—The appeal in this case was improperly entertained by the Provincial Court of Appeal, the appellate side of the Court of Queen's Bench. That Court has no jurisdiction to hear an appeal from the Superior Court when the amount in controversy is less than £20. The Canadian statute (Consolidated Statutes *Lower Canada*, ch. 77, sec 23, p. 648 9) enacts: "That an appeal shall lie to "the Court of Queen's Bench, as a Court of Appeal and Error, from any judg- "ment rendered by the Superior Court for *Lower Canada*, in any district, in "all cases where the matter in dispute exceeds the sum of £20 sterling, or relates

* 11 L. Can. R. 485.

Gugy and Brown.

"to any fee of office, duty, rent, revenue, or any sum of money payable to Her "Majesty, or to any title to lands or tenements, annual rents, or like matters "or things, where the rights in future might be bound, although the immediate "value or sum in appeal is less than £20 sterling." Now, here the sum at issue was only £11 10s. Canadian currency, between £9 and £10 sterling. It is true that the majority of the Judges of the Appeal Court held that the judgment complained of related to a fee of office, and was, therefore, within the exception provided for in the Act, and they held that the language of the judgment of the Superior Court, "*Considérant qu'en loi un avocat a le droit de conduire "lui-même sa défense devant aucun tribunal,*" &c., &c., warranted such conclusion. But I maintained there, as I do here, that the fees of office mean official fees strictly and literally, and not the charges allowed to attorneys for conducting their clients' or their own affairs. The appeal arises out of the words, "*avec dépens contre le demandeur,*" in the judgment of the 4th of September, 1861, which awarded costs against the respondent.

But the respondent did not appeal from that judgment, and is, therefore, bound by it. Now, fees are a part of the costs which were given by the judgment; the taxing officer, however, refused to allow the fees in question, referring to, as his authority, the case of *Gugy* v. *Ferguson* *; there the order expressly directed that no attorney's or other fees upon any of the proceedings should be allowed to the then respondent, by reason of his being a practising attorney, and of his having personally conducted his own defence. These were the special terms of the order, and, apart from the legality of such direction, which I question here—it being part of an order of the Court unappealed from—the taxing officer was bound to carry it into effect; but it formed no authority or decision on the subject, and was no warrant for such officer, in a totally different and distinct case, determining the meaning of "*avec dépens*," and thus constituting himself into a Court of Appeal from the judgment of the Superior Court.

There was another objection, which was also urged below, and was referred to by Mr. Justice *Mondelet*, who all along dissented from the other Judges, namely, that the case on appeal was merely one of taxation, and not against the judgment granting costs, and that the appellant's claim to particular fees could not arise on such an appeal, a ground of objection which I submit ought to have been held fatal to the appeal below. Assuming, however, that the question regarding these items of cost is fit for decision here, the question is, first, what law is applicable to the case? and, secondly, how does such law apply?

With regard to the first point, there can be no doubt that the old French law is the law which must govern the decision, for though there are many acts among the Canadian statutes relating to costs, and regulating the tariffs thereon, there is no Act which has prohibited an attorney from receiving fees for conducting his own case. According to the old law of *France*, attorneys could at all times conduct their own cases. *Pigeau, Procédure Civile du Châtelet; De l'Instruction* liv. ii., part ii. (Ed. *Paris*, 1779). This is a work of the highest authority on practice. *Le Parfait Procureur par Nöel Duval*, Tom. ii., par. ii. (Ed.

* 11 L. Can. R. 409.

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Lyons, 1705), another authority of equal value. In *France*, the Judges formerly assumed so much latitude in dealing with costs, and so much partiality in giving or withholding them, that many edicts and *ordonnances* were promulgated for the special guidance of the Courts on the question of costs; *Ordonnance of* 1667, *Tit.* 31, art. 1, "*Des dépens*," which but re-enacted a previous and very old rule: *La pratique judiciaire, &c., de M. Imbert, par M. Pierre Guenois et M. Bernard Automme.* Tit. "*De la condamnation des dépens, taxe et liquidation d'iceux*," p. 334 (Ed. *Paris*, 1623).

There are other Ordinances of earlier date to the same effect, which are collected and commented on in the same work, as those of *Charles* IV., 1324 and *Charles* VIII., 1493. Contrary to the rule that nothing could be granted which had not been claimed at the hands of the Court, it was held that the unsuccessful litigant should be condemned to pay costs, notwithstanding the omission of a conclusion to that effect.

A judgment without a condemnation to pay costs was deemed so iniquitous that the Judge who pronounced it himself was held liable for the amount. *Conférence de Bornier*, Tit. 31, "*des dépens*" (Ed. 1729); *Le nouveau praticien français par Rémi Gastier*, Tit. "*De la taxe des dépens*," p. 402 (Ed. *Paris* 1665); *La Jurisprudence du Code Justinien conférée avec les Ordonnances Royaux, les coutumes de France, et les décisions des Cours Souveraines, &c., par M. Claude de Ferriere*, Liv. vii., tom. 2, p. 193 (Ed. *Paris*, 1684); *Serpillon, Commentaire* sur l'Ordonnance de 1667, tit. 31, "des dépens," p. 563 (Ed. 1776).

Such being the old law of *France*, the question is, has the Statute law of *Lower Canada* introduced or enacted any alteration. Now, I contend, that there are no statutory provisions in the law of *Lower Canada* which prohibit attorneys from conducting their own causes, nor is there any tariff of fees, which excludes fees payable and allowed to attorneys, even in cases in which they act as attorneys of Record in the cause on their own behalf; Consolidated Statutes, ch. 83, p. 752; authorising Judges to make a tariff of Fees. This appears from the cases extracted from the Records of the Courts, and are unimpeachable; there are instances, ranging from the year 1839 to 1857, of attorneys being allowed and receiving fees as such, in cases in which they personally conducted their own causes, and it was not until the year 1861, in a case in which I was interested, that for the first time it was made part of the order for costs that my fees should not be allowed by reason of my being a practising attorney, and of my having personally conducted my own defence: *Brown* vs. *Guay**. Upon the authority of that order the Taxing Officer refused to allow my fees.

In the judgment in that case, Mr. Justice *Duval* relied chiefly on the authority of *Jousse*, citing the 2nd vol. of his *Justice Civile*, p. 460, No. 38.

That passage, however, applies not to the attorney, but to the advocate, who, by the old law of *France* could not recover his fees, though he might damages, by action. But the law is inapplicable, if an *Avocat* is a *Procureur*, as in *Lower Canada*, where every attorney is also an advocate.

*11. L. Can. R. 408.

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In the case of *Gugy* vs. *Fergusson*, *, which was before the full Court on the appeal side of the Court of Queen's Bench, the law, as well as the reason of the case, is so ably stated by Mr. Justice *Meredith*, that I crave leave to use his judgment as my argument; he says †; "As to the question raised in this case, and in several others, whether an attorney conducting his own case can recover fees in the same way as if he were acting for another person, I must say that it has presented some difficulty to my mind.

The tariff under our Statute, as has been remarked, is made for Officers of the Court; it may, therefore, be said, that if an individual, not an attorney, were to conduct his own case, he could not be awarded the fees contained in the tariff for attorneys; and it is further argued that a man cannot act as an attorney for himself, because in such a case no contract of agency can intervene. Still, it is undeniable that the defendant is an attorney, and that he has performed certain services in this cause, for which, when performed by an attorney, the tariff allows certain fees, and I really cannot see any thing in law, or in reason, to prevent the defendant, an attorney, from receiving the fees usually incident to the services which he so performed.

If the objection argued against the appellant be well founded, it ought to have as much weight in *England* as it has here; and yet we know it would not be maintained there.

The rule on this subject is: that where an attorney is a party to an action and obtains a judgment in his favour he is entitled to the same costs as if he had conducted the action as attorney for some other person, and not merely to the costs which another person suing or defending, in person, would be entitled to; *Archbold's* Prac., vol. 1., p. 48; and in support of this opinion Archbold there cites several cases. The French authorities are divided on the point. *Serpillon*, p. 565, declares that even a private individual gaining his own cause is entitled to full costs; whereas *Jousse* is of a contrary opinion. The practice in this country may, I think, be said to be in favour of the attorney.

The Prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief Justice *Sewell* fees in such cases were not allowed, but in the time of Sir *James Stuart* the practice was to allow them; that the last-mentioned practice has continued ever since; and he gives a note of four cases ‡ in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances, I think it doubtful whether any change in the practice as to this matter ought to be made; and that if a change was determined on, it ought to be made so as not to affect pending cases. Indeed, it would seem to me hardly just, that an attorney, having conducted his own case to the close without any objection on the part of his antagonist, or of the Court, should be informed at the last, that he could not legally do that which he actually had done

* 11 L. Can. R. 409. † Ibid. 419.

‡ No. 1417 of 1857, *Pentland* and *Smith*; No. 1959, *Stuart* and *Miller*; No. 2145, *Pentland* and *Bell*, 1859; No. 2147 *Pentland* and *Bell*, 1859; to which may be added Circuit Court, No. 1025, 28 June, 1851, *Cannon* vs. *Hemley*, also cited No. 2133 of 1586 *Allen* and *Gilbride*.

with success, in the presence of the Court. I, therefore, think the appellant ought to have his costs." It is true that the majority of the Judges in that case were of a different opinion, and that the attorney was refused his costs. But the reasoning of the learned Judge is so pertinent and forcible that I rely upon it as the strongest authority I could produce in my favour.

Mr. Leith, for the respondent:

The objections to the jurisdiction of the Court below—on the ground of value, and that the judgment for costs was not appealed from, but only the order on taxation of the officer of the Court, were disposed of conclusively by the Court of Appeal, that when fees of office were in contest, the rule regarding the appealable value did not prevail in the Court of Queen's Bench in *Lower Canada*, had already been decided in the case of *Chabot* v. *Sewell* * and an appeal allowed to Her Majesty in Council in the former case of *Brown* v *Gugy* † in which the order regarding costs was similar to that made here. The present appellant was then respondent, and had appealed for and obtained from the Court below leave to appeal from that part of the order refusing him costs as attorney in his own cause, but as he did not prosecute his cross appeal, no decision on the point was pronounced by this Court. Now, the learned Judges of the Court of Queen's Bench in *Lower Canada*, have very ably and very fully stated the law in the reasons they have assigned for their judgment, one of whom was Mr. Justice *Meredith*, whose opinion in *Gugy* v *Ferguson* ‡ has been so much relied on. Mr. Justice *Mondelet*, though he took a different view of the law from the other Judges, did not deny the correctness of the statements regarding the practice of the Courts, both of *Québec* and *Montreal*, being against the appellant's claim.

The sole question, then, is, whether by the law and practice in *Lower Canada*, fees can be allowed to attorneys in cases in which they are parties in the cause and act as attorneys. Now, I admit that this question is one for which there is not any express provision of law; but it is undoubted that there have been no less than four decisions of the Courts in *Lower Canada* directly bearing on the subject: *Chabot* v. *Sewell*, already referred to; the former case on appeal here of *Brown* v. *Gugy*, where the present appellant brought a cross appeal on the very same grounds as he appeals here now, but did not prosecute it, and, therefore, must be held as assenting to the judgment; and the case of *Gugy* v. *Fergusson* § which was decided upon a decision of three to two of the Judges of the Queen's Bench ‖. But I contend that the decision of this point of practice must depend entirely on the true construction of the ordinance of *Louis* XIV of April, 1667, Tit. 31, Art. 1; and the meaning of the "*dépens*" in that article, having reference to the *status* and character of an attorney, and the application of the established tariff of fees to an attorney acting in, and conducting his own cause. It appears that shortly after the conquest of *Canada* by *England*, attorneys and counsel were introduced into the colony, and an ordinance was passed by the then Governor and the Legislative Council, the 20

* 1 L. Can. R. 466.
† 2 Moore's P. C. Cases N. S. 341.
‡ 11 L. Can. R. 409.
§ 11 L. Can. R. 409.
‖ Ibid. 484.

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Geo. 3, c. 3, entitled, "For the regulation and establishment of fees," and a tariff of fees was accordingly established, which has since been varied and extended under the *Lower Canada* Statutes 41 Geo. 3, c. 7, and the 48. Geo. 3, c. 22.

Under these acts the tariff of costs as to attorneys is laid down. No fee is allowed to any party not an attorney, either as a plaintiff or defendant, acting in person. An attorney must, *ex necessitate*, be a person employed by another: *Spelman, Gloss*, Archæologicum, voce "*Atturnatus*," defines an attorney, "*que aliena negotia ad mandatum Domini administrat*;" and he refers to *Berault, Comment, de la Coutume réformée* de *Normand*. c 589. Mr. Justice Badgley, in the reasons given by him for his judgment, in this appeal, puts the case of the "*inscription en faux*," and the "*distraction de dépens*," both peculiar to the law of *Lower Canada*, as illustrating the impracticability of an attorney being entitled to fees as such when acting in his own cause.

In the former case he would require procuration from himself, and in the latter, the costs being adjudged, according to the practice of the Court, to the party in the cause, would be claimed by the attorney, to whom they are never *eo nomine* given; and he cites *Pothier, Traité du contrat de Mandat*, No. 135, vol. 4, tit. 10, and relies on the tariff of fees originally established by the Ordinance of 1667, and prevailing and in force in the *Lower Canada* Courts.

So far as the decisions in the Courts of *Lower Canada* go, the result of them is decidedly against the appellant, and even Mr. Justice Meredith, whose judgment he cites and relies on in *Gugy* vs. *Fergusson*, was one of the Judges composing the majority in the case we are now arguing, and concurred with the law as laid down and commented on by the two other Judges who decided the case with him. Upon all these grounds, I submit that the decree appealed against was just and proper, under the circumstances of the case, and with reference both to general principles of law, and the established practice and rules of procedure of the Courts of Lower Canada.

Judgment was delivered by SIR EDWARD VAUGHAN WILLIAMS.

This case is an appeal from the decree of the Court of Queen's Bench for *Lower Canada*, dated the 19th of September, 1862. By this decree a judgment, dated the 2nd of November, 1861, of the Superior Court of the District of *Quebec* was reversed. That judgment was pronounced by a single Judge (*Taschereau*) on a motion made by the present Appellant to review the Prothonotary's taxation of a Bill of costs which had been submitted to him to be taxed by the appellant, under a prior judgment of the last mentioned Court upon a proceeding called "an opposition," awarding him costs as against the Respondent generally, by the words "*avec dépens*." The question, and the only question, raised and decided in the two Courts was, whether the appellant, who was an advocate and attorney duly admitted therein, and had appeared personally in Court and conducted his own case as attorney on record, was entitled under the said judgment to charge in his Bill of costs, and to have allowed, on the taxation thereof against the respondent, certain fees claimed and charged by him in respect of his character of attorney.

Judge *Taschereau* decided in the affirmative; the Court of Queen's Bench in the negative.

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The rule for deciding this question, as it was said by *Lafontaine*, C.J., in *Brown v. Gugy* *, must be furnished by reference to the French and not to the English law, because the then existing French law was dominant in *Lower* Canada when it was conquered in 1759, and consequently that law continues to be dominant there, subject to any alterations which have been introduced by Legislative acts, or other competent authority.

It is necessary, therefore, to inquire what the old French law was, with reference to this subject.

On behalf of the Appellant several authorities were cited, the principal of which are "*Le Parfait Procureur*" †, *Pigeau*, *Ferrière*, and *Serpillon*. These are for the most part stated in the appellant's case, and referred to by Mr. Justice *Taschereau* in 11 *Lower Canada* Reports, 484, 485. And their Lordships are of opinion, in accordance with the opinions of Mr. Justice *Meredith* and Mr. Justice *Taschereau*, that the passages cited from these Books constitute a preponderance of authorities in the French law for allowing fees to an Attorney who appears as such in his own case. But it was argued for the respondent, that the old French law has, at all events, been displaced by modern authorities. It is certainly true that although in the case which is the subject of appeal, when in the Superior Court of Quebec, Judge *Taschereau* adhered to the old French law, and decided the case accordingly in favour of the attorney's claim (11 Lower Canada Reports, 483), yet on three earlier occasions the Court of Queen's Bench decided the contrary, in disregard of that law, and held that an attorney conducting his own case is not entitled.

Two of these cases were decided by a majority of three to two Judges in *Brown* vs. *Gugy* ‡, and *Gugy* vs. *Ferguson* §; and a third case of *Fournier* vs. *Cannon*, was cited by Mr. Justice *Meredith*, in his judgment in the present case, in which he himself and all the other Judges of the Queen's Bench appear to have concurred.

In the judgment now under appeal, Mr. Justice *Meredith*, although he thought it right to agree with the majority of the Court, declared that his own contrary opinion (expressed in *Gugy* vs. *Ferguson*) still remained unchanged; and Mr. Justice *Mondelet* agreed in that unchanged opinion, and differed from the other Judges of the Court.

Mr. Justice *Aylwin* appears to rest his judgment mainly on the argument that the tariff gives fees to attorneys only, and thus in effect denies them to parties who are not attorneys, and that a person who appears in person cannot call himself an attorney. In answer to this it may be observed, that an attorney who conducts his own case, and describes himself on the face of the proceedings not as a party suing or defending in person, but as attorney on record, accepts by that very act all the duties and responsibilities which the practice of the Court imposes on attorneys acting for ordinary clients. Mr. Justice *Meredith* founds

* 11 L. Can. R. 407.
† Ed. 1705.
‡ 11 L. Can. R. 401.
§ Ibid. 409.

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his judgment merely on the propriety of a Judge's deferring to the authority of adjudged cases. Mr. Justice *Badgley*, in substance, takes the same view as Mr. Justice *Aylwin*, with the addition that he relies on the circumstance that in the case of an attorney appearing for himself, inasmuch as in the proceeding by way of "*inscription en faux*" the law requires a special procuration from the party to his attorney, as the foundation of the proceeding, there would be an absurdity on taking such a special power of attorney from a man to himself; and further, that the proceeding by way of "*distraction de dépens*" would not be practicable, because the occasion for it could never arise. But their Lordships are constrained to observe that they cannot understand how these are good reasons for disallowing to the attorney his fees for services performed in the cause as an attorney.

It will be observed that in no one of these judgments is there any dealing with the authorities cited on behalf of the appellant from the old French law books in favour of the attorney's right.

The Judges do not at all deny that there are such authorities, or attempt to distinguish them. Mr. Justice *Duval* alone, in his judgment in the earlier case of *Brown* vs. *Gugy*, says that the opinion of *Serpillon* on this point is of little weight, being founded on faulty reasoning only, and quotes a passage from Jousse, as to the rights of *Avocats*, as a conflicting authority. But Mr. Justice *Meredith* observed (1), "That authority (Jousse) is not applicable here in *Canada*, where advocates are also attorneys. It must be recollected that in *France* the right of action for fees was not only denied to advocates, but such as claimed them were struck from the Rolls." And this appears to be the only authority which has been cited on behalf of the respondent from the French law books on denial of the attorney's right to fees.

With respect to the argument founded on the tariff of fees, the Court of Queen's Bench of *Lower Canada* is authorized by several statutes to make and establish tariffs of fees for the counsel, advocates, and attorneys practising therein. But the object of such a tariff appears to us to be, not to confer fees on any one, or to deprive any one of them, but simply to fix the amount of them for particular services done by such officers. If at the time of making the tariff an attorney acting for himself in a cause was, according to the authorities cited by the appellant, entitled to such fees as would have been payable to another attorney acting on his behalf, it surely was not meant by the tariff to alter the law, and deprive him of such fees altogether, but merely to regulate the amount to be paid to him. On this point their Lordships concur with the view taken by Mr. Justice *Meredith* in *Gugy* vs. *Ferguson* *, where that learned Judge says, "It is undeniable that the appellant is an attorney, and that he has performed certain services in this cause, for which, when performed by an attorney, the tariff allows certain fees; and I really cannot see anything in the law, or in reason, to prevent the appellant, an attorney, from receiving the fees usually incident to the services which he performed."

But it is intimated in the judgment of *Lafontaine*, C. J., in *Brown v Gugy*,

* 11 L. Can. R. 418.

and asserted in the judgment of Mr. Justice *Aylwin* in the present case, that the practice had been to disallow fees to attorneys conducting their own cases. And if this practice has been shewn to be uniform and long established it would certainly have gone far to prove that the old authorities were not be relied on.

But there appears to be some mistake on this subject; for it is said by Mr. Justice *Meredith*, in *Gugy v. Fergusson* * "The practice in this country may, I think, be said to be in favour of the attorney. The Prothonotary of the Superior Court, an officer of great experience, informs us that in the time of Chief Justice *Sewell* fees in such cases were not allowed; but that in the time of Sir *James Stuart* the practice was to allow them; that the last mentioned practice has continued ever since; and he has given us a note of four cases in which attorneys appearing in their own cases have been allowed their fees. Under these circumstances I think it doubtful whether any change in the practice as to this matter ought to be made, and that if a change were determined on, it ought to be made so as not to effect pending causes."

Whether the Court of Queen's Bench might lawfully alter the law under the statutory power confirmed by the Consolidated Statutes, c. 77, s. 15, to make and "establish such rules of practice as are requisite for regulating the due conduit of the causes, matters, and business before the said Court," it is unnecessary to decide; for the Court has in fact made no such rule, nor has the law been altered by any legislative Act, or other competent authority.

We, therefore, think it was the duty of the Judges of the Court to administer the old French law, and that they could not alter it, or decline to apply it, on grounds of supposed expediency, as they appear to have done in the judgment in the present case, and the preceding cases on which that judgment was founded.

For these reasons, their Lordships will advise Her Majesty that it should be reversed.

Their Lordships do not think it should be reversed with costs because the appellant had a full opportunity of bringing the point before this Committee, and of obtaining their judgment, when the former case of *Brown* v. *Gugy* was before them. † Had the present appellant then prosecuted his cross appeal, the question which is the subject of the present appeal would have been then decided. His neglect to do so has been the occasion of the costs of this appeal having been incurred; and their Lordships, therefore, think he ought not to be allowed them. ‡

Gugy, the appellant in person.

La Penotière, Solicitor for the appellant.

Clark, Son & Rawlins, Solicitors for the respondent.

Leith, Counsel for the Respondent.

(F. W. T.)

* L. Can. R. 418. † Moore's P. C. Cases (N. S.) 341.

‡ See the case of the Jersey Bar, 13 Moore's P. C. Cases, 275,) and the French Ordonnances there cited in note, as to the right of an avocat to fix the amount of his fees and to recover such fees by action.

(CROWN SIDE.)

MONTREAL, 3rd NOVEMBER, 1866.

Coram DRUMMOND, J.

THE QUEEN *vs.* THOMAS KENNEDY RAMSAY, *for Contempt.*

HELD:—That an Advocate who publishes in a public newspaper letters containing libellous, insulting and contemptuous statements and language, concerning one of the Justices of the Court, in reference to the conduct of said Justice while acting in his judicial capacity, on an application made to him in Chambers for a Writ of *Habeas Corpus*, is guilty of contempt, and may be lawfully convicted of and punished for such contempt by the Justice against whom the contempt has been committed.

This was a Rule for contempt against Thomas Kennedy Ramsay, described as "an Attorney, Counsel, and advocate, conducting the Crown business," before the Court, for having published two certain letters, "in the city of Mon-"treal, in the public newspaper known as the *Montreal Gazette*, in two issues or "numbers thereof, bearing date respectively on the 28th and 30th days of "August" then last past, "Signed T. K. Ramsay," and alleged to contain "libellous, insulting, and contemptuous statements and language concerning "one of the Justices of this Court, in reference to his conduct while acting in "his judicial capacity, in a certain case pending before him upon the petition "of one Ernest Sureau Lamirande, for Her Majesty's most gracious Writ of "*Habeas Corpus*."

The Rule was resisted on several grounds, the substance of which is the same as was urged by Mr. Ramsay in support of a Writ of error subsequently sued out, in the following words.

"1st, That the rule shews no offence known to the law.

2nd, That even if the rule did set forth a contempt, it was an offence which this Court, as now constituted, had alone the power to take notice of, at its term held from the 1st to the 9th days of September, and that this Court, as constituted, not having taken any notice thereof, the said pretended offence was passed over and condoned, and it was not competent for any single Judge of Assize, on the Crown side of this Court, afterwards to take up the said pretended offence, and to deal with it.

3rd, That as no man can be a judge in his own cause, and as Mr. Justice *Drummond* was himself the complainant, he was precluded from sitting or giving any judgment on the said rule.

4th, That the said rule does not allege that Plaintiff in Error wrote the said letters in question.

5th, That it is not alleged in the said rule where this pretended contempt was committed, and it does not appear that this Court has any jurisdiction in the premises.

6th, That the said pretended contempt not being in face of the Court, the rule should have been supported by affidavit, which it is not.

7th, That the said pretended rule was not under seal as required by C. S. L. C., c. 77, sec. 73; and the absence of seal in writs and process issuing out of this Court on the Crown side is not covered, as in the case of writs and process issuing out of this Court on the Civil side."

Drummond, J., said, that the Court would now proceed to give judgment in the case of the Queen against Ramsay, in which a rule had been issued for defendant to show cause why a writ of attachment should not issue against him for contempt of Court, in respect of certain articles bearing Mr. Ramsay's signature, which applied to articles written in the *Herald*, on the opinions expressed and observations made by him (Judge Drummond) on occasion of application for the writ of *habeas corpus* in the case of E. S. Lamirande. Any expressions made use of by him, although they might be severe, were not just cause for these letters of Mr. Ramsay, an officer of this Court. If the remarks were such as were calculated to wound the feelings of a person not too susceptible, they would certainly afford a palliation, but on reading over the articles he could find nothing in them to injure Mr. Ramsay's character or reputation. It could not be supposed that any imputation was made that he had falsified documents which were 120 miles off while Mr. Ramsay was here. He could understand how the thing had occurred, and it was much to be regretted. He understood that signatures were now put to papers before being filled up, which was not formerly the case, and great pains and expense would have been saved to have had papers [illegible], as for instance he himself, Attorney General, rather than resort to the irregular course now said to be pursued, had to employ the greatest haste to have papers completed when Lord Elgin was suddenly called away, which were sent after him by a special messenger, and signed by his Lordship in an inn on the Temiscouata road. But he never could have dreamt of accusing Mr. Ramsay of falsifying the document alluded to. If difficulty had arisen between the Court and Mr. Ramsay, it was because Mr. Ramsay, with his other high attainments, is possessed of remarkable volubility with tongue and pen, a great gift, a coveted gift, but one which required to be curbed. He had never known any representative of the Crown or the High Courts of Justice, before Mr. Ramsay, to rush into print to discuss the opinions or decisions of the Judges. It might have been done anonymously but he was not aware of it. He had been thirty years connected with the Bar, and during all that time he had never known of any of Mr. Ramsay's predecessors, amongst the illustrious dead, getting into an altercation with the Courts, or making use of disrespectful remarks with reference to the Judges either in or out of Court. The Stuarts, the O'Sullivans, the Ogdens, who have left behind them names ever to be remembered by the Bar and the people of Lower Canada, were never known to place themselves in opposition to the Courts before which they represented the Executive authority, but, on the contrary, they invariably set an example of the respect due to the tribunals of the country, and brought the influence of their high character to the judicial authority.

Since their withdrawal from the forensic arena, there was one case (the first case cited below) of a difference between the Queen's Counsel and the Judge, which showed certainly great susceptibility on the part of the bench, and perhaps some indiscretion on the part of Mr. Driscoll. But it showed how determined the Court was to prevent any infringement of the authority of the Court. It may be thought that in this case the Court was disposed to be rather severe, but every Court is the sole and best judge of its contempts. He would not have referred to this case had he not found in other reports some remarks spe-

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cially applicable to the present, and expressed in that terse, pointed and vigorous language so peculiarly characteristic of the style of his learned brother Judge, Aylwin. (His Honour then proceeded to read the passage which is cited below.) On this occasion the Court was adjourned for several days, apparently in the expectation that the Attorney or the Solicitor-General would appear to close the term, but as Mr. Driscoll again appeared, a rule for contempt was issued against him returnable in the term of October—some six months after—when all further proceedings were dropped. He had been highly blamed, and some persons were most anxious to have matters hurried on, without regard to the necessity that existed to show that the Court could not be accused of acting hastily, more particularly as the Court was composed of the same judge who was insulted, and who, therefore, should not proceed precipitately. It was not a case which should have to come before the Court of Appeal while engaged in Court matters. As connected with a criminal proceeding, it was appropriate that it should be disposed of by this Court. It would have satisfied some, if on the first day the Court had sentenced Mr. Ramsay to be sent to prison, or had suspended him. But what would have been the consequence? There were a hundred and twenty charges to be disposed of. There were Grand and Petty Jurors, witnesses and lawyers in attendance, all to be detained in idleness or in expectation for several days, because any other counsel taking Mr. Ramsay's place would have required seven or eight days to prepare for the efficient performance of his duties. The fact that, after the term has closed, four or five days have been required to dispose of the question, shows the wisdom of the course pursued. The opportunity of seeing the unexceptionable manner in which Mr. Ramsay behaved towards the Court was another advantage, as no one could have imagined that there was any difficulty till Mr. Ramsay's own case came up, when he rather lost his temper. The ability which he had shown, and the satisfactory manner in which he had conducted the business of the Court, were most gratifying. This made it the more painful for his Honour to perform the duty devolving upon him, and it was rendered more so since he believed that if at the beginning of the term Mr. Ramsay had reflected as he had done since, the matter would have been easily disposed of. Although it might be tedious, he would read a number of authorities, which was the more necessary as serious errors existed on the subject of contempts of Court even among lawyers, as for instance the belief that no contempt of Court could be committed except in the face of the Court, or when process was obstructed. This was a dangerous error, imported from the United States, but which had never gained an entrance into the Courts of this Empire. If ever there was a time in the history of Canada when the authority of the Courts should be maintained, and when every respect should be shown to the tribunals of justice by the people it was now, when they were called to enquire into the conduct of men who had invaded our soil in a fearful and most unjustifiable manner, and when a professedly friendly nation pretended to take on itself to sit in review on the action of our Courts. Another error was that Judges were not under the protection of the law while sitting in Chamber. They are protected by it in any judicial function, even, as he had already said, if sitting in the remotest backwood, writing an order on

the stump of a maple tree. Another error was that no contempt, unless committed within the precincts of the Court, could be punished, but even in the States, where the rules were much more lax than here, there were decisions to the contrary. As to the liberty of the press, no one could be more convinced of its blessings than he was. Its license only could destroy its liberty. It never was ruined unless when it was itself to blame. When gagged it would be found that it had almost invariably been instrumental to its own destruction. *Quem Deus, vult perdere, prius dementat.* The French press owed its restraints principally to the fact that for some years a large portion of it had been a source of demoralization and danger to the whole community. He trusted we would never see anything of that kind here. He did not refer to Mr. Lusignan, for generally the paper he conducts speaks respectfully of the Judicial authorities, indeed professed excessive zeal to maintain the authority of the Court, although he took a strange way of showing it. He had repudiated any desire to insult the Court, but there were various ways of telling a story, and his was ingeniously put. There was a case reported of an editor having been fined $10. But he had come up and apologised at once, a different case from Mr. Ramsay's. In his case the disapprobation of the Court should be the more strongly marked, not only of the offence, but because Mr. Ramsay was an officer of the Court, acting for the Crown, and representing the Executive of the country, leading to the belief that there was an antagonism between the Executive and the Judiciary, than which nothing could be more disastrous for the Executive. Judiciary and Legislature ought to work together harmoniously, and it will be found that the Judges have given every proper support to the Executive, while it is equally the duty, and it is no doubt the desire of the Executive to support the Tribunals. Mr. Ramsay's letters were calculated to make an impression on the public that this harmony does not exist. Mr. Ramsay did not come at first to acknowledge his fault, but when he has cooled he has at length come and made an ample apology.

Mr. Ramsay said he had made no apology. He had withdrawn all his statements, in view of the statements made by his Honour, but he was astonished to hear the word apology used. The written paper was in the hands of the Court. His Honour then read the statement handed in by Mr. Ramsay, which was as follows:—

In consideration of the declaration made this morning in open Court by Mr. Justice Drummond, to the effect that in his remarks with relation to the extradition of Ernest Sureau Lamirande in Chambers, on Saturday, the 25th day of August last, he did not say, nor did he intend to insinuate that the said Thomas Kennedy Ramsay was the party guilty of any conspiracy in the said affair, nor of the falsification of a public document alluded to in the said Judge's remarks, nor of any act of a nature to compromise his character, individually or personally, the said T. K. Ramsay withdraws whatever may be personally offensive to Mr. Justice Drummond in two certain letters published in the Montreal *Gazette* on the 28th and 30th days of August last, and bearing the signature of him, the said T. K. Ramsay, the said letters having been only written in answer to the remarks of the said Judge as reported in the *Herald* of the 27th and 29th

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days of August last, and the said T. K. Ramsay further regrets that he should have been induced by such reports to misinterpret the words, as also the intentions of the learned Judge.

(Signed,)

T. K. Ramsay.

Mr. Ramsay said it was an explanation and not an apology. His attention had been called before to his use of the word misinterpret, and that it might be turned against him. But he would not look at it in a narrow quibbling attorney spirit, or use any guarded expression which might even seem to throw a doubt on the sincerity of the retractation he had accepted. He had distinctly stated the course he would follow. He had distinctly understood that when that paper was put in the rule would be discharged. If the word explanation was used he would be satisfied.

His Honour said there could be no such thing as an understanding between the Court and him as to how a case was to be decided.

Mr. Ramsay said that in that case he would not have made the statement in writing. As a man of honour he understood that the statements made from the Bench were to be withdrawn, and that nothing affecting his character or honour was meant to apply to him. Public opinion had expressly pointed to him as denounced by the Court as guilty of a crime, and when His Honour expressed himself as having no intention to convey such a charge, was it possible to doubt his word? When he (Mr. Ramsay) wrote these letters he believed himself justified in so doing, and unless he had been a coward he would have acted as he did. His honour and character were every thing to him, and were the same thing to be done again he would do it. There had been too many characters written down in this country. He would take care that his was not. The day after any charge was made affecting his character he would take steps to put it down. But he never had and never would write anonymously; whatever he wrote would have his own signature.

His Honour said he would proceed with his judgment. Mr. Ramsay had expressed regret in writing at having misinterpreted the remarks of the Judge and that he had written the letters forming the charge under an erroneous impression. It was to be regretted that this was not done earlier, but Mr. Ramsay was absent, and had explained that previous to his absence he had intended to make an explanation. He was under an erroneous impression that when Mr. Ramsay had asked for three judges to sit he desired nothing to be done till they sat. Mr. Ramsay's statement, although it was late of being made, he was willing to take in mitigation of the sentence to be pronounced.—Had it not been for that it would have been his duty to have inflicted a severe punishment, as a warning to all to behave towards the Court or to write concerning it in a proper manner.—He was most unwilling to inflict injury on the feelings of any one, and had the statement of Mr. Ramsay been made earlier it might have enabled the Court to place matters in a more satisfactory position. The offence, however, could not be allowed to pass without severe censure, and some punishment.

The Court declared Mr. Ramsay guilty of contempt of Court, but in consi-

deration of the regret expressed by Mr. Ramsay for having written under a misapprehension, the sentence would be limited to a fine of £10.

Mr. Ramsay applied to have the words, "In consideration of the plea put in in writing," instead of those used by His Honour, which was agreed to. He then said that this judgment, if unreversed, he would look upon as the greatest insult he had ever received in his life, and no words made use of could soften his sense of the injury. For the amount of the judgment he did not care two straws, but the reflection conveyed in the sentence nothing could soften.

In the course of the delivery of his judgment His Honour referred to the following authorities, from which he cited at some length in support of his judgment:—

Law Reporter 1854, pages 27, 29, and 30, a case wherein the Court deemed itself insulted by the Crown officer, and declared that "as Mr. Attorney General is the highest of these officers when here, his representative would seem more eminently bound to give active aid to the Court in his absence. Instead of active aid the Court has experienced marked and offensive obstruction. If obstructions of justice and contumacious behaviour by inferior officers call down speedy punishment upon the offender, how can Courts shut their eyes and ears upon attempts openly made in the highest places to treat them with scorn and mockery."

Hawkins (P. C. 231, B. 2, C. 22, sec. 43, and do. do. 29, note to sec. 43) say, that" by contemptuous words or writings concerning the Court the party is punishable by attachment for contempt." A libel published in a newspaper in the form of an advertisement, reflecting on the proceedings of a Court of Justice, is, in the language of Lord C. Parker, "a reproach to the justice of the nation, a thing insufferable and a contempt of Court." V. A. Title, Contempt, p. 466, Pool *v.* Sacheverel.

Chitty's Blackstone's Commentaries, vol. IV., pages 285, 286 and 287. Petersdorff's abridgment, vol. VI., pages 108 and 114. Wreeks *vs.* Robbins. T. T. 1788, C. B. Ca. Pra. 132. 2 Rex *vs.* Unitt, T. T. 1724, K. B. 1 Stra. 567, S. P. Queen *vs.* Cross, M. T. 1702. K. R. 6 Mod. 43. 1 Anon, H. T., 1709, K. B., 1 Sal. 84, S. P. Morarvia's case, T. T. 1736, K. B. Ca. Temp. Hard. 135. 2 Ark. 469. Wilmot's notes of opinions, page 253 to 259. Also the same, page 97, showing power of Judges in vacation in Chambers. Ibid, page 265: "There is nothing in the Constitution of the Court which forbids the business of it being done by one Judge; for one Judge sitting in Court has the authority of the whole Court, and the libel upon him would be a libel upon the Court, in the strictest sense of the word, and certainly a libel upon a single Judge for an opinion given in court, controlled by the other three judges, though it could never be called a libel upon the Court, yet would be a contempt of the Court, and be proper for an attachment. And therefore, the question resolves itself at last into the single point, whether a Judge making an order at his house or chambers, is not acting in his judicial capacity, as a Judge of the Court, and both his person and character under the same protection as if he was sitting in Court. * * There is no greater obstruction to the execution of justice from

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the striking a Judge than from the abusing him; because his order lies open to be enforced or discharged, whether the Judge is struck or abused for making it." See Holt, Folio 15, Holt on libel, page 169, note, and 154–159. Hurd on *Habeas Corpus*, &c., pages 7, 9 and 412. Bishop on Criminal Law, 211, 212, 216 and 223. Kent's Commentaries, vol. I, pages 300 and 301. Holt on Libel, American edition, pages 173 and 174. The conclusions to be drawn from all these authorities are the following:—

1st. That the power to punish for contempt is inherent in all Courts, and is a necessary condition of their existence.

2nd. That under the public law of England transplanted into this colony at the time of the cession of Canada by France to the Crown of Great Britain, that power is not confined in this country to contempt in the face of the Court or to pending cases, or to resistance to process; but that it extends to the punishment of all contemptuous publications calumniating or misrepresenting its judicial opinion as a Court, or the opinion or orders of any Judge of the Court pronounced or made either in term or in vacation whether in chamber, at his own residence, or in any other place where, within the jurisdiction of this Court, he may be called upon to perform any judicial duty, and to all publications tending to cast ridicule or odium upon the Court or any of its Judges in reference to their judicial acts, or to impair the respect and confidence of the public in the purity and integrity of the tribunal or any of its members.*

Rule for contempt absolute.

T. K. Ramsay, in person.
J. A. Chapleau, Counsel.
(S. B.)

APPEAL SIDE.

MONTREAL, 9th MARCH, 1867.

Coram DUVAL, CH. J., AYLWIN, J., DRUMMOND, J., BADGLEY, J. MONDELET, A. J.

RAMSAY,

Plaintiff in Error;

AND

THE QUEEN,

Defendant in Error.

HELD:—That the proceedings on a Rule for Contempt, on the Crown side of the Court of Queen's Bench, do not constitute a *criminal case*, and therefore that a Writ of Error does not lie with respect to a Judgment rendered on such Rule.

This was a Writ of Error which had been taken out by Mr. Thomas Kennedy Ramsay, with respect to the judgment rendered against him by the Honourable Mr. Justice Drummond, on a Rule taken against Mr. Ramsay for contempt, as reported at page 152 of the present volume of the *Jurist*.

On the return of the Writ, the Chief Justice expressed a doubt as to the legality of such a Writ in a case for contempt, and required Mr. Ramsay to show cause why the writ should not be quashed, and Mr. Ramsay was accordingly heard at length in support of the writ.

* A writ of Error was subsequently sued out, which was quashed by the Court, on the ground that no such writ lies in respect of a judgment for contempt—REPORTER'S NOTE.

MONDELET, A. J., dissenting, said:—This case is one of vast importance to the interests of public justice, to the bar in the exercise of their whole profession, and to the public. Judges, it is true, must be protected in the discharge of their duties; but I cannot see that it is necessary for their protection to put an end to free criticism of their acts. If they are honest they have no reason to fear free discussion. At the present moment we have not to decide whether or not there has been a contempt of this Court. The only question is as to whether a Writ of Error lies from a contempt. Some authorities may be cited, perhaps, to show that there is no way of examining a judgment for contempt; but on turning to our Statute (C. S. L. C., cap. 77, Sec. 56) I find that a Writ of Error lies to this Court "in all criminal cases before the said Court on the Crown side thereof, or before any Court of Oyer and Terminer or Court of Quarter Session." Now the only question in the case now before us is, is this a criminal case? It must be either a criminal or a civil case. There cannot be any case which is neither the one nor the other. Cases are but of two kinds: civil and criminal, and the Writ of Error lies in both. How then can we create an exception? Is it because there are no cases in the English books? But that cannot control our Statute—the Statute constituting this Court. As for the argument of inconvenience, it wont do for me. It may be inconvenient to have a judgment revised; but it must be likewise very inconvenient to be sent to jail or fined illegally. But is there any such inconvenience? I have nothing to do with the definition of contempt to-day; but if anything is said on that subject I may have something to add. But whatever may be the nature of the offence, how can it be more inconvenient to allow a writ of error in the case of a contempt than of any other offence? To say that in cases of contempt a writ of error lies is not so utterly absurd as some would have us believe, for the Lords of the Privy Council have recently ordered a record in a case of contempt in British Guiana to be sent up on the petition of Lawrence McDermott, the publisher and printer of the *Colonist* paper who had been condemned to six months imprisonment by the Supreme Court of Civil Justice of the Colony for a contempt. I do not cite this case to show positively that the Lords of the Privy Council have decided that there is a right to appeal in cases of contempt, because they have granted the order without prejudice to the competency of the appeal; but I bring it forward to shew that the Privy Council has not laid down the doctrine that is about to be laid down in this case; but on the contrary, in so far as it has judged, it has leaned to a contrary opinion. But what can be the inconvenience of a party condemned coming before the five judges here, instead of being satisfied with the decision of one who may be his enemy, perhaps his political enemy, and asking them to decide whether the condemnation of the one is legal? Are we to answer him and say, not only we shall decide against you, but we won't even hear you? Is he to have no remedy but an impeachment? To say that there is no remedy in this constitutional country seems to me very strange indeed. Besides an impeachment is not a remedy for the injured party. It can only end in the censure or dismissal of the judge. How strangely does this case contrast with one which occurred here some short time ago? An enormous crime was committed, a crime that might involve the country in war. In that case the Court of Queen's

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Bench, as in Mr. Ramsay's case, the Court of Queen's Bench—for I will not commit the folly of calling it the judgment of Mr. Justice Drummond—gave an order as to the custody of the prisoners, and yet on *habeas corpus* a judge in Chambers declared that the order of the Court of Queen's Bench was null and void. If this could be done on *habeas corpus*, why not on Writ of Error? If the arbitrary doctrine is to prevail that there is no mode of reviewing a judgment for contempt, what becomes of the rights of free discussion, and the liberty of the press? We shall be in the same condition they are in France, for any Judge may say to Mr. Editor, you shall not write this or that." For myself I want no such privileges: not only as a citizen but as judge I invite the scrutiny of the public eye. If I am honest I have nothing to fear, and if I am dishonest the sooner I am found out the better. Apart from the rule laid down in our statute, and which, as I have shown, clearly gives the Writ, I shall show that the same doctrine is laid down by Blackstone.

"A judgment may be reversed *by writ of error*; which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamation; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the Court, or not duly describing where his county court was held; for laying an offence, committed in the time of the late king, to be done against the peace of the present; and for many other similar causes."

Blackstone, like our statute, does not particularize, but it was not necessary for him to do so. It is mathematically included; the whole contains its part, and it is not for me to cut off a segment of the circle, and to say that the whole circle is to be considered less the segment. Mr. Ramsay may have been right or he may have been wrong, but with that I have nothing to do at present. He has at all events done his best to have the judgment reviewed, and he is met by the answer, you have no remedy. In the case of Barsalou, I refused a rule for contempt, for I trembled at the idea of putting an arbitrary restriction on discussion; and if a libel had been published, there was another course—by indictment. Mr Marchand, when the judgment in this case is entered, you will also enter my formal dissent.

BADGLEY, J.—The learned Judge (Assistant Judge Mondelet) has not confined his attention to the sole technical point submitted for the decision of the Court, but has, in the expression of his opinion upon the circumstances and law of the case, taken the opportunity of enlarging upon the constituents of contempts in general, their relation to society as now constituted, and the law which he considers applicable to them, and in this view he has examined the simply technical question, and ... legal opinions upon the subject. It is with the purpose of guarding myself ... any supposed acquiescence in such opinion, that it is necessary to exam... matter somewhat in detail, and the more so, as the case has been ... the Court with a degree of warmth by the plaintiff in error, which is ... or frequently exhibited here, and which really does not

seem to have been necessary in the explanation of the case itself, or of the points of law upon which either the preliminary applications were argued, or those upon which this principal one was founded. The point presently submitted to the Court is confined within the comprehensive question put to the plaintiff in error by the Chief Justice—have you a Writ of Error in a case of this sort? or, in other words—does a Writ of Error lie in this case? It becomes, therefore, essential to ascertain what the case is, and the limit of the particular controversy, which can only be supplied by the record itself, and it must be examined for that purpose, because the Court cannot be influenced by facts or suggestions beyond it. The completeness of the record is assumed because no suggestion of diminution or falsification has been made; the information, therefore, must be taken from it alone, and the judgment of the Court must rest upon it. The reason for this close observance of the record is, that the matter for adjudication is a Writ of Error which, in strict practice, involves the examination and consideration not merely of formal but of substantial defects appearing on the record, or in other words, upon the judgment or other parts of the record; and if not going into the merits of the contempt itself, to ascertain at least if the judgment complained of is obnoxious to the influence of such a writ. A brief examination, therefore, of the record will be made, as also of the proceedings which led to the obnoxious judgment, only as explanatory of the nature of the subjects submitted, but without adjudging upon the merits of the facts and incidents upon which that judgment was founded.

In the last September term of the Court of Queen's Bench for this district, presided over by one of the judges of this Court, the Hon. Judge Drummond, a rule for attachment was issued by the Court against the plaintiff in Error—a member of this bar, and then conducting the Crown business before the Court—for a contempt alleged to have been previously committed by him in the publication under his name, in two numbers of the *Montreal Gazette*, both fyled of record, of libellous, insulting and contemptuous statements and language, concerning one of the Judges of the Court of Queen's Bench, in reference to his judicial conduct in a certain judicial matter before him, in those statements mentioned, and which it was charged tended to prejudice the administration of justice, &c., &c. The plaintiff in Error appeared to the rule, and after the rejection of his recusation against the presiding Judge, interrogatories were exhibited against him tending to identify him as the author and writer of those statements. The interrogatories were not responded to, but the plaintiff in Error produced and fyled of record an answer in writing to the rule for attachment, in which he set out a variety of objections in fact as well as law, against the proceeding, the relevancy or pertinency of which objections, or otherwise, it is not at present necessary to inquire into; but it must be observed, with reference to them, that whilst he declared that he did not admit his authorship of these statements, he at the same time declared that he did not deny his authorship of them, and after reiterating in his answer certain injurious expressions against the honorable judge with reference to the original proceedings out of which this affair arose, but for what sensible purposes such reiteration was

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made, it is impossible to understand, the plaintiff in error concluded by asserting his right to make those offensive statements. The plaintiff in error, after having fyled his elaborate answer, moved to quash the rule upon the grounds set out in his motion, which having been rejected by the Court, he subsequently produced and filed of record his declaration in writing, affirming that as the honourable judge had expressed his absence of intention to impute personal misconduct to him in the original matter, he (the plaintiff in error) withdrew his injurious and insulting statements against the honourable judge. This declaration was filed on the 2nd of November, and was succeeded on the following day by the judgment complained of, in which, as it may be briefly stated, the Court declared the plaintiff in error guilty of contempt and fined him to the amount of $40.00, and to remain committed until paid. It is manifest that the proceedings referred to above were in a matter of contempt, that the judgment was rendered upon such contempt and by a Court of competent jurisdiction entitled to cognizance of such a matter. It may be added that the proceedings were before a Court of Record, acting not according to the common law by a jury, but in a summary manner, according to the common law by attachment.

Upon this special submission then, the merits of the contempt do not fall within the province of this Court to express any opinion upon them, whether the publications referred to were libellous or not, or whether it was competent or not for the plaintiff in error to go beyond a just and temperate vindication of his assumed grievance; but it may be observed *en passant* that the language exhibited by him in those statements, and which it would be a breach of propriety to designate as either commendable or respectful at any time, would under any circumstance be offensive if addressed to any one, and would become peculiarly so when addressed in an unmistakeable manner and by name to a Judge of the highest Court in Lower Canada. It is not, however, the duty of this Court at present to consider that language judicially, nor to determine whether it tended to encourage a respect for Courts of Justice or for the Judges who preside in them; our duty is to determine whether this Writ of Error can lie to examine and consider the conviction of contempt.

Before proceeding to examine the main question, it is right to observe, with reference to some part of the procedure in this case, and only as a matter of professional practice, that when the contempt is of such a nature that if the fact which constitutes it be once acknowledged, and the Court cannot receive any further information by interrogatories, there is no necessity for administering them, if the defendant wish to be admitted to make such acknowledgment. Again, when the evidence of a contempt of Court is before the Court and the defence is palpable, a rule to shew cause why an attachment should not be issued is unnecessary. In such cases attachments may be issued in the first instance. The practice of taking a rule arose out of a distinction between direct and consequential contempts, and was resorted to when it became necessary to procure evidence not before the Court.

It has also been held that the use of abusive and impudent language towards a Court or any of the Judges thereof and contained in a petition for a rehearing, signed by the party in proper person and filed with the clerk, is a contempt, and

this though he is a licensed attorney. Upon the subject of the withdrawal by the plaintiff in error of his offensive statements; it has been held that when a writing is so clear of itself as to amount to a libel, the mere affidavit of the defendant that he had no intention of offering any contempt to the Court or Judge will not screen him from punishment. And so Holt on Libel, p. 22, Am. Ed., in which it is said that the Court did not consider the disavowal of the slanderer, as exculpatory; on the contrary, it was declared that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings, &c., &c.

It is quite unnecessary to enlarge upon the power admittedly vested in Courts of Justice to commit for contempts, a power which has never been disputed or questioned as being inherent in them under any system of civilized jurisprudence, and particularly under that of the common law of England; the books are replete with cases of that description, and judgments for contempt are very frequent. It would be waste of time to refer to the numerous law authorities which are at hand upon the subject, but a few may be referred to in support of the assertion. Hawkins in his Pleas of the Crown, says "that for contemptuous words or writings concerning the Court, the party is punished by attachment for contempt;" and he adds, with reference to this last class of cases, "it seems needless to put instances of the kind," so generally obvious to common understandings. Chief Justice Parker says, in reference to libel publications in a newspaper in the form of an advertisement reflecting on the proceedings of justice, that it is "a reproach to the justice of the nation, a thing insufferable and a contempt of Court." Blackstone says that some of the contempts may arise in the face of the Court, others in the absence of the party from it, *inter alia* mentioned by him, "by speaking or writing contemptuously of the Court, or Judges acting in their judicial capacity, by printing false accounts or even true ones, without proper permission, of causes then depending in judgment, *and by any thing, in short, that demonstrates a gross want of that regard and respect which when once Courts of Justice are deprived of their authority, so necessary for the good order of the State, is entirely lost among the people.*" Mr. Justice Wilmot, in his most logical and finished opinions upon the writ of *habeas corpus*, holds the same view, and he maintains "that this power is as ancient as the common law and the attachment a constitutional remedy." The Courts in the United States, resting upon the common law of England, entertain similar opinions, and are at one with the English authority as to the power of Courts to commit for contempt; the learning upon this matter will be found set out with great perspicuity in the 2nd vol. of Bishop upon Criminal Law, in which he has given cases and law as to the various kinds of contempt, those committed in the presence of the Court, those committed by officers of the Court not in its presence, those by parties and persons served with process and, finally, contempt in the absence of the Court by other persons: under which last head the author cites a case, which will be cited here, as somewhat analagous with the one in hand, with the difference that in the American case the language was verbal. The case occurred in Virginia, "where one being interested in the event of a pending suit, but not as a party, met the judge proceeding to take his seat on the bench, and on being spoken to by him, responded in substance, I do

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not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and defenceless—alluding to expressions of the judge on the trial of the cause at a former term. This was held to be a contempt."

Then assuming the existence of this inherent power in Courts of Justice to punish for contempt, is the judgment liable to be controlled by any other Court or Tribunal? and, as introductory to the answer to this question, it must be observed, that the constitution of this Court as such has been settled by statute law, which, in the organization of the Provincial Judicature, has established the Court of Queen's Bench as the highest judicial tribunal in Lower Canada, but has divided it into two jurisdictions, separate and distinct the one from the other, constituting it on the Civil side a Court of Appeal and Error in civil suits; and on the criminal side, constituting it an original criminal Court for the trial of criminal offences, and also a Court of criminal Error. As to the Civil side, the Legislature has provided for the disqualification especially of a judge from sitting in Appeal or Error, if he has sat on the case appealed from at the rendering of the final judgment, but has not extended this disqualification to the judges sitting on the Criminal side or Criminal Error. The Court, therefore, as at present personally constituted is according to the statute, and the proposed recusation by the plaintiff in Error of the judge who judged the contempt has been legally rejected.

This being so, it is proper *in limine* to inquire what is the nature of a judgment or conviction in contempt? It may be briefly answered that it is a judgment in execution, and, to speak more correctly, in immediate execution wherein bail is not allowed to be taken. This fact, that is the negation of bail, indicates as well the stringent nature of the judgment in itself as its immediate application to the party convicted by it, and whilst it sustains the inherent power in Courts to punish for contempts, it gives to those Courts the necessary power to determine the constitutents of the contempt adjudged to be so. It was held in Brass Crosby's case, 3 Wils, 188, that the adjudication for contempt is a conviction, and the commitment in consequence is execution, and no Court can discharge on bail a person that is in execution by the judgment of any other Court. This doctrine, which has not since been interfered with in England, has also been sustained in the United States, and so held almost in the same words by Story, J., in the case of Kearney in the Supreme Court, 7 Wheat. 43, following Crosby's case, and likewise maintained in many other reported cases. Hence from the mere reason of the thing, it is a plain consequence, that contempts would necessarily fail of their effect and the authority of Courts of Justice would become contemptible if their judgments could in such matters be subjected to revision by any other Tribunal. It has been very strongly urged that this power from its very nature must necessarily be independent of all other tribunals; for if it depend upon another whether a punishment can be inflicted or not, that very dependence defeats and overturns it. The insulted judge must go to law before some other tribunal with every one whom his decision offends, and leaving his own duties in his own Court, must attend upon other Courts and before other Judges, who may not be disposed to discourage the contempt because it was not done actually in *facie curiæ* according to the opinion of Judge Mondelet; and it might happen that the proceedings might be set aside and quashed, and the

judgment arrested or reversed and therefore would require the proceedings themselves to be commenced again, and similar difficulties encountered. Under such a state of law, no one would be afraid to offend; the delay of punishment and the manner and chances of escaping it, would disarm the expected punishment of all its terrors, nor could the insulted Court or Judge ever think of an attempt to cause the infliction of punishment under so many discouragements. It would be idle for the law to have the right to act, if there be a power above it which has a right to resist, and hence the right of the law as enforced by a legal tribunal would be only anarchy and contention. In no case whatever of a criminal nature is it sufficient to get rid of the mere act. Penal law and every thing which by its reason is within penal law, is always made up of two things: satisfaction for the present act, and security for the future; in other words a remedy and a penalty. So, in the same manner in all contempts, the fine upon, or the imprisonment of the person, at once abates the contempt and punishes it. How could there be either a remedy or a penalty, if the judgment of contempt was subject to review by any other tribunal? Apart from this most conclusive reasoning, no cases can be found in which other tribunals have interfered with such convictions of other Courts, whilst on the other hand numerous direct authorities are to be found the other way. Brass Crosby's case has already been adverted to which settled that point many years ago in England, and American Authorities are at one with the English decisions. Mr. Justice Blackstone says, "the sole adjudication of contempt and punishment thereof belongs exclusively and without interfering to each respective Court. Infinite confusion and disorder would follow if Courts could examine and determine the contempt of others." It would be waste of time to make more citations, but Hurd on Habeas Corpus may be referred to at page 412, where he lays it down "that the right of punishing for contempt is inherent in all Courts of Justice and essential to their protection and existence. A commitment under such conviction is a commitment in execution, and the judgment of conviction is not subject to review in any other Court unless specially authorized by statute." And in *Morrison* vs. *McDonald*, 8 Shep. 550: "There can be no revision, either by appeal or certiorari of the judgment of a Court of record for imposing a punishment for a contempt of the Court."

It is quite true that this Court on the criminal side, has jurisdiction over all crimes and criminal matters to the extent contemplated by the criminal laws of England, introduced and established by statute here, by the Imperial Act of 1774 and as amended by our own Legislature. It has also somewhat recently been constituted by statute a Court of Error in criminal cases, and also authorized to settle and determine reserved points of criminal law; but apart from these later statutory powers, our Court of Queen's Bench has no appellate criminal jurisdiction: the common law of England, from which it derives its chief criminal powers, cannot be made to affirm the legal existence of Writs of Error in convictions for contempts, from its simply being ignorant of their existence in such cases; or, in other words, because no authorities can be found to say that in cases of contempt there is no Writ of Error. This negative argument is of no force. The legal existence of

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such a writ requires to be derived from affirmative authorities; but of these there are none, and this Court cannot without such authority of itself initiate such a proceeding.

Archbold, however, tells us, that no Writ of Error lies upon a summary conviction, and that it only lies on judgment in Courts of Record acting according to the course of the common law. Now, Blackstone lays it down that the proceeding in contempt is in all cases summary before the judge without the intervention of a jury, and it was held long ago in England, and that ruling has since existed in its integrity, "that it was against the nature of a Writ of Error to lie on any judgment, but in causes where issue might be joined and tried, or where judgment might be had upon demurrer." This was the case of the King *vs.* Dean and Chapter of Trinity Chapel, Dublin, 8 Mod. 27, and upon Writ of Error brought into the House of Lords, all the judges of England being of opinion that the decision was correct; the judgment of the King's Bench was affirmed, 2 Bro. p. c. 554. And Kent upon this doctrine says, "the principle is of immemorial standing. It has stood the test of two centuries as an incontrovertible principle without a precedent or doctrine to oppose it. To overthrow it would be to tear up the common law by the roots." It is therefore fair reason as well as law to hold against the Writ of Error lying in this case.

Judge Mondelet has referred in support of his views of the matter to the recent McDermott case before the Privy Council in England, in which Mr. McD., the editor of a newspaper at Georgetown in British Guiana, had been subjected to six months' imprisonment on a conviction in contempt for publishing in his newspaper what the judgment of conviction has affirmed to be scandalous, reflecting upon the Court and the administration of Justice. That reference does not apply to this case in any particular, and even McDermott's counsel before the Judicial Committee of the Privy Council calls it a case of peculiarity, and as such entreats the Court to permit the issue of the Appeal. And so think the Judges of the P.C., who say that they would give leave to appeal, but would reserve to themselves the right to consider whether the appeal was allowable.

Judge Mondelet has also in the expression of his opinion upon this special *delibéré* indulged in observations upon the subject of the protection due to the liberty of the press. It is difficult to discover how that subject can be brought into this matter, but certainly at this day it cannot be denied that the liberty of the press should be supported, particularly with reference to proceedings in Courts of Justice and the judicial acts of Judges: these are clearly public property, but in giving them extensive circulation, and in commenting upon them, the public journalist should bear in mind that his comments and even his criticism should be expressed in civil and temperate language, which, whilst giving public information, would not tend to bring the administration of Justice into contempt.

AYLWIN, J.—In this matter of contempt, there is not to be found one single case in the legal records of England, nor anything in the books, of a writ of error. It is now for the first time that the Attorney General has consented to a writ in such a case. The judgment of the Court is that as the writ has been issued illegally and improperly it must be quashed.

DUVAL, C. J.—The law of discretion is the law of the t[illegible] a judge who relies on that law is a tyrant on the Bench. On the oth[illegible] if a judge respects the law of the land, his decisions will be respected. Otherwise a judge might indulge term after term in improving on the criminal law of England. One day he might say that there was no capital punishment, and another, that there was a writ of error in cases of contempt, although there has not been a single case cited. We are to be guided by the criminal law of England. Our own statute has made no difference. What is the criminal law of England as stated on this subject? That every Court must be the judge of its own contempts. Blackstone, already referred to, in treating of contempts, says that the judgment of the Court is be to carried into immediate execution. And if so, how can there be a writ of error? A man, for instance, is sent for twenty-four hours to jail. He suffers the punishment before he can get his writ of error. There is not a single case in the English law that can be referred to in support of such a pretension. In the case of McDermott, communicated to the Lower Canada Law Journal, we are told that different rules were laid down. On the contrary, Lord Westbury distinctly said the Committee would reserve to themselves the right to consider if the writ was allowable. Here we have heard the gentleman, and what do we tell him? We tell him this: We cannot find any authority which would justify us interfering in this case. We are told that if in England there is no writ of error, there is one by our own criminal law. On what is that founded? Most assuredly the intention of our legislature was not to introduce anything new in this respect. Our Statute says there may be a writ in all criminal cases. Let us see if we have no interpretation of this in England. Has not the Court of Queen's Bench jurisdiction in all cases? Do not the English Statute and English common law give the Court of Queen's Bench the right to take cognizance of all criminal cases? Then why should contempt be embraced here any more than in England? There is nothing in the statute to show that it was the intention of the Legislature to go beyond the English law, and we are therefore bound by the English decisions. It was said you could get your remedy by *Habeas Corpus*, and why not by a writ of error? But the two things are as distinct as can be, and it does not at all follow that because a judgment can be reviewed on writ of *Habeas Corpus* that it can also by a writ of error. It was idle to put such a question. We follow precisely the rule laid down in England, we follow the decision in the McDermott case, for whatever the Privy Council may do hereafter in that case, we cannot exercise the power used there in this country. It is very consolatory, however, for us to know that if we are wrong our refusal does not deprive the party from going before the Privy Council. For my part I solicit an appeal. I wish the question to be decided; but having looked at the case dispassionately, I can come to no other opinion, and I have not heard one principle of law laid down to-day militating against the judgment of the Court. I do not argue from considerations of convenience; but from principles of law, and if we are wrong, we can be set right by an appeal to the Privy Council. Possibly it might turn out that the Privy Council, granting the writ in the McDermott case, would refuse it in this case, for I see a great difference between the two cases. I stated the other day that I thought there was a Statute that

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granted the right of appeal in cases where penalty exceeded £100. I find that such is the case (Con. Stat. Lower Canada, cap. 105, clause 6.) The power is given, though I do not remember any appeal having been brought before the Council. The judgment of the Court is that the writ having been issued illegally and improperly, must be quashed.*

Writ of Error quashed.

T. K. Ramsay, in person.
(S.B.)

SUPERIOR COURT.

MONTREAL, 31st MARCH, 1866.

Coram BERTHELOT, J.

No. 2299.

Panton et al., vs. *Woods* et al.

HELD.—That an exception of discussion which fails to indicate the property to be discussed, or to allege even the existence of property liable to discussion, and which also fails to contain an offer to defray the expense of discussion, and to be accompanied by the actual deposit of the necessary funds to that end, is bad in law and will be dismissed on demurrer.

This was a hearing on law. The action was brought on a letter of guarantee, and one of the defendants (the surety) fyled an exception of discussion, to which the plaintiffs fyled an answer in law, assigning the following reasons of demurrer:

"Because the said exception wholly fails to allege, that at the time of the institution of this action, or even of the fyling of said exception, the defendant, William H. Woods, was possessed of any goods or chattels, lands or tenements, liable to discussion, and out of which the plaintiff's claim might or could be realized either in whole or in part.

Because the said exception wholly fails to indicate any goods or chattels, lands or tenements, belonging to the said William H. Woods, and liable to discussion, out of which the plaintiff's claim might or could be realized either in whole or in part.

Because the said James Moir both wholly failed to deposit in the hands of the Prothonotary of this Court a sum of money sufficient to defray the expense of discussing the goods and chattels, lands and tenements (if any) of said William H. Woods, or any sum of money whatever to that end.

Because the said exception wholly fails even to offer to pay any such sum of money or in any way to defray the expense of such discussion."

The court sustained the demurrer and dismissed the exception with costs.

Exception dismissed.

Strachan Bethune, Q.C., for plaintiffs.
Cross & Lunn, for defendant *Woods*.
(S.B.)

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*Mr. Ramsay moved for leave to appeal to Her Majesty in Her Privy Council, but the application was refused.—*Reporter's Note.*

COURT OF QUEEN'S BENCH, 1867.

MONTREAL, 8TH JUNE, 1867.

In appeal from the Superior Court, District of Montreal.

Coram DUVAL, C. J., AYLWIN, J., DRUMMOND, J., BADGLEY, J., MONDELET, A. J.

JOHN HAROLD,

(Plaintiff in the Court below,)

APPELLANT;

AND

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF MONTREAL,

(Defendants in the Court below,)

RESPONDENTS.

CITY CORPORATION—LIABILITY IN DAMAGES FOR NEGLIGENCE IN CONSTRUCTION OF WORKS BY SERVANTS OR CONTRACTORS.

It was proved that the respondents had been guilty of negligence in the excavation and construction of works which they were authorized by law to make.

HELD.—1st. That they were liable in damages for their own acts of negligence and for those of the contractors working for them.

2nd. That the declaration made by the respondents in protests made by them against the contractors would be taken as evidence against the respondents of the acts complained of by the appellant under Consol. Stat. L. Can. Cap. 73 S. 27.

The factum of the appellant contained the following statement:—

In the year 1862 the respondents constructed and laid a main sewer through the greater part of McGill Street. The work occupied a long and wholly unnecessary time; the sewer was so constructed that the street was for a long time blocked up with mud and excavated earth; traffic was impeded, and the appellant's business, as a shoemaker, in the street, greatly interfered with. His receipts diminished, and his customers went elsewhere. For the damage he sustained he seeks redress, and the judgment of the Superior Court, which dismissed his suit, is, he contends, contrary to law, and the *considérants* thereof ignore the evidence adduced which conclusively proves the negligence of the respondents, and the damage suffered by appellant.

The plaintiff, in his declaration, sets up the lease to him of property in McGill Street, his payment of rent and taxes for the same; his carrying on trade there; the obstruction of the street by defendants, "who made large excavations in the said street, and heaped and piled up large quantities of earth "taken out of such excavations in and upon the said street," and kept part thereof obstructed and closed up, for an unreasonable and unnecessary length of time, and thereby prevented the plaintiff from carrying on trade in as ample and beneficial a manner as he had been accustomed to, and thereby the plaintiff lost profits and sustained injury to the amount claimed. By another count the plaintiff varies his case by setting up use and occupation instead of lease, and he concludes for $10,000 damages.

The plea was the general issue.

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The plaintiff was the largest retail dealer in boots and shoes in the city; had a first-class stand on the west side of McGill Street, on the Mills' property, between St. Joseph and St. Maurice Streets; McGill Street being the greatest thoroughfare in the city, especially on the plaintiff's side. He paid $1,000 per annum rent, assessments $87, and business tax $48.

The defendants determined to construct a large tunnel from St. Ann's Market, through McGill Street to Craig Street.

They had a first contract with Patrick White, dated 7th July, 1862, by which he undertook to finish the work by 1st December, 1862. The following clauses deserve attention in connection with the evidence.

The sides of the excavation shall be supported with suitable timber wherever necessary, and the contractor shall be held responsible for all damages arising from slides or slips of the earth at the sides of the excavation.

In case of running sand or treacherous ground, the work shall be proceeded with day and night, without interruption; and the counter shall be laid in a timber cradle to the satisfaction of the City surveyor, if so required by him.

The contractor shall, at his own expense, shore up, sling, protect, alter, divert, restore, and make good, as may be necessary, all water pipes, gas pipes, sewers, drains, buildings, fences, or other properties which may be disturbed or injured during the progress of the work; he shall also keep a sufficient fence and number of lights and watchmen on the work at night to prevent accidents, and shall be held responsible for all damages or accidents which may in any manner occur from his work.

The contractor shall deposit the excavation from the work, and all materials required for the work, in such a manner as not to interfere with the traffic of the streets.

White began the work in June, some of the witnesses say, opening up holes here and there in McGill Street, commencing the construction of the brick work of the tunnel at St. Ann's Market.

Before the 2nd September, 1862, White had so much obstructed McGill Street with his work, and was using so little despatch, that the defendants served upon him a protest (2nd September, 1862, Ross, N. P.), in which they use the following language:—

That the works are not proceeding to the satisfaction of the City Surveyor, too much of the street being obstructed by excavations, and earth from excavation, at the same time, while there are not one fourth bricklayers as are required to push on the work as it should be done, according to contract.

Matters did not improve, and the defendants served another protest upon White (29th October, 1862), in which they use the following language:—

And whereas the said Patrick White hath made default in fulfilment of the said deed of contract, inasmuch as that he has deposited excavation in McGill Street, aforesaid, in such a manner as to interfere with the traffic of the said McGill Street; and furthermore, that the work is not progressing to the satisfaction of the Road Committee and City Surveyor;

We, the said Notaries, at the aforesaid request, do hereby notify the said

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Patrick White that, unless he does, within twenty-four hours from the date hereof, remove the said excavation, and push on the work to the satisfaction of the Road Committee and City Surveyor, &c.

The work was shortly afterwards taken out of White's hands by the defendants, who made a new contract with Valin and Barbeau, containing the same stipulations as the one with White, excepting that Valin and Barbeau had till the 15th January to finish.

When Valin and Barbeau began, White had constructed 625 feet, and on the 20th December, when Valin and Barbeau suspended for the winter, McQuisten, City Surveyor, says that they had proceeded 152 feet further, and were then 60 beyond, or north of plaintiff.

Valin and Barbeau's work caused much damage by being insufficiently supported in the construction, the banks of the trench, 22 to 24 feet deep, being insecurely shored by side supports, and in consequence giving way under the superincumbent earth.

On the 28th July, 1863, the defendants served another protest upon Valin and Barbeau, in which they state several facts which fully admit the gravity of the plaintiff's grievances.

That the work they bound themselves to perform in a solid and workmanlike manner, in constructing sewer in McGill Street in the said city, and as set forth in the specifications thereunto annexed, has not been done according to said contract, inasmuch as in consequence of the defective and insufficient work of the sewer or tunnel in that section of the work between Notre Dame and St. Paul Streets, it has become necessary for a long time to repair that part of the said sewer or tunnel; that the work generally has not been done according to contract, and in a workmanlike manner.

That the said works are not carried on with due diligence, according to contract.

We, the said Notaries, at the aforesaid request, do hereby notify the said Nicholas Valin and Joseph Barbeau, severally, that they must make the repairs to the said tunnel or sewer with diligence, and continue the rest of the work without delay and intermission; and should they not comply, that then and in such case, within twenty-four hours from the date hereof, the said City Surveyor or Road Committee shall employ other parties, purchase materials, &c., to push on the work, the expense of which shall be charged to the said Nicholas Valin and Joseph Barbeau.

And furthermore, we, the said Notaries, at the aforesaid request, do hereby make known unto the said Nicholas Valin and Joseph Barbeau; that after repeated notices given by the City Surveyor, to them, the said contractors, to repair the said tunnel and fill in the excavation, they have done nothing, and part of the said McGill Street is obstructed on account of the said open excavation since several months, so that the residents of said McGill Street have complained already and may hereafter suffer damages which they will claim from the said Corporation, or from the said contractors.

According to their contract, Valin and Barbeau were to have done 975 feet in

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10 weeks. They did 152 feet in 7 weeks, two-thirds of which had to be done over again.

The evidence fully supports the plaintiff's case and shows as well the negligent manner in which the work was done as the injury the plaintiff sustained.

Damages to plaintiff in his business were proved as follows:—1. Falling off of business sales. 2. Depreciation of stock from remaining unsold. 3. Destruction of business.

The following was the judgment rendered in the Superior Court.

The 20th September, 1865.

Present:—The Honourable Mr. Assistant Justice MONK.

The Court having heard the parties by their respective Counsel, upon the merits of this cause, examined the proceedings, proof of record, and having maturely deliberated, considering that it is not proved by sufficient evidence that the defendants were at any time, during the excavation and construction of the works mentioned in the plaintiff's declaration and the evidence in this cause, guilty of negligence or of any acts rendering them, in law, liable for the damages or any part of the damages claimed by the plaintiff's action; but on the contrary, it appears by the evidence, that defendants used all possible care, diligence and expedition in the making and completing said works; considering, moreover, that the plaintiff hath not proved any damage for which defendants can, in law, be held liable, the Court doth dismiss the plaintiff's action with costs, *distraits*, in favour of Messieurs Stuart and Roy, the attorneys of the said defendants.*

R. Roy, Q. C., for the respondents argued, as follows:—

En mars mil huit cent soixante et trois, l'appelant institue contre les Intimés une action en recouvrement de $10,000, pour l'indemniser des pertes qu'il prétend avoir souffertes par leur faute, et il allègue qu'il faisait commerce de chaussures, rue McGill de cette ville, quand les défendeurs, dans l'été et l'automne de mil huit cent soixante et-deux, ont fait construire un EGOUT ou TUNNEL dans cette rue; que ces travaux ont été exécutés avec négligence et d'après un mauvais système, que la rue a été inutilement encombrée et obstruée par les dits travaux, surtout en face de la boutique de l'appelant, pendant un temps assez considérable; que la circulation dans cette rue est alors devenue difficile, et que son commerce en a souffert au montant de la somme qu'il réclame.

Les intimés ont plaidé à cette action que les faits invoqués par l'appelant étaient controuvés; que les travaux, qui étaient d'un intérêt public, avaient été

AUTHORITIES OF PLAINTIFF.

* Sedgwick on Damages, p. 136. In an action for damages for obstructions, which hindered plaintiff in his business as the keeper of a refectory and lodging house, and diminished his custom, loss of custom and of profits are the measure of damages, and the mode of computing the damages, by proof, of the actual receipts of plaintiff's hotel, for a sufficient period previous to the obstructions, the actual receipts during the continuance of the obstructions, and the receipts after the obstructions were removed. St. John v. the Mayor, &c., of N. Y. 13 How. pp. 527.

Also, case of Wilkes vs. Hungerford Market Company. 2 Bingham, N. C. 281.

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poursuivis avec diligence, et que l'appelant, si vraiment, il avait éprouvé des dommages, ne pouvait obtenir indemnité des défendeurs.

Après instruction des faits à l'Enquête et audition des parties, la Cour Supérieure prononça le jugement contre suit: (vide judgment above.)

Ce jugement est porté au tribunal d'appel et les intimés prétendent respectueusement qu'il doit être confirmé, et en effet voici ce qui ressort de l'enquête. Le 7 de juillet 1863, les intimés (*la Corporation de Montréal*) firent avec *Patrick White* un *acte* ou *marché d'ouvrages* pour la construction dans la rue McGill, d'un égout ou *canal* dont les dimensions étaient de six pieds de hauteur par environ cinq pieds de largeur; cet ouvrage était important au point de vue de l'intérêt public et d'une exécution difficile.

Le contracteur essaya d'abord de travailler sous terre pour moins obstruer la rue, mais il trouva ce moyen impraticable; il fallut alors ouvrir une tranchée et rejeter la terre des deux côtés; il rencontra de grandes difficultés, impossibles à prévoir, et qui ont retardé le progrès des travaux.

Vers la fin d'Octobre, même année, les intimés croyant que *White* ne faisait pas toute diligence requise, lui ôtèrent le *contrat* pour le donner à *Valin et Barbeau*, autres contracteurs, qui reprirent les travaux sans délai; c'était à l'automne, au commencement de novembre, dans la saison des pluies.

Arrivés à peu près à la hauteur du magasin de l'appelant, *Valin et Barbeau* éprouvèrent dans leurs travaux un accident qu'ils ne pouvaient anticiper, et qui fut cause des obstructions dont s'est plaint l'appelant, et des retards apportés à l'exécution du contrat.

Jusque là les entrepreneurs avaient eu à lutter contre de graves inconvénients: ils avaient à soutenir l'ancien *égoût* ou *canal* placé en côté de la tranchée nouvelle, et qui se trouve à quinze ou dix huit pieds comme suspendu au-dessus du fond de cette tranchée, il fallait passer à travers tous les *égoûts* privés qui se déchargeaient dans l'ancien *canal*, à travers les tuyaux à gaz et à l'eau et tout près du gros tuyau de l'Aqueduc lorsque, par un concours de circonstances purement accidentelles, les deux côtés de la tranchée s'écroulèrent près du magasin de l'appelant.

En cet endroit, les ouvriers, creusant à une profondeur de vingt-trois à vingt-quatre pieds, à travers les obstacles sus-énumérés, tombèrent sur une couche de *sable mouvant* (quicksand) en même temps que le gros tuyau de l'Acqueduc se rompait: l'eau faisant irruption dans la tranchée en fit affaisser les deux bords, et ce n'est que par les plus grands efforts que les entrepreneurs parvinrent à rétablir leurs travaux. Toute la terre qui avait glissé dans la tranchée dut être rejetée en dehors, ce qui produisit les amas de terre qui ont partiellement obstrué la rue, près du magasin de l'appelant; cependant il y eut constamment un passage sur le trottoir, mais ce passage était nécessairement converti en boue quand de fortes pluies délayaient les amas de terre.

Un témoin a dit que si on avait enlevé la terre à mesure qu'on l'extrayait de la tranchée, les obstructions eussent été moins grandes; c'est vrai, mais d'autres témoins ont expliqué que cela ne pouvait se faire, puisque cette même terre devait être rejetée dans la tranchée à mesure que le *tunnel* en briques avançait.

Le printemps suivant (1863), après l'institution de cette action, les défendeurs

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ont repris eux-mêmes les travaux et les ont conduits plus rapidement; la raison en est qu'ils avaient l'expérience des contracteurs précédents et moins de difficultés à vaincre. (Voir dépositions *Low, Quinlan, McKenna et al.*)

Les témoins de l'appelant peuvent se diviser en trois catégories.

1o. Les contracteurs que les intimés ont congédiés, et qui leur sont hostiles, et leurs cautions.

2o. Les marchands de la rue McGill, qui vont immédiatement intenter une semblable action, si l'appelant réussit, et préparent par conséquent leurs propres causes.

3o. Les employés de la Corporation, qui représentent les faits d'une manière favorable aux intimés.

Il n'est pas surprenant que quelques contracteurs trouvent défectueux le système adopté par *White*, et *Valin* et *Barbeau*, dans la construction du tunnel, tandis que les autres déclarent que c'est le système généralement suivi: sur un travail de cette importance les opinions peuvent bien différer; et d'ailleurs ne voit-on pas tous les jours des contracteurs qui s'imaginent, quoique sans raison, pouvoir mieux faire que les autres!

Mais dira-t-on, les Appelants ont admis, par les *protêts* qu'ils ont fait signifier aux contracteurs, que ces derniers étaient peu diligents. Certes, ces protêts ne prouvent seulement qu'une chose; c'est que, dans son anxiété et son zèle, la Corporation n'a négligé aucun moyen pour pousser activement le parachèvement des travaux, et lorsqu'elle a cru s'apercevoir que les contracteurs languissaient quelque peu, elle leur a ôté les ouvrages pour les confier à des mains plus habiles. Il est incontestable que la Corporation a fait toute diligence possible; ses ouvriers ont travaillé jusqu'au 25 Décembre 1862, malgré d'abondantes pluies et les froids les plus intenses, lorsque les travaux publics sont généralement suspendus vers le milieu de Novembre; enfin le *tunnel* a été complété dans un espace de temps comparativement court vû son importance; plusieurs témoins l'attestent.

Qu'il y ait eu des retards, on ne peut le nier; mais loin de les attribuer à la négligence de la Corporation, il faut, après avoir lu la preuve, en voir la cause dans les difficultés imprévues et souvent si considérables contre lesquelles ont eu à lutter les contracteurs.

L'Appelant n'a prouvé aucun dommage. Il produit une liste comparative de ses recettes mensuelles depuis le 1er juillet 1861 au 31 Décembre même année et pendant la même époque en 1862; ses recettes ont été au dessous de celles de 1861 pour chaque mois correspondant, et il conclut que les travaux de la Corporation en ont été la cause; mais il s'est chargé lui-même de démontrer combien une telle base est incertaine; en effet il produit deux états dont l'un marqué XXXX, montrant ses recettes depuis le 1er Janvier 1861 au 1er Juillet, même année, et l'autre marqué XXX ses recettes pendant la même période en 1862; dans les premiers six mois de 1861 il a reçu $5,865 et en 1862 $5,148, faisant différence de plus de $700, repartie par chaque mois. Cependant les travaux de la Corporation n'ont été commencés que longtemps après, et si ces travaux n'ont pas causé cette différence dans les premiers six mois de l'année, pourquoi l'auraient-ils causée de Juillet à Décembre?

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Il y a plus, l'appelant, sous l'impression apparente dans sa déclaration que les travaux avaient été inaugurés en juin 1862, établit un état comparatif de ses recettes du 1er juillet au 21 décembre 1862, et de la même période en 1861 ; mais il est en preuve que ces travaux n'ont été commencés que le 12 août 1862, et près du Marché Ste. Anne, à une grande distance du magasin de l'appelant ; que la circulation n'a été gênée près de chez lui que vers le commencement de novembre; et ce n'est que le neuf de décembre suivant, que l'appelant s'est plaint, par *protêt*, des obstructions.

Quelques témoins de l'appelant croient que White a inauguré les travaux dès le mois de juin ; ce qui prouve leur erreur c'est que le *contrat* n'a été signé qu'en juillet ; en outre *White*, le contracteur lui-même, est le meilleur témoin pour prouver ce fait et il précise exactement la date ; il affirme qu'il n'a commencé les travaux que le 12 d'août.

La diminution dans les recettes de l'appelant s'est donc produite longtemps avant le commencement des travaux, et en voici la cause :—

Le Tribunal verra que l'appelant avait depuis longtemps formé le projet d'abandonner au printemps suivant, le commerce de détail pour faire le commerce de gros, et, à cet effet il avait épuisé une bonne partie de ces fonds, et probablement négligé des chalands dans le détail: de là une diminution dans ses recettes.

Il est prouvé qu'au printemps suivant il devint marchand en gros.

Enfin dans l'hypothèse où l'appelant aurait établi que les travaux en question, lui ont causé des dommages, il n'est pas recevable à en demander indemnité aux intimés : ces derniers ont agi dans les limites de leurs attributions, la construction du *tunnel* était un ouvrage d'intérêt public, et ils ne pouvaient être responsables envers l'appelant que s'ils avaient agi par malice, ou avec une négligence

AUTORITÉS DES DÉFENDEURS.

14 & 15 Vict. Ch. 128, § 53.—Pouvoirs de construire égoûts et tunnels. Pickering's Rep. Sup. C. T. 19, p. 174-178. "Brooks vs. City of Boston." Corporation n'est pas responsable de dommages causés par obstructions résultant d'ouverture d'un canal, etc. Cour n'accordera pas de dommages incertains. Barbour's Rep. Sup. C. T. 26, p. 136-137. "Ely vs. City of Rochester, "*Damnum absque injuria*,—ne donne pas lieu à une action. Cite plusieurs décisions. "Même auteur. T. 26, p. 564. "Medbury vs. New York R. R." Incertitude des dommages. " " T. 32, p. 411-419. Kelsey vs. King. Term Reports. T. 4, p. 794. The Governor of the Cast Plate Co., etc., vs. Meredith & Co. & p. 796 "Lord Kenyon." Some individuals suffer an inconvenience under all these acts of Parliament; but the interest of individuals must give way to the accommodation of the public. (Dans l'espèce actuelle l'obstruction n'a été que passagère, tandis que dans l'espèce citée, le pavé avait été élevé de manière à barrer pour toujours partie du passage des demandeurs et la Cour leur a dénié le droit d'action, parceque les Commissaires n'avaient pas excédé leurs attributions. Barnewall & Creswell. T. 2, p. 703. Boulton vs. Crowther. Angell. On Highways, Nos. 207 à 212. Sourdat. Responsabilité. T. 2, Nos. 1053-1054. Même si les entrepreneurs ont été coupables de quelque négligence, l'administration n'est pas responsable à moins que les travaux n'aient été conduits avec grande négligence *pendant un espace de temps assez considérable* pour que l'administration ait pu connaître le fait et qu'elle l'ait toléré. Foucart. Droit public et administratif. T. 2, p. 159, No. 705. Daubanton. Voirie, p. 238 à la note 2. Arrêt de la Cour de Cassation discutant toute la matière. Joras vs. La Ville de Paris. Application de la maxime; *Damnum non facit qui jure suo utitur*. Dufour. Expropriation, p. 275 et Seq.

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vraiment coupable: or, sous ces rapports, la preuve justifie et exonère pleinement les intimés.

C'est donc avec confiance que les intimés sollicitent la confirmation du jugement porté en appel.

BADGLEY, J., gave the judgment in appeal.

In the year 1862, the Corporation of this City, under their charter authority, determined to construct a brick tunnel, to extend through McGill street, from St. Ann's market to Craig street, and for that purpose contracted with Patrick White by contract dated the 7th of July of that year. The contract contained stipulations that the work should be done according to the plans and specifications annexed to the contract, and under the direction, superintendence and approval of the Road Committee of the Corporation and of the City Surveyor, that the ground should be opened for distances to be specified by that officer, that the sides of the excavation should be supported with suitable timber wherever necessary, that the counter should be laid in a timber cradle to the satisfaction of the surveyor, if so required by him, that the contractor should be responsible for all damages arising from slides or slips of the earth at the sides of the excavation, that in case of running sand or treacherous ground the work should be proceeded with day and night without interruption, *that the excavation from the work and all materials required for the work should be deposited in such a manner as not to interfere with the traffic of the street*, that the work should be proceeded with to the satisfaction of the Road Committee and City Surveyor, that the contractor should be subject to the express condition that his default to work his contract to the satisfaction of the Committee and Surveyor should authorise the Corporation to take the work from him after twenty-four hours' notice to him, and finally it was agreed that the work *should be finished on the first of December following*. The contract would thus seem to have fully provided against all contingent difficulties from shifting sand and treacherous earth, &c., and by its terms and provisions gave to the Corporation through the committee and surveyor the perfect control of the works in their progress. These were commenced on the 2d or 3d of August, and for the purpose of the improvement a broad and deep trench was dug out in the line of the street, the excavations from which were thrown upon the roadway on both sides, encumbering both roadway and foot pavement, and obstructing the traffic of the street. This was done in the sight and with the knowledge of the committee and surveyor, through whom the Corporation at a very early period were moved to express their dissatisfaction about it to White, from as early as the 2d of September, when the Corporation protested against him for not proceeding with the works to the satisfaction of their surveyor, for having opened too much of the street, for *obstructing its traffic with excavations of earth*, and for employing only one-fourth of the required number of bricklayers; also directing him to employ the full number of workmen and to push on the work as it should be done. This was followed by similar complaints to White on the 13th of September and afterwards until the 29th of October, when a more positive protest of the Corporation declared to him that having made default in *the fulfilment of his contract by depositing excavations in McGill street in such a man-*

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ner as to interfere with the traffic of the street, and that as the work was not progressing to the satisfaction of the committee and the surveyor he was notified that unless, within twenty-four hours from that date, he *did remove the obstructions* and push on the work to their satisfaction, the Corporation would employ other parties to remove the said excavation and would themselves purchase materials and do the work, reserving their recourse against him for all damages and expenses which might be incurred thereby. This last protest was officially served upon White on the 30th of October, and on the following day the Corporation *took the work out of his hands, under a resolution of the Road Committee*, and made a new contract on the 31st October with Valin and Barbeau for the completion of the work by the 15th of January following. The second contract was in all essentials similar to the former as to the excavations, removal of obstructions, &c., &c., the doing of the work under the direction, superintendence and approval of the committee and surveyor, and subjecting it to be taken from the new contractors if not performed to the satisfaction of the committee and surveyor; the control of the work under the second contract, as under the first, being also with the Corporation through the committee and surveyor. The new contractors began their work on the 3rd or 4th of November, but suspended it about the end of December until the ensuing spring. In the meanwhile, on the 9th of November, the plaintiff and other residents on the street protested against the Corporation by their protests of that date, complaining of the annoyances and damage to which they were subjected from the unreasonable delay incurred in the progress of the work, the defective and unskilful manner of its construction causing continual delays, and the continual obstruction of the street, at the same time notifying the Corporation of their intention to claim from them indemnification for the damage already suffered by them, and also for what they should afterwards be subjected to by reason of this misconstructed work.

The original documents themselves up to this time executed by the Corporation, which are authentically produced in evidence, have so far afforded the explanation of the prominent facts of the case, and in order to complete the statement of facts in support of the plaintiff's claim, the remaining Corporation documents connected with the contract and the work done, will also be examined, in elucidation of the contention. These extend beyond the limit of time of the damage suffered by the plaintiff as stated in his declaration, but are necessary to complete the documentary evidence of record.

The new contractors renewed their work in May '63, and continued until the 29th of July, when it was also taken from them by the Corporation after their formal protest of that date, for the reasons set out in that document, namely, on account of the negligent and defective work done by them, of their unworkmanlike manner of doing it, their want of diligence in pushing on the work according to contract, their refusal to repair the defective work done, and their obstruction by the said excavations, for several months, of McGill street, between Notre Dame and St. Paul streets (within which interval the plaintiff's premises were situated), by reason whereof the residents of the street had already complained and might thereafter demand damages which they would

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claim from the Corporation. After this date, the Corporation took the work into their own hands, and finally completed it in the autumn of the year.

These documents from which these references have been taken are authentic and are filed of record; they are the acts and deeds of the Corporation themselves and have not been disputed by them, they are explicit in character and statement, and have afforded evidence and admissions which are beyond controversy. These documents were drawn up and used whilst the works were progressing within the cognizance of the Corporation through the Road Committee and City Surveyor, who had both sight and knowledge of the matters complained of, and they were, moreover, officially executed at the particular times when the state of the work occasioned the complaints themselves and gave existence to the documents.

It may now be observed, as matter of fact, that McGill street is one of the most busy and frequented thoroughfares of this city, having on both sides extensive and thriving warehouses and large retail shops, the latter of which derive much of their support from the custom of passengers through the street. Any interruption to this traffic would of necessity be sensibly felt by those whose business depended upon it, and amongst the number of such traders was the plaintiff who had a large shoe shop situated in the block of houses facing the street on the south side lying between St. Joseph and St. Maurice streets, which latter were included between Notre Dame and St. Paul streets. Feeling aggrieved by the obstructions of the street, and his business in particular, he instituted this action against the Corporation, the defendants, by which he has claimed from them an indemnification of $10,000 for the loss and damage suffered by him in his trade and business for a period of eight calendar months, from June, 1862, inclusive. The declaration charges the defendants with having by their agents and servants made large excavations in the said street, and heaped and piled up large quantities of earth taken out of such excavations in and upon the said street, and upon the sidewalks and foot paths thereof opposite to and against and nearest to the plaintiff's shop and premises, and with having kept and continued that part of the street lying between Notre Dame and St. Paul streets, in which were situated the plaintiff's premises and those premises themselves, obstructed and partially closed, and thereby with having during all that time, the same being an unreasonable and unnecessary length of time, obstructed the street and the sidewalks thereof, and hindered and prevented the plaintiff from carrying on his business in as ample and beneficial a manner as he would have done and had been accustomed to do and did in previous years, &c.

The defendants have pleaded substantially the general issue, denying their liability to indemnify the plaintiff, if in fact he should have suffered damage. With such an issue it would have been sufficient to examine the evidence adduced, had not the opposing counsel, in their arguments on either side, extended their contention beyond mere facts to disputed points of law as to the liability of the Corporation under any circumstances, and in relation to the legal positions assumed by them respectively in their contention. It is proper therefore to examine these points *in limine*. Amongst them some admit of no discussion, namely,

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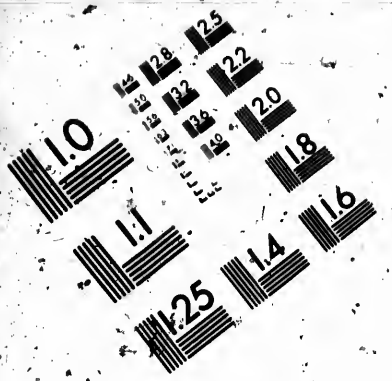
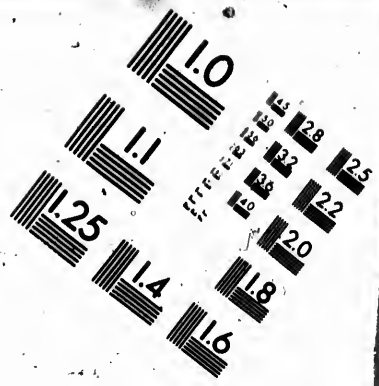
that the powers of public or of municipal corporations acting in the public behalf over highways and streets are not restricted to their mere use for the purpose of transit only, but that they extend to the promotion of public convenience, such as by laying water and gas pipes, repairing streets, making sewers and drains, and generally to the promotion of the public convenience and public health; and therefore an injury which might result to individuals from such a use of the public streets, unless there be a lack of proper care, or unless there be negligence, unskillfulness or misconduct, is *damnum sine injuria*, and it makes no difference though the regulation thus made be of such a character as to [illegible] enjoyment of the property in the sole mode in which the pl[illegible] it. The rule is here plainly pointed out as well as th[illegible] this exception which characterizes th[illegible] as a tor[illegible] another indisputable principle arises, th[illegible] orts, *quasi* [illegible] known to our common law, committed by municipal corporat[illegible] ies are liable, in the same manner as individuals would be, for acts wh[illegible] warrant actions against the latter, provided that the acts were done by the authority of the corporations upon the subject matter, or when ratified by those bodies after they were done. Hence their liability like individuals for injury caused by the insufficient construction of their public works, and their responsibility to the same extent and in like manner as natural persons for the negligence or want of skill of their agents in the construction of works for the benefit of municipalities. The principle will be found summarized in 2 Hilliard on Torts, p. 414 and seq. 2, and in Sourdat de la Responsabilité par 1030, upon the same subject. This latter author says: "Tous les corps ou personnes morales, etc., les communes, etc., sont en principe soumis au droit commun en ce qui concerne la formation des obligations; pour eux comme pour les particuliers, les obligations ont leur source dans les contrats, les quasi-contrats, les quasi-delits, et l'on doit ajouter les délits; car si la nature des choses met obstacle à ce que ces individualités morales soient atteintes par les peines afflictives corporelles établies par les lois de répression, rien ne s'oppose à ce qu'elles encourent des obligations pécuniaires à raison des délits de leurs agents, etc., les diverses administrations auxquels ces derniers appartiennent, sont sujettes aux réparations civiles du dommage causé par le délit." These may be taken as elementary principles that the municipality when acting for the public in this respect is endued with, as it were, legislative authority, that its exercise may be said to have no limit so long as it is within the objects and trusts with which the power is conferred, but that its protection ceases when its acts fall within the stated exception, and then it is made amenable for the consequences that ensue, as would be an individual under similar circumstances. This principle has been finally settled affirmatively in England in the Mersey Docks cases, Law Rep. 1 H. of L. pp. 93, 119. The judgment of the Court of Queen's Bench in these cases which held "that the Commissioners were a public body discharging a public duty without reward and without funds, and so were not responsible for the negligence of those whom they employed," having been set aside in the House of Lords upon appeal, upon the well-considered ground "that a public body were liable in their corporate capacity for damages





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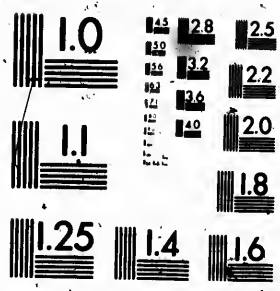

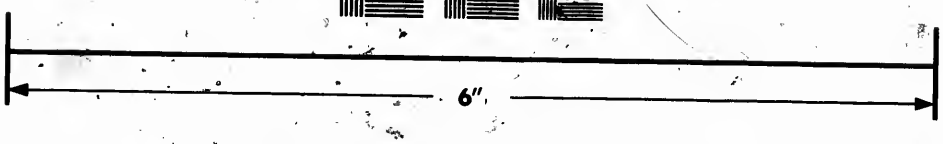

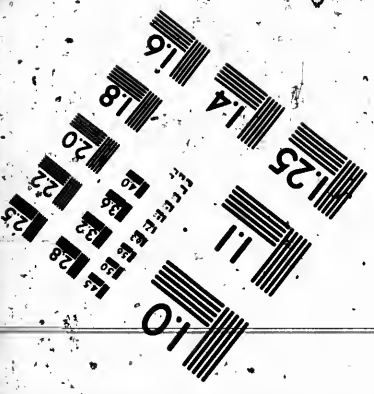

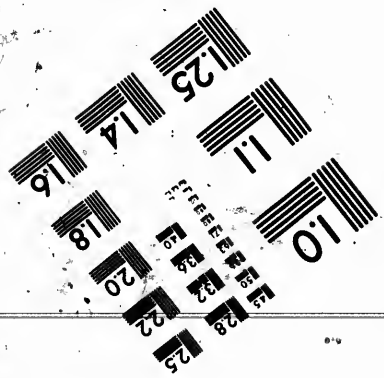

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caused by an irregularity, though within the general scope of their authority," and this was subsequently maintained in the case of Coe *vs.* Wise, by the judgment of the Exchequer Chamber overruling the judgment of Cockburn, chief-justice, and Mellor, J., against Blackburn, J., which supported the judgment of the Court of Queen's Bench in the Mersey Docks cases.

The test of liability in such cases has often been rested upon the fact of the alleged unlawfulness of the act complained of, according to the maxim that *quod non jure fit injuria fieri dicitur.* The general rule of courts of justice being that they can enforce only legal obligations and redress injuries to legal rights, and therefore parties in the exercise of their legal rights are not liable to damages for the injury done, unless it was caused by want of care or skill ordinarily exercised in such cases, and hence the principle that no one can be made liable to an action for tort for an act which he is authorized by law to do. In this case the Corporation were in the exercise of a legal right in making the public improvements, and no action could lie against them in such case, unless in the doing of it they should have exceeded their powers or been guilty of negligence, unskillfulness or misconduct, when their legal right will not shield them from the injurious effect of the excepted act. Sourdat, 2 vol. p. on 1051, states the principle also with the exception, in the application ex. gra. to the State, but which he also extends to other bodies, *communes départements*, &c. He says: "Nous avons eu plus d'une fois l'occasion de dire que l'Etat, considéré dans l'accomplissement des travaux publics, est responsable des accidents arrivés par la négligence ou l'imprudence de ses agents, manifestés soit dans la conception même des travaux entrepris, soit dans le mode d'exécution, s'il y a omission des précautions nécessaires," and afterwards commenting upon the formula *que tout ce qui n'est pas défendu par la loi est permis*, he observes, "que tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé de le réparer, quand il n'a pas sa source dans l'exercice d'un droit reconnu par la loi, ou quand il résulte d'un mode particulier d'exercer son droit qui n'a pas d'utilité pour son auteur, ou qui aurait pû être évité."

Even if the work in question could be classed as a nuisance on the highway or street, still the plaintiff could have no action if he were merely a common sufferer with the public, although from his proximity to the obstructed way, or from his more frequent occasion to use it, he might suffer in a greater degree than others, unless he shall have sustained a special damage differing in kind from that which is common to others; this exception would give him a right to action which he otherwise would not have. The rule and the exception have been frequently recognised in England and in the United States, and the reason given why a special damage must exist to give the action, is that the law gives no private remedy for anything but a private wrong. The plaintiff has therefore taken care to bring himself within the exception by alleging a special injury and damage, by charging the defendants with unnecessary and unreasonable delay in the progress of the work, and especially with obstructions at and near his premises, thereby causing him loss of business and trade. A similar complaint came up for adjudication in Wilkes in Hungerford Market Co., 2 Bing. N. C., p. 281, which is for stopping a thoroughfare for an unreasonable

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tinje, causing loss of custom from passengers through it, which has been referred to in argument and which is now mentioned by reason of the observations of Lord Chief Justice Tindal which are very suggestive, he said: "The complaint was of obstruction by something done by the defendant under the general right to effect the object of the Act of Parliament, and that right the jury found was exercised to an unreasonable extent; the grievance was that the obstruction had continued for an unreasonable time, and the plaintiff had a right to complain of the immediate and proximate cause of his loss. Is this such a peculiar and private damage to plaintiff beyond that suffered by the rest of Her Majesty's subjects, as to enable him to sustain an action against the defendants?". His Lordship answers: "It is in conformity with the greater number of the decisions. The injury to the subjects generally is that they cannot walk in the same track as before, which is a common inconvenience, and for that cause alone an action would not lie, but the injury to the plaintiff is the loss of a trade, which but for this obstruction to the general right of way he would have enjoyed, and the law has said from the year books downwards, that if a party has sustained any peculiar injury beyond that which affects the public at large, an action will lie for redress." Is this injury of that character or not? The plaintiff in addition to a right of way which he enjoyed in common with others, had a shop on the roadside, the business of which was supported by those who passed. All who passed had the right of way, but all had not shops. Indeed, for the most part, the only question is whether the injury to the individual is such as to be the direct, necessary, natural and immediate consequence of the wrongful act." Bosanquet, J., after concurring in the principle, observes: "It may be that others have also been injured in the same way, and a case has been put in argument of every shop keeper in a long line of streets suffering a like injury from the same cause, but it does not resemble this of a peculiar injury to one."

Upon this latter point, Hilliard on Torts, p. 79, observes: "It need hardly be said that the rule in question against multiplicity of suits is not so strictly construed as in all cases to preclude a private action, merely because other persons than the plaintiff experience the same annoyance or injury from the act complained of which is sustained by him," and in a note at p. 77, the author refers to an old case in Lord Raym., Rep. 938, decided by Chief Justice Holt, Ashby *vs.* White, in which it is said "if men will multiply injuries, actions must be multiplied too, for every man that is injured must have his compensation."

The instance mentioned by Chief Justice Tindal, of the common inconvenience suffered by the public in the usage of a public way rightfully obstructed, finds its coincidence in our French law, as follows: "parce qu'il n'y aura d'atteinte portée qu'à de pures facultés ouvertes à tous d'une maniére générale, à la différence des droits proprement dits que la loi établit, reconnait et garantit. Les premières ne sont garanties positivement à personne, tel est l'usage des voies publiques; tant qu'elle subsistent, chacun à le droit d'en jouir, d'en tirer tout l'avantage que cet usage conforme aux lois et aux réglements, peut procurer; leur abandon, leur suppression ne peut donner lieu à des réclamations fondées."

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It has been stated that the plaintiff has alleged a special damage, and it may be added that he has adduced evidence, both written and oral, in support of it: does that evidence support his pretentions? It would be tedious to detail the proof given, and it must suffice to declare its general tendency and results, and the sources where they are to be found. In first importance is the strong and uncontradicted evidence afforded by the authentic documents of the defendants themselves, above referred to, the statements and admissions contained in these; next, their corroboration by the oral testimony of their own officials connected with the work, and afterwards the independent testimony of practical men brought up as witnesses, establishing the defective, unskilful and negligent work done, the unreasonable time employed in the doing of it, the street obstructions which might have been entirely avoided by proper care and attention on the part of the Corporation, the needless interruption of the traffic in general in the street, and the particular obstruction and injury done to the plaintiff.

It has been urged for the defendant that unknown and unexpected difficulties, shifting sand, treacherous earth, &c., caused the delay; but this is no excuse, because these particulars were foreseen and specially referred to in the contracts, and it has in fact been proven that the delay was occasioned in part by the want of proper science, care and skill in guarding against those difficulties and properly protecting the works from their possible occurrence. White, who is a witness for the plaintiff, gives another reason for the delay, but his testimony must be taken *cum grano*, he says that he could have finished his job in time if the Corporation had paid him, as they were bound to do, as he progressed with the work. Whether this were so or not it will be remembered that the Corporation themselves frequently complained of the delay in the progress of the works as well as of the obstructions in the street, and by their protest of the 29th October, they required White to remove those obstructions within twenty-four hours, otherwise they would do it at his expense: nothing, however, was done by him nor by them in the matter, except their making of the new contract [illegible] 31st October, and the obstructions were allowed to continue as they were [illegible] long after.

The defendants, however, urge an important objection to their liability in the fact that the work was done by contract and that the contractor was not their servant or agent. As to this it has been a prevailing doctrine that a party who has contracted for the doing of certain work for his own use and benefit, is not liable for injuries arising in the performance of such work, whilst a master is responsible for injuries arising from the negligence of his servant; and the distinction is made to rest upon the ground that a master has the control of his servant and can remove him for misconduct. The general rule establishing the peculiar relations in one or other case, is laid down as follows, that if an employer *keeps control of the mode of work* there is no distinction between his liability for a contractor and for a servant. Defendants contracting with pipe layers to lay down pipes in a city were held liable for the negligence of the workmen employed by the pipe layers, so No. 37 Ey. L. & Eq. 495, a municipal Corporation employing workmen to lay down gas pipes in the borough is responsible for their negligence; and Sourdat at No. 887 holds. "Quoiqu'il en

soit, et bien que la prédominance de l'un ou de l'autre contrat soit plus marquée suivant les circonstances de chaque espèce, le rapport de commettant à préposé entre deux personnes, dépend de ces deux conditions reunies; 1er que le préposé ait été volontairement et librement choisi; 2nd que le commettant eut le pouvoir de lui donner des instructions et même des ordres sur la manière d'accomplir les actes qui lui sont confiés; partout où l'existence de ces deux conditions sera constaté on pourra dire hardiment que la responsabilité existe," and he cites a judgment of the Cour de Cessation of 20 August, 1847, which settles and establishes the principle.

Now it will be recollected that the contractors were not independent, their subjection *to the Corporation through the committee and surveyor, was manifest*, the contractors were bound to follow the directions of committee and surveyor in the doing of the work, and the contract might be set aside at the pleasure of the Corporation after twenty-four hours notice given. It will also be remembered that the Corporation virtually saw and knew of the obstructions, and that they declared they would remove them themselves if the contractor did not do so, a circumstance which Chief Tindal said in a case of 1 C. B. 578, Burgess and Gray, was an admission, that defendant was exercising dominion over the work from their personal interference, and Cresswell, J., in the same case said, "I think there is abundant evidence that the defendant at least sanctioned the placing of the nuisance on the road, and therefore he is responsible for the consequence." It was in fact on account of their control over the work that the Corporation did actually set aside both contracts, the one after the other, and finished the work themselves. The relation therefore between the Corporation and the contractors is that of employers and servants, and they were in fact the makers of the work, through the agency of the latter, see Allen & Hayward 72 B. 960—16 M. & W. 499, 4 C. B. 783, 2 Exch. 245.

Again, the liability of any one other than the actually guilty party for the wrongful act done by the latter, proceeds upon the maxim *qui fait per alium*, &c. The employer has the selection of the employed, and it is reasonable that he who makes choice of an unskillful or careless person to execute his orders, should be responsible for injury resulting from the want of care of the employed, and therefore municipal Corporations are held liable for acts or negligence of their contractors when this relation exists between them, and Sourdat agrees with this in his 2 vol. par 1035. "Seulement l'action est soumise à ces deux conditions essentielles: 1er que l'acte dommageable ait été commis par l'agent dans l'exercice de ses fonctions; 2nd que cet acte constitue de sa part une faute caractérisée. C'est d'ailleurs au demandeur à établir positivement la faute de commission ou d'omission qu'il impute aux agents &c. l'Etat (La Commune,) ne saurait être responsable d'un accident qui n'avait pas de cause reconnue, ou dont la cause ne serait pas attribuée avec certitude à la négligence de ces employés." See also 1054.

Assuming, then, that in law, the defendants were virtually the makers of the work which they afterwards themselves finished, and having committed a tort *quasi-délit* against the plaintiff, of which he has complained and proved, it only remains to settle the extent of their liability and the amount of damage. The

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plaintiff's declaration extends the period of his suffering, from on or about the first of June, 1862, for eight calendar months, which would reach to on or about the first of February, 1863. But it is not so. In this period the plaintiff has included every thing done upon the street from the first resolution of the committee to do the work at all, and from the first opening of the street at St. Ann's Market, a very considerable distance from the plaintiff's premises, and by which he could not have suffered, and has not proved any direct inconvenience: his injury as stated above must be direct and immediate, and his damage must also be the necessary, direct, natural and immediate consequence of that injury. The time for which he has ground to complain, limited by these principles, would be when the obstructions reached and incumbered his premises, and only for the time when they directly affected him. For that period of time Boisseau, his late foreman, says that the trade began to be injured principally about the beginning of September, when the earth was piled on the sidewalk opposite to the plaintiff's store, and Hugh Harold, the plaintiff's son, says, about the middle of September the tunnel was opened up as far as my father's place; and Raymore, the plaintiff's neighbour, and in the same line of business, an independent witness, says that the street was *opened again* for traffic in January, 1863. So that the period of special direct interruption was about four months. His special damage was the diminution of his trade, and he has proved the amount of his sales for each of those months in 1861 to January, 1862, the year preceding the work, and for the corresponding period up to January, 1863, when the work was being done; the corresponding period for the following year, after the street was re-opened for traffic, could not be given, because in September, 1863, the plaintiff gave up his retail business on the street; but he has given, in addition to the above details, his first six monthly sales of the three years of 1861, 1862, and 1863, so that no mere speculative loss is shewn from these facts proved: he has, in addition to the evidence of the diminution of business, made proof of other facts, tending to shew the same result, and upon the whole has made his proof as complete as the circumstances would seem to admit. The plaintiff has adopted the rule as laid down by Sedgwick on damages, p. 136, as follows:—In an action for damages for obstructions, which hindered plaintiff in his business as the keeper of a refectory and lodging house, and diminished his custom, loss of custom and of profits are the measure of damages, and the mode of computing the damages, by proof, of the actual receipts of plaintiff's hotel, for a sufficient period previous to the obstructions, the actual receipts during the continuance of the obstructions, and the receipts after the obstructions were removed. St. John v. the Mayor, &c., of N. Y. 13 How. Rep. 527.

Also, case of Wilkes vs. Hungerford Market Company. 2, Bingham, N. C. 281, applies as to this.

The corresponding period of months of sales shews a diminution between 1861 and 1862, of $1094.83, which is sworn to as having been caused by the special obstruction to the plaintiff's business, and allowing 25 per cent., taken as average proved profit upon the sales, the actual loss of profit would be $273.70. There is no sufficient proof to enable the Court to add to this result a percentage for dead stock, so that the plaintiff's proved damage is the sum of $273.70.

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or which he should have had judgment with interest from service of demand. The judgment therefore of the Sup. Court should be reversed, and the Corporation made responsible to that extent, because every man of common sense must understand that their charter ought to be carried into execution without doing injury to individuals as has been manifestly done in this case, and that if they aggrieve and damnify the subject as in this present case, they are answerable *civiliter* in damages to the party injured. It is the implied condition of a grant of authority that it shall suffer no abuse in the execution of it: and therefore in such cases the Corporation is liable for the acts of its servants and agents in the same manner as individuals, and the more especially, when the master or employer might have prevented the act, which caused the damage, and did not do it. See Sedgwick, 42 to 49.

The judgment of this Court was *motivé* as follows:

"The Court, &c., &c. Considering that it has been proved that the respondents, defendants in the Court below, during the excavation and construction of the works mentioned in the declaration of the appellant, plaintiff in the Court below, and in the evidence in this cause produced and filed, which said works the said respondents were by law authorised to make, were guilty of negligence and of acts rendering them liable in damages to the said appellant as claimed by him in his said declaration, by obstructing for the period of four months, from the middle of September, one thousand eight hundred and sixty-two to the middle of January, one thousand eight hundred and sixty-three, full and perfect access to the shop and premises occupied by the said appellant, thereby hindering him in his business in the said shop and premises, and causing him loss and injury therefrom, considering that the said damages suffered by the said appellant have been proved to amount for the said space of time, to the sum of two hundred and seventy-three dollars and seventy cents; considering that in the judgment rendered by the Superior Court for the District of Montreal on the twentieth day of September, one thousand eight hundred and sixty five, there was error, this Court doth revise and set aside the said judgment, and proceeding to render such judgment as the said Court should have rendered, doth condemn the said respondents, defendants as aforesaid, to pay and satisfy to the said appellant, the said plaintiff, for the causes above mentioned, the said sum of two hundred and seventy three dollars and seventy cents with interest from the fourth day of April, one thousand eight hundred and sixty-three, date of the service of process in this cause, until paid, with costs of the said Superior Court and of this Court."

Appeal maintained.

Torrance & Morris, for appellant.
Stuart & Roy, for respondents.
(F. W. T.)

MONTREAL, 12TH APRIL, 1867.

CRIMINAL SIDE.

Coram MONDELET, A. J.

The Queen v. *Dunlop.*

INDICTMENT—NUISANCE—CONVICTION.

The defendant was convicted by a jury of a nuisance in keeping in a building an excessive quantity of gunpowder.

The Court thereupon adjudged that he should pay to Her Majesty, £50, and be imprisoned until the fine was paid, and further ordered the sheriff forthwith to abate the nuisance by the immediate destruction of the powder.

The indictment was in the following words:

"The Jurors of Our Lady the Queen upon their oath, present that Charles John Dunlop, late of the parish of Montreal, in the District of Montreal, Esquire, on the first day of September in the year of our Lord one thousand eight hundred and sixty-five, and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the Parish of Montreal, in the District aforesaid, in a certain building situated at a place called Côte Ste. Catherine, in a property occupied by him, the said Charles John Dunlop, in the Parish aforesaid, near a public highway and road leading from the City of Montreal, in the District aforesaid, to divers parishes and places contiguous thereto, and also near the dwelling-house of divers subjects of our said Lady the Queen there, and also near unto divers public streets being the Queen's Common Highways within the limits of the City of Montreal, and numerous other dwelling houses of divers other liege subjects of our said Lady the Queen there, did unlawfully and injuriously in the said building receive and keep and still keeps an excessive quantity of gunpowder, to wit, the quantity of fifty-one tons of gunpowder, and over, whereby the said liege subjects of our said Lady the Queen there residing, as also those residing within the limits of the said City of Montreal, and those passing and repassing on the said highway are and have been and still are placed in great terror, and in great danger to the great damage and common nuisance of, &c.

And the Jurors aforesaid, upon their oath aforesaid, do further present that the said Charles John Dunlop, on the first day of September, in the year of Our Lord one thousand eight hundred and sixty-five, and on divers other days and times between that day and the day of the taking of this inquisition with force and arms, at the Parish of Montreal aforesaid, in the District aforesaid, in a certain building situated at a place called Côte Ste Catherine, in a property occupied by him, the said Charles John Dunlop, in the Parish aforesaid, near a public highway and road leading from the City of Montreal, in the District aforesaid, to divers parishes and villages contiguous thereto, and also near the dwelling-houses of divers subjects of our said Lady the Queen there, and also near unto divers public streets, being in the Queen's Common Highways, within the limits of the City of Montreal, in the District aforesaid, and numerous dwelling-houses of divers other liege subjects of our said Lady the Queen there, did unlawfully, injuriously and negligently in the said building receive and keep and still keeps a large quantity of gunpowder, to wit, fifty-one tons of

gunpowder, the said building being insecure and unsafe for the purpose of storing gunpowder, being neither vaulted nor fireproof, and moreover by then and there unlawfully, injuriously and negligently carting, and permitting the same to be thrown into, and carelessly placed in the said building, and by permitting the door of said building to remain open and accessible to all persons at all hours, and permitting access into the said building after dark and with lights, whereby the said liege subjects upon said Lady the Queen there, and also those residing within the limits of the said City of Montreal, and there passing and repassing on the said highway are and have been and still are placed in great terror and in great danger of the great damage and common nuisance of, &c."

R. Mackay for the defendant before the Jury said: The accused was charged with having in his magazine at Côte Ste. Catherine fifty-one tons of gunpowder, against the provisions of the law, and that the building in which said powder was kept was not adapted to the purposes of a magazine. The question to be decided was, had the facts alleged in the indictment been proved? He believed not. With reference to the keeping of gunpowder every man knew there was always great danger in doing so, but at the same time it was necessary that a quantity should be kept constantly on hand for purposes of defence, and a building must be had to store it in. It was a question of policy whether there should be one or several magazines; but he believed it safer to have only one. For if the Corporation were to license as many magazines as taverns, there would be the more danger to life and property. In fact no security at all. The building at Côte Ste. Catherine had been in existence for twenty-three years, and no explosion, not even of a cartridge, had ever occurred, a circumstance greatly in favour of his client. All the witnesses had moved to the vicinity of the so-called nuisance since its erection, and yet they only began to fear danger now. They had moved towards the magazine; the magazine had not been taken to them, or to their neighbourhood. The proceedings instituted were got up by private prosecution, and was the result of the *animus* of Mr. Bellingham against Mr. Dunlop, and not of Mr. Beaubien, the nominal private prosecutor, who was merely a tool in the matter. It had been got up to harass Mr. Dunlop to gratify personal and petty animosities; but he had no doubt the jury would look at the whole facts of the case in their proper light, and give his client the benefit of an acquittal, which he was certainly entitled to. Taking into consideration the nature and position of the magazine, Mr. Mackay said he would have no fear, seeing the nature of the building and of the walls surrounding it, of being hurt if he was sitting on a fence half a mile from the magazine, and it containing seventy tons of powder to explode. No fear whatever. The learned counsel then ably appealed to the jury to judge of the merits of the case, and they would clearly see that it originated from personal motives. In conclusion he said he would adduce evidence to show that Mr. Dunlop was not and had never been the proprietor of the premises, the land or the magazine. He produced a deed of sale from Madame Ambault to Charles and Alexander Francis Dunlop of the said property, and also a mortgage held against the same by the Montreal Permanent Building Society.

Carter, Q. C., *contra*, cited Russell on Crimes, to show that the storage of

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such a quantity of gunpowder in any one place as was dangerous to life or property, was a nuisance of the gravest kind, which the Court could summarily order to have abated. He then proceeded to address the jury. He owed it to them to be very brief in his remarks in reply, because they had been already detained a very long time. But in a case of such importance as the present, he felt he would be wanting in his duty if he did not say a few words upon the evidence that had been adduced for the defence. One circumstance connected with this had caused him a great deal of pain. He much regretted to find a gentleman in the position of the defendant called upon to answer a criminal charge, trying to shuffle out of it by throwing the responsibility of his own acts on the shoulders of his unfortunate sons. Admitting that the rights of property and soil were vested in the sons of Mr. Dunlop, yet if it was shown, as undoubtedly it had been shown, that Mr. Dunlop had the use of that property, and converted it to the illegal purpose which the indictment charged, then it was he, not his sons, who was answerable,—he, not his sons, against whom the indictment lay. It was not the man who used the soil, but the man who abused it, against whom proceedings could be legally taken. The evidence adduced for the defence as to the proprietorship of the magazine had signally failed. only went the length of proving that the title to the property was vested in the two sons. Now, supposing that to be so, and that the storage of gunpowder was out of the question, this building, enclosed with four stone walls, certainly could not be indicted as a nuisance. It was the use to which that building was applied wherein consisted the offence; and that use having been proved,—it having been shown also that defendant, besides living in the house on the property, and exercising paternal control over his sons, also exercised the whole and sole control and management over the powder-magazine, receiving its revenues, and settling its debts—there could not be the slightest shadow of a doubt that he had been rightly indicted, and that he was the one who should pay the penalty if a verdict of guilty was returned. Then, again, he would ask the jury, why seek to raise such an issue before them, unless his learned friend felt that his case was a desperate one—that the evidence was so overwhelming that it was necessary to resort to some shabby scheme or another to get out of it? But that the conviction of defendant was a certainty, and his learned friend felt it to be so, this line of defence would never have been attempted. He felt pained to a great degree when he reflected that such were the motives which evidently prompted the defendant in attempting to shift the responsibility from his own shoulders to those of his sons; but he (the learned counsel) said again defendant could not shirk that responsibility, neither could he get rid of it, even supposing it had been established to the perfect satisfaction of the jury that the sons were the absolute proprietors of the property and soil. It was defendant who had the exclusive management and control of the magazine: one son was in the United States, the other was seldom at home, and attempt to conceal it as he might, the magazine was defendant's property to all intents and purposes. Captain Hawkes laboured under the impression that the magazine was properly guarded, and every witness had asserted that to leave the magazine unguarded—apart from the circumstances of the internal management, and of the quantity of powder

stored therein, was attended with the greatest risk and danger. It was true Mr. Phillips—quiet, easy-going man—could sleep in peace under any circumstances, but that only showed that he was as reckless of danger as was the defendant himself. But it was not what he thought, or what anybody else thought, that the jury had to consider: It was what they thought themselves. They were the guardians of society, and he called upon them in virtue of the oath they had taken, to see that its interests were protected. He asked them to say if Mr. Dunlop was not carrying on a profitable business, utterly regardless of the risk to the lives and property of themselves and their fellow-subjects. This magazine was in the immediate neighbourhood of three largely populated villages; it was quite close to the Hotel Dieu; it was within two miles and a half of this city, and, if an explosion by any fatality took place, the consequences would be almost too fearful to contemplate. His learned friend had said he would, without fear of being hurt, sit on a fence within half a mile of the magazine if he was certain it would explode. Well, just let him remove the powder some five or six miles farther from the city, and then try the experiment. He (Mr. Carter) ventured to say that long before a slow match reached the powder, his friend would be flying out of harm's way as fast as his legs could carry him. Another argument put forth by the defence was that the magazine had been in existence for over 23 years, and that during all that long time no explosion had taken place. What an argument! Because a merciful Providence had during all that time preserved us from danger, was it possible that no accident might occur at some future time? That great and constant danger was incurred in consequence of this storage of gunpowder, had been abundantly proved. And he told the jury, as a lawyer, as they would be told from the Bench by the Judge, that where a nuisance exists, and was complained of, no matter what its character or kind, the strong arm of the law must be called in to put it down. It was not for Mr. Dunlop to say. So far you have been perfectly safe; wait till an explosion takes place, and the villages around, and probably a great portion of the city, are laid in ruins, and their residents slaughtered, and then you may have some grounds for complaint—some right to cry out about it. But another insinuation was urged, and that also was really a most unjustifiable one. It was said that the private prosecutor in this case had really no interest in the matter at all; that it was Mr. Bellingham—who, to gratify some vindictive feeling of his own towards the defendant—that had instigated the whole. How that had been met in the witness-box, the jury themselves had heard. Mr. Bellingham was a resident close to this magazine, had a natural regard for his own and the lives of his family, and had done nothing more than re-echo a sentiment of dread which pervades the breasts of many of his fellow-citizens. Was there any reason, then, that his name should be brought forward in reprobation because he had been more active in his endeavours than others to put down a nuisance in which, perhaps, he was much more nearly and dangerously interested? He was entitled to all credit for the efforts he had used; and after the evidence brought before the jury, he (Mr. Carter) was thankful to say these efforts must succeed. They were met by yet another objection at the very outset of this case. The authority of this Court was denied, and it was set up, forsooth, that another suit was now pending against the defen-

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dant before the Recorder's Court, at the instance of the Corporation. Well, gentlemen, what course did the defendant pursue in that Court? Why, he snapped his fingers at the Corporation by-law; declared it was not worth a straw; denied their jurisdiction, and said the proper way to get at him was to indict him at common law. That had now been done, and here he turns round with the utmost gravity, and declares the case could only be tried by the Recorder; that a special statute overrides the common law—in fine, that this Court could not in any shape touch him! This was how the defendant sought to wriggle out of this most serious charge, and, if he possibly could, set law at defiance as well as place lives in jeopardy. The learned counsel contended that two counts of the indictment at least had been proved by such overwhelming testimony, that the jury could have no difficulty as to the verdict they ought to return. When they saw the danger to which the locality was exposed, it was their bounden duty to look into the case carefully, and to give the public that protection to which they were alike entitled by law and justice.

JUDGE MONDELET charged the jury. After stating what scientific men had calculated would be the force of the explosion of a quantity of gunpowder, such as was said to be stored at Mr. Dunlop's magazine, His Honour went on to say it was the duty of the jury to enquire whether this powder magazine was or was not a nuisance, and if their answer was in the affirmative, it required only common sense, without any knowledge of law, to see that no nuisance of the kind could be for a moment tolerated. As jurors and as citizens they were bound to do to others as they would wish to be done by. Their neighbours had just the same right to protection as they had themselves. That this magazine was dangerous to public life and safety was the gravamen of the offence. Whether it was kept properly or not, were such the case, it must be removed. Mr. Dunlop had it in his power to prove that it was well guarded, but he had not done so, and there was evidence showing distinctly that such was not the case. The learned Judge went into the evidence with considerable minuteness. Captain Hawkes had always believed that the magazine was guarded, and would not have slept so securely in his bed, had he known there was no watch about the premises at all. Mr. Phillips' evidence was only an expression of opinion likely to be entertained by a man who did not know better. Chief Penton and Mr. McGrath had visited the magazine together at a very late date, when, according to defendant's admission, there was from 60 to 70 tons of powder stored in it.

Their description of the inside of the magazine, and of the storage, was as graphic as it was important. There was no person in charge, but they got the key from Mr. Dunlop. There were no racks, but the kegs of powder were piled in tiers one above the other. The jury would see how dangerous this in itself was. A slight noise, any unforeseen accident might cause one of these barrels, perhaps the whole row to roll down, and there was no telling what might result from the friction thereby caused. Every one understood that by rubbing wood smartly together sparks might be produced, and if the smallest quantity of gunpowder happened to ignite, how fearful might the consequences be. There were no holes on the floor—it was quite bare; there was no guard, and thus access might be had by any one at any hour of the day or night. He never knew be-

fore that the military authorities carted their powder as it had been shown in evidence Mr. Dunlop was in the habit of doing—in wooden carts, sometimes covered with tarpaulins and sometimes not. And I say this with all respect to the military, that if what the witness Vincent said was correct, the military exhibited a degree of negligence which surprised him, and of which he should have thought them utterly incapable. But that would not excuse Mr. Dunlop. If the military were wrong he was wrong also, and he might depend upon it that it would be looked to in future. But it having been proved that the magazine was negligently, insufficiently and carelessly kept, of itself constituted a nuisance. Another question for the jury to consider was—had Mr. Dunlop the control of the magazine. An attempt had been made to saddle the ownership on his son. But in cross-examination the son admitted that his father had and exercised the general management and superintendence, and their own witnesses showed that the agreement with Vincent was signed by Mr. Dunlop himself—in his own name, not for or on behalf of his sons. Then about the difference of the ten pounds, what did he say to Vincent when he went to see him about this and get it settled? "Go on," said Mr. Dunlop, "the magazine is mine." Now what could be more convincing testimony than this. And it was out of the mouth of their own witnesses,—of a man brought up by the defence, not the evidence of a witness for the prosecution, which might perhaps have been open to some suspicion. It would be an insult to the understanding of the jury to dwell longer on this point, or to refer to other facts to prove what they must be satisfied of, that Mr. Dunlop was really the owner and manager of this magazine. That the apprehensions of danger were well founded, every witness examined on the point had testified. It appeared quite clear that in the event of an explosion Côte des Neiges, the Mile-End, and the village of St. Jean Baptiste would inevitably be sacrificed, and the loss of life would be immense. Capt. Hawkes had related his experience of the consequences of an explosion in the Crimea, which were dreadful indeed. It was the duty of every good citizen to endeavour to protect his neighbour from even the remotest possibility of such a catastrophe happening to him. But it was argued no accident had ever happened since the magazine was erected, more than three and twenty years ago. That might be. A house might stand for fifty years without being struck with lightning, but the year following, that might happen, and the building be burnt to the ground. A ship might make fifty voyages across the Atlantic, but on the one following she might be caught in a storm and become a total wreck. A man might have travelled by railway between this and Quebec, or between this and Chicago, over and over again, without meeting with any accident, but on some unfortunate day that might overtake him at last. This was therefore no argument at all, and must be left aside. The simple question for the jury was, as he had already told them: Is this storage of gunpowder—this powder magazine—a nuisance, and if so, it must be abated. He would tell them again, they were expected to do to their neighbours as they expected to be done to by them, and he would say in conclusion that when the powder was again carted from this magazine, care would be taken that proper precautions in the conveyance were used.

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The jury returned a verdict of guilty on both counts of the indictment against the defendant, and the Court recorded a judgment as follows:

"The Court, &c., considering that the defendant not having established before this Court that he had abated and prostrated, but on the contrary, he having neglected to abate and prostrate the nuisance complained of, and declared by the verdict of the Jury, it is hereby declared and adjudicated, that the defendant should pay, and he is hereby condemned to pay to Her Majesty a fine of £50, and to be imprisoned until the said fine be paid; and it is further ordered that the Sheriff do forthwith abate and prostrate the said nuisance, and he is by this Court ordered and authorized to employ and use all such means as will enable him to abate and prostrate, altogether, fully and completely, the said nuisance by the immediate destruction of the gunpowder contained in the defendant's powder magazine, found to be a nuisance by the verdict of the jury."

Judgment for the Crown.

E. Carter, Q. C., for private prosecution.

R. Mackay, for defendant.

(F. W. T.)

*** A writ of error was allowed to defendant from above judgment; the defendant contending, among other things, that whereas the nuisance was susceptible of being abated by removal of powder there was not need to order the destruction of the powder, and that the judgment ought not to have done more than order the sheriff to abate the nuisance.

This writ of error was quashed June Term, 1867, upon objection taken by the Court to Mr. Ramsay's signing the Attorney General's name per procuration to the allowance of the writ. Another writ has since been allowed to defendant, and is now pending.

(F. W. T.) July, 1867.

SUPERIOR COURT, 1866.

MONTREAL, 30TH APRIL, 1866.

Coram BADGLEY, J.

No. 91.

Connolly vs. *Bonneville et al.*

HELD:—That where a female has been sued as a widow, but is in reality the wife of the other defendant who has been sued in his quality of executor of a will, and the return of service establishes that the copy of the writ and declaration for the female defendant was left with the male defendant personally, the plaintiff may amend the writ and declaration so as to describe the female defendant correctly.

This was a motion by the plaintiff to amend the writ and declaration.

One of the defendants was sued as a widow, and the copy of writ and declaration for her had been handed to the other defendant, who was sued as an executor, and who was also, in reality, the husband of the female defendant.

The female defendant, assisted by her husband, fyled an exception *à la forme*, on the ground that the suit, having been instituted against her as a widow, whereas she was a married woman, was null and void.

The plaintiff thereupon moved, inasmuch as the husband was really a party defendant to the record and had not only been duly served with a summons himself, (although in a different quality) but had also received personal service of the writ and declaration for his wife, that the writ and declaration might be amended in such wise as to describe the female defendant as the wife of the male defendant.

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Per Curiam:—As the husband is really a party to the record and has received the service intended for the wife, I can see no injustice in granting this motion, but the plaintiff must of course pay the costs of the exception. The motion is therefore granted.

Motion to amend granted.

Strachan Bethune, Q.C., for plaintiff.
Dorion & Dorion, for defendants.
(S.B.)

COURT OF REVIEW, 1866.

MONTREAL, 30TH MAY, 1866.

Coram SMITH, J., BADGLEY, J., BERTHELOT, J.

No. 2.

THOMAS McCREADY *et al.*, APPELLANTS;

AND

ANDREW LEAMY, RESPONDENT.

HELD.—That the *onus probandi* is on the Petitioner, under sub-section 3 of section 3 of the Insolvent Act of 1864, to establish that his stoppage is only temporary and that his assets are sufficient to meet his liabilities.

This was a case in revision of a judgment rendered at Aylmer, by the Hon. Mr. Justice LaFontaine, on the 6th day of December, 1865.

The respondent had been served by the appellants, who were two of his creditors, for sums exceeding in the aggregate $500, with a demand in the form E, under the Insolvent Act of 1864, and on the 14th day of November, 1865, the respondent presented a petition to the Judge, under sub-section 3 of section 3 of the Act, praying that all proceedings upon the demand should be stayed. In this petition the respondent in effect alleged:—

That no other demand had ever been made on him by the claimants for the amount due them except the notice already mentioned. That he was not aware of the exact amount which he owed them, or of the nature of the claim the said McCready intended to make.

That he had not, at any time, stopped payment of his debts generally, and that he had only temporarily delayed payment of the claimants' claims, and that with their consent, and whilst negotiating for accommodation.

That he was not then insolvent, and that his property would, at any time within the last six years, pay, and was worth more than five times all the debts due by him or charges affecting the same, of which he alleged the claimants

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were aware. He then proceeded to set forth several lots of land, of which he alleged himself to be proprietor, and declared himself to be possessed of horses, cattle, farm implements, provisions, &c., to have two lumbering establishments in operation, and to have a large quantity of lumber; and he finally stated that if his property were sold by auction it would bring more than five times the amount of all his debts.

That the non-payment of the claims of the claimants was not caused by any fraud or fraudulent intent on his part, but was only temporary, and was not caused by any insufficiency of his assets to meet his liabilities. And he concluded by alleging that the proceedings taken by the appellants were so taken without reasonable grounds, for the purpose of enforcing payment under colour of the said Act; and accordingly prayed that it should be ordered that no further proceedings should be taken under the said act upon the said demand, and that the appellants should be condemned in triple costs.

The claimants met the petition in the following manner:—

Firstly.—By an answer in law, by which they urged that it did not appear by the petition that the non-payment of the claims of the appellants was occasioned by any temporary circumstance, nor, in fact, in what manner his stoppage of payments was caused; moreover, that the petitioner did not allege that he had any assets out of the proceeds whereof he could meet his engagements, or that he would soon, or at any future time, resume payment; and also because he did not show what was the amount of his liabilities, but merely stated what he claimed to have as assets.

Secondly.—By a special answer describing their respective claims in detail, alleging that the petitioner had ceased to meet his commercial liabilities generally as they became due; that he had wasted his means in frivolous and vexatious litigation; that he was indebted in large sums of money to divers persons for commercial debts; that he had sold and disposed of all the assets which could be readily sold, and had not applied the proceeds to the payment of his commercial liabilities generally as they became due; that he had secreted and made away with his estate and effects; and that he was insolvent within the meaning of the Insolvent Act of 1864.

Thirdly.—By a general denegation.

The petitioner made no replication to these answers.

At *enquête*, the claimants proved in a general way, that the petitioner had ceased to meet his commercial liabilities generally as they became due, and the petitioner proved that he was possessed of very large and valuable assets, but wholly failed to establish or even explain the amount or nature of his liabilities.

The following was the judgment rendered on the petition:—

"All motions made, held to be unfounded, and the same are rejected with "costs, and considering that the petitioner has established by evidence the ma- "terial allegations of his petition, and that petitioner had not, at the time of "said demand made upon him, under the third clause of the Insolvent Act of "1864, ceased to meet his commercial liabilities generally, the prayer of peti- "tion is granted, and it is ordered that the said demand shall have no force or

"effect whatever, with costs against [illegible], and the further conclusions of "said petition are hereby rejected."

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The points submitted on behalf of the appellants were, that they had abundantly established the stoppage of payment by the petitioner, but that he had wholly failed to prove that such stoppage was only temporary, and that he had assets sufficient to meet all his liabilities. And the petitioner on the other hand contended:—

1st.—That he had fully established that at the time of the service upon him of the demand for an assignment of his estate and effects, aforesaid, he was perfectly solvent and was in possession of property, real and personal, sufficient to pay all his debts.

2nd.—That by law he, respondent, was not bound to produce any schedule of debts and liabilities.

3rd.—That appellants failed to prove their answer to respondent's petition.

And, after taking time to consider, the Court of Review pronounced the following judgment:—

"The Court now here, sitting as a Court of Review, having heard the parties by their respective Counsel, in revision upon the judgment rendered in the matter, on the sixth day of December, one thousand eight hundred and sixty-five, by the Hon. Mr. Justice LaFontaine, resident Judge of the Superior Court in the district of Ottawa; having examined the record and proceedings in this cause, and the said Judgment the sixth day of December, 1865, and maturely deliberated, considering that there is error in the said Judgment. This Court now proceeds to render the judgment which ought to have been given and rendered in said matter, and revising the said judgment and considering that the said claimants, plaintiffs in revision, have established the material allegations of their answer to said petition of said Andrew Leamy, defendant in revision, and that the said Andrew Leamy, the said petitioner and defendant in revision, hath entirely failed to establish, that at the time of the service upon him of a demand of an assignment of his estate and effects for the benefit of his creditors under the Insolvent Act of 1864, he, the said Leamy, was not insolvent; and further, that he hath failed to show that he was in possession of property, real and personal, at said period, sufficient to pay his debts, and that he hath not shown by any production of the schedule of debts, the nature and extent of his liabilities. The Court doth reverse the said judgment of the 6th day of December, 1865, and doth set aside and reject the said petition of Andrew Leamy, of the fourteenth November, eighteen hundred and sixty-five, the whole with costs against the said Andrew Leamy, as well those of this Court as those of the proceedings in Insolvency, before the said Judge of said Superior Court, District of Ottawa, and it is ordered that the record be remitted to the Superior Court, District of Ottawa."

Judgment of S. C. reversed.

Abbott & Carter, for appellants.
Perkins & Stephens, for respondent.
(S. B.)

MONTREAL, 30TH APRIL, 1866.

Coram SMITH, J., BERTHELOT, J., MONK, J.

No. 954.

Dewar vs. *McLennan*, & *McLennan* Plaintiff *en faux* vs. *Dewar*, Defendant *en faux*.

HELD.—That a will, made in solemn form, by a person who could not write or sign his name and who was wholly ignorant of any other language than Gælic, before a Notary who only spoke and understood the French Language, and two witnesses, one of whom was wholly ignorant of the French language (in which the will was written) and the other spoke English, French and Gælic, and acted as interpreter all round, was valid.

This was a hearing in revision of a judgment rendered in the Superior Court, at Montreal, on the 30th day of April, 1866, by the Hon. Mr. Justice Smith, dismissing an inscription *en faux*, fyled by the defendant to the last will and testament on which the plaintiff's action was based.

The will attacked as being false was that of one Kenneth McLennan, and purported to have been executed in solemn form, in the French language, before a Notary Public and two witnesses. And the *moyens de faux* relied upon were, to the effect, that the testator (who could not write or sign his name) was wholly ignorant of the French language and knew only the Gælic language,—that the Notary was wholly ignorant of the Gælic language and spoke and understood only the French language,—that one of the witnesses was wholly ignorant of the French language,—and that the other witness was the only one of all the persons concerned who understood the language both of the testator and of the Notary who wrote the will.

The evidence adduced in the cause fully established the facts to be as alleged in the *moyens de faux*.

The Court of Review sustained the judgment of the Court below, and it was consequently confirmed.

Judgment of S. C. confirmed.

Doutre & Doutre, for plaintiff and defendant *en faux*.
Dorion & Dorion, for defendant and plaintiff *en faux*.
(S. B.)

SUPERIOR COURT, 1867.

MONTREAL, 9TH JULY, 1867.

Coram MONK, J.

No. 902.

Connolly vs. *Woolrich* and *Johnson* et al., defendants *par reprise d'instance*

INDIAN MARRIAGE—QUESTION AS TO VALIDITY.

William Connolly was born about 1786, at Lachine, in Lower Canada, which was his original domicile, and remained there till the age of 16, when he went to the North West territories, where he resided at different posts of the North West Company for 30 years. In 1803, at the age of 17 years, he took to live with him, as his squaw or Indian wife, an Indian girl, the daughter of an Indian Chief, with the consent of her father, and cohabited with her as his squaw or Indian wife, according to the usages and customs of the Cree nation to which she belonged. They cohabited in the Indian country, and were faithful to one another there for 28 years, and had a family of six children. They came to Lower Canada in 1831 and co habited there for a short time as husband and wife. In 1832 Connolly left his squaw and had a marriage ceremony, after a dispensation by the Bishop, celebrated between himself and his second cousin Julia Woolrich, according to the rites of the Roman Catholic Church in Lower Canada where he continued to be, and from that time, till his death, in 1849, cohabited with her as his wife.

HELD:—1°, That though the Hudson's Bay Company's Charter is of doubtful validity, yet, if valid, the chartered limits of the company did not extend westward beyond navigable waters of the rivers flowing into the Bay;

2°. That the English Common law prevailing in the Hudson's Bay territories, did not apply to natives who were joint occupants of the territories; nor did it supersede or abrogate even within the limits of the Charter, the laws, usages, and customs of the aborigines;

3°. That no other portions of the English Common law than that introduced by King Charles' Charter obtains in Hudson's Bay Territories;

4°. That the English law was not introduced into the North West territories by the cession by France to England, nor by royal Proclamations subsequent to that date;

5°. That neither the decrees of the council of Trent, nor the ordinances of the French kings, nor the British Marriage Acts, were law nor in force at Rat River, or in any part of the North West Territories, in 1803;

6°. That a marriage contracted where there are no priests, no magistrates, no civil or religious authority, and no registers, may be proved by oral evidence, and that the admission of the parties, combined with long cohabitation and repute will be the best evidence;

7°. That such a marriage, though not accompanied by any religious or civil ceremony, is valid.

SEMBLE:—That polygamy and divorce, or repudiation at will, prevail among the Cree Indians who are pagans;

8°. That an Indian marriage between a Christian and a woman of that nation or tribe is valid, notwithstanding the assumed existence of polygamy and divorce at will, which are no obstacles to the recognition by our Courts of a marriage contracted according to the usages and customs of the country;

9°. That a Christian marrying a native according to their usages, cannot exercise in Lower Canada the right of divorce or repudiation at will, though SEMBLE:—He might have done so among the Crees;

10°. That an Indian marriage, according to the usage of the Cree country, followed by cohabitation and repute, and the bringing up of a numerous family, will be recognised as a valid marriage by our Courts, and that such a marriage is valid;

11°. That *Connolly* never lost his domicile of birth and never acquired one in the Indian Territory;

12°. That, under the circumstances, a community of property existed between him and his Indian wife or squaw, as to all property subject to such law in Lower Canada.

The facts of this most important case appear from the remarks of the Court (Mr. Justice MONK) in giving judgment for plaintiff, at Montreal, the 9th July, 1867, as follows:

This is an action instituted the 13th of May, 1864, for the recovery by the plaintiff of the sixth portion of one-half of the estate in defendant's possession

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and claimed by plaintiff as his share in a community of property alleged by him to have existed between his father, the late William Connolly, and *Susanne*, Connolly's wife, mother of the plaintiff. The case is one of importance, and involves a great number and variety of questions, both of law and fact. The Court has considered it an imperative duty, as the decision is one of much interest to the parties, and, in some measure, to the public, to enter at length into a review of the peculiar circumstances of the case, and also of the law by which it must be determined.

The declaration sets forth in substance, that in the year 1803, the late Wm. Connolly, at the *Rivière-aux-Rats*— Rat River— in the Rebaska, or Athabaska country, in that part of British America, known and distinguished as the Hudson's Bay Territory, married an Indian woman, called *Susanne Pas-de-nom*, of the Cree tribe or nation; that this marriage was celebrated according to the usages and customs of the Territory, and could not be otherwise solemnized, as there were no priests or ministers residing there at that time; that these parties lived together continuously and happily as husband and wife from 1803 till 1832, during which period there were born of this marriage several children, of whom plaintiff is one; that Wm. Connolly died at Montreal on the 3rd June, 1849 leaving a large amount of property in Upper and Lower Canada, which is in part enumerated and described. It is then averred that there was no contract of marriage between the parties, and that consequently a community of property existed between them according to the law of Lower Canada, and that the real and personal estate was acquired during the existence of the marriage; that Mrs. Connolly died at Red River, in the Hudson Bay Territory, on the 14th August, 1862, leaving the plaintiff, and several other children, her heirs-at-law; that Wm. Connolly, the father, left a will, dated in 1848, by which he bequeathed all his property to one Julia Woolrich and to two children, issue of a connection between Wm. Connolly and the said Julia Woolrich; and that the latter took possession of all the estate, and still holds it; that Connolly, the father, could dispose of only one-half of the property, inasmuch as his lawful wife was living at the time of his death, and she was, consequently, entitled to the other half of the estate, as *commune en biens* with her husband; then, alleging baptism of children in December, 1831, the plaintiff concludes that he be declared proprietor of the sixth part of his mother's half share of the estate belonging to the community, and that defendant do account.

It is to be remarked, that Rebaska or Athabaska is stated (whether in 1803, or at the time of the bringing of the action, does not appear very certain) to be situated within the Hudson's Bay Territory; and it is also to be noted that the plaintiff does not pray to be declared the legitimate offspring of Wm. Connolly and the Indian woman, plaintiff's mother.

Defendant pleads that Connolly was never married to Susanne; that, on the 16th May, 1832, he was married to the defendant, Julia Woolrich, according to the rites of the Church of Rome, from which date they enjoyed the *status* of husband and wife, and that in this marriage there was continual aquiescence on the part of Susanne and her family, and among others by the plaintiff; that by the laws of the Hudson Bay Territory, and particularly such as were in force at

the *Rivière-aux-Rats*, and by the law which has prevailed in that country for the last 100 years, no community of property resulted from a marriage there.

The plaintiff answers, that at the time of Connolly's pretended marriage to Julia Woolrich, 16th May, 1832, Susanne, Connolly's lawful wife, was living, she having died long after, that is, on the 14th August, 1862; that Wm. Connolly was born at Lachine, in Lower Canada; that he had not resided in the H. B. Territory with the intention of remaining, but intended always to return; that he was in the employ of the Company, returned to Montreal in 1831, and remained in Lower Canada till his death in 1849.

The plaintiff has ignored entirely the marriage between Wm. Connolly and Julia Woolrich, and the suit has been directed against her as an unmarried women;—as a *spinster*. Neither by his declaration, nor by his special answer, has the plaintiff prayed that this alleged marriage be declared null. It is also to be observed, that the defendant has not, by her plea, asked that the marriage existing between Connolly and the Indian be declared a nullity, or that the Court should hold that such a marriage never legally existed. The only questions, therefore, raised by the pleadings and presented for my adjudication, are 1° was there a legal marriage between Connolly and the Cree woman; and if so 2° did a community of property result from that marriage, under the circumstances of this case?

Upon this restricted, but intelligible issue, the parties proceeded to the adduction of evidence which will receive the careful consideration of the Court hereafter. But before entering upon an examination of this testimony in regard to those points where it may prove concurrent and conclusive; where it may conflict, or bear a less clear and direct proof of important facts, it may be proper, with a view to a more complete understanding of the real difficulties of the case, to state generally but briefly, what the testimony of record establishes indisputably as matters of fact, in the opinion of the Court.

The late Wm. Connolly went to the Indian country as a clerk in the service of the North-West, not the Hudson's Bay, Company, in the year 1802 or 1803. He was stationed at the *Rivière-aux-Rats*, or Rat River, in the Athabaska district, which is situated, according to Judge Johnson's evidence, about 2000 miles from York Factory, and over 1200 miles from the Red River Settlement. In the year 1803 he, by his own admission, married, according to the customs of the country, the daughter of an Indian chief of the Cree nation, named Susanne *Pas-de-nom*. The Cree Indians are a tribe whose territory is on the Elk or Athabaska River, near the lake of the same name, and which is about 300 miles from the Rocky Mountains. They were both minors. After their alleged marriage, and up to the summer of 1831, they appear to have lived together as husband and wife at Rebaska and other posts in the North-West country. It is proved that he continually acknowledged and treated this Cree woman as his wife during twenty-eight years, and also that they had several children. They lived happily, and their conjugal relations, so far as the evidence goes, were those of inviolable fidelity to each other.

In the year 1831, Wm. Connolly, (who, after the amalgamation of the two Companies had become a chief factor and member of Council of the Hudson Bay

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Company in 1825,) came to Lower Canada with his Indian wife and several of his children. He first went with them to reside at St. Eustache, where two of his daughters were baptized by a Catholic priest, to whom, and the principal people of the locality, it seems, Connolly introduced Susanne as his lawful wife. She passed by the name of Mrs. Connolly, and associated with the people of St. Eustache as his wife. After remaining there four or five months, Connolly came with Mrs. Connolly and children to Montreal, and there boarded first with his sister, and afterwards with a Madame Plon. There is no proof to show that any intimation was given to Mrs. Connolly of the occurrence which was about to take place on the 16th May, 1832. She was still in Montreal when Connolly on that day married his second cousin, the present defendant, Julia Woolrich, a lady of good social position and of high respectability. It would appear that the Indian wife felt very sensibly this desertion, and Connolly's marriage to another woman.

The plaintiff contends that this was a repudiation by Connolly of his lawful wife, and the second marriage is void. The view which the Court takes of this summary proceeding on the part of Wm. Connolly, and of his subsequent union with Miss Woolrich, will appear in the sequel of these remarks, and by the judgment to be rendered in this case. Some time after these occurrences, Susanne was sent to the Red River Settlement, and was there supported in a convent until her death, in 1862, first by Mr. Connolly and after he died, in 1849, by the defendant, Julia Woolrich. Of the marriage of Wm. Connolly and Julia Woolrich, there was issue two children. Julia Woolrich died on 27th July, 1865, after making a will dated 28th January, 1861, by which she left several legacies, and amongst others, £30 to *Susanna* and two small legacies to the Indian children. William and Henry Connolly; but the principal part of the property, which was considerable, she bequeathed to her children.

Having adverted thus briefly to a series of facts clearly established, it is proper now to set forth the pretensions of the defendant more completely than they have been developed in the pleas.

The defendant's counsel, Mr. Cross, has urged in argument at great length, that the Common law of England prevailed at Rebaska in 1803, and that the testimony in this case does not establish a legal marriage between Wm. Connolly and the Cree woman under and according to that law; that the usages and customs of marriage observed by uncivilized and pagan nations, such as the Crees were, cannot be recognised by this Court as giving validity to a marriage even between the Indians themselves, and more particularly, and much less, between a Christian and one of the natives; that there can be no legal marriage between two parties so situated under the infidel laws and usages of barbarians; that the broad and well recognized principle that the *lex loci contractus* determines the validity of marriages solemnized in Christian countries, according to the laws, sanctions and ceremonies of such countries, does not apply in the present case; can have no application to the connection existing between Mr. Connolly and this Indian woman; that even if the plaintiff could successfully urge this principle of the law of all christian nations, and one so well known to the common law of England, yet there is no sufficient proof of the existence of any such usage as that contended for, or that the plaintiff's parents were ever married even ac-

cording to the customs of the Cree nation; that there is no contract, verbal or written, proved; no solemnization of any marriage established; that the connection of the plaintiff's parents was fugitive, temporary, dissolvable at pleasure, and had none of the legal or religious characteristics of marriage; that polygamy is one of the incidents or privileges of barbarian life, and that a law in regard to marriage which sanctions such an anti-Christian usage, cannot be regarded as a foreign law deserving of recognition by this Court; that no presumption of a marriage can result from the connection of the plaintiff's parents because it was broken off by Connolly and was not persisted in till his death: and this argument is urged with double force in this case, as it is proved that by the Indian law marriage was dissolvable at the will of either party; that the *status* of husband and wife between Connolly and Julia Woolrich is undoubted, is beyond all question, by a marriage of 30 years; that Susanne and the plaintiff, her child, acquiesced in this marriage, and that by general repute, and by his baptismal certificate, it is shown that his *status* was that of illegitimacy; that before he could bring this action he should have established a *status* of legitimacy; that the marriage with Julia Woolrich was solemnized according to law, that it is and was legal, and must be so considered till the contrary is judicially declared; that this marriage is an effectual bar to the plaintiff's pretensions, and finally, that there is not and cannot be by law any community of property resulting from this Indian marriage, evidently not to be regarded as valid by this Court; and if legal, that none exists by the law of England, which prevailed at Rat River in 1803. There is also another difficulty of a technical character. It was urged that this action should have been brought by all the children issue of Connolly's first marriage, and could not be instituted by the plaintiff alone.

These are succinctly the chief grounds taken by the defendant; they will be more fully explained hereafter.

Proceeding now to a more minute and lengthened examination of this case, the first question to be disposed of, is whether the law of England in regard to marriage prevailed at *Rivière-aux-Rats* in 1803, or whether the law of France or of her contiguous colonies, or the Canon law, or the decrees of the Council of Trent, were in force; or finally, whether the Indian customs and usages constitute the only rule by which this Court can be guided in determining the validity of this marriage between Connolly and the Cree maiden.

Mr. Justice Aylwin and Mr. Justice Johnson have been examined in this cause as witnesses. The former gentlemen, produced by the defendant says: "At the time of the birth of the plaintiff at Rat River, in 1803, the English law "prevailed in the Hudson Bay territory, and has done so ever since—that "is to say, it has prevailed since the Patent of King Charles, which regulated that country."

Judge Johnson, witness for plaintiff, in cross-examination, says: "The laws "which prevailed throughout the Hudson Bay territories are the laws of Eng"land, with such modifications as have been made by the local Councils having "authority under the Charter to pass such laws. The English common law was "introduced into the country at the date of the granting of the Charter to the "company by King Charles."

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From this evidence, and according to this high authority, we are led to infer that the common law prevails throughout the Hudson Bay territory in virtue and by the terms of the Charter generally, and in regard to all the inhabitants or occupants of the territory, both natives and Europeans.

Mr. Hopkins, witness for defendant had been in the service of the Hudson Bay Company for twenty-five years, and is a gentlemen of great intelligence; he testifies that "the laws by which the Hudson Bay territory is governed are "the laws of England, modified by certain regulations passed by the Council of "the Hudson Bay Company." Mr. Hopkins adds: "*I know the place called "Rebaska from official intercourse, and from having been in the vicinity of it. "It is one of the most remote districts, and is without the limits of the Hudson "Bay Company territories proper; the jurisdiction of the Company extended "over this post, and still extends over it. We held it up to within a recent date "by separate license.* If the late William Connolly was stationed there, it was "long before my time. I have no knowledge of the regulations of the Company (if any), with regard to marriage in that country in 1803."

This evidence, though proceeding from good authority, leaves the Court in doubt:—

1st, As to what portion of the laws of England prevailed at *Rivière-aux-Rats* in 1803; to whom they were applicable, and how they were introduced into that particular district of country, though all those gentlemen seem to imply that these laws, whatever they may be or have been, were extended to that locality by the Charter of Charles II.

2nd, As to what modifications had taken place in 1803 and since, in these laws, within the Hudson Bay territory, or at *Rivière-aux-Rats*.

3rd, Whether the Athabaska District, within which is situated *La Rivière-aux-Rats*, was or was not, in 1803, within the chartered limits of the Hudson Bay territories, or under the jurisdiction of the Company, in such a way as to subject it to the laws of England generally, and as stated by the two learned Judges.

4th, As to whether there exists a native usage or law of marriage among the Indians, either at *Rivière-aux-Rats* or elsewhere within the chartered limits of the Hudson Bay territories, distinct from the law of England prevailing in that country.

The Court is bound to respect the testimony of these witnesses so far as it proves any thing; but I shall proceed to show, I think clearly and conclusively, that the Athabaska District never was within the chartered limits of the Hudson Bay Company; and, moreover, admitting it to be doubtful whether the common law of England obtained even within the last-mentioned territory to the full extent stated by the witnesses, still it is beyond controversy that this law did not prevail in the Athabaska region at *Rivière-aux-Rats* at the time of Connolly's alleged marriage with the Cree woman; and, in any case, that the customs of the Cree Indians relative to marriage were in force there at that time. In doing so, it will be necessary for me, in the first place, to advert briefly to the discoveries made and trading posts established in those vast and remote regions of the North-

West, previous to the Charter granted by Charles II. to the Hudson Bay Company in 1670.

Spain, England, and France have been the most conspicuous among the European States in the discovery and colonization of America. About the year 1627 the authority of France was successfully established on the banks of the St. Lawrence, though discovery, hunting, and trading by these Europeans had extended farther west previous to that time. Forty-three years after this date, the Charter of King Charles II. was granted to the Hudson Bay Company; and one hundred years later, the whole of North America belonging to France was finally ceded to Great Britain. Long prior to 1670, and so far back as 1605, Quebec had been established, and had become an important settlement. In the early part of the seventeenth century, anterior to 1630, the Beaver and several other companies had been organized at Quebec for carrying on the fur trade in the West, near and around the great Lakes, and in the North-West territory. The enterprise and trading operations of these companies and the French colonists generally extended over vast regions of the northern and western portions of this continent. They entered into treaties with the Indian tribes and nations, and carried on a lucrative and extensive fur trade with the natives. Neither the French Government, nor any of its colonists or their trading associations, ever attempted, during an intercourse of over two hundred years, to subvert or modify the laws and usages of the aboriginal tribes, except where they had established colonies and permanent settlements, and then only by persuasion, and as the fiercer and more barbarous of the Indian nations receded, or in the lapse of time, when their barbarism had been subdued by contact with the whites, or mitigated by the influences of European civilization. It is quite true, it is contended, they had no right, no lawful authority to do so; yet, as a matter of fact, they appear to have wholly abstained from the exercise of any unjust or arbitrary power in this respect. In the prosecution of their trade and other enterprises, those adventurers evinced great energy, courage and perseverance. How far they carried their hunting and trading explorations into the interior, I am unable precisely to determine; but I am inclined to think they had extended them to the Athabaska country, though perhaps not to *Riviere-aux-Rats*, where Connolly was stationed in 1803. The Rat River locality is, so near as I can ascertain, situate in latitude 58° north and longitude west from Greenwich about 111°. It is on the north shore of the lake, and about 600 miles from the Hudson Bay coast. It is due east 300 miles, from the Rocky Mountains, and due north from the boundary line of the United States 650 miles, and it is nearly the same distance, due south, from the Arctic or Frozen Ocean. Of course the deviations along the existing lines of travel would make the distances by these routes much greater than the estimate here made. As before stated, I have no positive evidence that any French trader or hunter visited *Rivière-aux-Rats* during the sixteenth, or the first half of the seventeenth century, though there is every reason to believe they had been there. It is in my opinion, more than probable, from all I can collect, or learn from a careful examination of the authorities at my command, that some portions of the Athabaska country had, before 1640, been visited and traded in, and, to some extent, occupied by the French colonists and traders in Canada, and their Beaver Company

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formed in 1629. From that date, during the thirty years which immediately preceded the grant of King Charles II. in 1670, these discoveries and trading settlements had considerably increased in number and importance. If this be true, it will be seen hereafter that, apart from the question of the Company's limits, the Athabaska region was, by a general clause, excepted, from the grant of King Charles; for although neither the laws of France, nor those of her contiguous colonies, may have obtained at those distant posts in 1670, the date of the Hudson Bay Charter, yet I think it is beyond all doubt that the Athabaska, and other regions bordering on it, belonged to the Crown of France at that time, to the same extent and by the same means, as the countries around Hudson Bay belonged to the Crown of England—that is to say, by discovery, by hunting, and trading explorations—with this difference, that in the case of the French traders there was a kind of occupation, whereas the English never occupied or settled any part of the Hudson Bay coast till 1669. I will assume, however, for the purposes of argument, that, in both these cases, the principle of public law applied, viz., that in the case of a colony (though they were not plantations or colonies in the proper or legal sense of the terms) acquired by discovery and occupancy, which is a plantation in the strict and original meaning of the word, the law of the parent states then in being was immediately and *ipso facto* in force in these new settlements—that is to say, at Athabaska and on the Hudson Bay; and that the discoverers and first inhabitants of these places carried with them their own inalienable birthright. the laws of their country. Yet they took with them only so much of these laws as was applicable to the condition of an infant colony. For the artificial refinements and distinctions incident to the property of a great and commercial people, the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, were neither necessary nor convenient for them, and therefore not in force. The whole of their institutions were also liable to be new modelled and reformed by the general superintending power of the legislature in the mother country, and even this doctrine would apply only to newly discovered and uninhabited regions.

But in both cases under consideration, the discoverers and first settlers found these wild regions occupied and held by numerous and powerful tribes of Indians;—by aboriginal nations, who had been in possession of these countries for ages; and in regard to the Cree Indians, it is stated by a writer who professes to have a familiar knowledge of the natives, (Martin's Hudson Bay, pp. 84-85):

"The Crees are the largest tribe or nation of Indians, and are divided into "two branches—the Crees on the Saskatchewan, and the Swampies along the "borders of Hudson Bay, from Fort Churchill to East Main. Forty years ago, "in consequence of their early obtainment of firearms, they carried their victories to the Arctic circle and across the Rocky Mountains, and treated as "slaves the Chipewyans, Yellow Knives, Hares, Dogribs, Loucheux, Nikanies, "Dahotanies, and other tribes in the adjoining regions."

Now, as I have before stated, I am admitting for the sake of argument, the existence, prior to the Charter of Charles, of the common law of France, and

that of England, at these two trading posts or establishments respectively, yet, will it be contended that the territorial rights, political organization such as it was, or the laws and usages of the Indian tribes, were abrogated—that they ceased to exist when these two European nations began to trade with the aboriginal occupants? In my opinion, it is beyond controversy that they did not—that so far from being abolished, they were left in full force, and were not even modified in the slightest degree in regard to the civil rights of the natives. As bearing upon this point, I cannot do better better than to cite the decision of a learned and august tribunal—the Supreme Court of the United States. In the celebrated case of *Worcester against the State of Georgia*, (6th Peters Reports, pages 515-542), Chief Justice Marshall—perhaps one of the greatest lawyers of our times—in delivering the judgment of the Court, said:

"America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; *or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.*

"After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment *was war, hunting and fishing.*

"Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, *on agriculturists and manufacturers?*

"But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

"The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects or by whose authority it was

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"made, against all other European governments, which title might be consummated by possession." Johnson *vs.* McIntosh, 8 Wheaton's Rep., 543.

"This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; *not one which could annul the previous rights of those who had not agreed to it.* It regulated the right given by discovery among the European discoverers, *but could not affect the rights of those already in possession, either as aboriginal occupants*, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

"The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist; in fact, are understood by both parties, are asserted by the one, and admitted by the other.

"Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made *before possession* was taken of any part of the country. They purport, generally, to convey the soil, *from the Atlantic to the South Sea.* This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the *feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people or occupy the lands from sea to sea, did not enter the mind of any man.* They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood. * * * * * * * *

"Certain it is, that our history furnishes no example, from the first settlement of our country, *of any attempt on the part of the crown to interfere with the internal affairs of the Indians*, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. *He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.*"

Though speaking more particularly of Indian lands and territories, yet the opinion of the Court as to the maintenance of the laws of the Aborigines, is manifest throughout. The principles laid down in this judgment, (and Mr. Justice Story as a member of the Court concurred in this decision), admit of no doubt.

Phillimore in his International Law CCXLI. p. 208, Ed. of 1854, says:—

"The nature of Occupation is not confined to any one class or description: it must be a *beneficial use and occupation* (*le travail d' appropriation*) "but it may be by a settlement for the purpose of prosecuting a particular trade, "such as a fishery, or for working mines, or pastoral occupations, as well as "agriculture, though Bynkershoek is correct in saying, '*cultura* utique et *cura* "*agri* possessionem quam maximè indicat.'"

"Vattel justly maintains that the pastoral occupation of the Arabs entitled "them to the exclusive possession of the regions which they inhabit. 'Si les "Arabes pasteurs voulaient cultiver soigneusement la terre, un moindre espace "pourrait leur suffire. Cependant, aucune autre nation n'est en droit de les res- "serrer, à moins qu'elle ne manquât absolument de terre; car enfin ils *possèdent* "leur pays; ils s'en servent à leur manière; ils en tirent un usage convenable "à leur genre de vie; sur lequel ils ne reçoivent la loi de personne.'"

"It has been truly observed that, 'agreeably to this rule, the North American "Indians would have been entitled to have excluded the British fur-traders from "their hunting grounds; and, not having done so, the latter must be considered "as having been admitted *to* a *joint occupation of the territory*, and thus to have "become invested with a similar right of excluding strangers from such portions "of the country as their own industrial operations pervade.'"

Authorities might be accumulated on this point, concerning which all writers agree.

Mr Fox in the great Debate upon his system of Government for India said: "It had been often suggested that it would be advisable to give to the Gen- "toos the laws of England; but such an attempt would be ridiculous and chime- "rical. The customs and religion of India clashed too much with them."

I have no hesitation in saying that, adopting these views of the question under consideration, (and acquiescing, for the sake of argument, in the pretensions of the defendant) the Indian political and territorial rights, laws, and usages remained in full force—both at Athabaska and in the Hudson Bay region, previous to the Charter of 1670, and even after that date, as will appear hereafter. I come now to the consideration of that Charter; for it was incidentally and impliedly contended that it not only introduced the common law of England, but also rendered it applicable to all the inhabitants, and abrogated the Indian customs and usages, within the territories.

Hudson's Bay had been discovered prior to the attempt in which Hudson perished in 1610; but from the voyage of Sir Thomas Button, 1611, till the year 1667, it appears to have been wholly neglected by the English Government and nation. In the latter year, the communication between Canada and the Bay was discovered by two Canadian gentlemen, Messrs. Raddisson and De Groseliers, who were conducted thither across the country by Indians. Succeeding in

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this, they returned to Quebec, and offered the merchants to conduct ships to Hudson's Bay, the proximity of which to the principal Fur districts, was now ascertained. This proposal was rejected, as well as a subsequent one to the French Government at Paris; there they were persuaded by the English Ambassador to go to London, where they were favourably received by some merchants, and persons of high rank, who commissioned a Mr. Gillam, long accustomed to the Newfoundland trade, to prosecute the discovery. Mr Gillam sailed in the Nonsuch, in 1667, into Baffin's Bay, to the height of 75° north latitude, and thence to 51°, where he entered a river, to which he gave the name of Prince Rupert's; *and finding the Indians friendly*, erected a small Fort. The persons interested in this vessel, upon the return of Gillam, applied to Charles the Second for a Patent, who granted them the Hudson's Bay Charter, dated the 2nd May, 1670, and from which I make the following extracts:—

The Charter declares— "WE have given, granted, and confirmed, and by "these presents, for us, our heirs, and successors, do give, grant, and confirm, "unto the said Governors and Company, and their successors, *the sole trade and* "*commerce of all those seas, straits, bays, rivers, lakes, creeks, and sounds, in* "*whatsoever latitude they shall be, that lie within the entrance of the Straits* "*commonly called Hudson's Straits, together with all the lands and territories* "*upon the countries, coasts, and confines of the seas, bays, rivers, lakes, creeks,* "*sounds, aforesaid, that are not already actually possessed by or granted to* "*any of our subjects, or possessed by the subjects of any other Christian Prince* "*or State,* with the fishing of all sorts of fish, whales, sturgeons, and all other "royal fish in the seas, bays, inlets, and rivers, within the premises, and the fish "therein taken together with the royalty of the sea upon the coasts within the "limits aforesaid, and all mines royal, as well discovered as not discovered, of "gold, silver, gems, and precious stones, to be found or discovered within the "territories, limits and places aforesaid, and that the said land be from hence-"forth reckoned and reputed as one of our plantations of colonies in America, "called 'Rupert's Land.'"

"And further we do by these presents, for us, our heirs and successors, make, "create, and constitute the said Governor and Company for the time being, and "their successors, the true and absolute lords and proprietors of the same terri-"tory, limits, and places aforesaid, and of all other the premises, saving always "the faith, allegiance, and sovereign dominion due to us, our heirs and succes-"sors, for the same to have, hold, possess, and enjoy the said territory, limits, "and places, and all and singular other the premises hereby granted as afore-"said, with their and every of their rights, members, jurisdiction, prerogatives, "royalties, and appurtenances, whatsoever, to them the said Governor and Com-"pany, and their successors for ever to be holden of us, our heirs and successors, "as of our manor of East Greenwich, in our County of Kent, *in free and com-*"*mon soccage, and not in capite or by knights service; yielding and paying* "*yearly to us our heirs, and successors the rame, two elks, and two black* "*beavers, wheresoever and so often as we, our heirs and successors, shall happen* "*to enter into the said countries, territories, and regions hereby granted.*

"And further our will and pleasure is, and by these presents, for us, our

"heirs and successors, we do grant unto the said Governor and Company, and "to their successors, from time to time, to assemble themselves, for or about "any the matters, causes, affairs, or business of the said trade, in any place, or "places for the same convenient, within our dominions or elsewhere, and there "to hold Court for the said Company, and the affairs thereof; and that, also, it "shall and may be lawful to and for them, and the greater part of them, being "so assembled, and that shall then and there be present, in any such place or "places, whereof the Governor or his Deputy for the time being to be one."

And the Company has the right "to make, ordain and constitute such and so "many reasonable laws, constitutions, orders and ordinances as to them, or the "greater part of them, being then and there present, shall seem necessary and con-"venient for the good government of the said Company, and of all governors of co-"lonies, forts and plantations, factors, masters, marines and other officers employed "or to be employed in any of the territories and lands aforesaid, and in any of "their voyages; and for the better advancement and continuance of the said "trade or traffic and plantations, and the same laws, constitutions, orders and "ordinances so made, to put in, use and execute accordingly, and at their plea "sure to revoke and alter the same or any of them, as the occasion shall re-"quire. And that the said Governor and Company, so often as they shall make, "ordain or establish any such laws, constitutions, orders and ordinances in such "form as aforesaid, shall and may lawfully impose, ordain, limit, and provide "such pains, penalties and punishments upon all offenders, contrary to such "laws, constitutions, orders and ordinances, or any of them, as to the said Go-"vernor and Company for the time being, or the greater part of them, then and "there being present, the said Governor or his Deputy being always one, shall "seem necessary, requisite or convenient for the observation of the same laws, "constitutions, orders, and ordinances; and the same fines, and amerciaments "shall and may, by their officers and servants from time to time to be appointed "for that purpose, levy, take and have, to the use of the said Governor and "Company, and their successors, without the impediment of us, our heirs, or "successors, or of any the officers or ministers of us, our heirs, or successors, "and without any account therefore to us, our heirs, or successors to be made: "All and singular which laws, constitutions, orders and ordinances, so as afore-"said to be made, WE WILL to be duly observed and kept under the pains and "penalties therein to be contained; so always as the said laws, constitutions, "orders and ordinances, fines and amerciaments, *be reasonable, and not contrary "or repugnant, but as near as may be agreeable to the laws, statutes or customs "of this our realm.*"

And the "Governor and Company shall have liberty, full power and "authority to appoint and establish Governors and all other officers to govern "them, and that the Governor and his Council of the several and respective pla-"ces where the said Company shall have plantations, forts, factories, colonies or "places of trade within any the countries, lands or territories hereby granted, "may have power to judge *all persons belonging to the said Governor and Com-"pany, or that shall live under them,* in all causes, whether civil or criminal, "according to the laws of this kingdom, and to execute justice accordingly; and

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"in case any crime or misdemeanour shall be committed in any of the said Com-
"pany's plantations, forts, factories or places of trade within the limits aforesaid,
"where judicature cannot be executed for want of a Governor and Council there,
"then in such case it shall and may be lawful for the chief Factor of that place
"and his Council to transmit the party, together with the offence, to such other
"plantation, factory or fort where there shall be a Governor and Council, where
"justice may be executed, or into this kingdom of England, as shall be thought
"most convenient, there to receive such punishment as the nature of his offence
"shall deserve."

From these extracts it will be seen:

1. What description of territory, rivers, and sea coasts were ceded; and that the tenure of these extensive regions was to be that of free and common soccage.

2. That the Company had power to make laws and regulations agreeable, in so far as might be, to the laws and customs of the realm.

3. That English law, civil and criminal, was introduced and made applicable within the territory to all persons belonging to the Company, or living under them; and,

4. That territories then already actually possessed or granted to any British subjects, or possessed by the subjects of any other Christian Prince or State, were excepted from the grant.

It is no part of my duty, upon the present occasion, to offer any opinion upon the validity of this extraordinary charter, though that point is not without interest in this case; and it is worthy of note, that some of its clauses have given rise to doubts among lawyers, and have been the occasion for considerable controversy both in England and in this country. Several modes of testing the question have been suggested; but as yet none have been adopted. Apart from the immense and irresponsible powers conferred upon the Company, it has been contended that the grant in free and common soccage, in fee simple, of such extensive regions of territory in the actual possession of aboriginal and powerful nations, was not in the power of the crown, and was a violation of the plainest principles of public international law. Some have gone further, and contended that without the authority of Parliament, such a grant of land and exclusive privileges and monopoly could not be made; that the concession of the exclusive right of trade with the Indian tribes was an illegal exercise of the Royal Prerogative; that the Company have never carried out the intentions of the Crown, either by proper attempts to find a north-west passage to the Southern Ocean, or by making useful discoveries and planting, settling, and colonizing the territory; that they have not attempted, by even ordinary means, to civilize the natives; nor have they, by judicious and appropriate regulations, laws, and government, endeavoured to render such a vast and important dominion of the Crown beneficial to the Parent State. The Company, when called upon from time to time, have answered these charges more or less successfully; and they have further urged, that in the reign following that in which this Charter was granted, the cession received the confirmation of Parliament; however, it was specially provided that the act of confirmation should only remain in force for the period of seven years, "and from thence to the next session of Parliament, and no longer."

After this, no re-confirmation of the Charter by Parliament ever took place, though its existence has frequently been incidentally recognized in Acts of that body, and among others may be noticed the following:—By an act of Parliament of Great Britain (43 George III., chap. cxxxviii.), passed in August, 1803, it was provided that crimes committed within the Indian territories, which, though not conveyed by Charter to the Company, have long been leased to them, should be cognizable by the Courts of Upper and Lower Canada. The preamble of this Act recites that crimes and offences committed within the Indian territories were not cognizable by any jurisdiction whatever. In 1821, an Act (1 and 1 George IV., chap. lxvi.) was passed extending the provisions of the above-named Act to crimes and offences committed within the territory covered by the Company's Charter, anything "in any grant or Charter to the Company to the contrary "notwithstanding." This latter Act also gave to the Canadian Courts a right of jurisdiction within the Indian territory, as well as over Rupert's Land, which is covered by the Company's Charter. The existence of the Charter has also been referred to in royal Proclamations. All this may give rise to interesting investigations hereafter.

But for the purpose of this case, I take the Charter as I find it, and regard it as legally conceding territory and introducing the Common Law of England, with a restricted application within the limits of the grant. And conceding this, it becomes necessary, in the first place, to enquire whether the Athabaska region was included within the Chartered limits of the Company or not. Mr. Hopkins, a witness for the defendant, says it was not; but there is a qualification in his evidence which renders his meaning in some degree doubtful. Let us look a little closer into this matter, and see if the fact can be ascertained, or the doubt be reasonably solved. And here it may be proper to remark, once for all, that the western boundaries of the territory have never, so far as I can ascertain, been clearly settled or defined by either judicial decision or otherwise. Before proceeding, however, to advert more particularly to this question, it may not be out of place to refer to the opinions of some of the most eminent lawyers in England in regard to this difficulty of boundary which is not new, and which has arisen under circumstances to which it is unnecessary for the Court to advert.

Lord Brougham and his associate counsel, consulted in 1814 by the North-West Company, were of opinion, that the territorial grant was not intended to comprehend all the lands and territories that might be approched through Hudson's Straits by land or by water, but must be limited to the relation of proximity to the Straits, and to the confines of the coasts of the Bay within the Straits; and likewise, that the boundary must be such a one as is consistent with that view, and with the professed objects of a trading company, intended, not to found kingdoms and establish states, but to carry on fisheries in their waters, and to trade and traffic for the acquisition of furs, peltries, &c.; and they add, that as one hundred and fifty years had then elapsed since the grant of the Charter, it must have been ascertained by the actual occupation of the Company what portion or portions of lands and territories in the vicinity, and on the coast and confines of the waters mentioned and described as within the Straits, they had found necessary for their purposes, and for forts, factories, towns, villages, settle-

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ments, or such other establishments in such vicinity and on such coasts and confines as pertain and belong to a company established for the purposes mentioned in their charter, and necessary, useful and convenient to them, within these prescribed limits, for the prosecution of these purposes; and they say, that the enormous extension of land now claimed (and they had reference only to the Red River District transferred in 1812 by the Company to Lord Selkirk; for no pretence was ever made by the Hudson Bay Company that Rebaska, Rat River, or Athabaska, was within the Chartered Boundaries, till it was first put forth in this case,) appears therefore, not to be warranted by any sound construction of the Charter.

Sir Samuel Romilly, Scarlett, afterwards Lord Abinger, and others consulted, in 1814, by the Hudson's Bay Company, were of opinion that the grant of the land contained in the charter was good; and that, moreover, it would include all the countries, the waters of which flow into Hudson's Bay.

All this is pretty vague; and what is most apparent and precise, in these opinions, is the different way in which they view the charter and the Western limits of the Company's territories. The charter grants the right of exclusive trade and commerce of all *seas, straits, rivers, &c.*, that lie within the entrance of *Hudson Straits*; also together with all the lands and territories *upon* the countries, coasts and confines of the sea, bays, lakes, rivers, creeks, and sounds aforesaid. It seems to me, if these words, taken together, are susceptible of any reasonable construction or interpretation, they were intended to concede a vast extent of country, round the whole coast of Hudson's Bay and the rivers flowing into it. That all the regions westward from the shores of the Bay along the great rivers, tributaries of that inland sea, so far as those streams are navigable for the purpose of trade and commerce, are included in the grant; in other words, their limits extend as far west as the head of the water-shed, where navigation ceases, in longitude west, 95.

Assuming this view to be correct, yet the Athabaska region would not be included within the western boundaries of the Company's territory. The Elk, or Athabaska River, rises in the Rocky mountains; and after flowing north and west 300 miles, discharges its waters into lake Athabaska, otherwise known as the lake of the Hills. By two outlets, the waters of lake Athabaska flow into Peace River, an affluent of the MacKenzie, through it to the Frozen Ocean. It is idle, therefore, in the opinion of the Court to contend that Rat River or the Athabaska County are or were ever within the chartered limits of the Hudson's Bay territories.

Before leaving this branch of the case, it may be proper to refer to the treaty of Ryswick, in 1697, between Great Britain and France, and also to the treaty of Utretcht, between the same powers, in 1713.

By the 7th and 8th articles of the former treaty it is declared and agreed that:—

"VII. And in like manner the Kings of Great Britain shall restore to the "most Christian King all countries, islands, forts, and colonies, wheresoever "situated, which the French did possess before the said declaration of war; "and this restitution shall be made on both sides, within the space of six months,

" or sooner if it can be done. And to that end, immediately after the ratifica-
" tion of its treaty, each of the said Kings shall deliver, or cause to be delivered,
" to the other, or to commissioners authorized in his name for that purpose, all
" acts of concession, instruments, and necessary orders, duly made and in proper
" form, so that they may have their effect."

" VIII. Commissioners shall be appointed on both sides, to examine and
" determine the rights and pretensions which either of the Kings had to the
" places situated in Hudson's Bay; but the possession of those places which were
" taken by the French, during the peace that preceded this present war, and
" were retaken by the English during this war, *shall be left to the French*, by
" virtue of the *foregoing article*." These commissioners were named, but never reported.

By the 10th article of the treaty of Utretcht it is provided that :—

" X. The said most Christian King shall restore to the kingdom and Queen
" of Great Britain, *to be possessed in full right for ever, the bay and straits of*
" *Hudson, together with all lands, seas, sea-coasts, rivers, and places situate in*
" *the said bay and straits, and which belong thereunto, no tracts of lands or of*
" *sea being excepted, which are at present possessed by the French subjects of*
" *France*."

The Hudson's Bay territory, as described in the latter treaty, would seem to be restricted to the limits contended for by Lord Brougham, rather than to those laid down by Sir Samuel Romilly; and in any case, I believe, as before stated, that the Athabaska region was beyond and without the chartered limits of the Company, and could not therefore come under the operation of that grant. There may, moreover, be urged another reason, and, in my opinion, successfully, why the Athabaska country should be excluded from the limits of the Hudson Bay territory, and an argument more cogent than that to be found in the vague and doubtful terms of the Charter. It is declared by that remarkable instrument, that the grant is made of all those seas, bays, straits, &c., together with all lands and territories, &c., that are not already actually possessed by or granted to any of our subjects, *or possessed by the subjects of any other Christian Prince or State*. Now, as I have before remarked, it appears to me to be beyond controversy that, in 1670, the Athabaska country belonged to the Crown of France. It had previously been discovered by French colonists, and been more or less explored by these adventurers and the trading companies of New and Old France. It is true their settlement and occupation was not precisely that of colonists; but they were traders with trading posts, explorers, hunters, discoverers, carrying on a trading intercourse with the natives. If this be true, and there can be no doubt of it, the region in question was expressly excepted out of that grant; and such was the opinion of Lord Brougham and his associate Counsel.

But admitting, for the purpose of conceding to the defendant all that can be granted, that in 1803, the Athabaska district was included within the western limits of the Hudson Bay territories, still that portion of the Common Law of England which would prevail there, had a very restricted application—it could be administered and enforced only among, and in favor of, and against those

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"*who belonged to the Company or were living under them.*" It did not apply to the Indians, nor were the native laws or customs abolished or modified, and this is unquestionably true in regard to their civil rights. It is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that two different systems of civil and even criminal law may prevail. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally or indiscriminately—it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and exist under the sanction and protection of the Crown of England, and Mr. Connolly might bind himself as well by that law, as by the Common Law of England.

It is still further contended that, by the treaty of Paris, in 1763, by which all the French possessions on the continent of America were ceded by France to Great Britain, the North-West was brought, not only under the dominion of England, but the common law of the realm was *ipso facto* introduced into that country.

As a matter of fact and of public law, the treaty in question effected no such change in the laws of the territory. It will be observed that between 1670 and 1763 nearly one hundred years had elapsed, and during that period the French colonists, and French trading companies, had made settlements and established trading posts as far as the Rocky Mountains; that these countries were in the occupation of the French, and that no change could take place in their laws, or in the Indian usages, except by the express will of the conqueror, or of the sovereign to whom the cession was made. I find in the proclamation in pursuance of that treaty, dated 7th October, 1763, the following clauses:—

"And we do further declare it to be our royal will and pleasure, for the pre-
"sent, as aforesaid, to reserve under our sovereignty, protection, and dominion,
"for the use of the said Indians, all the land and territories not included within
"the limits of our said three new governments, or within the limits of the terri-
"tory granted to the Hudson's Bay Company, as also all the land and territories
"lying to the westward of the sources of the rivers which fall into the sea from
"the west and north-west as aforesaid; and we do hereby strictly forbid, on pain
"of our displeasure, all our loving subjects from making any purchases *or settle-*
"*ments whatever*, or taking possession of any of the lands above reserved without
"our especial leave and licence for that purpose first obtained."

There is nothing to be found in this, or in any subsequent proclamation, abolishing or changing the customs of the Indians or the laws of the French settlers, whatever they may have been; nothing which introduced the English common law into these territories. When Connolly went to Athabaska, in 1803, he found the Indian usages as they had existed for ages, unchanged by European power or Christian legislation. He did not take English law with him, for his settlement there was not preceded by discoveries made either by himself or English adventurers, nor was it an uninhabited or unoccupied territory. This pretension of the defendant, therefore, that, to the exclusion of the laws and customs of the natives, the common law of England prevailed at Rat River, in 1803, or

at any subsequent period, must be over-ruled, and in doing so the Court may remark that it was not competent in any case for Mr. Connolly to carry with him this common law of England to Rat River in his knapsack, and much less could he bring back to Lower Canada the law of repudiation in a bark canoe. If he could in this way carry the law of England there, he is bound by it, as I view the fact of this case; and coming back to Canada, he cannot bring with him, or invoke the Cree law of divorce at will.

I have dwelt upon this branch of the case at greater length than it would seem to require through deference for the arguments of the defendant's counsel, and not because the question is one presenting any difficulty, or in the opinion of the Court susceptible of a doubt. The plaintiff's counsel seemed to attach very little importance to it, either because they thought it too clear, or perhaps immaterial.

I come now to the facts, and the law of the case claiming more close and anxious consideration.

Before, however, proceeding any further, it may be well to state some general principles applicable to the law of marriage; how that institution was considered, and what were the ceremonies observed in solemnizing matrimony among the principal nations of Europe prior to the Council of Trent, the ordinances of the French Kings, and the British Marriage Acts as they are called. As none of these laws were ever promulgated, or in force at Rat River, we need not carry our investigations into the religious customs or observances of more recent times.

By the law of nature, a man and a woman without religion or law have the right, it is said, to form a union upon such conditions as they may choose to impose. By the law of nations, all communities which observe that law, have agreed to recognize as husband and wife persons of the opposite sexes, who in their union have observed and fulfilled all the laws in force relative to matrimony, in the country which they inhabit or where the union is formed; and by the Civil law, each nation has established certain formalities upon the observance of which the validity of marriage depends. In a state of nature the contract has been defined as *Contractus quo personæ corporum suorum dominium mutuo tradunt et recipiunt.* By the Civil law it has been regarded as *Contractus quo legitimatæ personæ rite et mutuo corporum suorum dominium tradunt et recipiunt.* So far as marriage requires religious sanction it may be considered *maris and feminæ conjunctio individuæ vitæ retinens secundum prescripcum legun divinarum et humanarum ad usum conjugalem.*

Among the chosen people and the heathen nations of antiquity, before the teachings of Christ, marriage in many respects was not unlike that described as existing among the aboriginal inhabitants of this continent. We must in regard to many of these nations always except the facility of divorce and repudiation. Among some of the barbarians of North America, marriage is said to be dissolvable at pleasure—at the will or caprice of either party—the meaning of which is, I presume, that the causes which justify divorce are very numerous; and that the formalities to be observed in the exercise of this mutual right of repudiation, are very few. It is a question of degree, more or less; and so far it is different from the law of divorce as it obtains and has obtained among many civilised and christian nations.

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It seems to be admitted among all christians, that our Saviour imparted to marriage a more solemn and sacred character than it previously possessed; and the Roman Catholic theologians and councils hold, that it was elevated by Him to the dignity of a sacrament, and that the bond was rendered indissoluble. I have no good reason to doubt but that this has been the doctrine of the Church of Rome, upon the first two points from the time of the Apostles to the present day; in fact we have the authority of Tertullian, who wrote in the middle of the second Century, and of many later fathers, that this was the doctrine of the Church; though of course, it was extremely difficult to impress these religious solemnities in all their stength and purity upon nations passing from paganism to christianity, or to enforce their strict observance amidst the corruptions and violence of a vast Empire, perishing from the effeminacy and licentiousness of its people. The Church came in at the decline; while she prepared to encounter with weapons more powerful than those of man, the wrath of the barbarians, advancing now to the destruction of roman power and roman civilization, her work of conversion was still incomplete, and her doctrines were not entirely or adequately asserted. Perhaps during the centuries of disorder, anarchy and barbarism, which preceded and followed the final overthrow of the Western Empire, it was impossible to inculcate or to enforce those doctrines which were defined and promulgated in later and more christian times. I am not, however, called upon to determine that question; but in order to appreciate in a religious point of view one peculiarity of this Indian marriage, *viz*; that of having taken place by mere consent without rites or ceremony, it may be interesting to refer to some of the laws of the christian Emperors and to epistles and decretals of the Popes. Constantine, the first Emperor who acknowledged Christianity on the throne, and many of his successors, expressly recognize divorce in their laws, and also marriage by consent alone. We have several collections of Roman laws since the Empire became christian, which define what marriage was under these laws:—1st. The Theodosian Code which was published in 438, and 2nd, the Code of Justinian and other parts of his legislation; in them will be found, in the greatest detail, what constituted a legal marriage. In the Institutes, we find the following:

"Justas nuptias inier se cives romani contrahunt, *qui secundùm præcepta* "*legum coeunt*: masculi quidem puberes, fœminæ autem viripotentes; sive patres- "familiarum sint, sive filii-familiarum. Dum tamen, si filii-familiarum sint, "consensum habeant parentum, quorum in potestate sunt. *Inst. lib.* I, *tit.* X, "*in princ.*"

This is what the Digest calls the nuptial—the essential and legal rite. In a law of Theodorius, we find the following:

"Si donationum antè nuptias, vel dotis instrumenta defuerint, pompa etiam "*aliaque nuptiarum celebritas* omittatur, nullus æstimet ob id deesse, rectò aliàs "inito matrimonio, firmitatem, vel ex eo natis liberis jura posse legitimorum "auferri, si inter pares honestate personas, nullâ lege impediente, fiat consortium, "*quod ipsorum consensu, atque amicorum fide firmatur. Cod. Theod. lib.* III, "*tit.* 7 *l.* 3."

This is the famous doctrine of Theodosius, the younger, promulgated 428,

and inserted in the Theodosian Code. It was afterwards adopted by Justinian. We find these words in the third chapter of the 22nd Novel:

"*Nuptias* itaque *affectus alternus facit, dotalium* non egenis augmento. Cùm "enim semel convenerint sub puro nuptiæ affectu, sive etiam oblatione dotis, et "propter nuptias donationis; oportet causam omnino sequi etiam solutionem aut "innoxiam, aut cum pœnâ."

It will be borne in mind that these pecuniary arrangements were not essential to the marriage contract; but they were regarded as evidences of consent, and their omission gave rise to serious difficulties. In his 74th Novel, (App. 4) we find the law which defines more in detail than any other what shall constitute a legal marriage; but nothing is said there about any religious ceremony. He says:

"Et antiquis promulgatum est legibus, et à nobis ipsis sunt hæc eadem con- "stituta, *ut utiam nuptiæ extrà dotalia documenta ex solo affectu valeant et rate* "*sint*. Cap. IV. in princ.

"Introeuntes testes sine periculo mentientes, quià vir vocabat *dominam* "cohærentem, et ista illum similiter nominabat; et sic eis finguntur matrimonia "non pro veritate confecta. *Ibid.*

"In majoribus itaque dignitatibus, et quæcumque usque ad nos et sen- "atores et magnificentissimos illustres, neque fieri hæc omnino patimur; sed "sit omnino et dos, et antenuptialis donatio, et ad omnia quæ honestiora decent "nomina. Quantùm vero in militiis, honestioribus et negotiis, et omnino profes- "sionibus dignioribus est: si voluerit legitimè uxori copulari, et non facere nup- "tialia documenta: non sic quomodocumque et sine cautelâ effusè, et sine pro- "batione hoc agat, sed veniat ad quantum orationis domum, et fateatur sanc- "tissimæ illius ecclesiæ defensori: ille autem adhibens tres aut quatuor exinde "reverendissimorum clericorum, attestationem conficiat declarantum, *quia sub* "*illâ indictione, illo mense, illa die mensis, illo imperii nostri anno consule illo,* "*venerunt apud eum in illam orationis domum ille et illa, et conjuncti sunt* "*alterutri, etc.* Eod. cap. § 1."

This legislation continued until the reign of Leon VI, Emperor of the East, n 911. In the West the nuptial benediction was rendered necessary much earlier. In his Capitularies, Charlemagne, in 802, established by law the neces- sity of this nuptial benediction and the indissolubility of marriage. But, not- withstanding these laws I think it is beyond doubt that marriages were held to be valid without this religious ceremony, and that, too, immediately and long after the promulgation of the Capitularies. The authority of Popes and Bishops would perhaps be considered sufficient to establish that fact in a matter of this kind. I find in the reply of Nicholas I, in 866, to the Bulgarians, after stat- ing the ceremonial required in the Catholic Church to be very much the same as it now is, the following words are to be found in the conclusion:

"Hæc sunt jura nuptiarum; hæc sunt, præter alia quæ nunc ad memoriam "non occurrunt, pacta conjugionum solemnia. Peccatum autem esse, si hæc "cuncta in nuptiali fœdere non interveniant, non dicimus, quemadmodûm "Græcos vos æstimare dicitis; præsertim cùm tanta soleat arctare quosdam rerum "inopia, ut ad hæc præparanda, nullum his suffragetur auxilium: *ac per hoc*

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" *sufficiat secundùm leges malus earum consensus, de quorum conjunctionibus* " *agitur.* Qui consensu sui solus in nuptiis fortè defuerit, cætera omnia, etiam " cum ipso coitu celebrata, frustrantur; Joanne Chrysostomo, magno doctore, " testante, qui ait; Matrimonium non facit coitus, sed voluntas. Ibid."

Pope Adrian the Second, successor of Nicholas, was applied to, that he might determine whether a certain marriage, celebrated without the presence of a priest, was or was not valid; and he wrote to the Bishop of the Diocese in the following words:

" Ut autem omnis quæstio super eodem matrimonio de cætero sopiatur, per " apostolicæ tibi scripta mandamus, quatenùs hujusmodi connubium dissolvi " nullatenùs patiaris, sed firmum factu atque inviolabile permanere. Si enim " aliàs personæ convenientes et legitimæ fuerint, et contractus ipse legibus con- " cordans, ita quod non videatur ei de sacris canonibus obviare; *pro eo quod* " *sacerdos fuerit, tale matrimonium non debet ullatenùs impediri.*" Ibid.

There does not appear to have been any peculiar circumstances about this marriage, except the absence of the priest; it is to be remembered, however, that several witnesses were present. Pope Alexander the Third, writing to the Bishop of Salerno, says:—

" Inquisitioni tuæ taliter respondemus, quo si legitimus consensus à solemni- " tate quæ fieri solet, præsente sacerdote, *aut etiamsi jus notario, sicut etiam in* " *quibusdam locis adhuc observatur,* coram idoneis testibus interveniat de " præsenti, ita quod unus alium in suum mutuo consensu verbis expressis " recipiat, utrinque dicendo: Ego te recipio in meam, et ego te in meum; sive " sit juramentum, sive non, non licet mulieri alii nubere, etc.—Conc. Labb. t. " X, col. 1574."

The same Pope in writing to an English Prelate, the Bishop of Norwich, makes the following remarks:—

" Super eo quod ex tuis litteris intelleximus virum quemdam et mulierem, de " mandato Domini utriusque, sese invicem recepisse, *nullo sacerdote præsente,* " *nec adhibitâ solemnitate, quam solet Anglicana ecclesia exhibere* et aliam " mulierem ante carnalem commixionem solemniter duxisse et cognovisse; tuæ " prudentiæ taliter duximus respondendum, quod si primus vir et mulier ipsa " pari consensu de præsenti sese receperint, dicendo unus alteri: Ego te recipio " in meum, et ego te recipio in meam; etiamsi non intercesserit ulla solemnitas, " nec vir mulierem carnaliter cognoverit, mulier ipsa primo debet restitui, cum " nec potuerit, nec debuerit, post talem consensum, alii nubere.—Antonii " Augustini antiquæ decretalium collectiones. Paris, 1621, p. 103."

Innocent the Third, replying to the Bishop of Brent, says:—

" Postulâsti utrum ex solis verbis, et ex quibus matrimonium contrahatur. " Nos igitur inquisitioni tuæ taliter respondemus, quod matrimonium in veri- " tate contrahitur per legitimum viri et mulieris consensum: sed necessaria " sunt, quantum ad ecclesiam, verba, consensum exprimentia *de præsenti.*— " Decretal. Greg. IX, de spons, et matr. cap. 25."

In the decretals we find the marriage *per verba de præsenti* referred to in language the most precise. It may take place before the priest, or before the relatives and friends of the parties: this kind of marriage may be contracted

without witnesses, provided both parties admit the fact, and even may be proved by simple presumption, arising from cohabitation.

In support of what I have here stated, the Court deems it interesting to make the following citations from the decretals:—

"Ex parte C. mulieris nobis insinuatum est quod Andreas juramentum præ-
" stitit, quod eam ab eo tempore pro conjuge teneret, et ei sicut uxori suæ fidem
" servaret, Ipsa quoque eidem Andreæ juravit se illum pro marito habiturum, et
" fidem tanquam viro proprio servaturam; quo facto præmoninatus A. reliquit
" eamden. Quia igitur nemini licet uxorem suam sine manifestâ causâ forni-
" cationis dimittere, et tunc eam sibi reconciliare debet, aut ipsâ vivente continere;
" mandamus, quatenùs eundem ut superinductâ dimissâ, et ad uxorem suam re-
" deat, et eam maritali affectione pertractet, monitione præmissâ, per eccles. cens.
" cogatis., *Eod. tit. cap* 9., *Voy. aussi le chap. II.* de præsumptionis, *et le chap.*
" 6. de eo qui cognovit consanguineam, *etc.*

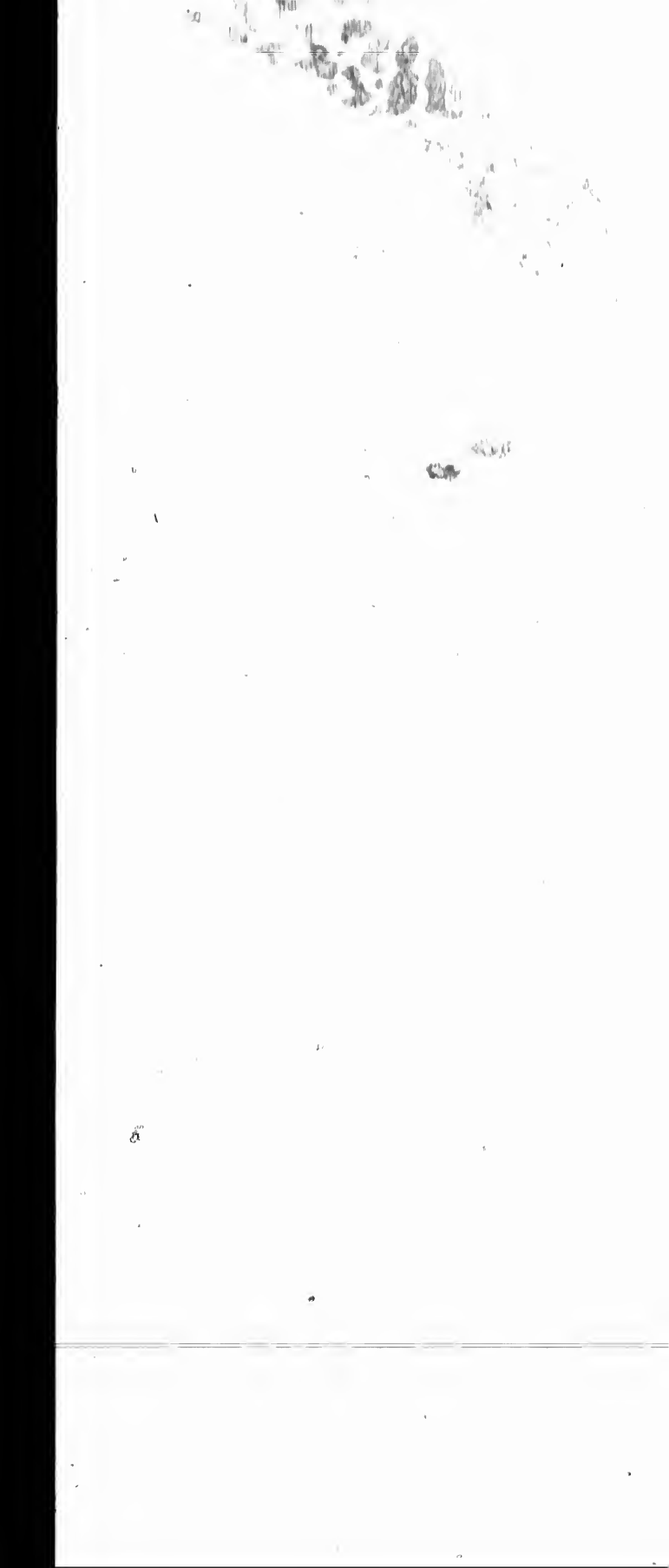
" Si matrimonia ità occultè contrahuntur quod exindè legitima probatio non
" appareat, ii qui ea contrahunt, ab ecclesiâ non sunt aliquatenùs compellendi.
" Verùm si personæ contrahentium hæc voluerint publicare, nisi rationabilis
" causa præpediat, ab ecclesiâ recipienda sunt et comprobanda, tanquàm à
" principio in ecclesiæ conspectu contracta. *Ibid.* de clandestinâ disponsatione,
" *cap.* 2.

" Veniens ad nos Gu. suâ nobis relatione monstravit, quod in domo suâ mulie-
" rem quandam receperit, de quâ prolem habuit, cui fidem coram pluribus præstitit
" quod eam duceret in uxorem. Interim autem cùm apud domum vicini sui per-
" noctaverit, ejus filia nocte illâ secum concubuit, quos pater puellæ simul in uno
" lecto inveniens, ipsum eam per verba de præsenti desponsare coëgit. Ideoque
" mandamus, quatenùs si inveneris quod primam post fidem præstitam cognoverit,
" ipsum cum eâ facias remanere: alioquin secundæ (nisi metu coactus qui po-sit
" in virum constantem cadere, eam desponsaverit) adhærere facias, ut uxori.
" *Ibid* de sponsal et matrium: *cap.* 15.—Is quid fidem dedit M. mulieri super
" matrimonio contrahendo, carnali copulâ subsecutâ, si in facie ecclesiæ ducat
" aliam et cognoscat, ad primam redire tenetur: quia licet præsumptum primum
" matrimonium videatur, contra præsumptionem tamen hujusmodi non est probatio
" admittenda. Ex quo sequitur, quod nec verum nec aliquod consetur matrimo
" nium quod de facto est postmodo subsecutum. *Eod. tit. cap.* 30."

In conclusion, I quote the opinion of M. Agier., in his Treatise on Marriage, vol. I., pp. 122 and 123:

" Le concile de Trente, pour faire cesser l'inconvénient de la clandestinité, a
" ordonné que les mariages ne seraient contractés valablement qu'en présence du
" propre curé. Mais, sans examiner pour l'instant si le concile en ce point n'a
" pas excédé son pouvoir, j'observe d'abord qu'à cet égard il introduisait un droit
" nouveau; et en conséquence le décret porte qu'il ne sera exécuté dans chaque
" paroisse que *trente jours apres sa publication.* Ainsi, jusqu'à ce moment,
" et dans toutes les paroisses où il n'avait pas encore été publié, les mariages
" ont pu se contracter valablement comme autrefois, sans l'intervention d'aucun
" prêtre.

" J'observe ensuite que le décret du concile de Trente est subordonné, com-



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" me toutes les lois humaines, à la loi supérieure de la nécessité; d'où il suit " que son exécution cesse dans les endroits où il ne se rencontre pas de pasteur " en exercice, ni personne qui en tienne la place; c'est la décision uniforme des " canonistes."

It would be fatiguing to cite authorities in support of this view of the Canon law, as it stood in earlier times. It can be easily understood that, as at Rat River—it was not always possible to have any other form of marriage—and under peculiar circumstances there can be no doubt, that such marriages were regarded as valid by the Canon law.

These quotations are given to exhibit some of the legislation of the early Christian Emperors in regard to marriage, and to prove also what were the opinions of some of the most learned and illustrious among the Popes of Rome; and finally what were the principle of the earlier Canon law in this respect. Of course neither these laws nor the opinions of the Popes necessarily convey what were the doctrines of the Church, but they are worthy of note in a case like the present; they show that consent was the main element in the contract, that religious or other ceremonies were not, in every case, essential. In the course of time the Ecclesiatical power became more strict; and the doctrines of the Church, on these subjects, among others, were defined and promulgated in the decrees of the Council of Trent. It is unnecessary for me to speak of these decrees, they were never published in England or France, much less in the North West or Athabaska territory.

We come now to enquire what was the Common law of England in respect to marriage. Previous to doing so the Court deems it right to advert to the forms and solemnities requisite in France and Scotland and Spain.

In France, before the Revolution, the form of marriage was of a mixed nature, and it was held, by lawyers, that the essence of the marriage consisted rather in the civil contract than in the sacrament or religious solemnization; for the marriage law of France was derived from the ancient canon law, subject to regulations of the provincial councils of the kingdom, agreeably to the independence of the Gallican church, and subject also to the control of the monarch. None of the ordinances and declarations of ancient France embody and enforce, in express terms, the provisions of Papal bulls and the Tridentine decrees relative to marriage. In an edict of Henry IV., 1606, there seems to be a recognition of the authority of the Council. The substitution of the civil magistrate for the ecclesiatics appears to constitute the principal differences between the rules observed during the *ancien régime* and those of the *code civil;* each exhibiting an equal precaution in their preliminary forms; and parental right is scrupulously maintained; for the declaration of the 24th session of the Council of Trent, which rendered the consent of parents unnecessary for the validity of marriage, was protested against on the part of France, and was virtually disavowed by the *Ordonnance de Blois*, in 1579, and by the subsequent royal edicts on that particular point. According to the civil code of France it seems that a domicile of six months is a necessary qualification for marriage, after which a municipal officer of the commune of the domicile, at the door of the hall of the commune, publishes the names, residence, and age of the parties intended to marry, and the names

and residence of parents. After this publication, a public act is drawn up, setting forth the description of the parties, and the day, time, and place of the publication, a copy of which remains fixed on the door of the hall of the commune, until the end of eight successive days, when the publication is to be repeated with the same formalities. After a lapse of three complete days from the last publication, the marriage may be celebrated on a day appointed by the parties at the hall of the commune, by the municipal officer, in the presence of four witnesses. The officer, after addressing the parties on the subject of their duties, receives their separate declaration that they take each other for husband and wife, and then, in the name of the law, pronounces them to be united in marriage, and a public act is immediately drawn up and recorded. According to the law of France, it is only in virtue of this act that the rights belonging to marriage can be maintained in that country, so that, like the marriage act of England, the law of France, as to the form of marriage, is not merely directory, but prohibitory also; admitting (as it seems) no marriage to be valid that has been contracted within the territory according to any other form than that prescribed by the civil code of the kingdom.

The decree of the Council of Trent was never recognized in Scotland. In marriages at Gretna Green, a blacksmith has supplied the place of a priest or a magistrate.

By the canon law, there is a distinction between the contract *de præsenti*, and the promise *de futuro*; the former constituting a good marriage of itself; the other not unless followed by copula or some other act which is held in law to amount to the carrying the promise into effect: and this canon law prevailing in Scotland, Lord Stowell adjudged that under the Scotch law, the contract *de presenti*, does not require consummation in order to become "very matrimony;" that it does *ipso facto et ipso jure* constitute the relation of man and wife. (Dalrymple *vs.* Dalrymple, 2 Haggard's C. R. 54; 4 Eng. Eccl. Rep., 485.) This position was approved in the House of Lords. (McAdam *vs.* Walker, &c.; 1 Dow. 182.) By force of such a contract in Scotland (without religious celebration), Lord Stowell, in the Dalrymple case, pronounced Miss Gordon the legal wife of Mr. Dalrymple, an English officer, who, after making in Scotland a contract of a marriage with her, was married in England to Miss Manners, the sister of the Duchess of St. Albans.

In Spain the decrees of the Council of Trent were received and promulgated by Philip II, in his European dominions. But the laws applicable to her colonies consisted of a code issued by the Council of the Indies antecedent to the Council of Trent, and are to be found in the code or treatise called *Las Siete Partidas* and the laws of Toro. The law of marriage as contained in the *partidas* is that *consent alone joined with the will to marry, constitutes marriage.*" (10 How., 182.)

It is matter of history that many marriages were contracted in the presence of civil magistrates and without the sanction of a priest in Spanish colonies, which have since been ceded to the United States. (Id. 180.)

Whether an actual contract of marriage, made before a civil magistrate (and followed by cohabitation and acknowledgment), but without the presence of a

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priest, was valid, and the offspring thereof legitimate according to the laws in force in the Spanish colonies previous to their cession to the United States, was a question in Hallett, &c; *vs.* Collins, and it was determined in the affirmative.

But it may be asked, what were the nature and obligatory force of a contract *per verba de præsenti* by the English common law, previous to the passing of the Marriage Act, in the 26 Geo II. It was supposed by Gibbs, C. J. of the Common Pleas, that before that Act, marriages in England were governed by the canon law, and that a contract of marriage entered into *per verba de præsenti* should be considered an actual marriage if followed by cohabitation. (Lautour, &c. *vs.* Teesdale and wife, 8 Taunt. 830, 4 Eng. Com. Law Rep. 299.) Lord Ellenborough also thought that a contract of marriage *per verba de præsenti*, would have bound the parties before that Act. (King *vs.* Brampton, 10 East, 288.) And the opinion of Gibbs, C. J., has some support in the language of Lord Stowell in Dalrymple *vs* Dalrymple. But in that case, it was of no importance whether or no the canon law of Europe was introduced into England as part of its laws; the only question in the Dalrymple case, in respect to the canon law, being whether it was introduced into the law of Scotland.

In the United States, the Courts of several of the States have gone quite as far as Chief Justice Gibbs. Thus it has been laid down by the Supreme Court of New York, that a contract of marriage made *per verba de præsenti* amounts to an actual marriage, and is as valid as if made in *facie ecclesiæ*, (Fenton *vs.* Reed, 4 John. 52; Jackson *vs.* Winne, 7 Wend. 47); and by the Supreme Court of Pennsylvania, that marriage is a civil contract which may be completed by words in the present time without regard to form. (Hantz *vs.* Sealy, 6 Binn. 405; Patterson *vs.* Grines and wife, 4 How., 587.) And upon the ground that parties have power to contract marriage *inter se*, without the intervention of a clergyman—that such is the common law—and the Supreme Court of New York, in the absence of proof to the contrary, presumed this to be law of Connecticut at the time of the marriage, which was in question in Starr, &c. *vs.* Peck, 1 Hill, 271.

To this view of the common law of England, acted upon in the American Union—the same taken by Chancellor Kent in his commentaries, and Judge Story in his treatise on the Conflict of laws—Lord Campbell, in the case of The Queen *vs.* Millis, called attention in the House of Lords to the fact that the United States "carried the common law of England along with them, and jurisprudence is the department of human knowledge, to which, as pointed out by Burke, they have chiefly devoted themselves and in which they have chiefly excelled." (10 Clark & Finn. 777.) A view of the law different from that which Lord Campbell sought to enforce was taken by Chief Justice Tindal. This Judge, whom for learning and ability, Lord Campbell has pronounced, as not inferior to the most distinguished of his predecessors, endeavoured, in the case of the Queen *vs.* Millis, to shew that the law by which the spiritual courts of England have from the earliest time been governed and regulated, is not the general canon law of Europe imported as a body of law into England, and governing those courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the eccle-

iastical constitutions of the English bishops and archbishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the king's ecclesiastical law. (10 Clark & Fin. 78.)

The opinion of a majority of the common law judges of England, as delivered by Chief Justice Tindal, was, that by the law of England, as it existed at the time of the passing of the Marriage Act (1753), a contract of marriage *per verba de præsenti* was a contract indissoluble between the parties themselves, affording o either of the contracting parties by application to the spiritual court the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The opinion delivered by Tindal, C. J., was dissented from by Lord Brougham in the House of Lords; he thought it reasonable to presume that the English law touching marriage was the same with the general law of catholic Europe, until it was shown that England had receded from that law. (P. 722.) He considered that she had not so receded until the Marriage Act; and therefore, that until that A ct the English law agreeing with that of all Europe, a marriage *per verba de præsenti* was valid without the intervention of a priest. (P. 732.) With Lord Brougham concurred Lord Campbell (P. 746) and Lord Denman (P. 804). These three judges were of opinion that before Lord Hardwicke's Act of 1753, contract *per verba de præsenti* was, by the English law, a good marriage *ipsum matrimonium*, (P. 829); Lord Campbell distinguishing between the case of a mere betrothment, a mere executory contract *per verba de præsenti* for a marriage thereafter to be solemnized, the parties not meaning to be husband and wife until such solemnization; and the case of *nuptiæ per verba de præsenti* without any contemplation of a future ceremony as necessary to complete the relation of husband and wife, (P. 749.) But the Chancellor (Lord Lyndhurst) did not consider that by the law of England, previous to the Marriage Act, a contract of present marriage had so great an effect as was ascribed to it by these three judges. He considered such a contract a marriage for many, but not for all purposes, and that in order to constitute a marriage in its complete and perfect state, solemnization was necessary. (P. 844, 5.) Lord Cottenham laid down that the consequences of a valid marriage must be, 1st, to give to the woman the right of a wife in respect to dower; 2nd, to give to the man the right of a husband in the property of the woman; 3rd, to give to the issue the right of legitimacy; 4th, to impose upon the woman the incapacities of coverture; 5th, to make the marriage of either of the parties leaving the other with the third person void, and then he proceeded to show by authority that none of these consequences followed from a mere contract of marriage *per verba de præsenti*. (P. 878.)

Lord Abinger concurring with Lords Lyndhurst and Cottenham, the votes were equal—that is, three for reversing and three for affirming. According to the ancient rule in the law, *semper præsumitur pro negante*, the House affirmed the Judgment of the Court of Queen's Bench in Ireland, holding that a contract of marriage *per verba de præsente* in the presence of witnesses does not, in England or Ireland, constitute a valid marriage at the common law, unless it

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be also in the presence of a regularly ordained minister; and consequently, holding the accused who, after such a contract with one woman, married another, not to be guilty of bigamy. (P. 907.) By the authority of this decision, the Court of Exchequer has said it was bound. (Catherwood *vs.* Caslon, 13 M. & W. 261.)

All this presents an amazing spectacle, and no doubt is very unsatisfactory. The decision in the case of the Queen *vs.* Millis, notwithstanding the recognition of it by the Court of Exchequer, is not one by which this Court considers itself bound. Were it necessary for me to determine the point raised in that case, having made a careful examination of the question, it seems to me that I should not hesitate to concur in the opinion expressed by Lords Brougham, Campbell, and Cottenham. But holding as true that the common law of England did not prevail at Rat River in 1808, it becomes unnecessary for me to carry the investigation further. Though even if governed by that law, I should regard the marriage of Connolly with the Cree woman as valid.

The laws which control marriage in civilized countries are intended to operate as a protection and not a prohibition. It is to be presumed that parties in barbarous or foreign countries, are to be entitled to an exemption from the strict rule, whenever it is shown that insupportable obstacles alone had occasioned the deviation from established forms; and if it appears at the same time that the marriage, although irregularly had, is in fact a *bona fide* marriage, free from all suspicion of fraud and clandestinity; for the law of England, in prescribing a form for its own subjects, does not compel them to impossibilities; and it is difficult to suppose, when a marriage is shown to be complete according to general law, that it could be held to be a nullity, merely on account of a deviation in point of local form, arising out of circumstances which it was not in the power of the party to control, more especially as to deny to parties so situated the rights which, according to natural law, belong to every free agent, would have an immediate tendency towards encouraging those unlawful connexions which are injurious to society, and subversive of morals and religion. But however limited the degree of indulgence permitted in this respect by the courts of other countries, it is evident from the valuable judgment in the case of Ruding *vs.* Ruding that those of England (whilst they admit the universal authority of the *lex loci*, in determining the validity of marriage, pleaded to have been had according to law, and acknowledge the validity of marriage, had in conformity to its regulations, without considering whether they are more strict or less cautious than our own) do not admit opposite propositions in an equal extent by laying down a positive rule, that no marriage is valid that has not been had according to the law of the country of its celebration.

After these preliminary observations, it may be well to remind the parties that in 1803, at *Rivière aux-Rats* there were no priests, no ministers, nor is it proved that there were any magistrates at that place, or in the neighbourhood. It was a barbarous country situated in the remote wildernesses of North Western America; religion had not as yet proclaimed her authority; had not inculcated her teachings, nor extended her sanctions to the domestic life of the inhabitants. Christianity had not built her temples, nor had the ecclesiastical power sent

forth decrees for the guidance either of the European, or the native. Civilization had made no serious impression; had exerted no salutary influence over those wild regions and those wilder nations of the forest. Associating with Indian warriors, hunters and fishermen, and trading, bartering in trinkets, muskets, rum and peltries, the servants and clerks of the North West Company, it is easy to suppose, were not very successful in inculcating morality among the natives, or in maintaining their own; it can, without difficulty, be imagined that the intercourse and traffic between these men and the savages were not likely to form a very religious or refined community. The restraints of law, or the sanctions of religion so far as they recognized either, it may be presumed were not extremely effective in controlling such a mixture of barbarism and peculiar civilization as prevailed in the Athabaska country in 1803, and previous to that time. At such a place, surrounded by such influences and such unfavorable circumstances, if Mr. Connolly, whose moral character seems to have been without reproach, desired, whether from feeling or interested motives, to take this Indian maiden to his home, he had one of three courses to pursue; that was, to marry her according to the customs and usages of the Cree Indians—to travel with her between three and four thousand miles, in canoes and on foot, to have his marriage solemnized by a priest or a magistrate—or to make her his concubine. I think the evidence in this case will clearly show which of these three courses he did adopt, and which of them, during a period of twenty-eight years, he honorably and religiously followed. The first enquiry to be made then, is, whether in 1803, at Rat River, in the Athabaska territory, there existed among the Cree Indians there and in the neighbourhood, any native usage, law or custom relative to marriage among the Indians themselves, and also in regard to the European traders and the Indian women; if so, whether that custom has been proved and what is the nature of it. Before proceeding to examine the evidence of record, and that upon which the decision of the Court must of course mainly rest, I may appropriately advert to historical testimony, establishing the existence generally of such a law or custom among the natives; and as there was a striking similarity in forms, ceremonies and usages of marriage among all the tribes and nations of North American Indians (with the exception of some Mexican tribes) from the Gulf of Mexico to Anticosti and the Frozen Ocean, it will be apparent that the law of the Crees was not exceptional, but entirely in harmony with, and conformable to the general usages of the barbarians over the entire continent of North America.

Washington Irving, in his Astoria, says, in reference to this usage: "The "suitor repairs not to the bower of his mistress, but to her father's lodge, and "throws down a present at his feet. His wishes are then disclosed by some "discreet friend employed by him for the purpose. If the suitor and his pre- "sent fine favor in the eye of the father, he breaks the matter to his daughter "and inquires into the state of her inclinations. Should her answer be favor- "able, the suit is accepted, and the lover has to make further presents to the "father—of horses, canoes, and other valuables, according to the beauty and "merits of the bride; looking forward to a return in kind whenever they shall "go to housekeeping."—(Cap. 56, p. 462.)

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Hildreth, in his History of the United States, says (Cap. 2, p. 62): "Marriage was a sort of purchase—the father receiving presents from the husband "in exchange for his daughter, who, after a few months of fondling and favor, "fell to the condition of a domestic servant. Polygamy was not common, except among the chiefs; but there were no objections to it. Every Indian had "as many wives as he could pay for and support. It was indeed, the labor of "their wives that enabled the chiefs to maintain the hospitality proper to their "station. The Indian husband divorced his wife at pleasure. In case she "proved unfaithful, he might put her to death. Unmarried women might follow, with little reserve, the bent of their inclinations; but the Indians of both "sexes, as a general rule, were remarkable for continence. The affection of "the women for their childeren was unbounded; the fathers also were very indulgent."

Bell, in his Statistical and Philosophical Geography of North America, "says: "None of the North American tribes, however rude, are unacquainted "with the institution of marriage. They generally are contented with one wife; "sometimes they take two, but seldom more than three. The women are under the direction of their fathers in the choice of husbands, and very seldom "express a predilection for any particular person. Their courtship is short and "simple. The lover makes a present, generally of game, to the head of the "family to which the woman he fancies belongs. Her guardian's approbation "obtained, he next makes a present to the woman and her acceptance of this "signifies her consent. The contract is immediately made, and the match concluded. All this is transacted without ceremony—without even a feast. The husband generally carries his wife among his own relations, where he either returns "to the tent that he formerly inhabited, or constructs a new one for their own use. "They sometimes, but seldom, remain among the wife's relations. These "contracts are binding no longer than during the will of both parties. If they do "not agree, the woman returns to her relations, and if they have any children, "she takes them along with her; but after they have children, a separation very "seldom takes place. If a woman be guilty of adultery, and her husband be "unwilling to divorce her, he cuts off her hair, which is considered the highest "disgrace which can be put upon a female."—(Vol. 5, cap. 2, p. 274.)

Bancroft, in his History of the United States, says (Vol. III., cap, 22, page 266): "And yet no nation has ever been found without some practicable confession of the duty of self-denial. God hath planted in the hearts of the wildest "of the sons of men a high and honorable esteem of the marriage bed, insomuch "that they universally submit unto it, and hold its violation abominable. Neither might marriages be contracted between kindred of near degree; the Iroquois might choose a wife of the same tribe with himself, but not of the same "cabin: the Algonquin must look beyond those who used the same *totem*, or "family symbol; the Cherokee would marry at once a mother and daughter, "but would never marry his own immediate kindred.

"On forming an engagement, the bridegroom, or, if he were poor, his friends "and neighbours, made a present to the bride's father, of whom no dowry was "expected. The acceptance of the presents perfected the contract; the wife

" was purchased; and, for a season at least, the husband, surrendering his " gains as a hunter to her family, had a home in her father's lodge.

" But, even in marriage, the Indian abhorred constraint; and, from Florida, " to the St. Lawrence, polygamy was permitted, though at the north it was not " common. In a happy union, affection was fostered and preserved: and the " wilderness could show wigwams where couples had lived together thirty and " 'forty years.' Yet love did not always light his happiest torch at the nuptials " of the children of nature, and marriage among the forests had its sorrows and " its crimes. The infidelities of the husband sometimes drove the helpless wife " to suicide; the faithless wife had no protector; her husband insulted or dis- " figured her at will; and death for adultery was unrevenged. Divorce, also, " was permitted even for occasions beside adultery; it took place without for- " mality, by a simple separation or desertion, and, when there was no offspring, " was of easy occurrence. Children were the strongest bond; for, if the mother " was discarded, it was the unwritten law of the red man, that she should her- " self retain those whom she had borne or nursed." (Vol. III., cap. 22, p. 226.) (See Catlin's Letters on the North American Indians, vol. I., Letter 26, page 213.)

It would be easy to multiply historical authorities on this point, both from English, American, and French historians. They are unanimous, and all go to establish this Indian custom of marriage and its incidents; and among these incidents, divorce at will is no doubt clearly shown. How far this right of divorce or repudiation affects the present case, will be seen in the sequel of these observations.

But we have other evidence of this custom; the Court has proof before it, which I am bound to regard as conclusive; and that is, the clear and concurring testimony of witnesses, produced by both parties, and placed on the record in this cause.

The first witness to whose evidence I shall refer, is that of Amable Dupras. In answer to the question as to the custom of the Cree country, he says: " La " façon de ces pays est que lorsqu'on avait envie d'avoir une femme, *on allait de-* " *mander au père s'il voulait nous la donner, et si le père voulait donner sa fille,* " *on allait leur acheter quelque chose par reconnaissance. Ordinairement, c'était* " *la façon du pays de donner un présent au père de la fille donnée en mariage.* " Ce n'était pas loisible d'avoir plus d'une femme. *Un homme qui était marié,* " *comme cela était regardé, comme étant bien marié et le mariage était regardé,* " *comme les mariages d'ici; et dans le mariage, des noces se faisaient comme* " *dans le mariage et les noces d'ici.* Des Canadiens se mariaient et faisaient des " noces là comme ailleurs. *C'était impossible de se marier autrement,* parcequ'il " n'y avait pas de prêtres ni ministres dans le pays à ce temps-là, les femmes con- " servaient beaucoup d'autres nations. J'ai souvent vu faire des mariages dans " ce pays, et je parle de cette coutume avec connaissance. J'ai été souvent moi- " même à des noces." This witness seems to be a man of considerable intelligence. He is seventy-two years of age, and in earlier life had been fourteen years in the North-West territory. He knew five or six nations; and says that, in regard to marriage, this was the general custom.

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This testimony is, moreover, corroborated by that of a man of the name of Noel Annance, produced on the part of the plaintiff. His evidence is somewhat remarkable, and is to the following effect:—"*The Indian customs do not differ* "*much with regard to marriages.* The custom of polygamy prevails universally "among the Indians, particularly with the chiefs, in consequence of their ability "to support a number of wives; I do not say that I have ever known of any "persons being murdered in consequence of a regular intercourse between the "sexes. I have myself seen them greatly ridiculed, and have heard the women "talk especially. When a man and a woman live together, they are called man "and wife. I could not say that I ever knew of any distinction being made in "the Indian territory or North-West in regard to any man and woman who "live together. The woman is always called the wife of the man with whom "she lives, *without regard to the manner of marriage. It is always presumed* "*that she has been regularly bought.* When I say that a man cannot legally "have two wives in the North-West or Hudson Bay territory, I do not mean "that the Indian law prohibits it, but that the law of the civilized people—that "is, the Hudson Bay Company's servants—are against it. It is only sometimes "that the subject of giving away a girl is mentioned to the chief, and that "purely out of deference to him. The term squaw, signifies a woman or wife; a "young woman is called *hunk* squaw. A woman who lives with a man is called "that man's squaw, which, in fact, means a wife. If I had a squaw or wife in "the Hudson Bay territory, she would be called Annance's squaw—meaning "my squaw or wife. There was a chief at Fraser River, whom I knew well, "who had ten squaws or wives. His Indian name was Sasceatan."

The Rev. Pierre Aubert, Père Oblat, testifies as follows: "Si elle n'était pas "chrétienne lors de son union avec William Connolly, il faudrait une dispense "*selon la règle générale des lois ecclésiastiques.*" But he says that, according to the custom of the country, "*l'époux offrait des présents, quand les présents* "*étaient acceptés les parents donnaient en mariage leur fille à l'époux qui la* "*prenait alors pour femme.*" This gentleman was several years in the Hudson Bay territory, and his attention had been much directed to the customs of the country in regard to marriage. He adds: Les prêtres ne sont allés jusqu'à "l'Isle de la Crosse s'y établir, qu'en l'année 1843. Avant ce temps-là, il n'y "avait pas de registres dans ce pays-là."

Another witness of great experience and intelligence, Pierre Marois, thus deposes: "Un homme par là ne pouvait pas prendre plus qu'une femme, et "nous regardions cette union comme l'union de mari et femme par ici, et union "aussi sacrée. J'ai été marié là moi-même à la façon du pays. J'ai vécu vingt-"trois ans avec elle, et elle est morte il y a huit ans passés. *Quand on voulait-il* "*se marier dans le Nord Ouest, il fallait demander au père et à la mère la fille* "*qu'on voulait avoir, et s'ils consentaient, on demandait après au bourgeois la* "*permission de se marier, et c'était la toute là cérémonie; et après cela, nous nous* "*considérions comme mari et femme légitimes comme ici, comme si nous étions* "*mariés à l'église.*".

This evidence is strongly, entirely corroborated by Alexander Robertson and Mr. Herriott, both men of education and long and varied experience in the North West regions.

Mr. Robertson was in the employ of the Hudson's Bay Company: he entered the service in 1812, and remained in the North West thirty-six years. He says there was but one form of marriage in the North West, and that was the giving away. He saw his men get wives in the way he mentions, that is, from their relatives; they gave presents if they pleased; he considered this a marriage according to the customs of the country.

Mr. Herriott says: "In 1809 I went up to the Hudson's Bay territory. I "went in the employ of the Company. I have risen from apprentice clerk to "that of chief factor, from the lowest grade of clerks to the highest position in "the Company's employ, except that of governor. I lived in that country up "to September, 1864, constantly. I have met the late William Connolly there "at Stewart's Lake, in the years 1828 and 1829. This was the first time I met "him, he was married then. I think his wife was a pure Indian of the Cree "Tribe. He had three or four children."—"*When I say married, I mean ac-*"*cording to the custom of the country, which was by an agreement between the*"*father of the girl, and the person who was going to take the girl to wife.*"*They lived as married people when married in this manner. I considered it*"*as binding as if celebrated by an Archbishop.* I was married after the "custom of the country myself. The first clergymen that I saw in that country "was in 1838, their names were Blanchet and Damase, they passed me at "Edmonton on the Saskatchewan. These were the first priests I saw since the "year 1809 in that country. Rebaska is from six to seven hundred miles "north from the Saskatchewan. The first clergymen that went up the English "River went up some time in the forties. I was never there myself. None "could have gone there without my knowledge. There was no Court of Justice "in the North West, except at the Red River Settlement, and that at a com-"paratively late date. We followed the English Law; it was not customary "for the Europeans to take more than one wife; it was not customary for the "Europeans to take one wife and discard her, and then take another. *The*"*marriage according to the custom above described was considered a marriage*"*for life.* I considered it so. I know hundreds of people living and dying "with the woman they took in that way and without any other formalities. "According to my opinion this marriage lasted during the lifetime of the par-"ties in as binding a manner as if married by a clergyman. The first missionary "that I ever heard of coming, was to the Red River Settlement, far to the South "of us, it was in the year 1819 or 1820, I will not be sure as to the date, it may "have been in 1816. I never heard of any Jesuit Missionaries, nor of any "Roman Catholic Missionaries having resided at any of the Company's posts "previous to 1840. These last missionaries came to the Saskatchewan and to "the English River. I never heard of, or have met anybody in the North West "territory who had been married by a priest or clergyman in the North West "territory previous to eighteen hundred. There were no Jesuits in that country "when I went there. I resided nearly eleven years at the Red River Settle-"ment. I knew all the European settlers there until the last four years. I "never met any person living at Red River Settlement who was married in the "North West territory by a clergyman resident in the North West territory.

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"previous to eighteen hundred. I have never seen nor heard of any person "being married at York Factory or Norway House, or at any post on the "Saskatchewan, by a resident clergyman, previous to the year 1817. I know of "instances of persons married after the custom I have described bringing their "wives into civilized countries and re-marrying them according to the forms of "civilization; but I know of no instance where they have been so brought in- "to civilization without going through that form. I know that William Con- "nolly brought his wife down to Canada. There is no rule amongst the natives "by which a wife is entitled to property by virtue of her marriage. When a "man dies, his family, wife and children inherit whatever he leaves. Had I "come to a civilized community, I believe I should have married according to "the civilized forms of solemnizing marriage. I should have done so to "please people and to conform to the customs of society."

Joseph Larocque, a witness for the defence, in answer to a question in cross-examination, by which he was asked, "How did a chief clerk, partner or bour- "geois take an Indian wife in the North West country?" says "*He took her* "*by the consent of her parents and relations; there was no other ceremony ex-* "*cept the giving of a few presents.* The man then lived with her as long as he "liked or she liked." He adds "that he does not think any of these marriages "were legal, because there were no priests or ministers there."

The Court has examined with great care the cross-examination of these witnesses, and also the evidence adduced by the defendant on this point, but has found nothing to contradict or, in the slighest degree, to invalidate this testimony. It stands unimpeached, and, in my opinion, is unimpeachable. This law or custom of the Indian nations is not found recorded in the solemn pages of human commentaries, but it is written in the great volume of nature as one of the social necessities—one of the moral obligations of our race—through all time and under all circumstances, binding, essential, and inevitable, and without which neither man, nor even barbarism itself, could exist upon earth. It is, I think, conclusively established in this case, by the evidence of intelligent and experienced men, as being an existing and immemorial usage observed and consecrated in one of the most sacred and delicate relations of human life, even among the barbarians of North America. As such, with all its imperfections in a religious view of the holy sacrament and sanctities of marriage, it is entitled to the respectful consideration of this Court. It exacts the solemn consent of parents, and that of the parties who choose each other, for good or for evil, as husband and wife—it recognizes the tie and some of the sacred obligations of married life; and it would be mere cant and hypocrisy, it would be sheer legal pedantry and pretension, for any man, or for any tribunal, to disregard this Indian custom of marriage, inspired and taught, as it must have been by the law and the religion of nature among barbarians, who, in this essential element of a moral life, approach so near to the holy inculcations of Christianity. I apprehend that it is not much more loose or immoral than the well known laws of Gretna-Green, which not only require no regular religious ceremony, but even dispense with the consent of parents; a marriage according to this usage of the Crees would, in the opinion of the Court, be as solemn and

as binding in the eye of the law, as many which the greatest English judges have declared valid. I shall have occasion to refer to, this more particularly hereafter.

But the defendant contends that, even admitting the existence of this Indian law or custom, there is no legal or conclusive evidence in the record to show that William Connolly was ever married to the Cree woman according to this alleged usage. If this be true —if the testimony upon this point be illegal, be not conclusive—then there is an end of the plaintiff's case. I come, therefore, to the consideration of the proof which he has adduced of his father and mother's marriage; and this evidence, if admissible and sufficient in law, results (1st) from a cohabitation of twenty-eight years, during which time they were reputed to be husband and wife—had the *status* of married persons, and were known and acknowledged as such by all the world; and (2nd) from Mr. Connolly's repeated and solemn declarations that he had married his Indian wife according to the usages and customs of her tribe or nation, and also from the statements of Mrs. Connolly herself, that she had been married in the manner described by William Connolly. I shall examine, in the first place, the proof of cohabitation and repute.

Mr. Alex. Robertson, witness for the plaintiff, says: —

"I saw the late William Connolly for the first time in 1815 or 1816, at Cumberland House, in the North-West territory. He was then in the employ of "the North-West Company. I entered the service of the Hudson Bay in 1812, "and during my service of thirty-six years I saw the said William Connolly very "often at different posts in the North-West territory, at which time there were "no priests or ministers there. I often saw Susanne at his house at the "different posts, and he introduced her to me as Mrs. Connolly. She passed "and was universally acknowledged as his wife at the different posts where "I met her. She was called Mrs. Connolly, and her children by William Connolly were always acknowledged in public as the lawful issue of their marriage. "There were plenty of white people there connected with the Company, and "they all lived inside the fort, in the Company's houses, and I heard them and "their wives, white and Indian, and their servants, call Susanne Mrs. William "Connolly. The fact is, they were acknowledged to be man and wife every-"where I met them. Connolly made money in the company, and brought "down his wife and family to Montreal many years after I first saw them in "the North-West. She and her children first went to St. Eustache, and then "came to Montreal, where they boarded with Madame Poulin, Connolly's sister, "She was, when in Montreal, called old Mrs. Connolly.

"I was intimately acquainted with said William Connolly in the North-West, "and he never lived with any other woman than his wife, said Susanne. Wil-"liam Connolly and said Susanne were living together as man and wife for "about thirty years to my knowledge."

John E. Harriot, witness for plaintiff, says: "The Indian woman that the "late William Connolly was living with was regarded by all persons living in "that country and by myself as his wife. In speaking of her, the late William "Connolly was accustomed to call her his wife, and treated her as his wife."

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Amable Dupras, témoin pour le demandeur, dit: "A ce temps-là, c'est-à-dire "vers 1818, et pendant tout le temps, j'ai connu Monsieur Connolly et Madame "Connolly. J'ai entendu Monsieur Connolly me dire lui-même que c'était sa "femme, et elle était connu par tous les voyageurs comme la femme de Monsieur "Connolly."

"William Connolly et sa femme Suzanne ont vécu paisiblement au vu et au "sçu de toute leur famille prenant la qualité de mari et femme, pendent le temps "que je les ai connu."

Le dit Amable Dupras répond comme suit aux questions qui lui sont faites ce sujet:—

Question.—Pendant quel laps de temps est-il à votre connaissance que M. Connolly et sa femme Suzanne ont vécu ensemble comme mari et femme publiquement, au vu et sçu de leur famille et le public?—*Réponse*— Pendant cinq ans, c'est-à-dire pendant que je les ai connu.

Question.—Avez-vous entendu le feu William Connolly lui-même dire que la dite Suzanne était sa femme?—*Réponse*—*Oui, Monsieur.*

"Monsieur Connolly m'a dit que sa femme était la fille d'un chef qu'il avait "*mariée.*"

Noël Annance, witness for plaintiff, says: "I then found at Connolly's post "at New Caledonia the family of said William Connolly, consisting of his wife "as *he told me*, and some girls and boys."

"I remained at New Caledonia, when Mr. and Mrs. Connolly were living "there four or five days, and then returned to my post. They were living there "at that time as man and wife. This I know from what I could see, and from "what Mr. Connolly told me. He told me several times that she was his "wife, and the mother of his children, and that he had been married to her "according to the custom of the country; that at that time he was seventeen "and she fifteen when they were married."

"I boarded at Pion's a week with Mrs. Connolly in Montreal. She was then "called Mrs. Connolly."

"I never knew or heard of any man and woman living together in the North "West without being married."

Rev. François M. Turcotte, de St. Gabriel, dit: "Monsieur Connolly m'a dit "lui-même que le dite Suzanne était sa femme, *sa propre femme.* Je l'ai in"terrogé sur l'usage de prendre plusieurs femmes, et il m'a répondu qu'il res"pectait trop sa femme pour se permettre de faire usage d'autres femmes."

Pierre Marois, témoin produit par le demandeur, dit: "Je l'ai toujours connu "(Suzanne) pour la femme de feu William Connolly et j'en ai jamais connu d'au"tres pour sa femme. J'ai été quatre ans dans l'emploi de la compagnie du "Nord Ouest, et dix-sept ans dans la compagnie de la Baie d'Hudson. Pendant "tout ce temps là j'ai connu le feu William Connolly, et sa femme, sauvagesse. "J'ai hiverné quatre ans à Fort Cumberland. Sa femme était avec lui là. "Quand il nous disait de faire quelque chose pour Madame Connolly, il nous "disait, allez donc faire ceci ou cela pour *ma femme.* Il vivait avec sa femme "comme les autres bourgeois, et elle était connue par tout le monde là comme "Madame Connolly. C'est à ma connaissance que Monsieur et Madame Connol"ly étaient mariés selon la coutume du pays."

Judge Johnson, in his deposition, says: "I cannot tell how long Mr. Connolly lived in the Hudson's Bay Territory. I understand that Mr. Connolly lived with his Indian wife until the year 1832. I never heard that Mr. Connolly had more than one Indian wife, and always heard that he was a moral and well-conducted man."

Joseph Mazurette, ancien voyageur, dit: "La femme de Monsieur Connolly était de la tribu des Crees. Je les ai connus que pendant le cours de deux ans, c'était tout le temps que j'étais là. Ils ont vécu là comme homme et femme quand je les ai connu. Madame Connolly était connue entre tous les bourgeois et entre tous les engagés comme la femme de Monsieur Connolly.

This is the principal evidence of the cohabitation of Mr. and Mrs. Connolly as husband and wife in the Indian country. The Indian woman throughout all the North West territories, at all the trading posts and settlements there, was considered and treated by both natives and Europeans as his lawful wife, during a period of nearly thirty years; the children, moreover, were regarded as legitimate—Connolly acknowledged her as his wife—gave her his name, and bestowed it upon his offspring. It is really very difficult to conceive how, upon such facts proved beyond the possibility of doubt, this connection should be considered by any christian or civilized Court, under the circumstances of this case, as concubinage, and the Indian woman as Mr. Connolly's concubine, branding the children who bore his name as illegitimate. But it may be, and it has been said, that this is precisely the way they do things in the North West. That living with her publicly, treating her and acknowledging her as his wife in that country, amount to nothing; it is an understood thing, a man takes a squaw, lives with her as long as it suits him, and then discards her as he would a mistress. It is true he thereby bastardizes and makes outcasts of his children;—it is also true that when youth and beauty have faded, when the purity and dignity of innocence have been sullied, destroyed by the contamination of unlawful passion, the trader consigns his Indian wife and offspring to the contempt of the world; dismisses her and leaves her to pass the wretched remnant of her life in solitude and despair. That such is the custom of the country among the natives, may or may not be the case; but the European settler cannot act after this fashion. Without contesting this view of the case, without discussing its outrageous and preposterous immorality, but admitting all that is contended for, there is something more in this case. Mr. Connolly did not restrict his conjugal intercourse with this Indian woman to the country where such extraordinary usages prevail; it was not only in the North West that he cohabited with her and treated and acknowledged her as his wife; but he brought her to Canada, and continued the same intercourse and treatment here; and in connection with this branch of the case, there is a fact of considerable importance, and one which, so far as it goes, has received the serious consideration of the Court, not only in regard to this question of repute and cohabitation, but also with reference to another point, the repudiation of the first Mrs. Connolly by her husband, which will require to be carefully examined and decided hereafter. The proof of the facts just adverted to is, in the opinion of the Court, conclusive.

Henriette Routier, produced on the part of the plaintiff, says: "Je demeu-

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" rais avec mon père dans la paroisse de St. Eustache en 1831. Le feu William " Connolly venait dans le mois de septembre 1831 à St. Eustache avec sa femme, " une sauvagesse nommée Susanne, et leur famille au nombre de six, et tenait " maison vis-à-vis le magasin de mon père. L'aîné de ses enfants est le deman- " deur en cette cause, qui était alors fermier de M. Smith, mon oncle, à St. " Eustache. Le dit William Connolly introduisait la dite sauvagesse Susanne " à tous les voisins comme sa femme, et l'appelait *Mrs. Connolly*. Elle recevait " des visites là et ma mère y faisait visites. Ils ont resté là jusqu'à l'année " suivante, et quelques-uns de leur enfants ont été baptisés à St. Eustache. " Madame Connolly faisait des achats au magasin de mon père, et M. William " Connolly venait payer pour lui. Le demandeur pouvait avoir alors vingt neuf " à trente ans. Le prêtre qui a baptisé les enfants est M. Turcotte, et il venait " souvent faire visite dans la famille de M. William Connolly."

Mr. Turcotte, the priest, says: " J'ai connu William Connolly, la père du de- " mandeur, dans l'année 1831. Ce'tait à St. Eustache, à la Riviere du Chêne, " dans le Bas-Canada. Mr. William Connolly est arrivé à St. Eustache, avec sa " famille en l'automme de 1831. Sa famille était composée de Madame Connol- " ly et de plusieurs enfants, au nombre de huit ou dix. C'est moi qui ai bap- " tisé les enfants mentionnés dans les exhibits deux et trois. *Je les ai baptisé* " *comme enfants légitimes* de William Connolly. Le nom de le femme de feu " Wil. Connolly, était Susanne, sauvagesse. M. *Wil. Connolly m'a dit lui-même,* " *que la dite Susanne était sa femme, propre femme.*'

The cross-examination of these witnesses elicited nothing which materially, if at all, affects the force of their testimony, from which it is clear that Mr. and Mrs. Connolly lived together as husband and wife at St. Eustache, in Lower Canada; and other witnesses prove that he afterwards brought his wife and children to Montreal, where they remained some time boarding, first with Connolly's sister, and afterwards with a Madame Pion. But there is no satisfactory evidence to show that they lived together as married persons at Montreal.

Besides this, as has already been intimated, there is something more in this part of the case; in addition to the evidence of cohabitation and repute both in the Indian country and in Lower Canada, we have the express declaration of the late William Connolly himself, that he married Susanne according to the usagee and custom of the country.

The Honourable Mr. Justice Aylwin, a witness produced by the defence, and intended no doubt to sustain effectually the pretensions of the defendant, deposes " That his (Judge Aylwin's) uncle Connolly told him that he was about thir- " teen years old in the Indian country, and that it was difficult for " him to control the Indians in their trade with the whites; that he " had to get a woman whom he would have to buy from her father; that he " had got a chief who had great interest among the Indians, that this man had " sold the mother of the plaintiff to the late William Connolly; when plaintiff " was born, he, the father, was only fourteen or fifteen years of age, and his " Indian wife (sic) woman was about twelve years of age.

" The late William Connolly's Indian wife (sic) woman, was the daughter of a " chief, of what nation I do not know. The late William Connolly said that he had

"bought the said woman, that after the purchase he had difficulty with the father "in his trade, and upon the strength of it had been obliged to use violence to the "father. After treating him well, he had become tractable."

It does not appear that Mr. Connolly told his nephew, Judge Aylwin, whether he had purchased the Cree woman as a slave, as a concubine, or as a wife. But the Court will give his memory the benefit of the doubt; and as slavery did not exist in the North West, and as concubinage is illicit, and the purchasing a young woman for that purpose is infamous, the Court will assume that Mr. Connolly purchased the Cree maiden from the Indian Chief, her father, intending to make her his wife, according to the custom of the country, and not as a slave or concubine; and there is no difficulty in this presumption, seeing that he lived with her and acknowledged her as his wife, during a period of nearly thirty years after this purchase.

When Mr. Connolly was desirous of having his two daughters baptized at St. Eustache, in 1831, he went to the Rev. Mr. Turcotte, the priest of the parish, and requested him to perform that duty for him. Mr. Turcotte hesitated about baptising the young ladies as the legitimate offspring of William Connolly and the Indian woman. He says he had very serious doubts about the precise character of this connection; he asked a great number of questions in regard to the Indian custom of marriage, and whether he, Mr. Connolly, had married Mrs. Connolly according to that usage. From Mr Turcotte's evidence, Connolly seem to have been very earnest and impressive; for the occasion was rather a serio us one, and there could be no compromise, evasion or smoothing matters over, with the priest, who received the assurance from Mr. Connolly that he had married Mrs. Connolly according to the Indian custom; that she was his lawful wife and that he had always respected her too much to take another woman, and thereupon the priest baptised the children as the offspring of William Connolly and Susanne, a squaw.

The witness Annance says, Connolly told him several times that the Indian "woman was his wife and the mother of his children, and that he had been "married to her according to the custom of the country, that at the time of "their marriage he was seventeen and she was fifteen," and it is worthy of remark that, if they were married in 1803, the evidence of record shows that Connolly stated his age correctly to Annance, and erroneously to Judge Aylwin; for he was then seventeen years of age, not fifteen as he told his nephew. The same statement in regard to his marriage was made to other witnesses, and he seemed always particularly desirous of impressing upon those he associated with, that the Indian woman was his wife. Whatever may be thought generally of evidence by the admission of parties, no objection to that description of proof can be urged in the present case; these admissions were repeatedly and solemnly made, and on one occasion of great delicacy and interest to Mr. Connolly. This evidence is, moreover, conclusively corroborated by other testimony of record.

The cross-examination of these witnesses elicited nothing which materially, if at all, affects this testimony. This is the principal proof upon the point by the plaintiff as to the facts connected with the marriage of his parents. I proceed now to examine the evidence adduced on the other side.

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On behalf of the defendant no less than fourteen witnesses have been examined. Two of them, Marie Bourgeois and Marie Poulin, are nieces of the late Mrs. Connolly (Woolrich), and Judge Aylwin, who is her nephew. All these witnesses will have a share in Connolly's estate, provided the present heir dies without children. Another, Elizabeth Woolrich, is the second Mrs. Connolly's sister. Of course all these persons state with a peculiar emphasis that the Indian woman was Connolly's concubine; that all the offspring are illegitimate; and that the Indian family recognized Mrs. Connolly (Woolrich) as the lawful wife of their relative. This was natural, and was to be expected; but the tone of their evidence is somewhat remarkable, and in any view of it, is not very material, except that of Judge Aylwin, who has stated facts of great importance in this case as has been seen already, and as will be seen hereafter.

"Mrs. MacDougall says she knew Mr. Connolly and Julia Woolrich well—her "(Mrs. McD's) brother was a Northwester and very intimate with Mrs. Con- "nolly; he and others blamed him for bringing the Indian woman here at all, "and pitied her. My brother pitied the Indian woman because he brought her "down."

She says the second Mrs. Connolly was known as Connolly's legitimate wife, and the children of the Indian woman as illegitimate. The evidence of Elizabeth Woolrich, the sister who may hereafter share in the estate, (as she says), is very strong in language and in expression of opinion. If the Court were obliged to adopt her testimony, the case would be easily disposed of. It is quite natural that she should entertain very decided views in a case like the present. In my opinion, however, the deposition of this lady must be received with great caution —but even taking a view of it as favourable as reason and common sense would admit, it can have no material effect upon the case. The evidence of the other witnesses, with exception of Mr. Hopkins, Mr. Boucher, and Mr. Larocque, is immaterial. I have already had occasion to refer to Larocque's deposition. He is the principal witness for the defence, and it is proper I should give the whole of his evidence. It is very pertinent, and exhibits a state of things in the North-West Territory in some respects remarkable. As he depicts it, there is great room for judicious and perhaps extensive reforms. He was examined at Ottawa City and says:

"I do not know the plaintiff except by repute. I was well acquainted with "the late Julia Woolrich, but do not know the other parties in the cause. I "was well acquainted with the late William Connolly, the one who married "Julia Woolrich. I went up to the North-West with him in 1801. We both "went up as clerks in the North-West Company. I was in the service of this "Company until it was amalgamated with the Hudson's Bay Company, and remain- "ed in the service of the latter Company until 1830. I was partner in the "North-West Company, and shareholder in the Hudson's Bay Company. I was "present at the marriage of Julia Woolrich and William Connolly. I was inti- "mately acquainted with the squaw woman that William Connolly brought down "with him. *He was never reputed to be married to this Indian woman*, but I "do not know that if he had not fallen in with Miss Woolrich that he would "not have married her. *He was fond of his children and the Indian woman*,

"This Indian knew very well at the time that he married Julia Woolrich. I "had conversation with the Indian woman about the marriage. *She laughed and "talked about it, and said that she, Julia Woolrich, had only got her leavings.* "She was a Cree woman I believe. I understand and speak the language well. "I had occasion to see her often at this time, and had frequent conversations "with her about William Connolly's marriage with Julia Woolrich. She *did "not seem to care much about it.* She lodged at that time at Pion's, in Mon- "treal. I was not much surprised at her not caring. She had some hopes that "Connolly would have married her: and I think if he had not fallen in with "Julia Woolrich that he would have married her. *But she seemed not surprised "at his marrying a white woman.* But among other things she said 'he will "regret it bye and bye.' It is very common to change women in the Indian "country. The French Canadians in the North-West Company's employ and "the English did it too."

"This practice was common amongst the natives also. There was no "ceremony in those days about taking a woman or leaving her either. The "women themselves did not care about it. They did not care for their husbands "but they were very fond of their children.

"I saw Connolly in the interior a few times, and heard of him often enough. "According to reputation he was not married. *That is, he was married "according to the custom of the country there,*—that is taking a woman and send- "ding her off when he pleased. When I say the custom of the country, I mean "that the people did that as a common practice in those days. There was not a "legal binding marriage, there could not be in those days.

"Some of the servants of the company brought wives or women with them to "Canada and married them there according to the legal forms of Canada. On "the contrary, some lived with women in the interior and did not marry them "and abandoned them, and others lived with them, and abandoned them to marry "white women in the civilized world. One McIntosh, I believe, but I am not sure "that he re-married when he came with her to Canada.

"John McGilvray lived with an Indian woman in the interior, but he did not "marry her. He married a Scotch woman, I do not know where.

"Allan McDonnell brought his Indian wife down with him to Canada, and, I "think, got married to her. I knew old Hughes and his Indian wife who came "to Canada. *I do not think he remarried when he came to Canada.* They "lived together in Canada for some time. I believe there are other instances "but I do not recollect them at present. There were but few of the servants of "the Company who did not take women when in the interior and live with them. "But there were very few who brought them into civilized society, and married "them. The Cree Indians, like all the rest of the tribes, were wild and savage, "but not more so than the other tribes.

"*At the time I conversed with the Indian woman in question she admitted "that she was not married to Mr. Connolly.* It was from her that I understood "that she had hoped that he would marry her, *on account of his children, of "whom he was very fond.* I recollect one John George McIntosh, who had "several women in the Indian country, all fine girls, most of them half-breeds. He

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"changed from one to the other, and had children by most of them. He afterwards "married a Scotch woman. Sir George Simpson had plenty of women every "where in the interior, whom he lived with when he went to the different places "where they lived. The practice was so very common that it was not thought "strange. It was about the time of Mr. Connolly's marriage with Julia Woolrich "that I had frequent conversations with his squaw."

CROSS-EXAMINED.

Question.—Was Wm. Connolly married to the Indian woman referred to according to the customs of the country? *Answer—He took a woman according to the custom of the country. You may call it marriage if you please. It was the only kind of marriage that could be there,—that is, take a woman when you please and leave her when you please.*

Question.—What do you mean by a legal marriage? *Answer.*—I mean by a priest or minister. There were no priests or ministers in the North-West country where Mr. Connolly resided, when he took this Indian woman. *He could not be married in any other way than he was, except that he might have married before witnesses.* I cannot say when ministers or clergymen came to the Red River. I do not know anything about it.

Question.—How long did Mr. Connolly live with his indian wife? *Answer.*—*He took her when he first went up to Rat River, about 1803, and kept her always until he went down to Montreal.* He had a good many children by her. He lived with her over twenty years. I never heard that he lived with any other woman, although he might have. The marriage of William Connolly to Julia Woolrich *was not over pleasing to the Indian woman. She might have scolded about it. She did scold a good deal about it, and she felt annoyed, and said he would regret it.* The Cree women were true to their fancy through fear.

Question.—Were the Cree women, married as this Indian woman was to Mr. Connolly, generally true to their husbands? *Answer*—They were so when they were fond of them, and when the were not fond of them they were not.

Question.—What year did you have conversations with Mr. Connolly's Indian wife, about his marriage to Julia Woolrich?—*Answer*—About the time they were married, I do not recollect the year.

I never saw Mr. Connolly visit the Indian woman at Pion's; he might have done so, but I do not know.

Question.—When you refer to its being common to change women in the Indian country, was not this practice confined to the "voyageurs" and understrappers of the Company?—*Answer*—Yes, generally so.

Question.—How did a chief clerk, factor, partner, or bourgeois, take an Indian wife in the North West country? —*Answer*—He took her by the consent of her parents and relations. There was no other ceremony than the giving of a few presents. The man then lived with her as long as he or she liked.

Question.—When did you travel with Mr. Connolly or see him in the interior? —*Answer*—I cannot say what years, but I saw him at various times, and travelled with him for weeks in canoes. There could not be any legal marriage by priest

or clergyman in those days in the interior, because there was no priest or clergyman there. I cannot say positively that Mr. McIntosh remarried his Indian wife, as I don't know anything at all about it. I do not know whether John McGillvray brought his Indian wife to Canada or not. I don't know that John McGillvary married a Scotch woman; I only heard so, heard that he married Miss McDonald, a daughter of Miles McDonald in Upper Canada. I do not know whether Allan McDonald remarried his Indian wife after he came to Canada with her, or not, but I think he did. The case of Hughes is the only one amongst gentlemen, I remember, who lived with his Indian wife in Canada without remarrying her according to the form practised in Canada.

Question.—Were you a partner in the North West and Hudson's Bay Companies?—*Answer*—I had shares in both Companies. I was a partner in the North West Co., and also a shareholder in the Hudson's Bay Co.

Question.—When Mr. Connolly's Indian wife admitted to you that she was not married to Mr. Connolly, did she not mean according to the custom of Canada, that is to say by a priest or clergyman?—*Answer*—Yes, I believe so, there was neither priest nor clergyman there. That question she could not answer, because she did not know anything about it. In a legal sense she did not understand what marriage meant, she expected that Mr. Connolly *might have kept her as they do in the Indian country.* She had always been living with him up to that time as far as I know.

Question.—Mention how long John George McTavish lived with one of the girls referred to and where?—*Answer*—He took Yacko Tinneys, she was a half breed in the Rocky Mountains Spokane House, and lived with her about nine months. After which he took a daughter of McKenzie on the Columbia River somewhere, he remained with her about the same time. I saw him afterwards in Montreal with a Scotch woman I heard he was married to. Sir George Simpson found women provided for him by pimps at the posts as he went along, he would keep them for some time and then give them to some clerk and promote him. The late William Connolly must have had by his Indian woman, six or more children. *Mr. Connolly never had but one Indian wife to my knowledge.* A common man could not take a woman without the permission of the Company.

Question.—Did you ever hear the Indian woman called Mrs. Connolly?—*Answer*—Yes, I heard her called so by all the engaged men of the Company, they did so out of politeness. Any clerk having a woman the men called her Madame. *I never heard of any of the men keeping two women at a time, it was not customary. A man could only have one wife at a time.* The husband was obliged to clothe her, and as to living, she was obliged to live on the fare of the country, fish or flesh. I never heard that the Indian woman lived with any body else but Wm. Connolly, and do not think that she did."

As before stated, the Court has considered it right to give the whole of this man's deposition, in the first place, because his testimony is very peculiar; and because he is the principal witness for the Defendant, in regard to the state of society in the North-West. There are some incoherences and many contradictions in his evidence. In one place he says Susanne did not seem to feel the re-

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pudiation and second marriage, and afterwards, he says, she scolded very much and was annoyed about it. The account given of the morals of the traders clearly proves that great licence and disorder prevail in those countries. The Court will not and cannot belitve the picture here given to be true. But if it were intended to show how little law or morality is to be found in the Hudson's Bay country, how impossible it was for men to consider themselves under the moral restraints of marriage, in a country where debauchery and lawlessness were so prevalent, there can be no doubt that object has been successfully attained; but perhaps it is to be regretted that some portions of this evidence should have been introduced into the record.

It is worthy of remark, however, that Mr. Connolly did not belong to the class of persons more particularly referred to here. He was free from the vices and the special licentiousness of those who surrounded him; and it was creditable to him and his Indian wife that in a country, such as that described by the witness Larocque, their conjugal relations were marked by fidelity and devotion to the duties which that relation imposes.

Upon the strength of all this evidence for the plaintiff, and in the absence of contrary testimony for the defendant, it was strenuously contended by Mr. Stephens that the Court had proof of the Indian custom, and what that custom was; that we had cohabitation and repute during twenty-eight years, and the birth and bringing up of a numerous family; that this repute and cohabitation, and the paternal care and education of the children, were known and conspicuous not only in the North West Country, but also in Lower Canada. That there was, moreover, Connolly's express declaration that he had married this woman according to the native and Indian custom or usage, and his deliberate statement that she was his lawful wife, and that, as such, he respected her too much to take another woman. The learned Counsel than proceeded to show, with great cogency of argument and the citation of numerous authorities, that all this testimony combined was full and conclusive proof of the marriage of the plaintiff's parents; that it was sufficient, even under the common law of England, and that it was legal, complete, and unanswerable, in this case.

The defendant, however, has recorded her objections to all this evidence adduced by the plaintiff, and it was contended at the argument, that this attempt to prove a marriage by oral testimony was contrary to law, and directly against the provisions of our statute, (Chapter 20, Con. Statutes of [redacted] Canada.)

This Act does not apply to marriages solemnized without and beyond the limits of this Province. It could have no application whatever to such marriages, and there is no rule of evidence better known, longer recognized and more frequently enforced than this; "That where they are no registers kept, no "public records of marriages in existence, a marriage may be proved by parole "testimony; by witnesses who were present, or by the declarations of the "parents." It is also held that were registers have been lost or destroyed by fire, war, or other causes, parole testimony of marriage will be admitted. Lord Stowell and the best text writers have repeatedly declared the law to be as stated by the plaintiff's Counsel, and as a matter of fact and constant and universal practice, such, undeniably is the law. It is too elementary to be disputed—too

well known to require the citation of authorities to support it, though some will be mentioned hereafter, in order that even upon this point there may be no doubt of misapprehension.

But admitting its legality, the main difficulty consists in this: does all this testimony amount to proof of a marriage which this Court is bound to recognize as valid? This brings me to the consideration of the law which defines what marriage is, and what testimony will constitute proof of its existence. It will be borne in mind that at *Rivière aux Rats*, in 1803, as has been already insisted on there were no priests, no ministers, no magistrates, no registers: that the decrees of the Council of Trent had not been promulgated there; that neither the ordinances nor the declarations of the French kings, nor the English marriage acts were in force in that distant and barbarous region; that if, besides and in addition to the Indian usage or custom, any European law obtained there, that law probably was the common law of England, but that this is too doubtful to be adduced in argument; that there has been adduced and placed of record in this cause, indisputable evidence that Mr. and Mrs. Connolly cohabited as husband and wife during the period of twenty-eight years; that the plaintiff was born of that union, and that William Connolly, by repeated and solemn declarations stated and admitted, that the Indian woman was his lawful wife. To this may be added the fact, also proved and of record, that this woman declared to several witnesses, that she had been married to Connolly according to the law and custom of her nation.

Before the citation of authority in support of plaintiff's pretension, it may be proper to refer to the testimony of two Reverend Gentlemen, Mr. Turcotte and Mr. Aubert, Priests of the Roman Catholic Church, witnesses for the plaintiff, and the Rev. Mr. Boucher, also a Priest of the same Church, examined on behalf of the defendant. It is unnecessary to say that the Court could not in a matter of this kind be governed by their opinions, yet their evidence is a part of the record, and it is not without importance.

Mr. Aubert says, in cross-examination:

Quand je dis qu'on savait que la dite Susanne avait été marié au dit William Connolly, je le sais d'abord par l'opinion publique, et parce qu'elle—même me l'a dit et que'elle me l'a dit en me racontant le fait.

Question.—Quelle sorte de mariage est-ce?—*Réponse*—Celui qui était en usage alors pour tout le monde.

Question:—Est-ce un mariage ou reconnu par l'église ou par les lois civiles en aucun cas que vous pouvez rapporter?—*Réponse*—Pour la légitimité du mariage on le considère comme valide, dès qu'on se conforme aux usages admis dans le pays où l'on se marie. Je n'ai pas eu occasion d'examiner cette question sous le rapport civil.

Question—Savez-vous que bien souvent les chefs ont plusieurs femmes?—*Réponse*—Pour les chefs natifs nés Sauvages, c'est vrai' mais pour les blancs, je n'ai jamais connu de bourgeois de la compagnie en avoir plus qu'une.

Question.—En cas qu'un chef natif se transportât dans un pays civilisé, et ayant quatre ou cinq femmes Sauvages prises suivant l'usage du pays sauvage, est ce que tout ces femmes seront légitimes, soit aux yeux de l'église ou de la loi?

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—*Réponse*—La première seul sera légitime, et toutes les autres ne seront pas considérées comme les femmes légitimes.

Question,—Par quelle loi ou règle écrite ou comment autrement établie, sera faite une telle distinction entre les femme d'un chef Sauvage, pour légitimer l'une d'entr'elles, et rejeter les autres?—*Réponse*—Selon les lois ecclésiastiques elles se trouvent dans le droit *canon*: par les lois civiles je n'en sais rien.

Question.—Pouvez-vous citer une loi ou le texte de loi dans le droit *canon* à l'appui de ce que vous dites?—*Réponse*—C'est dans le traité du *mariage*. Si j'avais su que vous me demandassiez le chapitre, j'aurais emporté le livre.

Question.—Savez-vous si le mariage, selon la coutume sauvage, porte des conséquences différentes, et met la femme dans une position très-différente, du cas d'un mariage dans un pays civilisé?—*Réponse*—Ça ne dit rien; ça dépend des usages, des pays, quant au traitement de femmes et aux droits.

Question.—Selon votre opinion, je demande si par les lois sauvages la dernière femme aura une préférence sur les autres. Est-ce que la règle sera renversée par le transport du domicile dans un pays civilisé?—*Réponse*—Si les Sauvages restent infidèles, l'église n'a pas à s'occuper de leur conduite; mais s'il veut rentrer dans l'église, l'église l'oblige à reprendre la première femme, parce qu'elle la considère comme la seule légitime, à moins qu'elle ne veuille pas se faire chrétienne.

Question—Au cas qu'un homme et une femme se marient selon la coutume sauvage, s'ils veulent devenir chrétiens, est-ce qu'ils n'ont pas d'autres devoirs à faire; ou est-ce qu'ils doivent se faire remarier par un curé?—*Réponse*—Non, parce qu'ils sont déjà mariés.

Question.—Dans l'église catholique, n'est-ce pas que le mariage est un sacrement, et ce que c'est un devoir de recevoir la bénédiction nuptiale?—*Réponse*—Oui, le mariage est considéré comme un sacrement, mais la présence de curé comme témoin nécessaire est requis pour valider les mariages là où le décret du concile de Trente a été publié, *mais où il n'a pas été publié, les parties peuvent contracter mariage validement sans la présence du curé d'après les lois de l'église. Le seul fait que les époux se prennent dans l'intention de se marier est assez, sans l'imposition d'aucune cérémonie.*

The Rev. Mr. Turcotte, after having spoken of the marriage of Mr. Connolly and Susanne, says in cross-examination:—

"D'après mon opinion, ce mariage était valable selon les règles de l'église "Catholique Romaine, c'est-à-dire qu'en principe, c'est le *consentment mutuel* "*qui fait le mariage*. Si les parties sont des catholiques romains, l'église re- "connaitra une telle union, *si le Concile de Trent n'était publié là*."

The Rev. Mr. Boucher, a witness for the defence, was the confessor of the late William Connolly,—he had baptized one of his children by Julia Woolrich. He was an intimate friend of the second family. He had been for eight years missionary at the Red River, and knew the customs of that part of the country well. Speaking of polygamy among the natives, he knew of no case of a European having two women at a time. Concubinage is the prevailing vice in the North West; thinks Mr. Connolly was not married to Susanne, and when asked if he was not aware of the existence of such a marriage according to the custom of the country, he answers:—

"Je ne connais pas de coutume autorisant le dit mariage, ne pouvant autoriser comme coutume ce qui est une action défendue de Dieu et de l'Eglise. Je regarde comme crime une liaison semblable."

He says that such a connection as that between Connolly and Susanne was concubinage—not marriage. This gentleman also states that the plaintiff, and all Connolly's children by the Indian woman, passed for illegitimate. According to what is stated by these witnesses though in some degree conflicting, I am inclined to think that if this marriage took place according to the usages of the natives, it would be regarded as valid by the Roman Catholic Church. I have referred to their testimony to show the opinion of Churchmen on this point. It will be remarked, however, that Mr. Boucher does not reason much upon the matter, but expresses simply his private opinion, and takes, not a legal, but a moral or religious view of this kind of marriage.

Among the authorities cited by Mr. Stephens, one of the plaintiff's Counsel, are the following:

"Le mariage, c'est l'union ou la societé légitime de l'homme et de la femme qui s'unissent pour perpétuer leur espèce."—Toullier, Vol. 1, No. 489.

"Le loi ne considère le marriage que comme un contrat civil."—Toullier, No. 494, Vol. 1.

"By the law of nature, by the canon law, previous to the Council of Trent, "and by the law of England as it stood before the passage of the first marriage "act.—(A.D. 1753.)and by the law of Scotland and France, nothing need be "added to this simple consent to constitute a perfect marriage."—Bishop on marriage, Vol. 1, page 219. Section 218; and see cases cited in notes.

"In most of the tribes, perhaps all, the understanding is that the husband "may dissolve the contract at pleasure. It is plain that among the savage "tribes on this continent, marriage is merely a natural contract, and that neither "law, custom, or religion, has affixed to it any conditions or limitations or forms. "other than what nature has itself prescribed"—Bishop on marriage. Vol, 1, "No. 223.

"In a state of nature," says Lord Stowell, "the contract of present marriage "alone, without form or ceremony superadded, constitutes of itself complete marriage."—*Vide* Lindo vs. Belisario, 1 Hugg. Con. 216, 230; 4 Eng. Ec. 367, 374, "Bishop, Vol. 1, No. 19.

"If practically a man and woman recognize each other as in substance husband and wife, though they attempt to restrict the operation of the law upon "their relation, the law should hold them—public policy requires this, the peace "of the community requires it, the good order of society demands it—to be "married persons, unless some statute has rendered the observance of some form of marriage necessary."—Bishop, Vol. 1, No. 227.

"Whenever marriage is governed by no statute, consent constitutes marriage, "and that consent is shown by their living together." Bishop, Vol. 1, Nos. 229 "and 230.

"But whenever the matter is not governed by any doctrine there to be mentioned, no particular form for expressing the consent is necessary, nothing more "is needed than that in language which is mutually understood, or in any mode

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"declaratory of intention, the parties accept of each other as husband and wife," —1 Fraser Dom, Rel, 145; Bishop; marriage,, Vol. 1, No. 229.

"Quant aux enfants nés de ces mariages putatifs, ils sont légitimes à tous "égards. Ils jouissent des mêmes droits que s'ils étaient nés d'un marriage, a le légitime duquel il n'y aurait eu aucun obstacle"—Toullier, Vol. 1, No. 666.

"Marriage act of England does not apply to marriages abroad."—Latour vs. Teesdale, 8 Taunton, 830.

"None of the English marriage acts extend to any marriages taking place out "of England."—Blackstone, Vol, 2. page 296. Am. Ed. 1843.

"The laws which prescribe the manner in which and the persons between "whom a marriage may take place, and under what circumstances, and in what "manner it may be dissolved, constitute the status of husband and wife, and are "therefore personal laws of universal effect. It is not necessary to resort to the "origin of domicile; to ascertain what are its laws, if that were not the place in "which the marriage was contracted. The law of the place in which the mar-"riage was celebrated, must decide on its validity."—Burge Ed. 1838, Vol. 1, page 15.

"With respect to marriages contracted in a foreign country, they are con-"sidered as valid by our law, if made in such form as is deemed sufficient in the "place where contracted."—Rex. vs. Brampton, 10 East, 282; Latour vs. Teesdale, 2 Marsh, 243; Dôe vs. Vardill, 5 Barn. and Cress 438; 6 Bing. N. C., 385; Darlymple, vs. Dalrymple, 2 Hagg. 52.

From these authorities, I think, it is clear that by the Canon law, by the law of France and Scotland, and even by the Common law of England, the marriage under consideration with repute and co-habitation such as is proved, should be held up to be in all respects valid.

But the defendant contends, admitting, that among the Indians, this marriage would be good, yet it must be borne in mind that Connolly was a Christian and Suzanne an infidel, and this is a sort of *empêchement*. That the custom or usage, contended for, is barbarous and pagan; it allows polygamy and divorce at will and therefore, the principle which holds that a marriage, good by the *lex loci*, is valid everywhere, does not apply—that no Christian Court of Justice can recognize and give validity to a marriage solemnized according to such a usage or custom, and consequently, upon the plaintiff's own view of international law, I am bound to adjudge and declare the pretended marriage void. This is certainly a very strange pretention, and I confess my inability, after much research, to find any authority of sufficient weight to countenance such a proposition. Let us inquire in the first place, what is the law as laid down on this point, and ascertain if the decisions or the text writers of authority, so far as I have been able to examine them, have made such a distinction.

By what law is validity of a marriage to be decided? "As to the constitu-"tion of the marriage, as it is merely a personal consensual contract it must be valid everywhere, if celebrated according to the *lex loci*"—No. 100; Story; Conflict of Laws pages 203-205; No. 80 Story Conflict of Laws, Ed. 57 pages 110-218

Validity of marriage depends upon the *lex loci* of place of solemnization."

—Latour *vs.* Teesdale, 8 Taunton, 830, Lacon *vs.* Higgins, 3 Starkie, 178 and 183.

"The general principle certainly is, that between persons *sui juris*, marriage "is to be decided by the law of the place where it is celebrated. If valid there, "it is valid everywhere."—Story Conflict of Laws, Ed. 57 page 218, sec. 118; Id, pages 220-223. Dalrymple *vs.* Dalrymple, 2 Hagg. Con. R., 54. Lacon *vs.* Higgins, 3 Starkie 183. Kent *vs.* Burgess, 11 Sim. 361. Merlin Rep. Vo. Marriage, sec. 1, page 343. Pardessus, vol. 5, page 6, tit. 7, cap. 2, art. 1481 to 1495. Pothier, Mariage, No. 263; Catherwood *vs*, Caslon, 13 M. & W. 26. Connolly *vs.* Connolly, 7 Moore 438; Broom's Legal Maxims, Ed. of 1858, page 461; Boullenois Observ. 46, p. 458. &c., &c., &c.

"With respect to marriages contracted in a foreign country, they are considered "as valid by our law, if made in such form as is deemed sufficient in the place "where contracted."—Rex *vs.* Brampton, 10 East, 282. Latour *vs.* Teesdale, 2 Marsh 243. Doe *vs.* Vardill, 5 Barn. & Cress. 438.

"Ainsi les enfants qu'une femme sauvage aurait eus d'un sauvage dans un "pays où il n'y aurait point de lois établies seraient regardés comme légitimés, "même parmi nous, quand même, le père et la mère n'auraient suivi d'autres lois "que celles qu'ils se seraient imposées; de même, ceux de deux époux, Anglais "ou Chinois, qui auraient accompli les lois de l'empire de Chine ou du Royaume "de l'Angleterre."—Merlin, Marriage, sec. 2, § 1.

Lord Stowell, in deciding on the validity of a marriage celebrated in Scotland says," that the only principle applicable to such a case by the law of England, "is that the validity of the marriage rights must be tried by reference to the "law of the country where, if they exist at all, they had their origin. Having "furnished this principle, the law of England withdraws altogether and leaves "the legal question to the exclusive judgment of the law of Scotland."—Dalyrm-"ple *vs.* Dalrymple, 2 Hagg. Cons. Reports. 59.

It is, therefore," adds Lord Stowell," to be advised, that the safest course is "always to be married according to the law of the country, for then no question "can be stirred, but if this cannot be done on account of legal or religious diffi-"culties, the law of England does not say its subjects shall not marry abroad." "—Ruden *vs.* Smith. 2 Hagg. Cons. Reps., 371. And again the case Grim-"shire *vs.* Grimshire.

The same high authority insists with great force upon the observance of this "stringent and universal rule of the *jus gentium*. He says: "Why may not this "Court then take notice of foreign laws, there being nothing illegal in doing it? "From the doctrine laid down in our books—the practice of nations—and the "mischief and confusion that would arise to the subjects of every country from "a contrary doctrine, I may infer that it is the consent of all nations that it is "the *jus gentium*, that the solemnities of the different nations with respect to "marriages should be observed, and that contracts of this kind are to be deter-"mined by the laws of the country where they are made. If that principle is "not to govern such cases, what is to be the rule where one party is domiciled and "the other not? The *jus gentium* is the law of every country. and is obligatory "on the subjects of every country. Every country takes notice of it; and this

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"Court, observing that law in determining upon this case, cannot be said to determine *English* rights by the laws of *France* but by the law of *England*, of "which the *jus gentium* is part. All nations allow marriage contracts, they are "*jura gentium.*" and the subjects of all nations are equally concerned in them "and from the infinite mischief and confusion that must necessarily arise to the "subjects of all nations, with respect to legitimacy, successions, and other rights "of the respective laws of different countries were only to be observed, as to mar- "riages contracted by the subjects of those countries abroad; all nations have "consented, or must be presumed to consent, for the common benefit and ad- "vantage, that such marriages should be good or not, according to the laws of "the country where they are made. It is of equal consequence to all that one "rule in these cases should be observed by all nations—that is, the law where "the contract is made. By observing this law, no inconvenience can arise; but "infinite mischief will ensue if it is not."

I do not find in any of these authorities the distinction here contended for; and when the law does not distinguish, I will not.

And here it may be proper that I should refer more particularly than I have heretofore done, to one noticeable incident in these Indian marriages, and that is polygamy. It was contended that this imparts to this connection, in an especial manner, its infidel character, and renders it unworthy of recognition as a legal marriage by this Court, excluding it from the operation of the general rules so clearly enumerated and laid down in authorities which I have just cited. But it is obvious, and must be conceded at once, that this is an incidental, not an essential element, in the law or custom of marriage known among those aboriginal tribes. It is an abuse, but not a condition of, or an essential ingredient in these barbarian obligations of matrimony. If proved at all in this case, it is manifestly established *as the exception, not the rule;* and in regard to marriages between Christians and the natives, *it is not proved to be the custom.* It may have occurred in the case of some profligate men possessed of great power and authority in the Indian country, but as a general rule it was not known or practised even among the natives. Mr. Connolly was not among those who sanctioned or connived at such an abuse of those sacred obligations which bound him so long and with so much fidility to his Indian wife. The fact is, I have, strictly speaking, nothing to do with polygamy in this case. It does not in any way come up for my consideration, except in so far as it is an infidel and unchristian abuse of a foreign law, occurring in isolated cases, and upon which I am not bound to adjudicate. It is no part of my duty to recognize or sanction in the slightest degree, or in any way whatever, that part of the Indian usage so carefully and so religiously eschewed by Mr. Connolly. And here I may remark that although polygamy was allowed among the Jews, as a general rule they were content with one wife. Diodorus also informs us the Egyptians were not restricted to any number of wives, but that every one married as many as he chose, with the exception of the priesthood, who were by law confined to one consort. It does not, however, appear that they generally took advantage of this privilege; and Herodotus affirms that throughout Egypt, it was customary to marry only one wife. It is easy to reconcile these statements, by supposing that Diodorus speaks of a law

which permitted polygamy, and Herodotus of the usual custom of the people and if the Egytians were allowed to take more than one wife, we may conclude, from the numerous scenes illustrative of their domestic life, that it was an event of rare occurence.

Polgamy is permitted to the Moslem, but it is neither reputable to to have more than one wife, nor to divorce her without very cogent reasons; and though no objection can be made when there is no family, it is required, even in such a case, that her wishes, and those of her parents, should be consulted; and many marriage contracts stipulate that the wife shall have no partner in the harem.

No doubt this is law which Christianity expressly condemns, yet the Court has not the least hesitation in saying, that its existence among the Crees did not render Mr. Connolly's marriage with the Indian a nullity.

Further, Mr. *Cross*, the learned Counsel for the defendant, with great force and plausibility, has argued that there are other radical defects in this alleged marriage which, in his opinion, precludes the Court from regarding this union as legal matrimony. It was contended by him that no formal contract of marriage verbal or written, has been proved; that a custom which dispenses with this as a basis of marriage, which requires no witnesses, the intervention of no civil or religious authority, which is accompanied by no solemn or suitable ceremonies, exacts the observance of no religious rites whatever, and is a mere question of consent alone, is no marriage between a christian and an infidel. It must be conceded that all this goes to the very heart of this case: and these arguments have received the most anxious consideration of the Court.

In deciding this point, I think I may take it for granted, and it will be admitted at once, that the difference of religion or of race, the fact of one party being a Christian and the other pagan, cannot materially, if at all, affect the question. These parties were under the circumstances *sui juris*, and they could, even according to the defendant's view of the case, have been legally married by proper authority. I am not aware of any English law which prevents a British subject from marrying an infidel, or which would render his marriage with a pagan illegal. If this be a marriage at all, it is quiet true that it was a marriage without the intervention of any civil authority and without any religious or ecclesiastical sanction; it was matrimony according to Indian custom, not in conformity to any Christian law. The Court has to deal with it as a matter of consent, an agreement to be husband and wife, followed by *concubitus* and long cohabitation, and general repute, and here I think I cannot do better than cite the words of the great Lord Stowell, giving judgmens in the Dalrymple case,—(2 Haggard's Consistory reports. Vol. 2, page 62.)—He says:

"Marriage being a contract, is of course *consensual* (as is much insisted on, I "observe, by some of the learned advocates) for it is of the essence of all contracts "to be constituted by the consent of parties. *Consensus non concubitus facit* "*matrimonium*, the maxim of the Roman civil law, is, in truth, the maxim of "all law upon the subject; for the *concubitus* may take place, for the mere grati- "fication of present appetite, without a view to anything further, but a mar- "riage must be something more; it must be an agreement of the parties looking "to the *consortium vitæ*: an agreement indeed of parties capable of the *concubi-*

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"tus, for though the *concubitus* itself will not constitute marriage, yet it is so far "one of the essential duties for which the parties stipulate, that the incapacity "of either party to satisfy that duty nullifies the contract. Marriage, in its "origin, is a contract of natural law; it may exist between two individuals of "different sexes, although no third person existed in the world, as happened in "the case of the common ancestors of mankind: It is the parent, not the child "of civil society, '*Principium urbis et quasi seminarium Reipublice.*' In "civil society it becomes a civil contract, regulated and prescribed by law, and "endowed with civil consequences. In most civilized countries, acting under "a sense of the force of sacred obligations, it has all the sanctions of religion "super-added; It then becomes a religious, as well as a natural, and civil con- "tract; for it is a great mistake to suppose that, because it is the one, therefore "it may not likewise be the other. Heaven itself is made a party to the con- "tract, and the consent of the individuals pledged to each other, is ratified and "consecrated by a vow to God. It was natural enough that such a contract "should under the religious system which prevailed in *Europe*, fall under eccle- "siastical notice and cognizance, with respect both to its theological and its legal "constitution; though it is not unworthy of remark that, amidst manifold "ritual provisions, made by the Divine Lawgiver of the Jews, for various offices "and transactions of life, there is no ceremony prescribed for the celebration of "marriage. In the Christian church, marriage was elevated in a later age to "the dignity of a sacrament, in consequence of its divine institution, and of "some expressions of high and mysterious import respecting it contained in the "sacred writings. The law of the Church, the canon law (a system which, in "spite of its absurd pretensions to a higher origin, is in many of its provisions "deeply enough founded in the wisdom of man,) although, in conformity to the "prevailing theological opinion, it reverenced marriage as a sacrament, still so far "respected its natural and civil origin, as to consider that where the natural "and civil contract was formed, it had the full essence of matrimony without the "intervention of the priest; it had even in that state the character of a sacra- "ment; for it is a misapprehension to suppose, that this intervention was re- "quired as a matter of necessity, even for that purpose, before the Council of "*Trent*. It appears from the histories of that council, as well as from many other "authorities, that this was the state of the earlier law, till that council passed its "decree, for the formation of marriage; The consent of two parties expressed in "words of present mutual acceptance, constituted an actual and legal marriage."

In the preceding remarks Lord Stowell is describing a marriage extremely similar to the one proved in this case, less the twenty-eight years cohabitation. After all, what is there so immoral or revolting in this Indian usage? Jacob espoused the daughters of Laban, two sisters, very much in the same way; he bought them, he worked for them: and several instances of similar marriages are recorded in Holy writ. There does not seem to have been ceremony in those *cases*—not much if anything recorded about verbal or written contracts, and such like technical superfluity of terms. The Egytians too, as far as we can ascertain anything about their marriage rites, and the Greeks bought their wives and made presents on obtaining the consent of the parents and that of

their daughter. According to the custom of the first ages of the Republic the Roman husband bought his bride of her parents; they partook of a salt-cake of *far* or rice, and after this *confarreation* both parties were seated on the same care of sheepskin, and the ceremony was completed. After the success of the Punic wars, and in later times, amid the increasing opulence and the growing corruption of society and manners, Roman marriages, owing to the intrigues and ambition of the woman, became conspicuous for pomp and ceremony; but even then consent and *concubitus* were the main, the essential ingredients of the contract. This primitive state of things is pretty much what we find among the barbarians of North America, and very nearly, if not exactly, what is proved in the present case; nor can I perceive that much, or any more, was required in earlier times, and in cases like the present either by the canon law or by the common law of England, France or Scotland. For all these reasons, I am clearly of opinion that this case comes under the operation of the general rule of the *lex loci contractus* above referred to, and that the marriage is valid without any formal contract is sufficiently proved but to the evidence of Necon.

I have as before stated, made diligent and extensive researches into the law on this subject, in order to ascertain whether these arguments so much insisted on by the defendant, could be sustained by any book of competent authority, or in any judicial decision, and I am bound to say I can find none—nor do I believe that any exists. There is besides, one answer to all this, and a very plain one. 1st, The supreme authority of the empire, in not abolishing or altering the Indian law, and allowing it to exist for one hundred years, impliedly sanctioned it, and 2nd, The sovereign power in these matters, by proclamation, has tacitly acknowledged these laws and usages of the Indians to be in force, and so long as they are in force as a law in any part of the British empire or elsewhere, this Court must acknowledge and enforce them.

This Indian custom or usage is, as regards the jurisdiction of this Court, a foreign law of marriage; but it obtains within the territories and possessions of the Crown of England, and until it is altered, I cannot disregard it. It is competent—it has been competent during the last hundred years, for the parliament of Great Britain to abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not. This pretention is, therefore, as before stated, utterly unfounded.

Again it is urged by the defendant, that there is no legal proof that Connolly was ever married to this Indian woman. Now apart from his own express declarations to the contrary, and his long acknowledgment of her as his wife, we have twenty-eight years of cohabitation and repute, and I come now to consider what effect in law this fact has upon the case before us, and I find, first, the following decisions of our Courts:

Superior Court, Montreal, No. 286. Tranchemontagne *vs.* Monteferrand & ux, and Charles Faris, Opposant. (Present; Judges Smith, Vanfelson and Mondelet.) Lands were seized as belonging to defendant, Monteferrand's wife, one Lousie Faris, daughter of Hugh Faris and Mainville, by an Indian marriage, previous to the year 1810. Hugh Faris was a Canadian, and his wife, Mainville, a half-breed or "Metis" Indian. They were married according to the custom of the

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country, and in this cause, no proof of any ceremony was made, but simply cohabitation and reputation, Charles Faris, nephew of Hugh, opposed the seizure and sale, claiming the property as the rightful heir of Hugh Faris.

Plaintiffs contested the opposition on the ground that the female defendant was daughter of Hugh Faris and Josephte Mainville, and legitimate, and that the marriage was void.

So held by Court—Contestation maintained, and opposition dismissed, 27th October. 1854.

At Montreal. (In Appeal) [No. 14] Court of Queen's Bench, (*March* 1867) Morgan & al., Appellants, and Gauvreau, Respondent. Present: Hon. Judges Aylwin, Drummond, Badgley, and Mondelet. No attention paid to certificates filed. Held that declarations of party, verbal and written (in a lease) of marriage, will be binding, and give to Court the right to presume a marriage and to condemn respondent as the husband.

At Montreal. (In Appeal) [No. 10] Court of Queen's Bench, Hannah Fisher, (Plaintiff,) Appellant, and Angelique Gareau, (Defd't) Respondent, Present: Hon. Judges Duval (Chief Justice), Meredith, Badgley, and Mondelet. Demand by Appellant as widow of Samuel Liscom, of Argenteuil, and to him married 16th January, 1846. without contract. A daughter born and respondent appointed the tutrix to one Samuel Bower or Liscom, legatee universal of Samuel Liscom under his will—demand is for share in community—Plea: an anterior marriage by Samuel Liscom to Pursis Burr—Proof of defendant.

1. That Church Registers were kept at Greenwich, Mass., U. S. 2. That no entry of Marrriage could be there found. 3. Cohabitation and Reputation of Liscum and Pursis Burr as man and wife.

Held sufficient evidence.

Action dismissed by Superior Court (Smith, J.), 28th June, 1862.

Judgment unanimously confirmed in appeal, 9th March, 1864.

Mr. Stephens, the plaintiff's Counsel, has also submitted the following authorities:—

"Where marriage proved to have been solemnized abroad, but doubtful whether strictly according to rites of Church of England, and not according to custom of country where it took place, held sufficient with evidence of cohabitation Catherwood *vs.* Caslon, 1 C. & M. 431; Woodgate *vs.* Potts, 2 C. & P. 467.

"Reputation is good evidence of marriage, though the party adducing it, seeks to recover as heir at law, and his parents are still living."—Fleming *vs.* Fleming, 4 Bing. 466.

"Cohabitation as man and wife furnishes presumptive evidence of a preceding marriage."—Holmes *vs.* Holmes. 6 L. R. 470 Evans *vs.* Magoon; Exchequer Reports, 2 Crompton & Jervis 451, Danty, preuve, pages 100–112. &c., &c., &c.

"Ainsi deux personnes qui ont toujours vécu publiquement comme mari et femme, et qui ont passé pour tels, sans contradiction, ont la possession d'état et mari et de femme."—Toullier, Vol, 1, No 597.

"C'est donc le nom et la dignite du mariage, la cohabitation possible et présumée, la présomption toujours favorable à l'innocence et à l'état des enfants

"qui forme le premier principe adopté par les lois en matière de filiation comme "l'un des fondements de la société civile. L'enfant conçu pendent le mariage "a pour père le mari—.Toullier. Vol. 2, No. 790.

"Les faits principaux sont, que l'individu a toujours porté le nom de son "père, que le père l'a traité comme son enfant, et pourvu en cette qualité a "son éducation, à son entretien a son établissement," Toullier, Vol. 1, No. 869; see Letter of William Connolly to John Leeves, fyled and proved, dated Lac la Pluie, August 7th, 1818, from which I make the following extract:

"The account you give of John is highly satisfactory. I am quite proud of "the little fellow, and sincerely pray God that he may not defeat the hopes I entertain of him, what obligations do I not owe you, my dear Reeves, and your worthy aunt, for your care and attention to my child, &c., &c., &c."

"La force de la possession est telle qu'elle peut tenir lieu de l'acte de nais- "sance."—Toullier, vol. 2, Nos. 871-2.

"Le Code a tranché le doute en décidant qu'à défaut de titre et de possession "constante, ou si l'enfant a été inscrit soit sous de faux noms, soit comme né "de père et mère inconnus, la dreuve de fillation peut se faire par témoins."—Toullier, vol. 2, No. 888.

"When there is absence of *Regitres de Mariage*, the civil status of a person "can be proved by the declarations of parents and by witnesses."—Motz vs. Moreau, 5 Lower Canada Reports, page 438.

Il est nécessaire de suppléer aux registres de l'état civil, lorsqu'il n'en existe "point, soit parcequ'il n'en a pas été tenu, soit parcequ'ils sont perdus."—Toullier, Personnes, vol. 1., No. 345, Danty, Preuve, pages 100, 103 et 112.

"Quant aux enfants nés de mariages putatifs, ils sont légitimes à tous égards." —Toullior, vol. 1, No. 666,

"Where it is necessary to prove the fact of a marriage, the entry in the "Parish Register is not the only evidence; but it may be proved by persons "who were present and witnessed the ceremony, or by general reputation."—Saunders *Vbo.*, Secondary Evidence, page 835.

Baron Parke said: "I think there is a great deal of evidence to go to the jury. There is evidence of four years cohabitation "of these persons as hus- "band and wife, and such cohabitation is evidence of marriage,"—Bishop, on Marriage and Divorce, p. 227, Carrington & Payne, p. 460; Woodgate *vs.* Potts.

"But when two persons agree to have that commerce for the procreation and "bringing up of children, and for such lasting cohabitation, that in a state of "nature would be a marriage, and in the absence of all civil and religious insti- "tutions, might safely be presumed to be, as it is popularly called, a marriage in "the sight of God." Lindo *vs.* Belisario.—1. Hagg Cons. Rep. 316. "But "wherever the matter is not governed by any doctrine there to be mentioned, "no particular form for expressing the consent is necessary. Nothing more is "needed than that in language which is mutually understood, or in any mode "declaratory of intention the parties accept of each other as husband and "wife."—Bishop. Vol. 1, No. 229; Hicks *vs.* Cochran.—4 Edw., ch. 107.

"Oral evidence of marriage is admissible when there are no registers."—

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Toullier, Vol. 1 Nos. 345, 884; do. 2, No. 888; Code Civil Canada, No. 232; Danty, Preuve, p, 103, Ed. of 1727.

"As to testimony being allowed where the *acte de Baptême* is false."—Lahaye, Code. Annoté, Art. 323, and the authorities cited there, page 94 and page 95 (left column.)

"Good faith of one conjoint legitimises children."—Favard de Langlade; Rep. de la Nou. Légis; Verbo Mariage, p. 487, Ed. 1823; Toullier Vol. 1, Nos 653, 660, 661, 662 and 663.

The Court will now refer to some authorities touching proof of the legitimacy of plaintiff.—See Code Civil, Canada, Art. 232.

"When the child is inscribed under false names or as *inconnu*, la preuve de "filiation peut se faire par témoins."—Toullier, Vol. 2 No. 888.

"S'il existe des enfants issus de deux individus qui ont vécu publiquement "comme mari et femme, et qui *sont tous deux décédés*, la légitimité des enfants "ne peut être contestée sous prétexte du défaut de représentation de l'acte de "célébration de mariage, lorsque cette légitimité est prouvée par une possession "d'état."—Toullier, Vol. 1, No. 238.

"La possession d'état a trois caractères: *nomen, tractatus, fama*."—Toullier. Vol. 2, 869.

"La force de la possession est qu'elle peut tenir lieu de l'acte de naissance."—Toullier, Vol. 2, Nos. 869, 871, 872.

"When it is proved that the child is born of a female who was married at the "time of its birth, the law takes him under its protection, and says: *Pater est "quem nuptiæ demonstrant*."—Rutledge and Carruthers, Fac, Coll. 19th May 1812, Burge, Vol. 1, page 59. Many of these authorities bear directly upon the present case and sufficiently sustain the views which the Court has already enunciated.

It has been said that the plaintiff's *status*, being that of illegitimacy, those authorities do not apply; If this be true he was considered so only after Connolly repudiated his mother and married another woman. In the North-West and at St. Eustache, he was regarded as legitimate. I shall refer to this more particularly hereafter.

The Defendant has pleaded and argued that the plaintiff and his mother Susanne continuously acquiesced in this marriage of Wm. Connolly with Miss Woolrich. Letters have been produced. Some of these letters are addressed to the late Mr. Connolly, and several to Miss Woolrich, and are from the children and grand-children of Susanne; they are replete with expressions of gratitude, and the warmest affection to their father and the defendant; and there can be no doubt but this amiable and accomplished lady treated both Susanne and her children, with marks of friendly regard; the children even with affection; but as a matter of fact, so far as regards Susanne and the plaintiff John Connolly, there are no letters; there is nothing whatever to show express or implied acquiescence on the part of either of them,—nothing to establish express or implied acknowledgment or recognition of Miss Woolrich as the wife of Mr. Connolly, or of the marriage relied upon by the defendant; inaction, silence, are indifference not acquiescence; but even if they did not constitute such

acquiescence, it would amount to nothing in the present case. The marriage of Mr. Connolly with Miss Woolrich was good, or it was bad under the law of the land. If, as a matter of fact, Mr. Connolly was married to the Indian woman, his subsequent marriage to the defendant was null and void, and no acquiescence or sanction by his first wife could make it good. If Susanne was not his wife, his marriage with Miss Woolrich was valid, irrespective of any acquiescence by Susanne and her children. Lord Stowell thus speaks of that kind of acquiescence in Dalrymple *vs.* Dalrymple, 2 Hagg., p. 129.

"It is said that, by the law of Scotland, if the wife of the first private marriage, chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of *England;* no connivance would affect the validity of her own marriage; even an active concurrence on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that such a principle was ever admitted authoritatively; for though in the gross case of *Campbell* versus *Cochrane*, in the year 1747, the court of Session did hold this doctrine, yet it was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of *Scotland*, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding between the parties, or indeed on any other ground, it is a most important circumstance, in opposition to the real existence of such serious purpose or understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon to do so, but suffered them to be transferred to another woman, without any reclamation on her part."

If any authority were required upon this point, this seems to me to be very conclusive; it most decisively disposes of the Defendant's argument about acquiescence in this case. It will be remarked that Lord Stowell is speaking of a private or clandestine marriage, the one then under consideration in the Dalrymple case; but there was nothing secret or clandestine in the marriage of Mr. Connolly with the Cree woman. Their relation as husband and wife was as public as such relations could be. Miss Woolrich was Connolly's cousin. When she was married, this lady was no longer young. She was thirty-six years of age. The Indian wife had been living with Mr. Connolly at St. Eustache, and afterwards she and several of the children resided with Connolly's sister, Miss Woolrich's cousin, in Montreal. It is a fair inference, and one which I regard as inevitable, from the evidence adduced, that Miss Woolrich well knew

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of the existence of the Indian woman, and of her intimate relations with her cousin, Mr. Connolly; that she was aware that there was a numerous family, issue of that connection, I have no doubt. While stating this to be the opinion of the Court, I feel it my duty to express the belief that Miss Woolrich was unaware of the existence of a lawful marriage between her cousin and the Indian woman. I am entirely satisfied of this; and I think it is beyond all doubt that Miss Woolrich was in perfect good faith when she married Connolly; so also was the Cree maiden, at the age of fifteen, when Connolly took her as his wife; both were in good faith, and, so far, they were very much in the same position. It is in regard to Miss Woolrich's ignorance of this marriage, and her good faith, the Defendant's Counsel urge, that it requires very little to show acquiescence; silence, inaction would be sufficient. Now, so far as the plaintiff was concerned, he had no notice to give to Miss Woolrich; he had no approval or disapproval to offer. And as to the Indian wife, what had she to say or to do? She was not misled or deceived Miss Woolrich; that was all Connolly's work. This argument is extremely weak, and cannot be entertained for a moment by the Court. But as much has been said upon this question of acquiescence, I would refer again to the pretended continual acquiescence in this second marriage on the part of the plaintiff and his mother. It is proved that when Susanne heard that Connolly had deserted her and married another woman, she smiled; what she meant to express or to convey, by that smile, does not appear. The smile of a woman may express a variety of emotions; it would not, perhaps, be considered a very reliable indication of feeling in an Indian woman, or in any other, but it may fairly be presumed that Mrs. Connolly (Susanne) did not mean to express approval or satisfaction; for she added "that "Miss Woolrich would have only her leavings, and that Connolly would repent "the step he had taken." And Larocque says "she felt all this very much." Except stating on some occasions that she had been married according to the custom of her tribe, the evidence does not show that she ever alluded to the circumstance afterwards. She may have done so, however; but the testimony does not show it. This silence may, in the case of the Indian woman, be considered as resignation, apathy, pride, or despair at ever being able to vindicate her position as the lawful wife of Connolly; but such conduct could not be regarded as acquiescence on her part in Connolly's second marriage, or in her own fate as his discarded concubine. But it was further urged that from 1844 till her death, in 1862, the Indian wife was supported by Connolly till his death in 1849, and afterwards by Mrs. Julia Connolly in a convent at Red River Settlement; that is true; and this fact, and many others proved, reflect great credit upon the second Mrs. Connolly. But the inaction of this old woman—her accepting support from Connolly and his second wife, in her old age, so many years after she had been discarded—cannot for a moment be viewed as an acquiescence, on her part, in the second marriage; and even so, it would not, as before remarked, make the first bad or the second good. It is not a question of *status* which is under consideration, but whether there was or was not a marriage between Connolly and the Indian woman? All outside that simple enquiry has nothing whatever to do with this branch of the case as presented to me. Neither the good faith of

Miss Woolrich, nor the passive conduct or apathy of the Indian, can avail in the defence of this cause. The position, therefore, of the defendant, must be declared untenable.

Then it was said, and much insisted on, that one of the incidents of this Cree marriage was, that it might be dissolved at pleasure; and I am free to admit that as between the natives, it seems to be a practice with these barbarians to [illegible] their wives without much ceremony, and that practice appears to be [illegible] by their usages.

How far this is to be regarded as a part of their law of marriage, or merely an abuse of it, tolerated among savages, it is difficult for me to determine. It was argued by Mr. Perkins, in his remarkable reply and summing up of the plaintiff's pretensions in this case, that admitting the argument of the defendant to the fullest extent, and that marriage among the Indians, or even when between a squaw and a Christian, a European, or American, is dissolvable at the will of the husband or, of either party—such a concession can have no effect upon this case. If this Cree marriage was dissolvable at pleasure, Mr. Connolly could perhaps have repudiated his Indian wife, had he done so while residing among the Crees, or where such a barbarous usage prevailed. He might have done so then if he could do so at all—but when he came to Canada, that right ceased. At all events, he could not dissolve the marriage of his own free will; he could not repudiate her in Canada, in virtue and in pursuance of this Indian usage. A man goes to a country, where divorce is allowed, and marries, he returns to his own country, where divorce is not allowed. The Courts of the latter country will not enforce the law of divorce existing in his matrimonial domicile. Much less could Mr. Connolly repudiate his wife by merely wishing to do so and then marry again. The Indian woman was his wife here, and would remain so, until the marriage was dissolved by means known to the law. It was not intended by the defendant that the first Mrs. Connolly could have repudiated her husband and married again; had such an argument been offered it would have been at once overruled. This pretension of the defendant is, therefore, without foundation.

It was also urged by the defendant (and upon this argument considerable emphasis was laid) that, Miss Woolrich having enjoyed the *status* of the lawful wife of William Connolly during a period of upwards of thirty years, she had a prescriptive right to be regarded as such. Now it will be borne in mind that Connolly had previously cohabited with the Cree woman during twenty-eight years as his lawful wife. He then repudiated her, and married Miss Woolrich with whom he cohabited from 1832 till his death in 1849, a period of seventeen years. Susanne died in 1862, Miss Woolrich in 1865. Could Connolly, under the circumstances of this case, prescribe against his first marriage? During the lifetime of the Indian woman could Miss Woolrich obtain, by prescription, what perhaps she never had in point of law under the circumstances of this case, the legal *status* of the lawful wife of William Connolly? These questions must be at once answered in the negative. Such a prescription, as that contended for by the defendant, must arise and exist under circumstances wholly different from those proved in this cause. The Court has no hesitation in saying that this argument cannot be successfully maintained.

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It is further contended by the defendant, that the only *status* of Susanne was that of concubine to William Connolly, and that of the plaintiff was illegitimacy.

With respect to the Cree woman, this is not the fact. Connolly says he married her according to the usages of her tribe or nation. She passed for his lawful wife during twenty-eight years in the North West country, and he introduced her into civilization and among his Christian acquaintances and friends in Lower Canada, as his wife. If she had been his concubine only, it is strange, it is indeed not credible, that he should have lived with her for twenty-eight years—had a numerous family—brought her to Lower Canada—presented her as his wife even to the priest, who baptized two of his children, and have taken her to his sisters in Montreal. This is not to be accepted as the relation existing between Connolly and this Indian woman. The circumstances of the case as proved, rebut every such presumption. The evidence shows conclusively that her *status* was that of a lawful wife, and not that of a harlot, till Connolly repudiated her. If there were any presumption to be invoked, it is on her behalf. The *status* of the Indian was not that of his concubine. I am not here to give expressions to loose social views of relationships such as these among which the defendant seeks to class Connolly's marriage to the Indian. Upon facts proved in this case, I must presume this connection to have been legal and regular; it was so reputed till 1801; and I am called upon to administer the law, and not to enforce popular views on these subjects. It may be customary for the Christian trader to take as his wife one of these children of the forest, acting in perfect good faith and in conformity with the law and usages of her native country, and after years of toil, fidelity, and devotion, having always treated her as his lawful wife, this trading adventurer, tired of the connection, may repudiate her, insisting that she has only been his concubine, and their offspring bastards. This is one way of doing things? but the sooner this is checked the better; and the sooner these men understand that such outrages upon law and religion will not be sanctioned by our Courts the more probability there is that such irregular practices will be discontinued.

Then as to the *status* of the plaintiff: there is no doubt that since the repudiation of his mother by his father and his father's second marriage, he has been regarded as illegitimate; and particularly so by the friends of the late William Connolly and those of the defendant. I think it is quite true that he has been so regarded generally, and so far as this general opinion could create a *status*, it has been that of illegitimacy; and, no doubt, under circumstances which it is easy to suppose, such a fact would be of importance. The certificate of baptism of the plaintiff, in the case, does not establish its illegitimacy. It is somewhat peculiar. Dated the 2nd April, 1813, it is in these words:

"Nous, Curé de Québec, avons baptisé Jean, né dans le Haut Canada, âgé "de huit ans, et dont les *parents légitimes* nous sont inconnus.

"Louise Aylwin et Louis Delmarre,
"'Godmother.' 'Godfather.'

"William Connolly,
"Henry Connolly, } Witnesses."

The father, it is strange to say, was one of the witnesses to this ceremony. It is fair to presume that the priest was informed by the father that the boy was legitimate; but the names of the parents were not given; and to make the mystery still more complete, it was falsely stated that he was born in Upper Canada.

The priest did not know where he was born—did not know who his legitimate parents were. But Mr. Connolly did, and both have been disclosed to this court; and this very certificate establishes, so far as a certificate can establish anything conclusively, that the plaintiff was not illegitimate. This argument therefore, and the objection that this action should have been brought to establish the plaintiff's legitimacy, or, at least, that such a prayer should have been in the conclusions, are in the opinion of the court, wholly unfounded.

The technical objection taken that all the children, issue of the marriage of Connolly and the Cree woman, should have joined in this action is clearly untenable. They may have perfectly good reasons for not bringing such an action, and besides they may not choose to do so; but it cannot for a moment be seriously contended that the plaintiff alone has not the right to recover his share of the community in the possession of the defendant, if such community exist.

This case might be disposed of upon a well known principal of law and of morality, and it is this, that where a doubt exists as to the legality of a marriage, Courts of justice are bound to decide in favor of the alleged marriage. All law, all morality, require and sanction this view, even of a doubtful case. In this instance, however, no such doubts exist.

Very little remains for the Court to remark in regard to this branch of the case, but to declare that according to the view which I felt bound to take of the law and the facts, there was a valid marriage existing between the late Mr. Connolly and the Indian woman. The proof of this marriage results from his own repeated and solemn declarations, to the effect that he had married her according to the custom and usages of her nation;—from the fact conclusively proved of twenty-eight years of repute—public acknowledgment and co-habitation as husband and wife—from the circumstances that he gave her his name—bestowed that name upon his children, offspring of that marriage—and from his care and education of these children. It is beyond all question, all controversy, that in the North West among the Crees, among the other Indian tribes or nations, among the Europeans at all stations, posts and settlements of the Hudson's Bay, this union, contracted under such circumstances, persisted in for such a long period of years, characterized by inviolable fidelity and devotion on both sides, and made more sacred by the birth and education of a numerous family, would have been regarded as a valid marriage in the North West, was legal there; and can this Court, after he brought his wife and family to Canada, after having recognized her here as such, presented her as such to the priest who baptized his children, and to the persons he and she associated with, declare the marriage illegal, null and void? Can I pronounce this connection, formed and continued under such circumstances, concubinage, and brand his offspring as bastard, because Mr. Connolly exercised his Indian privilege of repudiating her and marrying another woman, and waited to exercise that right till he came to Canada, where happily for society no such privilege exists? I think not. There would be no law, no justice, no sense, no

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morality in such a judgment. The Court itself could have testified to the high and accomplished character; to the cultivated intellect and feminine virtues of the amiable lady whose name and position figure so conspicuously in this unhappy case. She passed among many as the lawful and honored wife of William Connolly. She was so regarded and respected and beloved by those who knew her best; but [illegible] all this, there have arisen other claims and other interests. The obscure and stigmatized offspring of William Connolly and his Indian wife has come forward, after many years, to vindicate his mother's memory and honor, and his own rights, as their lawful child. The law is with him. I am called upon to administer it, and I am forced to the conclusion that the marriage with the Cree woman was valid, that I am bound to recognize it as such, and to so adjudge; and I am bound, however painful it may be, to declare that the second marriage was and is an absolute nullity.

But there is still another question of very great importance to be decided, and that is, whether, admitting the legality of the first marriage, a community of property resulted from that marriage? Were Connolly and his Indian wife *Commun en bien* as claimed by plaintiffs' Counsel, and as understood by the law of Lower Canada? The answer to this question involves a point of law and one of fact. The Honorable Mr. Justice Aylwin, a witness for the defence, and whose evidence has already been referred to, has by his testimony disposed of this branch of the case as decisively as he did that of his uncle's marriage with the Indian woman. He says: "At the time the plaintiff came to Quebec, in 1813, my "uncle lived with his sister, Mrs. Delmar, and at the same time the late Mr. "Connolly came, Julia Woolrich came also from Montreal, where she was living, "and spent the winter with her. At the time it was understood among all the "family, (that is, by my father, my mother, my aunt Delmar, my uncle, and "Mrs. Connolly, then Julia Woolrich,) it was understood that there would be a "marriage whenever my uncle could return to Canada, and get rid of the country. "Again, my uncle always said that his intercourse with the Indian woman was "to cease when he left the Indian country. He also said he was obliged to do "as the natives did when he lived in the North West. He said also that they "were brutes, and that *he always intended* to return to Canada, to marry my "aunt, and live happily here in a civilized country." Further, this witness, who knew all about his uncle's affairs and intentions, says:—"The late William "Connolly was a native of Lower Canada. I know that he went to the North "West country with the intention of making his fortune there, and returning "to Canada to reside permanently."

According to this evidence, Mr. Connolly and Julia Woolrich were under an engagement of marriage during a period of nineteen years, and all this time, one most interesting to some people, he was living with an Indian woman whom he introduced everywhere as his wife, and by whom he had a numerous family.

But that is not the question here though worthy of note in many respects: this reference is not made with the view to mark with reprobation the conduct of Mr. Connolly; far from it. The Court has no hesitation in saying, that the evidence of Mr. Justice Aylwin, in regard to the facts just adverted to, requires no corroboration. His high position, his eminent name and abilities, place his statements with reference to these particulars beyond the reach of cavil or doubt.

The late William Connolly was born at Lachine, in Lower Canada, about the year 1786, he being seventeen years old when he was married. He was by religion a Roman Catholic, and had passed his first years in Lower Canada. He entered the service of the North West Company in 1801, in 1802 was stationed at *Rivière aux Rats* in the Athabaska country. He went there to buy furs and skins from the Indians, with no more design of settlement or residence there than such as was necessary to carry on his trade. It can be easily supposed that he did not, for a single moment at any time, entertain the idea of making his permanent abode or residence in that country, or that he ever lost his intention of returning to Canada as soon as he could. But Mr. Justice Aylwin's evidence leaves no doubt upon these points. The absence of all intention to fix his domicile in that country, the *animus manendi* and the *animus revertendi* are as obvious as such things can be, from the circumstances of Connolly's position; perhaps no evidence could render the presumption more palpable, but, if such be required, Mr. Connolly himself, in conversations with Mr. Justice Aylwin, has placed this matter entirely beyond question.

It is an admitted principle, that the domicile of birth is presumed to continue till the contrary is proved, that domicile is changed only—

"Quando quis re et facto animum manendi declarat" and that "domicilium "non procedit, si ille haberet animum revertendi." These are admitted principles; and two things, therefore, must concur to constitute a domicile; first, residence; and secondly, the intention of making it the home of the party. There must be the *fact* and the *intent*; for as Pothier has truly observed a person cannot establish a domicile in a place except it be *animo et facto*. Vo[illegible]phatically says: *Illud certum est, neque solo animo atque destinatione patriæ familias, aut contestatione sola, sine re et facto, domicilium constituit; neque [illegible] domus comparatione nec aliquâ regione; neque solâ habitatione, sine proposito illic perpetuo morandi.* So D'Argentré says: *Quamobrem si figendi ejus animum non habent, sed usus, necessitatis aut negotiationis causa alicubi sint, protinus à negotio dicessuri, domicilium nullo temporis spatio constituent; cum neque animus sine facto, neque factum sine animo ad id sufficiat.*

"Domicile is acquired, par le concours de la volonté et du fait, *animo* et "*facto*—that is by actual residence in the place with the intention that the "place thus chosen should be his principal and permanent residence, the seat of "his fortune, his family, and his pursuits in life. A new domicile cannot be ac"quired by intention alone; but having been once acquired, it may be retained "by intention, without actual residence. Neither can it be acquired, by residence "alone, however long, without that intention."

Pothier-Introd. Générale aux Cout., p.4.

D'Argentré, Coutume, Art. 449.

Toullier, liv. 1, Tit. III, No. 371.

Civil Code, Art. 103.

And again:

"There must be an intention to reside permanently."

It would be easy to adduce pages of authority which would go to corroborate the doctrine here laid down, but the Court deems it unnecessary to do so. The

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principle is well known and every where acknowledged that the intention to remain permanently must be combined with the fact of residence. In some cases this intention may be presumed, but in this instance there is no room for presumption; and if any presumption whatever could be invoked, it would be against the supposition that Connolly had abandoned his domicile of birth, with the intention of forming a new one in the North West territory. But we have positive evidence to show that he never had such intention, but entirely the contrary; he intended to return so soon as he could get rid of the country, and live happily in a civilized country. This, no doubt, was his intention, was always his intention, which he finally carried out; for he lived in Lower Canada eighteen years after his return and marriage to Miss Woolrich, and then died here. He had made his fortune, the object he had in view in going to the North West, and then returned. The *animus revertendi* is clearly and conclusively established in this case. But then it may be said, and has been urged in argument, that a residence of thirty years confers upon a man a domicile, particularly where he has been married and brought up his family, and where also he has carried on and transacted his chief business in the locality. It will be remembered that lapse of time does not alter the case, when there is a constant, a persistent, intention to return, and no intention to remain, and it is beyond all question, as a matter of fact, that where the matrimonial domicile of the wife is different from her husband, it does not cause him to lose his domicile of birth. No argument, no authority, is required to prove such to be true as propositions of law. But conceding, for the sake of taking a full and complete view of this matter, that Mr. Connolly without any intention of remaining, but determined always to return to Canada, did acquire a new domicile in the North West territory, the next duty of the Court will be to determine at what precise point in that vast and wild region Mr. Connolly had his domicile. Was it at Rat River, or Fort Chippewayan, at Great Slave Lake, Lesser Slave Lake, the Rocky Mountains, Vancouver's Island, or the Mackenzie River? Was it at Rainy Lake, the Lake of the Woods, Fort Cumberland, York Factory, or Norway House? Was it at Isle à la Crosse, Rat River or Fort William? He seems to have visited and to have resided with his family at all or nearly all these places, and it is in evidence that he frequently came to Canada, and more particularly, he was present at the baptism of plaintiff in 1813, and was at Montreal in 1814. Now in regard to these trading posts, it must be borne in mind that they were situated widely apart, in some cases, more than a thousand miles distant, over almost impassible regions of wilderness. He was a fur trader, and in the prosecution of his business, he went to and fro from trading post to trading post, up and down great rivers, over mountains, across prairies and lakes, and through forests where the European had no settled home, where neither the hand of man nor the arts of civilization had subdued the wilderness or reclaimed the barbarian. The success of his trade itself depended upon barbarism, upon the cunning and active co-operation of the native savages, and the successful entrapping and slaughtering of the beasts of the forests. He was a dweller around the Indian hunting grounds, and a dealer in furs and skins. There were then no houses except within the forts, no villages, no colonies, no plantations, no civilized settlements, no political or municipal limits, circumscrip-

tions, or institutions, in most of these places; there were no Courts of law, and scarcely any law, except the will of the trader, and the native customs and usages of the Indians. And there was good reason for the absence of all these signs of progress and colonization, because, as before stated, the pecuniary success of both the Hudson's Bay and the North West Companies depended upon retaining those vast regions in a state of barbarism, and they had the power to exclude all other traders and settlers, and consequently to prevent the introduction of every element of European civilization.

Can the Court, under these circumstances, determine where Mr. Connolly's domicile was, in the North West? It seems to me to be impossible. But I might, I think, go further, and say that under the circumstances to which I have just adverted, and situated as Mr. Connolly was, he could acquire no legal domicile at Rat River; and in any case, I am clearly of opinion that whatever kind of domicile he may have acquired—for example, we may assume that his matrimonial domicile was there—yet, as a matter of fact, he did not lose his original domicile, his domicile of birth; and in support of this view of the law, it may be proper to refer to some additional authorities on this point, cited by Mr. Stephens.

"It ought always to be remembered that the question, whether the *status* has "been constituted by means of a legal marriage, is perfectly distinct from the "consideration of the rights, powers and capacities which the *status* confers.

"The enquiry whether the *status* has been constituted, is answered by the "law of the country in which the marriage was contracted.

"If by marriage, which, according to that law, is valid, the *status* is consti- "tuted, the connection of the parties with the law of that country ceases, un- "less that place be the domicile of the husband; and then its law governs, not "because the marriage was celebrated there, but because it is the country of the "husband's domicile. The parties, if they do not, by any express agreement on "their marriage, stipulate as to their future rights and capacities, are presumed "to submit to them as they have been defined by some municipal law; and the "law which, it is presumed, they contemplate, is not that of a country in which "they have no intention to reside, and to which, therefore, their *status* cannot "be subject, but that of the country in which, as it is the place of their domi- "cile, their rights and capacities are to be exercised.

"Jurists, therefore, concur in selecting the law of the domicile of the husband "and wife, as that which determines the personal powers and capacities incident "to their *status*, and not the law of the place in which the marriage was cele- "brated." Burge, Col. and For. Laws, vol. I., page 245; Pothier, Community, Nos. 5, 14.

"Whatever contrariety of opinion may exist respecting the effect of a change "of domicile on rights of property acquired under the law of the matrimonial "domicile, there is a general concurrence among jurists in holding that, although "the law which confers those rights, powers and capacities is strictly a personal "law, yet its influence exists so long only as the parties remain subject to it by "retaining their matrimonial domicile. When they quit that domicile, and "establish another, their *status* is governed by the law of the latter, and their

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"capacities and powers are those which that law confers." Burge, Col. and For. Law, vol. I., page 253. Merlin, Tome 1, sec. 10, pages 532 and 533. Pothier, Community, No. 89. Pothier, Coutume D'Orleans, Intro., No. 15.

"A, born at Amsterdam, and the Dutch Consul at Smyrna, married B, at "Smyrna, and they entered into an ante-nuptial contract relative to their "respective property. The wife afterwards died, leaving two children, and "without having made any disposition of her half of the joined property, as she "was entitled by the settlement to have done. Shortly after her death, one of "the children died at Smyrna. It became a question whether the law of "Smyrna or of Amsterdam regulated the title to the wife's share; in other "words, whether the husband had acquired a domicile at Smyrna or retained his "domicile at Amsterdam? It was decided in favor of the domicile of the birth "at Amsterdam. And even were a man to remain ten or more years in a place, "he cannot be said to have had there his fixed domicile, so long as it was con-"sidered as a temporary residence." Burge 1, p. 49.

"Where the domicile of the husband and that of the wife are not the same, "the law of the husband's domicile is to prevail, unless he means to establish "himself in that of his wife." Pothier on Community, Nos. 14, 15 and 16; Burge, page 40.

"When the law of domicile and that of the *situs* are in conflict with each "other, if the question is respecting the state and condition of the person, the "law of the place where they are situate is to be followed." Merlin, Rép. Status, Autorisation Maritale, sec. 10. Story on Conflict of Laws, No. 53.

"Le lieu de la naissance de chaque homme est présumé son domicile d'affec-"tion, par une conséquence de cet amour que l'habitude et le commerce intime avec "nos parens, nos premiers instituteurs, nos amis, nous inspire pour notre patrie "Mais cette présomption de droit cède à la preuve contraire. Celui qui aban-"donne son domicile d'origine, en acquiert un autre par le fait, c'est-à-dire, par "l'habitation réunie à l'intention de fixer son domicile dans un lieu: car le domi-"cile, disent les lois, est plus d'intention que de fait."

Analyse raisonnée du droit Français. (*Verbo*, domicile, Doulcet.)

"Il y a présomption légale pour la conservation de la nationalité originaire "ou du domicile d'origine, jusqu'à la preuve du changement. De là il suit que "lorsqu'un individu a deux domiciles dans divers territoires, on doit de préfé-"rence avoir égard au lieu de sa naissance. Du reste, c'est un principe non "contesté que l'absence momentanée ne suffit pas pour former preuve du change-"ment de nationalité ou de domicile." Felix, Droit International, vol. I., page 56.

"Domicile is acquired by operation of law, as the necessary consequence of "some act; of this description is the domicile which a woman acquires on her "marriage, because she then passes to that of her husband." Burge, vol. I., page 33.

"It is difficult to lay down any rule which does not admit of some qualifica-"tion. A resort to and residence in a foreign country, for the purpose of "carrying on trade there, may, from the frequency with which the person visits "and returns from thence, exclude the presumption of an intention to establish "a permanent residence there.

"He may have left his wife and children in the place of his former domicile, "or all his arrangements may be made exclusively with reference to, and as "connected with, the prosecution of his commercial pursuit; he may have "remitted all his money to the place of his former domicile.

"These or any other circumstances, from which it might be inferred that his "residence was only temporary, and that he contemplated a return to his former "domicile, exclude the inference that he had taken up a new and abandoned his "former domicile." Burge vol. I., page 42.

And now let us see what is to be considered the matrimonial domicile:

"Where the domicile of the husband and that of the wife are not the same, "the law of the husband's domicile is to prevail, unless he means to establish "himself in that of his wife." Story on Conflict of Laws, Nos. 191, 192, 193, 194 and 196. "Law of actual domicile governs at death." Id., Nos. 157, 158, 159, 171, 172, 174, 175, 176, 177 and 178.

"A wife is entitled to one-half of the community, though she never came into "the state." Coles Widow, and Executors, 7 Louisiana Repts., new series, page 42.

These authorities seem to the Court to have a very important bearing upon the law of the present case, in regard to the point now under consideration, and there are none on the opposite side, within my reach, which controvert seriously the doctrines here laid down. From what has been said, and under the peculiar circumstances of this case, it is in my opinion beyond doubt as a matter of law, that Connolly, during his absence in the North West Country, though that absence was prolonged through many years, did not lose his domicile of birth, that he never acquired one at *Rivière-aux-Rats*. I think, moreover, that even his matrimonial domicile, such as it was, did not change or supersede the one of origin. In that case, whatever may have been the law which prevailed at *Rivière-aux-Rats*, a community of property existed between him and his Indian wife from 1803, the date of their marriage. The Court is further of opinion that, supposing the domicile of birth to have been suspended, if I may so express it, during Connolly's absence in the North West Territory, yet it would revive upon his return to Lower Canada. In that view of the law, he always having had the intention of leaving the country and returning to Lower Canada, and that intention having been fulfilled by his return, long residence and death, at Montreal, community existed from the date of his marriage with his Indian wife. Upon both points, therefore, the marriage and the distribution of the property acquired during its existence, according to the pretensions of the plaintiff, the Court is in his favor. Judgment must be entered for plaintiff and against the defendants.

In conclusion, it becomes the duty of the Court, to thank the Counsel on both sides for the able assistance given by their argument of this important case.

The decree of the Court was in the following terms:

"The Court having heard the parties by their respective Counsel upon the merits of this cause, examined the proceedings, proof of record and documents fyled by the parties in this cause, and having maturely deliberated—Considering that the plaintiff hath proved by legal and sufficient evidence the material

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averments of his declaration, and particularly that his father, the late William Connolly, and his, (the plaintiff's) mother, whose name before her marriage was *Susanne Pas-de-nom*, a female of the Cree tribe or nation of North American Indians, were married in the year one thousand eight hundred and three, at *Rivière-aux-Rats*, in the North West Territory; seeing that at that time there were no ministers, priests, or magistrates residing at *Rivière-aux-Rats* aforesaid, and further, that the marriage between the said late William Connolly and *Susanne Pas-de-nom*, was contracted and entered into according to the then existing customs and usages of the aforesaid tribe or nation of Cree Indians, which usages and customs have been proved in this cause;—Considering that this marriage between the plaintiff's parents was followed by twenty-eight years of continuous cohabitation as husband and wife, by and between the said late William Connolly and his aforesaid wife, and that they were always known, acknowledged, and reputed to be married persons during the whole period of the cohabitation aforesaid;—Seeing that the said late William Connolly repeatedly acknowledged and admitted that the said *Susanne Pas-de-nom* was his lawful wife; and further, that he had married her according to the laws and customs of the Cree Indians; and seeing it is proved that the said wife of the late William Connolly did likewise in her lifetime declare that she had been married to her said husband according to the customs and usages of the Cree nation;—Considering that the plaintiff is the offspring of the said late William Connolly and his said wife Susanne, begotten and born during the existence of the said marriage between his parents as aforesaid; and that as such he is one of the heirs at law of his said father and mother; and considering that from the date of the aforesaid marriage until the death of the late William Connolly, there existed between him and his said wife a community of property, according to the laws and usages of Lower Canada, and that plaintiff as heir at law of his mother is entitled to the one-sixth part or portion of the one-half of said community of property; seeing that the defendant hath failed to establish by legal proof the essential allegations of her defence, doth dismiss the pleas of the defendant and doth declare the plaintiff the true proprietor and owner of one-sixth part or portion of one-half, to wit—one-twelfth of the whole of the property composing and belonging to the community existing as aforesaid between the said William Connolly and his late wife, and enumerated in his will, as follows, to wit:—

"Sundry shares of bank stocks and other stocks, the sum of five thousand nine "hundred and fifty pounds, one eighty-fifth share in the profits of the Hudson "Bay Company for outfits in the years eighteen hundred and forty-five, eighteen "hundred and forty-six, eighteen hundred and forty-seven, eighteen hundred "and forty-eight, and eighteen hundred and forty-nine; a farm in the Quebec "suburbs of the city of Montreal, containing fifty-three arpents of land, with a "house and messuages thereon erected; a lot of land in Papineau Square, in "the said city of Montreal; twelve hundred acres of land in Hemmingford, in "the District of Beauharnois, with a grist and saw mill thereon erected, two "hundred acres of land in the township of Shefford, in the District of Bedford; "six houses in Kingston, in Upper Canada; twenty-five hundred acres of land "in several parts of Upper Canada; household furniture, plate and plated-ware;

"horses and carriages;" and the Court doth condemn the defendants *par reprise d'instance* in their said names and capacities to abandon and give up the said one-twelfth part of said property, and to restore it to the said plaintiff, and it is further ordered that the said defendants *par reprise d'instance* do make and render to the said plaintiff, within three months from the date of the service upon them of the present judgment, an account of the *fruits et revenus* derived from the said property during the unlawful enjoyment thereof by the said defendant, Julia Woolrich, otherwise called Mrs. William Connolly, and by themselves, the present defendants, *par reprise d'instance*, and the Court doth condemn the defendants, *par reprise d'instance* to pay the costs of this action, *distraits*, in favor of Messrs. Perkins and Stephens, the Attorneys for the said plaintiffs. The Court reserving to the said plaintiff to take such other proceedings as he may legally have and exercise in order to execute and carry out the present judgment.

Judgment for Plaintiff.

Perkins & Stephens, for Plaintiffs.
Cross (Q.C.) & Lunn, for Defendants.
(F.W.T.)

MONTREAL, 10 JUIN 1867.

Coram MONK, J.

Dans l'affaire *S. Larivière*, Failli, et *John Whyte*, Syndic Officiel, et *Anthony McEvila*, Créancier contestant le bordereau de dividende, et *Edmond Angers*, Appelant.

JUGE:—1o. Qu'un créancier chirographaire peut avoir un intérêt à contester la collocation de créanciers hypothécaires, sans mettre en question la validité de l'hypothèque.

2o. Lorsque des hypothèques affectent plusieurs immeubles dont les derniers sont à distribuer en même temps, et d'autres affectent seulement quelques-une de ces immeubles, les hypothèques générales doivent se diviser proportionnellement sur le produit des immeubles affectés ou la balance qui en reste à distribuer, et alors la masse des créanciers, et non pas les créanciers hypothécaires non payés, doit profiter de la balance du prix de vente d'un des immeubles qui se trouve dégagé par suite de cette division de l'hypothèque générale.

3o. Que le défaut de publication d'un bordereau de dividende, suivant l'acte concernant la faillite de 1864, le rend complètement nul; il reste dans l'état de projet, et le syndic peut le mettre de côté.

4o. Que la décision du syndic sur une contestation d'un bordereau de dividende, est finale à moins qu'appel ne soit interjeté dans les trois jours, par une signification à la partie elle-même.

La requête en appel exposait les faits suivants:

Un bordereau de dividende avait été préparé par le syndic le 20 juin 1866, par lequel Angers, l'appelant était colloqué pour $449.20cts., montant d'une obligation hypothécaire que lui avait consentie le failli. A McEvila, simple créancier chirographaire, produisit le 10 juillet suivant, une contestation à ce bordereau, alléguant qu'il était irrégulier, informe et nul, et concluant à ce qu'il fut déclaré tel, mis de côté et un autre préparé; il n'avait aucune preuve au dossier établissant que le requérant avait eu avis de cette contestation, et le requérant alléguait qu'il n'avait pu répondre à cette contestation, ni être entendu sur icelle.

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Le 17 septembre 1866 le syndic rendit le jugement suivant sur la dite contestation :

Having duly notified the creditors mentioned in said dividend sheet to furnish and produce before me on or before ten of the clock in the forenoon of this day their statements and vouchers in support thereof, which time has now passed ; having heard the said Anthony McEvila by his attorneys, Messrs. Nagle and Pagnuelo *ex parte*, no answer to said contestation having been fyled by any creditor, also Mr. McPherson Lemoyne, and also, &c., in person.....the said creditors (present) assenting to the granting of the said conclusions (of the contestation), and considering that the said dividend sheet, and the proceedings therefore and thereunder are in fact irregular and should be annulled. Therefore the said John Whyte in virtue of the power in him vested by the said statute, doth set aside and annul the said dividend sheet.

Après mention de ce jugement, la requête ajoute que E. Angers est lésé par ce jugement qui est erroné, et qui aurait dû renvoyer la dite contestation comme irrégulière et informe, en autant qu'avis n'en avait pas été donnée aux parties intéressées et au requérant en particulier : " Qu'en outre et dans tous les cas, la " dite contestant est mal fondée en droit et en fait, et que les allégations en " sont insuffisantes pour en faire obtenir les conclusions, vû que le dit A. McEvi- " la, contestant, n'est pas créancier hypothécaire, et ne fait apparaître aucun in- " térêt à produire le dite contestation en autant que la collocation do votre re- " quérant y est concernée, et que la collocation de votre requérant est légale et " doit être maintenue.....qu'y ayant à distribuer entre les dits créanciers hypo- " thécaires des deniers provenant de la vente de différents immeubles vendus sur le " dit failli, et y ayant des créanciers qui avaient hypothèque sur tous ces immeubles, " d'autres sur quelques-uns, et d'autres créanciers postérieurs, entr'autres votre " requérant, sur un des ces immeubles seulement, les créanciers qui ont hypothèque " sur plus d'un immeuble devaient répartir leur hypothèque au prorata de ce " qu'il y avait et de ce qui restait à distribuer sur leurs prix respectifs ; et que " par ce mode, la collocation de votre requérant doit être maintenue en entier."

" Que votre requérant n'a eu connaissance de dit jugement que le vingt-cinq " septembre 1866, et n'en a jamais eu connaissance et communicaton légale, " ainsi que requis par la loi."

M. Pagnuelo, pour McEvila.—I. Le contestant McEvila produisit d'abord une exception préliminaire basée sur la sec. 5 § 13 de l'acte concernant la faillite de 1864 qui déclare que la sentence du syndic sur les contestations de bordereau de dividende " *sera finale* à moins qu'appel n'en soit interjeté dans les trois jours " après qu'elle aura été communiquée aux parties contestantes," et sur la sec. 7, § 1, statuant " qu'il y aura appel de la sentence du syndic, rendue en vertu du " présent acte, lequel appel se fera par requête sommaire dont avis sera ducment " donné à la partie adverse et au syndic."

La requête en appel n'a été signifiée à McEvila que le 1er octobre 1866, et aux avocats qui le représentaient devant le syndic le 28 septembre, le jugement a été rendu le 18 septembre ; le syndic déclare en avoir donné avis par la poste au requérant le 20 septembre ; les délais étaient donc expirés lorsque la requête a été signifiée au contestant. Dans le cas où cet avis par le syndic serait insuffi-

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sant, il est admis dans la requête que le requérant a pris communication de ce jugement le 25 septembre. Or, la requête n'a été signifiée à McEvila que le 1er Octobre; la signification faite à ses avocats le 28 sept. et dans les délais est complètement nulle; le mandat du procureur était alors terminé par le jugement final du syndic; le bref d'appel, dans la Cour du Banc de la Reine, ne peut être signifié au procureur que par par une clause spéciale du Statut ch. 77, § 27 et 44; d'ailleur la clause 7 de l'acte concernant la faillite de 1864 dit que l'avis d'appel sera signifié *à la partie adverse*. L'appel n'est donc pas dans les délais.

II. Un créancier chirographaire peut avoir un intérêt à contester la collocation de créanciers hypothécaires, sans alléguer fraude ni attaquer la *validité* de l'hypothèque.

Par l'art. 2049 du Code Civil du Bas-Canada, reproduisant la loi en force, il est statué:

"Si, néanmoins, tous ces immeubles ou plus d'un immeuble hypothéqués (à "la même dette) sont vendus et que le prix en soit à distribuer, son hypothèque "se répartit *au prorata* de ce qui reste à distribuer sur leur prix respectifs, "lorsqu'il existe d'autres créanciers postérieurs qui n'ont hypothèque que sur "quelqu'un de ces immeubles."

Merlin, Rép. Vo. Inscription, p. 129, col. 2 (cité par les cod.)

Sirey 17, 2nde partie, p. 397, affaire Gocsson.

Dalloz, Hyp., p 102, note No. 1.

Ce principe est même invoqué par l'appelant dans sa requête. De là nous venons au résultat suivant:

3 immeubles sont vendus A, B, C.

A pour £100. B pour £500. C pour £1000.

Primus	a une hypothèque générale	sur les 3 immeubles	pour.....	£200
2dus.	a une hypothèque spéciale	sur A	pour.....	200
3us.	do	do	B pour.....	500
4us.	do	do	C pour.....	700
				£1600

Donnant le montant total de la vente, savoir.....

La réclamation de Primus se divise proportionnellement sur les prix respectifs des trois immeubles; sa dette de £200 est $\frac{1}{8}$ de £1600, prix total des trois immeubles vendus; il va donc prendre $\frac{1}{8}$ de chacun d'eux.

	A		B		C	
	£100		£500		£1600	
1us. $\frac{1}{8}$.....	12 10s.		62 10s.		125	
Balance.....	£87 10s.		£437 10s.		£875	
2dus. prend.....	87 10s.	3us. prend.....	437 10s.	4us. prend...	700	
Laissant.....	£112 10s.	laissant.....	£62 10s.	laissant.....	£175	
Pour lesquels il n'a pas de privilège.		sans privilège		pour la masse des créanciers		

D'où il appert que 2dus. perd..... £112 10s. sur A.

Do 3us. perd..... 62 10s. sur B.

Tandis que la masse des créanciers est avantagée de..... £175 00s. sur C.

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Il est donc faux de prétendre qu'un créancier chirographaire ne peut pas avoir d'intérêt à contester les collocations de créanciers hypothécaires sans attaquer leurs titres. Il est impossible, d'après les papiers produits, de dire si le contestant serait ainsi bénéficié, à cause de l'état informe et insuffisant du bordereau de dividende, mais il avait le droit de le savoir. L'appelant prétend que comme créancier hypothécaire, il devrait profiter de la balance du prix de vente de l'immeuble dégrevé; mais cette doctrine est combattue par les autorités suivantes: *

III. Le bordereau de dividende est d'une nullité complète absolue, et le syndic ne pouvait faire autre chose que le mettre de côté.

Le syndic fit une masse de tout l'argent provenant de la vente des immeubles et colloqua le premier créancier sur le certificat du régistrateur, puis le second et ainsi de suite jusqu'à ce que les fonds fussent épuisés, sans égard à l'immeuble dont provenait l'argent, ni à la propriété sur laquelle l'hypothèque était assise; il était si évident que cette collocation ne valait rien que tous les créanciers présents ont consenti à son annulation.

Le bordereau n'était pas signé, il ne portait aucune marque d'authenticité; il n'avait pas été publié régulièrement dans la *Gazette du Canada* et les journaux; du moins ces journaux n'ont pas été produits par le syndic; l'acte de 1866, C. de Proc. Civile. B. B., art. 724-5-6-7. 1 Pigeau, 816.

Aucun autre jugement ne pouvait être rendu sous ces circonstances que celui du 17 septembre.

L'appelant se plaint de ce que les termes de la contestation sont généraux et n'énoncent aucun moyen spécial de nullité du bordereau; il suffit de remarquer à ce sujet que tous les procédés devant le syndic sont sommaires, et qu'il n'existe aucune règle de pratique ordonnant d'énoncer spécialement les moyens de contestation.

M. Rainville, pour l'appelant.

1*re. Proposition.*—Le contestant McEvila n'avait aucun intérêt à produire une contestation du bordereau de dividende des deniers provenant de la vente des immeubles: du moins il ne le fait pas voir.—Grenier Hyp. vol. 1, p. 366, 367, No. 179, dit: "Si un débiteur failli saisse du mobilier et des immeubles "grevés d'hypothèques, sa fortune se divise naturellement en deux masses, celle

* Voir aussi Delvincourt, tom 3, in 4vo. No. 9, p. 163, tom 8, in 8vo., p. 82. Duranton No. 390. Arrêt de la Cour de Cassation du 26 déc. 1853, sous la présidence de Troplong, lequel a par là condamné l'opinion qu'il avait soutenue dans son traité des Priv. et Hyp., No. 760, d'après M. Grenier, lesquels admettaient la doctrine de l'appelant. (Devilleneuve, 1854, 1, 76). Voir un autre arrêt conforme de la Cour de Cassation du 24 déc. 1844, et un 3me arrêt du 16 août 1847 (Devil 1845, 1, 113-147, 1, 832) cités par H. F. Rivière Jurisprudence de la Cour de Cassation, No. 578, 9, 580. Mourlon et Pont ont soutenu également la doctrine de Tarrible dans la Revue des Revues, tom. 9, p. 142; leurs articles sont rapportés dans l'Ed. Belge de Troplong de 1848 sous le No. 760, Priv. et Hyp.

" du mobilier, et celle des immeubles. Les droits des créanciers ne sont point " les mêmes sur ces deux masses. Larivière, and Whyte, and McEvila.

" ..... *tandis* que les *créanciers* hypothécaires ont " SEULS droit aux immeubles.

Persil, Régime hypothéc., vol, 2, p. 182 parag. 17 et 18, dit: Un créancier " chirographaire peut intervenir dans une distribution de deniers entre créan- " ciers hypothécaires pour arrêter des collocations frauduleuses. Mais il ne " faut pas conclure de là qu'il pourrait faire ou proposer les mêmes contestations " que les créanciers hypothécaires. Tout ce qui est le fonds du droit, tout ce " qui concerne l'existence de la créance ou sa quotité, peut sans contredit être re- " levé par eux: mais il est étranger aux autres contestations. Ainsi les nullités " de l'inscription ne pourraient pas être proposées par lui parce que les formali- " tés sur l'omission desquelles elles reposent, n'étant pas exigées pour lui et dans " son intérêt, il serait *non-recevable* à se plaindre.

De là nous concluons que le contestant en cette cause ne pouvait pas produire de contestation telle que celle qu'il a produite en cette cause et qu'elle est insuffisante en autant qu'elle n'allègue pas les moyens de nullité. Et quand même on aurait proposé des moyens de nullité de forme, telle que celle résultant du défaut de signature du bordereau de dividende, la contestation ne pourrait pas encore se maintenir en loi, parce que le contestant n'a pas qualité pour proposer ces moyens de nullités; ils appartiennent aux créanciers hypothécaires, seuls.

2e. *Proposition.*—Le bordereau de dividende en question n'est entaché d'aucune nullité; et le serait-il, le contestant ne peut être reçu à les proposer maintenant.

En effet, nous ne pensons pas que le défaut de signature apposée sur la feuille même, soit une cause de nullité: Mr. McEvila a contesté ce bordereau sans indiquer les causes de sa nullité: les allégations de sa contestation étaient insuffisantes en loi, en autant qu'elles prenaient le requérant par surprise.

Le contestant a si bien senti la faiblesse de sa position, qu'il a articulé ces moyens de nullité dans sa réponse à la Requête en Appel: mais il faut observer qu'il ne peut pas, par cette réponse, changer la position qu'il s'était faite par sa contestation.

Les mêmes observations peuvent s'appliquer à l'objection que l'on fait sur ce que les journaux, sur lesquels on avait donné avis de ce bordereau de dividende ne sont pas produits dans le dossier.

3e. *Proposition.*—Quant aux moyens de fonds, nous disons que la collocation du requérant est légale, et que le contestant n'a pas d'intérêt à les proposer et que dans tous les cas il ne le fait pas voir par sa contestation.

Les créances hypothécaires excèdent le montant des deniers provenant de la vente des immeubles de $600.00 et au-delà.

Les auteurs qui ont écrit sous le Code Napoléon se sont partagés en deux catégories sur la question du concours de l'hypothèque générale avec des hypothèques spéciales.

Merlin et autres ont embrassé le système de la *subrogation légale*, qui est

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adopté par notre Code Art. 2049. Voir Merl. Rep. Vo. Transcrip. § 6 No 5. Comme exemplification du système de Merlin, nous référons au tableau produit avec le présent factum.

Grenier, Hyp. Vol. 1 p. 365 et suiv. adopte un autre système; celui de faire colloquer le créancier ayant hypothèque sur plusieurs immeubles, d'abord sur les deniers provenant de la vente d'un des immeubles soumis à une hypothèque spéciale, la dernière en date.

Ce système est exemplifié par le tableau produit dans le dossier, mais dans aucun cas, et moins dans la cause actuelle que dans toute autre, les créanciers chirographaires ne peuvent espérer pouvoir partager dans les deniers provenant de la vente des immeubles.

Montant à distribuer, $8415.

Réclamat.		Lot 1.	2.	3.	4.	5.	6.	
Héritiers McGill	$444.70	576	2520	2529	1170	720	900	
Lorange	$1692.41	34.15	149.15	149 66	69.14	42.60		
		129.75	567.45	569.50	263.45	162.26		
Héritiers Montmarquet	2451.45	166.83	729.16	732.66	338.98	208.54	364.08	On No. 4&5only (Note du contestant.)
C. C. Larivière	435.60	33.	148.	150.	65.	41.		
A. Larivière	2200.00	170.	744.	745.	342.	210.		
C. C. Snowdon	859.00	43.	197.	198.	87.	66.		
Mc. P. Lemoyne	521.14							
E. Angers	449.40						449.40	
Duplessis	176.00						80.	
		576	2520	2529	1170	720	900	

Le jugement est motivé comme suit:

The Court considering that chirographary creditors have the right to contest the distribution of the proceeds of immovables against hypothecary creditors, when the latter are erroneously and wrongfully collocated to their prejudice; considering that in this matter six immovable properties were sold, and that the hypotheca granted by the insolvent in some instances affected all, and in others only one or more of the same; considering that in such cases the hypotheca affecting more than one property must by law be, in their due order, divided rateably upon the proceeds of the properties affected or upon the balances thereof remaining to be distributed; considering that in this matter, in preparing the dividend sheet, which was contested by the said Anthony McEvila, the said assignee made one mass of the proceeds of the six properties, and collocated the hypothecary creditors on this mass in the order of the date of their registration, without regard to the properties severally hypothecated, and without any division as required by law; considering that the said dividend sheet was therefore wholly irregular and illegal, and that the said Anthony McEvila, although only chirographary creditor, had an interest in having a division made of the proceeds of the different properties of the said *hypothecs?* (insolvent,) as by this means a part of the money levied might have remained unabsorbed by the hypothecary claims, to be divided among the ordinary creditors, and that he had therefore a right to contest the said dividend sheet, and to ask that it should be annulled and set aside, and a new one prepared. Considering moreover, that no notice was ever given according to the provisions of the Insolvent Act of 1864, that the said dividend sheet had been prepared and was deposited for examination; that

it therefore was never more than a mere project, and that no rights whatever were acquired under it by the said appellant or by any other creditor. Considering moreover that the award of the said assignee was communicated to the said appellant, according to his own admission, on the twenty-fifth of September last, and that he did not appeal therefrom within three days from that date as required by the statute. Considering finally that the rights of the said appellant are not prejudiced by the said award, but that they remain intact, and that the said appellant can exercise them to their full extent, and that he is therefore not aggrieved by the said award, while others might be by the irregularity of the said dividend sheet. The Court doth dismiss the said appeal, and doth confirm the said award, rendered on the seventeenth of September, 1866, with costs against the said appellant *distraits* in favor of Messrs. Nagle & Pagnuelo, the attorneys of the said Anthony McEvila.

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Jugement confirmé.

Chapleau & Rainville, pour l'appelant.

Nagle & Pagnuelo, pour le contestant.

(S. P.)

IN THE QUEEN'S BENCH, 1867.

MONTREAL, 9TH JUNE, 1867.

APPEAL SIDE.

Coram DUVAL, C. J., AYLWIN, J., BADGLEY, J., MONDELET, A. J.

CHARLES JOHN DUNLOP

(*Defendant in the Court below*),

PLAINTIFF IN ERROR;

AND

THE QUEEN

DEFENDANT IN ERROR.

WRIT OF ERROR.—POWERS OF CROWN PROSECUTOR.

HELD:—That the issue of a Writ of Error was illegal where it was allowed and signed by the Crown prosecutor for and in the name of the Attorney-General, and not by the Attorney-General.

The Writ of Error in this case was issued by Thomas Kennedy Ramsay, Esquire, acting for and in the name of Her Majesty's Attorney General.

E. Carter, Q. C., for the private prosecutor, moved to quash the Writ for various reasons, *inter alia*.

"Because the said writ was improvidently and illegally issued, inasmuch as "the same was issued without any *fiat* signed by the Attorney-General having "been previously obtained.

"Because the said writ was issued upon the *fiat* of T. K. Ramsay, Esquire, "advocate, assuming to act for and in the name of the Attorney General, where- "as the right to grant a Writ of Error can alone be exercised by the Attorney- "General, and that that power cannot be delegated by him."

Ramsay, T. K., for the crown *contra*.

1st. The private prosecutor has no quality to raise the question. It has been said he might, as *amicus curiæ*, point out to the Court that it had no jurisdiction. This is not a question of absence of jurisdiction [illegible] record is there, and

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there is the Writ, no matter at whose instance issued. It is at most only a question of form, and, if overlooked by the parties interested, it cannot be urged by a third party, whose interest, if existing at all, is only indirect. In [illegible] of the Attorney-General's special power to Counsel, can it be said he does [illegible]ree? Besides, the maintaining this Writ is in favour of liberty and the extension of a wholesome jurisdiction.

2nd. It was said that discretion was improvidently exercised. This is not a question for the Court if Counsel had the power to sign *fiat*, but is it so? Judgment was to destroy *immediately* property to an immense value, and part of that the property of the Crown. There was a regular assignment of error; but it is said there was no affidavit. Affidavit is only required where error *of fact* is assigned. Gude 1, p. 263, and 2, pp. 185-6; Archbold, Pl. and Ev. in Cr. cases, p. 167; 1 Chitty, 369.

3rd. It was said private prosecutor should have been notified and heard. There is no authority for this, and no reason. It is not a final contest of law but only a permission to go further. It decides nothing: it is granted on probable cause of error in misdemeanours; and in treason and felonies it is entirely in the breast of the Crown to grant or refuse the Writ.

4th. Can the Attorney General delegate his powers? It is said he cannot, because the power exercised by him is judicial. This is not so. He has a discretion to exercise; but to what extent? Simply to see that the revision sought is not idle for the purposes of delay. He decides nothing. Besides the history of the law shows that up to the reign of Queen Anne the writ was granted under the sign manual. It [illegible] then a judicial but a prerogative act, and that prerogative is now exe[illegible] the Attorney General as the presumed agent of the Crown. Hawk[illegible] Ch. 50, sect. 13; Archbold, 167; Per Holt, C. J., in 1 Salkeld, p. 264. [illegible] would be as absurd to say it was a judicial act because a discretion was to be exercised, as it would be to say that granting a pardon was a judicial act, because discretion was to be exercised. Here another practice has grown up. The Attorney-General, who is always a Cabinet Minister, prosecutes entirely by deputy, who conducts almost all the active duties of the Attorney-General in Court on the Crown side. To say that this deputy is not to exercise his powers is to render the administration of criminal justice ridiculous by rendering it impossible. For the last fifteen years, at all events, the practitioner representing the Attorney-General has performed all his duties, and to begin now to make a special rule for Writs of Error would be totally unmeaning.

It has been advanced as an argument that a *nolle prosequi* must be entered by the Attorney-General. This is not correct. It can only be entered with his authority; but it need not be by him personally. The forms in Archbold show this, pp. 94 and 96.

In like manner the forms show that the procedure in error is not carried on with the Attorney-General in person, 2 Gude, p. 651; but with the Coroner and Attorney of the Court.

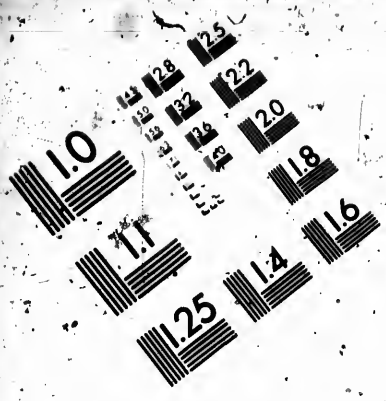
The case of Mr. Primrose in the Admiralty Court of Quebec was mentioned, but that case is against the motion to quash, for the Attorney-General's power

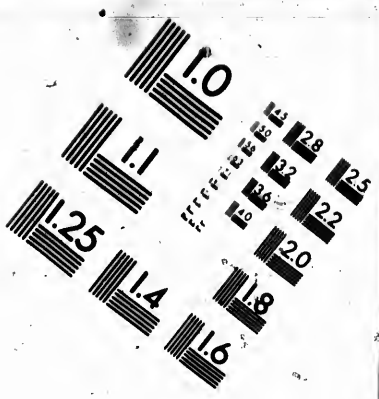
to give a proxy to counsel was here fully admitted; but from the particular nature of the Court he was called upon to file his proxy, which he did not do. This decision was acquiesced in by the four law officers of the Crown, of whom Mr. Justice Aylwin, as Solicitor General for Lower Canada, was one. The Dumfriesshire; Stuart's Vice-Admiralty cases.

MONDELET, A. J., *dissentiens*, said:—As I differ from my brother Judges, it is right I should express my reason for dissenting from the [illegible] about to be pronounced. The objection to the writ of error is, th[illegible] upon a *fiat* signed by the Attorney-General, but by Mr, Ra[illegible] rom, the position occupied by the Attorney-General it is im[illegible] personally to attend to the public prosecutions of the Crown, [illegible] from time to time deputed some counsel to act for him. If, t[illegible] leman so deputed to act, could validly prosecute a criminal, and obtain [illegible] ion, the effect of which might be to send a man to the gallows, why can [illegible] not exercise his authority in another way by granting a writ of error, the effect of which might be to save an innocent man from condemnation. I am told a distinction is to be made, but as I do not see the difference I must record my dissent.

BADGLEY, J., said:—Whatever inconvenience might arise from the consequence of holding that the Attorney-General, or, in his absence, the Solicitor-General, can alone exercise the power of deciding in what cases a writ of error shall issue, one thing is certain, that in a matter of such great importance parties must abide by the law, and the Judges are bound to see that the law is properly administered. The Writ of Error is a high prerogative writ, and formerly was issued under the Crown manual; but subsequently the Attorney-General, as representing the Crown, exercised that power by virtue of his high office. The Attorney-General alone can authorise the issue of the writ, and he cannot delegate that power to another. Upon whom rests the responsibility of issuing the writ according to law? Upon the Attorney-General. And for this reason, that he is responsible to Parliament if he should abuse his power in that respect. The law requires that the Attorney-General should have grounds laid before him to satisfy him that it is proper the writ should issue. We have had before us a copy of the delegation from the Attorney-General to Mr. Ramsay, in which the reason assigned is the immediate departure of the Attorney-General. Where, in such a case, would the responsibility rest? Could a procuration of that kind throw any responsibility on Mr. Ramsay? It is a mere procuration, and conveys no authority to him to advise the Crown, as is necessarily done when the writ is either granted or refused. The exercise of such power is incident to the office of Attorney-General, and cannot be delegated. I am clearly of opinion that the writ of error in this case has been used most improvidently.

AYLWIN, J., said:—I feel it to be my duty to say that the act of issuing the writ of error, as was done in this case, is the most unconstitutional that has ever been heard of. The law as well as the practice in relation to obtaining the issuing of the writ, is well established. The Attorney-General, being of course in this office, application is made to him in writing. He then requires the applicant to give notice to the opposite parties (as in this case there was a private prosecutor), to appear before him to shew cause against the application,





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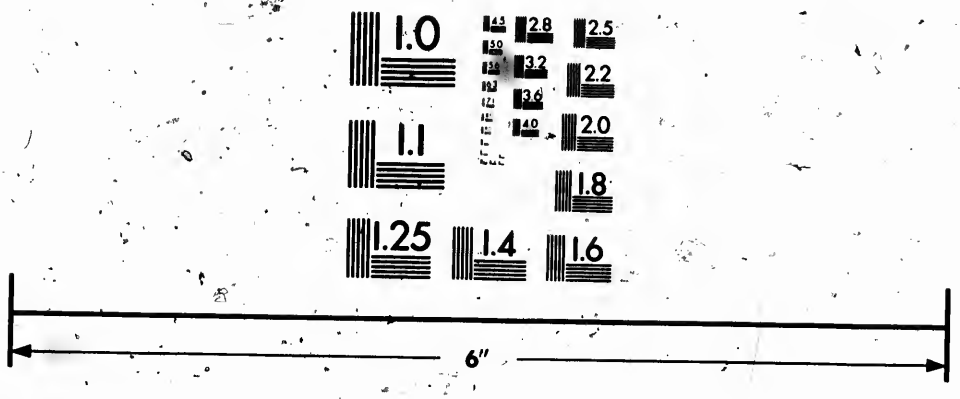

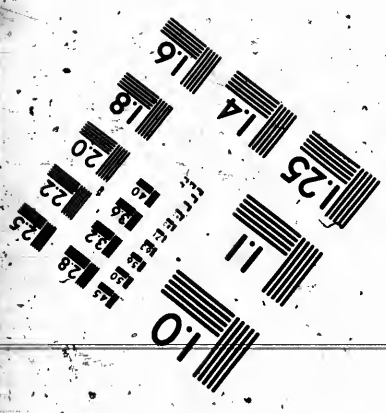

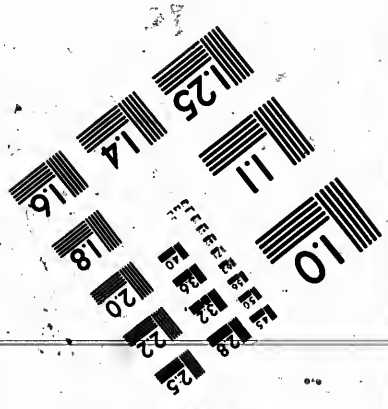

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Queen, vs. Dunlop.

and having heard both parties the Attorney-General exercises the prerogative of the Crown, by signing a *fiat* for the writ of error, if he sees fit. Now, in the present case, nothing of the kind took place, but we find that the execution of a judgment of one of the highest Courts in this country is suddenly stayed by such an operation as the mere signature of Mr. T. K. Ramsay. And how does Mr. T. K. Ramsay act? He produces a procuration from the Attorney-General, which commences by stating that as he was about to leave the country, you, Mr. Ramsay, will do so and so. The moment the Attorney-General was about to leave, his power ceased; his *mandat* to Mr. Ramsay was worthless. How stands the law? If the Attorney-General leaves, then the power rests in the Solicitor-General most unquestionably; and how is it then, even if there were no Solicitor-General, that the rights of the Crown could be entrusted to any third party, by a simple procuration of the kind? If such a course as this could be tolerated no man's life or property could be safe. I regard this as unconstitutional, and a departure from well established rules of a most glaring description. I was prepared yesterday, after the argument, to give my decision that the writ of error should be quashed at once, and it is now quashed ignominiously.

DUVAL, C. J., said:—The question raised in this case is one of very great importance, and involves the consideration of a constitutional principle affecting the rights and liberties of the subject. The power of granting a writ of error is vested by law in the Attorney-General, entrusted by virtue of his office with the prerogative of the Crown in this respect. It is proper that this power should not be exercised by irresponsible persons, as it might lead to serious results. In this case an indictment was presented by the Grand Jury, the defendant was convicted after trial, and the sentence of the Court is pronounced.

Is it right, then, that by a mere procuration from the Attorney-General power should be given to any individual to say to the Judge, "your judgment shall not be carried out? I shall not enquire whether the prosecutor has anything to say, but I will sign a *fiat* for a writ of error, and thus stay your proceedings." This, in effect, is what was done in this case. Has the Attorney-General power to delegate his authority? Clearly not.

The law vests in the Attorney-General the exercise of these powers personally, because, from the high office he fills, the Crown thereby reposes confidence in his ability and attainments; but we do not find in the law, nor from the nature of the office, anything to justify the delegation of his powers to another. I am aware that it has been usual to see indictments signed by counsel, and prosecutions conducted by them, as representing the Attorney-General; but as to the signature to the indictment, no question could be raised, as no signature is necessary. Then, as to conducting prosecution, the question was raised in Quebec, and Mr. Stuart, who acted for the Crown, said: So long as the Attorney-General does not object, the Court will not. This the Court assented to. But the case here is quite different. The prerogative of the Crown in this particular, cannot be controlled by any other than the Attorney-General or Solicitor-General, and we have no hesitation in saying that their powers cannot be delegated to any other. The matter in my mind admits of no doubt whatever, and I was ready yesterday to give my decision. The writ of error must be quashed.

The judgment was recorded in the following words:

"This Court, &c., &c. * * * * * * * * * * Queen, vs. Dunlop.

Seeing that the writ of error in this cause issued hath improvidently and illegally issued, inasmuch as the same was allowed by T. K. Ramsay, Esquire, for and in the name of Her Majesty's Attorney-General, and not by Her Majesty's Attorney-General, it is ordered that the said writ of error be and the same is hereby quashed, &c."

(The Honorable Mr. Assistant Judge Mondelet dissenting.)

E. Carter, Q. C., for the private prosecutor. Writ quashed.

T. K. Ramsay, for the Crown.

R. Mackay, for defendant.

(F. W. T.)

COURT OF QUEEN'S BENCH, 1867.

MONTREAL, 8TH JUNE, 1867.

(In Appeal from the Superior Court, District of Montreal.)

Coram DUVAL, C.J., DRUMMOND, J., BADGLEY, J., MONDELET, A. J.

ANGELIQUE GRIMARD, PAR REPRISE D'INSTANCE
(*Defendant in the Court below*),
APPELLANT;

AND

CHARLES S. BURROUGHS
(*Plaintiff in the Court below*),
RESPONDENT.

BARRISTER.—ATTORNEY.—FEE.—RETAINER.

HELD:—That a Barrister or Attorney cannot recover on a *quantum meruit* and verbal evidence of value of services the amount of a fee claimed by him over and above the amount of his taxed costs from his client.

In the Court below the respondent recovered judgment in his favour (Monk, A. J., 2nd March, 1864) which was recorded in the following words:—

"The Court having heard the parties by their respective counsel upon the merits of this cause, examined the proceedings, proof of record and deliberated; considering that the defendant hath not proved by legal and sufficient evidence the essential allegations of the pleas by the said defendant pleaded in this cause, doth dismiss the said pleas, and proceeding to adjudicate upon the merits of the said plaintiff's demand; considering that the said plaintiff has established by sufficient evidence the material averments of his declaration, and particularly that it results from the receipts filed by the said defendant, and by the evidence adduced that the defendant agreed to pay the plaintiff, over and above the regular taxed costs in the case referred to in the pleadings, a retaining fee; seeing that the plaintiff was and is entitled to the sum of £150, value and amount of such retaining fee; considering that it is proved that the taxed costs claimed by the plaintiff amount to the sum of £107 9s. 4d., the Court doth condemn the said defendant *par reprise d'instance* to pay and satisfy to the plaintiff the sum

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of £116 19s 1d. current money of this Province of Canada, to wit: the sum of £10 9s. 5d., balance due remaining upon the amount of said retaining fee; and the sum of £97 9s. 8d., amount remaining due and unpaid upon the amount of the bills of costs mentioned and declared in the declaration of the plaintiff in this cause; with interest upon the said sum of £116 19s 1d. from the 3rd day of March, 1853, date of the service of process in this cause, until actual payment and costs of suit."

This judgment was appealed from, and the appellant stated her grievances in her factum as follows:—

L'intimé a intenté son action le premier mars 1853, devant la Cour Supérieure à Montréal, contre l'appelant Louis Dechantal, qui depuis est décédé et se trouve maintenant représenté par l'appelante, sa veuve et sa légataire. Par cette action, l'intimé, qui est avocat et procureur, alléguait que le 1er. janvier 1853, le dit Louis Dechantal lui devait une somme de £2500. 0 pour services professionnels rendus à sa demande et requisition dans différentes causes où il avait été intéressé, et aussi pour examen de divers actes dans lesquels le dit Dechantal avait été partie, laquelle somme ce dernier aurait promis lui payer. L'intimé alléguait que John Ramsay Fleming, Ecuier, avocat, avait occupé en cette qualité, conjointement avait lui, intimé, pour le dit Louis Dechantal dans quelques unes des dites causes, mais que le dit Fleming lui avait fait transport de ce qui pouvait lui appartenir dans tels frais et honoraires, puis il concluait à ce que Dechantal fut condamné à lui payer cette somme de £250 avec intérêt et dépens.

DÉFENSE.

Par une première exception, Louis Dechantal a prétendu que le 30 mars 1848, il avait été interdit volontairement à raison de son grand âge; que son nom fut à cette époque là, inscrit sur le tableau des interdits et que, son épouse, Angélique Grimard fut nommée son conseil. Qu'à raison de cette interdiction, qui avait été parfaitement connue par l'intimé, ce dernier aurait du diriger son action, non seulement contre lui, mais encore assigner son conseil pour l'assister dans sa défense, et que ne l'ayant pas fait, son action devait être déboutée.

Par une seconde exception le dit Louis Dechantal a prétendu qu'il ne s'était jamais obligé de payer à l'intimé aucune somme de deniers en dehors et en sus des honoraires que le tarif des différentes cours accordait aux avocats, et qu'il ne pouvait réclamer qu'en conformité à tel tarif.

Par une troisième exception il a prétendu que l'intimé et son cédant, M. Fleming, n'avait occupé pour lui que dans quelques causes et qu'il leur avait payé £143. 5. 4, ce qui était plus que suffisant pour éteindre les honoraires et déboursés qu'ils auraient pu avoir droit de réclamer en vertu du tarif, et pour ce qu'ils avaient pu avoir fait pour lui en dehors de ces causes; en sorte que l'action ainsi dirigée contre lui devait être déboutée.

Ces exceptions furent suivies d'une défense générale.

RÉPLIQUE.

L'intimé a prétendu en réplique que l'acte d'interdiction invoqué par Dechantal avait été annullé par un jugement de la Cour, et il a répondu généralement aux autres exceptions.

ENQUETE.

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Lors de l'enquête, l'intimé a prouvé que tous les frais, honoraires et déboursés dans les causes en question, s'étaient élevés à £107. 9. 4. Ce fait est reconnu par le jugement. Et il a été prouvé que Dechantal avait payé £140. 10. 3 mais le jugement n'a reconnu que £130. 10. 7, ce qui par conséquent a privé l'appelante d'un crédit d'une somme de £9. 19. 8. Cette différence dans le crédit réclamé par l'appelante et celui que lui a accordé le jugement, est due à une simple omission que l'appelante va de suite signaler :

1o. Suivant la pièce No. 33 du dossier, l'appelante a droit au crédit de £130. 10. 7, montant de divers reçus. Ce chiffre est celui accordé par le jugement.....£130. 10. 7

2o. L'appelante a de plus droit au crédit de £5. 16. 4, montant de la pièce No. 34 du dossier. Ce montant a été inclus dans le mémoire de frais de l'intimé, comme étant un déboursé qu'il aurait fait, mais lors de l'enquête il fût prouvé que ce montant avait été déboursé par Dechantal lui-même. Voir admission de l'intimé pièce No. 5 du dossier..... £5. 16. 4

3o. L'appelante a droit au crédit de 13s. 4d. suivant la pièce No. 35 du dossier. Cette somme ayant été payée par Dechantal lui-même au Prothonotaire, ne devait pas être chargée par l'intimé dans son mémoire..... £0. 13. 4

4o. L'appelante a droit d'avoir crédit pour £3. 10. 0, montant de l'enfilure des deux défenses dans les deux causes en question. Les défenses furent préparées et produites par Messieurs Cartier et Cartier et plus tard l'intimé fut substitué à leur place, comme avocat de Dechantal, par conséquent dans son mémoire l'intimé devait déduire ces déboursés qu'il n'avait pas faits..... £3. 10. 0

Ce qui porte le total du crédit qui doit être accordé à l'appelante à cette somme de.....£140. 10. 3

Le jugement dont est appel maintient la prétention de l'intimé quant à une retenue de £150. 0. 0 en sus des frais taxés, et impute sur cette retenue les argents payés par Dechantal, puis condamne l'appelante à payer à l'intimé : 1o. La somme de £19. 9. 5, balance de la retenue ; 2o. £107. 9. 4, montant des mémoires taxés, ces deux sommes formant un total de £116. 19. 1 courant.

L'appelante croit avoir droit de se plaindre de cette décision.

Par son action l'intimé n'a pas allégué une convention entre lui et Dechantal en vertu de laquelle ce dernier fut convenu de lui payer aucune somme de deniers outre les frais qui sont accordés par le tarif, et il est prétendu par l'appelante, qu'en l'absence d'une telle convention, l'intimé ne pouvait réclamer plus que les frais taxés suivant la pratique de la Cour, un *quantum meruit* ne pouvait être invoqué par l'avocat contre son client, pour réclamer plus que les honoraires accordés par le tarif ; en l'absence d'une convention le tarif devant faire la loi des parties. La Cour de première instance a maintenu la prétention contraire, d'après le principe qu'il y avait dans la cause un commencement de preuve par écrit résultant des reçus que l'intimé avait accordés à Dechantal (ces reçus composant

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la pièce No. 33 du dossier) et que ce commencement de preuve autorisait l'intimé à prouver le montant auquel il pouvait avoir droit, sous forme de retenue, en dehors des honoraires du tarif.

Il nous semble évident que dans l'espèce, il ne pouvait être question d'un commencement de preuve par écrit. Un commencement de preuve par écrit n'est requis que pour parvenir à établir une convention et non pas un quantum meruit dont la preuve est admise de plein droit, en l'absence d'une convention; mais en supposant qu'il fût question d'un commencement de preuve par écrit l'appelante prétend que ce commencement de preuve n'existait pas au dossier, Les reçus, dans lesquels la Cour Inférieure a cru trouver ce commencement de preuve, ne peuvent être utilement invoqués en ce sens; ce sont des reçus émanés de l'intimé et qu'il a accordés à son client Dechantal. Dans ces reçus l'intimé déclare qu'il reçoit de lui, de l'argent en accompte de sa retenue dans ces causes. Ce dernier, qui était un homme illettré, (ainsi que cela est reconnu par l'intimé dans son admission, pièce No. 53 du dossier,) a accepté ces reçus sans en comprendre le sens, et de là on a conclu qu'il y avait un commencement de preuve par écrit, acquis au profit de l'intimé, lui permettant d'établir une retenue par quantum meruit en dehors des honoraires accordés par le tarif. Si ces reçus eussent été accordés à un homme instruit qui eut pu les comprendre, leur contenu aurait pu sans doute, militer contre lui, mais assurément que dans le cas qui nous occupe, il ne peut en être ainsi; au contraire, il y a eu surprise pour ne point dire dol de la part de l'intimé en accordant ces reçus dans la forme qu'il leur a donnée. Avant même d'avoir fait aucun travail dans les causes en question, il prétend qu'il a droit à des honoraires extra. Il est en preuve (voir la déposition de Charles Dechantal) que dans une occasion, Louis Dechantal en recevant un de ces reçus, demanda à l'intimé de lui expliquer ce que voulait dire le mot retenue qui s'y trouvait, l'intimé lui répondit que c'était de cette manière qu'il donnait ses reçus. Cette preuve nous fait voir clairement que l'intimé ne songeait point alors à réclamer une retenue et elle est loin d'indiquer que Dechantal ait promis d'en payer une. D'ailleurs les mots retenue et retainer qui se trouvent dans ces reçus signifient tout simplement honoraires, d'après le tarif. Dans le cas actuel l'intimé a reçu de son client £33. 0. 11 de plus que ses honoraires et déboursés. Les frais taxés sont de £107. 9. 4 et il a reçu £140. 10. 3. Il semble que cela eut dû lui suffire pour défendre à deux poursuites sur obligations. Il y a eu, il est vrai un grand nombre de témoins entendus dans ces causes, mais la somme de £33. 0. 11 qu'il a reçue sans convention au-delà de ses honoraires devait l'indemniser et s'il n'était point satisfait de ce traitement, il devait convenir d'une indemnité plus considérable; ne l'ayant pas fait, on doit présumer qu'il s'en rapportait au tarif et à la libéralité de son client

Quelque soit le sort des prétentions que l'appelante vient d'énoncer, il est évident dans tous les cas qu'elle est fondée à demander la réformation du jugement pour se faire donner crédit d'une somme de £9. 19. 8 que la Cour de première instance a omis de lui accorder.

RESUME.

1o. La Cour Inférieure aurait dû reconnaitre que le montant payé à l'intimé par l'appelante et son époux était de £140. 10. 3 au lieu de £130. 10. 7.

2o. Le Jugement dont est appel aurait du déclarer que l'intimé n'avait droit qu'à une somme de £107.9.4 pour ses honoraires et déboursés taxés en conformité au tarif de la Cour, et déclarer ce montant payé.

3o. La Cour Inférieure ne devait pas accueillir, de la part de l'intimé, la preuve d'un quantum meruit, pour établir une retenue en dehors du tarif de la Cour. L'intimé n'ayant point allégué une convention, avec Dechantal, quant au paiement d'une retenue extra, ne pouvait obtenir cette retenue au moyen d'un quantum meruit. Les dispositions du tarif formaient un contrat entre les parties auquel il ne pouvait être dévié sans une convention, et comme une telle convention n'existait point, le tarif était la loi.

Telles sont les motifs pour demander l'infirmation du jugement.

The factum of the respondent was in the following terms:—

"The present respondent instituted an action against Louis de Chantal for a sum of £250, being for value of services rendered him by said respondent, as advocate, counsel, attorney, proctor, solicitor, &c., and amount of disbursements made, in certain cases mentioned in said action. The declaration contained, besides the 'count' of quantum meruit, two 'special counts,' one for £107 9s. 4d., amount of fees and disbursements taxable under the tariffs of the Courts against the opposite party; the other for £150, amount of *retaining fee* for extra services.

This action was met by two pleas, one that Louis de Chantal has been voluntarily interdicted, and could not be impleaded without the assistance of his wife, his counsel, Dame Angelique Grimard, the present appellant; the other, that the said Louis de Chantal had never agreed to pay 'retaining fee,' and that he had *paid* all the taxed costs and disbursements.

The first plea was met by a special answer, setting up, among other things, that by the judgment of the Superior Court and of the Court of Appeals the said interdiction was declared null and void, and fraudulent, and that consequently the said plea was no sufficient answer to that action. L. C. Reports, 2 vol., p. 469, 473.

The second plea was met by general answer denying any such payment of *taxed costs* and disbursements.

After issue joined, the said Louis de Chantal died, and the respondent brought the said Dame Angelique Grimard into the case to take up the instance.

The plaintiff respondent produced bills of costs for fees and disbursements, taxable under the tariffs of the Courts, against—*not his own client but the opposite party*, amounting to £107 9s. 4d. This amount is admitted as correct by appellant.

The plaintiff respondent also produced a copy of the register of proceedings in the case of De Chantal *vs.* De Chantal, one of the cases he had conducted for said appellant, and at an *enquête* examined as witnesses, John Honey, Deputy Prothonotary, Messrs. Laflamme, Dumas, Abbott, Johnson and Elliott, respecting the total value of the services rendered, and they all deposed favorably to the respondent's pretensions.

The appellant, at her *enquête* only, produced a number of receipts given by respondent to Louis de Chantal for different sums, amounting in all to £130

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10s. 7d. The different dates of these receipts embraced a period of two and a half years, and were drawn out thus, 'Received for retaining fee.' These receipts were admitted by respondent as having been given for and on account of the retaining fee sued for, but as no payment of such retaining fee had been pleaded, they could not apply in support of defendant's plea. The *quantum meruit* was fully established at £250, divided into 'retaining fee' £150, and 'costs and disbursements' £100. Upon the *quantum* the parties are agreed.

The only question upon which the appellant and respondent differ is upon the question of the 'retaining fee.'

Thus: Has an attorney a right of action against his client for a *quantum meruit* for services rendered; or, in other words, can he sue for a 'retainer'?

As between attorney and client, do the tariffs of the Courts establish the *quantum* or value of services.

Was it established in evidence that the appellant had agreed to pay and was paying respondent a retaining fee?

Upon these three questions the Court below were with the respondent.

The respondent submits that the last question, being a question of fact, was clearly established by the receipts produced by the appellant herself and by the evidence of respondent's witnesses, especially that of John Elliott, and that the judgment of the Court below was well rendered.

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

The main contention raised by this appeal involves a professional question of some interest, which although not novel in itself, invites consideration. The respondent had represented the late De Chantal as his attorney-at-law in a principal suit, from after the fyling of the plea to final judgment in appeal he was also his attorney in defending a minor suit, and in a contestation of a saisie arret, and finally in an opposition à *fin d'annuller* to an execution issued against his client after the final judgment in appeal. The litigation between the contending parties was subsequently settled by a deed of arrangement, which the respondent professionally overlooked and advised, and therewith terminated the professional connection between himself and his client De Chantal, who having been unsuccessful in his litigation became liable to remunerate the respondent for his professional services in his behalf. The regular tariff for practitioners in the Courts not having established a rate as between attorney and client, the respondent caused his bills of costs in the several matters in which he had been employed, to be taxed at the highest rate of allowance as of a successful litigant, against an adversary, amounting together to £96 11s. 6d. The respondent in addition claimed £10 for arranging the final settlement, and 17s. 6d. the disbursements for necessary vouchers for his client, making in all £107 9s. 6., which is the same amount as stated in the judgment of the Superior Court in this cause, and which has not been objected to by the appellant.

In addition to this sum, the respondent claimed from his late client a further sum charged as follows: "To retaining fee, as agreed upon, and which I deserved to have, for the care and attention, time and labor and numerous consultations required to be had in and about the suit or suits pending between D. H. de Chantal and the said Louis de Chantal, as well in the Superior

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Court, as in the Court of Queen's Bench, £150; the detailed statement then following in explanation of these services and the charge for retainer."

It is this charge which has chiefly given occasion to this appeal. But of what passed in the Court below we are not advised, and, indeed, can know nothing except what the record itself informs us.

The respondent's demand as specially stated and detailed in his particulars is for £257 19s., composed of the above, £107 19s. for costs, and £150 for retainer. The action is in the common assumpsit form, the declaration containing an assumpsit count and a quantum meruit count, for the respondent's "work, care, diligence, &c., as the attorney, solicitor and counsel of the said late De Chantal in divers suits, &c.," with the usual breach, and conclusions for £300. To this action the late client, De Chantal, by his pleas, denied his liability except for taxable costs, denied his liability for extra costs and for the retainer demanded as being contrary to law, and averred payments made by him to the respondent to an amount of £143 5s. 4d., exceeding in fact the legal fees and charges, *honoraires* of the respondent.

It has been established in evidence by the respondent's receipts produced in support of the defence that the respondent had received from his late client between the time of his first professional connection with the latter up to the 26th August, 1852, not long after the final judgment in appeal, £136 4s. 1d., and it was also proved that the respondent had charged for disbursements as paid by himself, which had actually been paid by his late client, to the amount of £7 18s. 10d., making up the amount as having been paid by the defendant £144 2s. 11d., which the respondent altogether ignored, and for which he gave no credit in his demand, but claiming the entire £257 19s. without deduction, even on his claimed retainer, for any of the monies received by himself.

It will be observed that although the retainer is charged in the particulars as agreed upon, the declaration contains no special count or averment upon this alleged agreement.

The argument before this Court was only upon two points: 1. The overcharge above mentioned for £7 18s. 10d., which has been established; and, 2nd, the retainer, which involved the question, does the law give an advocate or counsel an action against an unwilling client for the recovery of a retainer? The question is restricted to the advocate, and does not reach the attorney, whose right of action for his costs and charges is indisputable.

This matter has been much considered in the jurisprudence of both England and France, based in both upon the Roman law, which refused to the advocate the right to sue for his fees from an ungrateful client. "*Nulla potest definiri conventione nulla ordinaria actione peti*"—Livingstone v. Cornell, 2 Martin; Louis: 285. In England where the distinction between the legal offices of attorney and counsel has been maintained, the Roman law has been observed with unabated strictness, and the fees of counsel are honorary in the strict acceptation of the term. Lord Coke, 1 Inst. 295 a, held, "that a counsellor at law cannot sue for his fees, for he is not compelled to be a counsellor and his fee is *honorarium*, not debt." So also Blackstone, 3 vol., p. 38, "it is established with us that a counsel can maintain no action for his fees, which are gratuitous, not a *locatio vel conductio* but as *quiddam honorarium*, not as a salary or hire, but a mere gratuity, which a counsel can-

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not demand without doing wrong to his reputation," and Comyns, on Contracts, p. 278, says the law of England gives no right of action to the advocate. In Chealey v. Beliot, 4 T. R. 287, the reason given was, "that it was proper that no temptations should be held out to countenance injustice, and that the regulations as to advocates was founded on grounds of public policy, from the very great influence of an advocate on his client, and his client's absolute and entire dependence upon the science and experience of his counsel," in other words, to protect the ignorance and fears of the suitor from the cupidity of the advocate. A recent decision in England in the Common Pleas, and afterwards approved in appeal, in the case of Kennedy v. Broun and Simpson in 1863, 9 Jur. N. S. p. 19, & 10 Jur. N. S. p. 142 establishes the law in this respect as to advocates; and the observations of the late Chief Justice Eyre are equally instructive and suggestive upon the refusal of the right of action to counsel.

In France the right of action has not been absolutely denied to the *avocat*, and arrets are to be found which support that right, but the constitution of the Bars in that country, and the peculiar membership and connection of the practising advocates with those Professional Associations and Corporations, produced in effect in France the same denial of the action as in England; and though the right to sue for fees is allowed to be a legal remedy, its use is so controlled by the Bar influence that *il était de règle au Parlement de Paris; que tout avocat, qui demanduit des honoraires en justice encourrait ipso facto sa radiation du tableau.*—Merlin, Rép. vo. avocat § 13. Honoraire § 1. Nouv. Den. vo. avocat, § 13 No. 13, and Lacombe. R. de juris. vo. avocat No. 57, says, "*s'il veut user de cette action il faut qu'il abandonne la profession,*" and Bioche a modern author vo. avocat, says of the modern system, "cette tradition s'est invariablement maintenue au barreau de Paris," and at No. 130 he adds, "l'avocat ne doit ni exiger ni taxer d'avance ses honoraires." It is plain, therefore, that Bar practice in France, like the law in England, allows no action to the advocate, and the same ruling was held by the Court of Queen's Bench for the District of Montreal, some years ago in an action for the recovery of a retainer upon the ground that it was *quiddam honorarium*.

This uniform practical jurisprudence upon the point in contention is therefore unfavorable to the respondent, who has very strangely taken care to place his claim within the application of those rulings, by so qualifying it, as counsel's fees, thereby removing it entirely from the category of Attorney's costs and charges.

But it has been urged that our practitioners, uniting in their own persons both the offices of attorney *procureur* and counsel *avocat*, differ in this respect from those distinctive legal officers recognised and kept apart in both France and England, rendering thereby the several services of either office not easily distinguishable, and assimilating them to practitioners in the United States. But in this case, no difficulty can exist as to the demand, because the respondent himself has classed it as an honorary service; and, moreover, the distinction between the two legal offices is practically known to our bars, and the tariff of fees which has established rates for services of attornies and advocates, has also recognised the counsel *eo nomine*, and given a tariff rate for certain services of counsel, such as counsel fee at *enquêtes*. Greenleaf, in his 2 vol., p. 144, is compelled to admit that in the United States counsel are indeed honorary in their advice and

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do not demand fees, although he also adds "that in the United States the offices of attorney and counsellor are so frequently exercised by the same person that they have become nearly blended into one, and actions for compensation for services performed in either capacity are freely sustained in most, if not all of the States of the Union," but he says that this result has been obtained from the municipal codes or laws of the several States where the right of action has been allowed. In most of them a fixed legal tariff regulates the fee of the profession generally; in others a gross sum is fixed as the only legal compensation which the practitioner can demand or receive, whilst in others a tariff fixes a gross sum as the measure of the claim of the victorious party against his opponent, and in remuneration of what he has paid for the services of his own counsel. In this province the costs of the successful litigation are in all cases adjudged to the successful party as a rule, with right of distraction to his attorney, if the attorney require it, but the rate of charge is that fixed by the tariff. The difficulty arising from the want of a fixed tariff rate of remuneration as between client and attorney is, however, in practice generally obviated by a consent taxation, analogous to the tariff rate, which, however, does not extend to retainers or counsel fees.

But even admitting *ex argumento*, still, the right of action, the nature and extent of the services rendered, and their price or value should be legally established, because the admission to sue does not of itself abolish the legal principles which value the services of the counsel, nor necessarily allows a judgment without legal proof. In such a case as this, involving an amount beyond what may legally be supported by oral proof, and not being an exceptional commercial dispute, it is waste of time to say that merely oral proof is not sufficient. The law requires an entirely different proof, either by writing or by its equivalent from answers on facts and articles, evidencing the client's acknowledgment and adoption of his counsel's demand; or it might be settled possibly by the Court as a legal *forum domesticum*, upon view and examination of the record, and therefrom making appreciation of the value of the services done, guided by a rule of valuation of similar services, according to the well-known rule of law, that the just decision in which the Legislature is silent may be sought for in analogy with that in which the Legislature has spoken, or finally, the practice of the courts, as in the settling of the allowances to experts, arbitrators, referees, might be advantageously adopted. But in all these cases, and in the cases of the *arrêts* in France favourable to the *avocat*, the action of the Court rested upon the record of the service done, and this was the course adopted in the celebrated case of Maréchale reported by Dumoulin in his Commentary upon *la Règle de Chancellerie de verisimili notitia*, No. 53, adjudged by the *Parlement de Paris* in favour of Maréchale against his client for 60 livres parisis for drawing up a short mémoire, but in which the legal science of the advocate was conspicuous, "fort courte mais tres savante," and the ground of the judgment was "*habita ratione non ad brevem sed ad doctam et resolutoriam scripturam modumque litis et eminentem scientiam advocati.*" The *arrêts* were rendered, so to speak, upon the examination of record, of the services rendered, upon the responsibility was not shifted from the Court itself to the bar, as in this case to the opinion of practi-

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tioners as to the reasonableness of the amount demanded. The respondent has afforded to the Court no means, either by the record or otherwise, for appreciating his services, except as he has stated them in his particulars. Now enquetes are always less or more long, but the remuneration for them is settled by the tariff. The number of motions in cases depends upon the necessity for making them, but these are covered as *procedure* in the cause by the tariff alone. The respondent's consultations with clients are a necessity of course, otherwise the counsel should not allow himself to be employed by his client; but these, together with the consultations with other counsel, and his great labour of mind and research into authorities only appear in his particulars, and are merely allegations, which the Court cannot value, merely because they are alleged, nor can it legally adopt the opinions of practitioners as to value, which would in effect be subjecting its decision to proof, beyond the common law, and establishing an assumpsit and quantum meruit by exceptional proof, for *the price and value of words sold and delivered.*

Apart from those professional opinions, the respondent has not supported his cause with evidence; but after he had closed his evidence, and upon the production of his own receipts upon the defence, he claims that these should be taken as a *commencement de preuve* in support of his demand. As to this demand there is no special count to which that proof can be fitted, and if there were, the receipts could not legally avail him by reason of the objection taken to them by the appellant. The receipts are by the respondent acknowledging monies received by him from his client, and generally contain imputations of those monies to the several retainers mentioned in them. But with reference to them, it is urged by the appellant, that the client was surprised by his counsel, considering their relative positions and the ignorance of the former. The respondent has admitted of record, that his client was an illiterate and ignorant man, "qu'il savait signer son nom, mais qu'il n'a jamais su lire," and it has been proved not only that he was ignorant of the nature of the acknowledgment and imputations made by the receipts, but that the respondent expressly refused to give him information about the retainer mentioned in them, although that information was particularly requested of him by his client; moreover, many of the receipts are in English, which was a foreign language to his client, and it is not proved that the client was acquainted with it. The evidence for the defence, which has not been contradicted, is as follows:

Question.—Vous êtes-vous, en aucun temps, trouvé présent au bureau du demandeur en cette cause, avec votre père, le défendeur, et ce dernier a-t-il jamais payé au demandeur en votre présence aucune des sommes de deniers mentionnés dans les reçus produits par la défenderesse, et rapportez ce qui s'y est passé?

Réponse.—Je suis allé à plusieurs reprises avec mon père au bureau du demandeur à Montréal dans le courant de l'été de mil huit cent cinquante deux; mon père était alors en procès avec Dame Denise Dechantal. Je l'ai vu, à plusieurs reprises, payer de l'argent au demandeur, et dans une de ces occasions mon père a payé au demandeur la somme de vingt cinq louis pour laquelle somme le demandeur lui a donné un reçu: mon père me présenta le reçu de suite en me priant de le lire, et voir s'il était bien fait; telles sont ses paroles. *Après avoir lu le reçu, j'observai a mon père que je ne le comprenais pas du*

tout ; je lui dis qu'il y avait une expression dont je ne connaissais pas le sens, que cette expression était le mot retenu qui se trouvait dans le reçu ; mon père alors demanda au demandeur ce que voulait dire le mot retenu ; *le demandeur répondit que le reçu était bien fait, que c'était de cette manière qu'il donnait ses reçus généralement, que j'étais trop jeune, que lorsque je serais plus vieux, j'en verrais donner moi-même de pareils.* Là-dessus le défendeur, mon père, mit le reçu dans sa poche, le croyant bien fait, et nous sommes partis. *Je me suis trouvé présent en plusieurs autres circonstances où mon père a payé de l'argent au demandeur, et tous les reçus que j'ai vu donner étaient faits de la même manière. Le demandeur n'a pas expliqué au défendeur la signification du mot* retenu ; *et la seule explication qui lui ait été donnée, en ma présence, c'est que ces reçus étaient bien faits et que c'était la manière dont il donnait ses reçus*

Transquestionné.

Je suis allé sept ou huit fois au bureau du demandeur avec mon père et aussi je suis allé avec mon père à la demeure du demandeur et j'y suis allé une fois seul.

Le reçu dont j'ai parlé dans mon examen en chef est celui marqué T, du 28 juin 1852, produit à l'enquête par la défenderesse par reprise d'instance.

J'ai vu payer de l'argent par mon père quatre ou cinq fois après ce temps-là ; c'est la première fois que j'ai vu un des reçus du demandeur, que j'ai fait la remarque ci-haut mentionnée : mon père a toujours retiré un reçu du demandeur *chaque fois qu'il payait de l'argent au bureau, mais il n'en a pas reçu lorsqu'il lui a donné à sa demeure privée, et cela à deux reprises, et une fois dans la rue.* Tous les reçus que j'ai vu donner, étaient dressés de la même manière que celui marqué T. Le bureau qu'occupait le demandeur dans ce temps-là était situé dans la petite rue St. Jacques, dans une maison qu'occupe actuellement le docteur Nelson, junior.

Nor is the legal effect of this testimony shaken or weakened by the plaintiff's evidence, which relates a casual remark made by the client upon one occasion that he was paying plaintiff more than his costs, *je lui paye plus que ses frais,* which might refer to some gratuity, but could not apply to a compulsory retainer for £150, in the particular suit 2736. Under these circumstances the receipts are obnoxious to the objections of *dol* and *surprise* by the Respondent upon his client as explained in the following authorities :

Toullier, 7 Vol., No. 177, says: "*C'est pour ce motif, dol ou surprise, qu'une simple surprise, quoiqu'elle n'eût pas le caractère d'un dol, suffit pour autoriser les juges à s'écarter de l'imputation adroitement glissée dans une quittance par un créancier au préjudice d'un débiteur simple,*" and he refers to Pothier Oblg., No. 566, upon the point, who states that in the case of *une personne qui ne sait pas lire,* &c., cette imputation *ne doit pas lui préjudicier, &c., par exemple un paysan owes à* procureur, for the price of land and for interest on it, 390 livres and for *salaires dûs au procureur,* 500 *livres ;* the debtor pays the *procureur* 400 *livres,* for which the procureur gives him *a quittance avec mention que c'est à compte des salaires qui lui sont dûs, il est évident que cette imputation sur les salaires est une surprise,* and Pothier therefore concludes that it cannot be effective.

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The imputations stated in the receipts therefore go for nothing, and the receipts are nothing but mere acknowledgments of money paid to the Respondent by his client; as such they have no character of legal proof as establishing a contract agreed upon or a promise to pay the retainer demanded. There is therefore no evidence of the engagement by the client as alleged in the judgment to pay the retaining fee of $600 over and above the costs which are not disputed, which alone constitute the Respondent's proved *demande* amounting as set out in the judgment to the sum of £107 9s. 0d., against which setting off his own charges, and payments made by the client amounting in the whole to £144 2s. 11d., there remains a balance of £36 13s. 11d. as overpaid above the full costs and expenses admitted, which having been paid may not be recalled, and stands as the client's gratuity to the Respondent as explained in the remark of the former *je lui paye plus que ses frais.* The witness for the defence spoke of other payments made without receipt, the amounts of which are not stated, and cannot be taken into account, but for this proved sum of £144 2s. 11d., the Respondent has given no credit, and compelled the client to set off and prove the same on his defence.

Taking those figures which are shewn in detail in the statement of account accompanying the judgment, the conclusions of the Appellant in her factum may be adopted here, namely:

"La somme de £36 13 11 qu'il a reçue sans convention, au-delà de ses honoraires devait l'indemniser. et s'il n'était point satisfait de ce traitement, il devait convenir d'une indemnité plus considérable; ne l'ayant pas fait, on doit présumer qu'il s'en rapportait *au tariff* et à la *libéralité de son client.*"

The judgment appealed from therefore must be set aside, with costs of both Courts against the respondent.

The judgment in appeal was *motivé* in the following terms:

Considering that the said defendant had paid to the plaintiff and advanced for charges made by the plaintiff, and not credited by him, to the defendant previous to the institution of the action against the defendant, the sum of £144 2s. 11d. being £36 13s. 11d. over and above the sum £107 9s. 0d. found to be due by the defendant as mentioned in the judgment of the Court below, and considering that the plaintiff hath not established in law his demand for the said sum of £150 by him claimed as retainer in the said professional matters in the said record set out, considering that the said sum of £107 9s. hath been paid by the said defendant to the respondent previous to the institution of this action, but without credit given therefor by him:—Considering that in the judgment rendered by the Court below, there was error, this Court doth reverse and set aside the said judgment, and proceeding to render such judgment as the said Court should have rendered doth dismiss the respondent's action with costs, and doth maintain the appeal of the appellant with costs of this Court.

(The Hon. Mr. Justice Drummond dissenting, and it is ordered that the record be remitted to the Court below.) Judgment reversed.

Leblanc, Cassidy & Leblanc, for appellant.

Cross & Lunn, for respondents.

(F. W. T.)

MONTREAL, 28TH FEBRUARY, 1866.

Coram BADGLEY, J.

No. 1258.

Beauchamp vs. *Cloran.*

HELD:—That a party injured by being run over, can only be held responsible for the exercise of such care and prudence as are *equal to his capacity*.

This was an action, by the father of a boy of seven years of age, who had been run over in Canning street, of this city, by a horse and cart belonging to the defendant, for the recovery of $200 damages.

The defendant pleaded amongst other things, that the accident was caused by the negligence and imprudence of the child. From the evidence it appeared, that the child was standing on the pavement of the street, with a long board under his arm projecting into the roadway, and that the cart was driven against the board in such a way that the child was overthrown, and that the wheel of the cart passed over his leg.

The Court held, that a child of such tender years could not, under the circumstances, be held guilty of negligence, and that the rule of law was, that a party injured was only responsible for the exercise of such care and prudence as are *equal to his capacity*. And cited, 1 Hilliard on Torts, pp. 162, 163, and *Lynch* vs. *Nardin*, 1 Ad. & Ell. N. S., p. 29. And awarded $60 damage and costs as of the lowest appealable class of the Circuit Court.

Judgment for plaintiff.

Henry Judah, Q. C., for plaintiff.
Joseph Duhamel, for defendant.
(S. B.)

COURT OF REVIEW, 1866.

MONTREAL, 30TH JUNE, 1866.

Coram SMITH, J., BADGLEY, J., MONK, J.

No. 2641.

Miller et al. vs. *Dutton.*

HELD:—That a plea of *litispendence* which does not cover the *whole* cause of action cannot be maintained.

This was a hearing in revision of a judgment rendered by the Hon. Mr. Justice Smith, in the Superior Court at Montreal, on the 26th day of March 1866, dismissing the defendant's plea of *litispendence* and maintaining the plaintiff's action.

The action was brought, by process of *Capias ad respondendum*, to recover the amount of a certain promissory note and additional sum of $50, for goods sold and delivered.

At the time of the institution of the action, there was pending before the Superior Court at Montreal, under the number 2453, an action, at the suit of the same plaintiff against the same defendant as in the present case, for the recovery of the promissory note recited in the plaintiff's declaration.

Miller et al., vs. Dutton.

To this action the defendant pleaded an exception of *litispendence*, which was dismissed by the original judgment, on the ground (as verbally explained by the judge who pronounced the judgment, at the time it was rendered; no special *motives* being assigned in the judgment itself), that such a plea, to be maintainable, must cover the *whole* cause of action.

For the same reasons (also verbally stated by the presiding judge), the Superior Court, sitting as a Court of Review, confirmed the original judgment.

Jugement of S. C. confirmed.

M. Doherty, for plaintiff.
Perkins & Stephens, for defendant.
(S.B.)

CIRCUIT COURT, 1866.

MONTREAL, 30TH APRIL, 1866.

Coram BADGLEY, J.

No. 1633.

Laflamme vs. *Fennell.*

HELD:—That where a lease has been continued for one year by *tacite reconduction*, no notice is necessary to terminate the lease thus continued, and that the same legally expires at the end of the year.

This was a hearing on law. The action was for rent to accrue, and was accompanied by a *saisie gagerie par droit de suite*. The plaintiff in his declaration alleged that he had leased certain premises to the defendant, for one year ending the 30th of April, 1864; that the lease had been continued for another year by *tacite réconduction*; that the defendant had failed to give a notice, as required by law, to the effect, that he wished the lease thus continued to terminate at the end of the year; and the plaintiff contended, in consequence, that the lease had been further continued by *tacite réconduction* for another year from the 30th April, 1865.

The defendant pleaded a *défense au fond en droit*, to the effect that no notice whatever was necessary to terminate the lease continued by *tacite réconduction*, and that the same expired by law on 30th day April, 1865.

Per Curiam:—"The Court * * * , considering that there was no *tacite réconduction* by the said defendant of the premises in the plaintiff's declaration mentioned from, at and after the 30th day of April, 1865, the termination of the year of *tacite réconduction* of the said premises from, at and after the 30th day of April, 1864, the day of the expiration of the said lease thereof as in the said declaration mentioned, and considering that by law the said defendant was not bound or liable to give to the plaintiff the said *avis* or *congé* as in his said declaration alleged, doth dismiss the said plaintiff's action with costs."

Action dismissed.

L. Labrèche Viger, for plaintiff.
M. Doherty, for defendant.
(S. B.)

10TH JULY, 1867.

Coram SIR JOHN TAYLOR COLERIDGE, SIR JAMES WILLIAM COLVILLE, SIR EDWARD VAUGHAN WILLIAMS, SIR FITZ-ROY KELLY (THE LORD CHIEF BARON), AND SIR RICHARD TORIN KINDERSLEY.

IN APPEAL

FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

ANN SCOTT,

(*Plaintiff in the Superior Court,*)

AND APPELLANT;

MARIE MARGUERITE MAURICE PAQUET AND OTHERS,

(*Defendants in the Superior Court,*)

RESPONDENTS.

LOWER CANADA, LAW OF—ORDONNANCE, 1639, ART. 6, CONSTRUCTION OF—MARRIAGE IN EXTREMIS.

ART. 6 of the Ordonnance of Louis xiii. (26th November, 1639) in force in Lower Canada, is in these terms:

Voulons que la même peine (de la privation de successions) ait lieu contre les enfans qui sont nés de femmes que les pères ont entretenues et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.

HELD:—FIRST, that as the above article of the Ordonnance was in restraint of natural liberty and penal in its nature it was to be strictly interpreted, and only when the fact of a party being in extremis at the time of the solemnization of the marriage was clear and beyond doubt, could it be applied. SECOND, that although death had taken place two days after a marriage had been celebrated, such article of the Ordonnance did not affect the validity of the marriage unless the party was at the time sensible that he was in his last illness and in immediate danger of dying.

Suit for nullity of marriage and to set aside a marriage contract on the ground that, at the time of its celebration, the husband was delirious and of unsound mind arising from an attack of delirium tremens, from which disorder he died two days afterwards. The evidence in chief of one of his medical attendants being to the effect that he was unconscious and in his opinion from the nature of the disease incapable at any time of contracting such marriage:

HELD:—On a general review of the evidence to be rebutted, especially by the conduct of the same medical witness in speaking of the probability of deceased's recovery, and by the evidence of the Priest, Notary and witnesses at the marriage, of his capacity, and judgments of the Courts in Lower Canada that the marriage should be sustained.

The facts of this case fully appear from the report 4 L. C. Jurist, 149.

Mr. Garth, Q. C., and Mr. A. T. Watson, for the appellant:

Three questions arise:—First, we insist that the marriage has never been celebrated with the forms and ceremonies required by the ancient law of France, in force in Lower Canada, so as to constitute a valid marriage. (The Lord Chief Baron:—If there was a marriage *de facto*, it lies on you to show it was invalid in law.) To be valid it ought to have been performed by the Parish Priest: Daguesseau, Tom. v. pp. 150,151,152,153; Pothier "Mariage" P. I. Ch. 1; No 3, Partie IV. cap. 1 sec. 3, Art. 1 par. 5, No. 350, (Ed. 1781) Danty, p. 102, Durand de Maillanne, Dict. Can: vo. Clandestin, Tom. 1. p. 523, Ed. Lyons, 1770, De Héricourt Loix: Eccles: Ch. v. Art. i. No. 27, p. 474. The respondents' Council objected to this point being now raised, as in the declaration the appellant had admitted the marriage and only sought to avoid it as being celebrated when Scott was *in extremis*, and unconscious, and submitted that it was not for

Scott and Paquet and others.

the respondents to give formal proof of the factum of such marriage; but that if it were necessary the proofs were sufficient according to the Provincial Statute 35. Geo. 3, c. 4, sec. 4, which only requires the presence of two witnesses. This point was not further argued.

Second, the evidence of the Medical attendants of Scott shews that at the time the marriage took place between Scott and the respondent, Paquet, which was only two days before his death, Scott was *à l'extrémité de la vie* so as to render such marriage null and void, by the Ordonnance of Louis XIII of 1639, Art. 6, and the Edict of the year 1697 depriving of civil affect marriages *in extremis*, Pothier Tom. v. p 238, Partie 5. Ch. II p 429; *Ib* 239 Merlin Rep. de Jur. verbo, " mariage " Tom. XIX, sec. 9, Art. 3; *ib* Tom. VIII, sec. 19, par. 1, No. 3, p 47 (Quarto Ed.)

Third, the evidence establishes the fact that at the time of the pretended marriage, Scott was delirious and unconscious from an attack of *delirium tremens* and then incapable of entering into any valid contract. In Dimes v. Dimes (*) The Attorney-General v. Parnther (†) Dew v. Clark (‡) the principles relating to lucid intervals are fully explained, and those authorities shew that the party claiming must establish that fact.

Sir *R. Palmer*, Q. C., and Mr. *Westlake* appeared for the respondents, but were not called upon.

July 10. Their Lordships' judgment having been reserved was now pronounced as follows:

The Lord Chief Baron: This is an appeal from a judgment by the Court of Queen's Bench for Lower Canada, affirming a decision of the Superior Court of that Province in an action brought by the appellant against the respondents, and in which the question to be determined was whether a marriage between William Henry Scott, deceased, and the respondent, Marie Marguerite Maurice Paquet, on the 16th December, 1851, was valid or void.

Several questions were raised (but disposed of during the argument) upon the alleged non-compliance with the formalities essential to the validity of a marriage by the law of France which prevails in Lower Canada. The objections to the marriage upon these grounds (which appeared when duly considered to be unsupported by the authorities) were abandoned by the Counsel for the appellant. Two questions alone remain: The first, whether this marriage was contracted while Mr. Scott was " *à l'extrémité de la vie*, " within the meaning of the 6th Article of the Ordonnance of 1639; the second is, whether at the time when the marriage was so contracted, Mr. Scott was of sound mind and in possession of his faculties.

Both these questions have been decided in favour of the respondents, unanimously by the three Judges of the Superior Court and by three Judges out of four of the Court of Queen's Bench in Lower Canada. And we think that this Court ought not, unless there be manifest error in the judgments under appeal, to overrule these decisions so pronounced in the Country in which the law of France, by which the first question must be determined, prevails, and must be

* 10 Moore's P. C. Cases, 422. † 3 Bro. C. C. 440. ‡ 1 Add. Ecc. Rep. 279.

known and continually acted upon by the Courts of Law; and in which also the witnesses on both sides reside and may have been more or less known to or seen when under examination by the Judges or some of them, who likewise are familiar with the usages and customs of the place in which all the circumstances which formed the subject of the evidence occurred.

The language of the Ordonnance is this:—*Voulons que la même peine (de la privation des successions) ait lieu contre les enfants qui sont nés de femmes que les pères ont entretenues et qu'ils épousent lorsqu'ils sont à l'extrémité de la vie.*

Pothier (No. 430) says "*Il faut que ceux qui attaquent ces mariages prouvent deux choses.*

"1. *Le mauvais commerce qui a précédé le mariage.* 2. *Que la personne était in extremis lorsque le mariage a été contracté.*

"*Le Mariage est censé contracté in extremis lorsque la personne était au lit malade d'une maladie qui avait un trait prochain à la mort quoiqu'elle ne soit morte que quelques mois après.*"

Several causes appear to have been decided upon this Ordonnance, the effect of which is well expressed in Merlin "Répertoire, verbo "Mariage," sect. 19, par. 1, No. 3, p. 47, vol. viii. in quarto: "*Le véritable, l'unique cas d'appliquer l'Ordonnance est lorsqu'un homme se marie dans un temps où il se sent frappé de mort, ou la violence du mal et l'impuissance des remèdes lui fait sentir que la vie est prête à lui échapper.*"

It seems from this commentary upon the law that the patient must himself feel that he is dying, or that the violence of the disease and the inefficacy of all remedies impress him with the belief that life is about to depart. There is nothing in the evidence to show that Mr. Scott thought he was a dying man. Neither Dr. Jamieson nor Mademoiselle Paquet thought so—at least, until after the day of the marriage. Dr. Jamieson himself says: "From the beginning of his disease, I excepted that he would recover from his disease." "On the first, second and third day, I did not look upon the disease as a decidedly mortal one." "I never conveyed to Scott the idea that he was or might be in danger." And in an other part of his deposition he says: "On the morning of the 17th, the defendant Miss Paquet, inquired of me as to the state of the late Mr. Scott. I informed her that he was in a dangerous condition, and she appeared surprised that the disease was at all connected with danger."

Besides this law is in restraint of natural liberty, and it must therefore be clear, beyond doubt, that it is applicable to the particular case before a Court of Justice can hold to be of force and effect to avoid a marriage. The great question in this case, however, is whether Mr. Scott was in a state of mind, or memory, and understanding, to enable him lawfully to contract marriage.

On the one hand, we have the evidence of Dr. Jamieson, who visited him first on the afternoon of the 15th of December, and found him suffering under erysipelatous inflammation in the face, arising as it appears from his having come in contact with a heated stove, while dozing or sleeping in a chair. Strong aperients were administered, and at a later period of the afternoon, the Doctor concluded that *delirium tremens* was approaching. At this time he quitted the house in which he resided, with his sister, and proceeded to the house of the respondent

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Paquet, shewing signs of great excitement and irritability, with delusions, as he went along.

At a later hour he was again visited by the Doctor, who remained with him during the greater part of the night, saw him again the next morning, and left him about two in the afternoon, when, as he says, he was labouring under *delirium tremens*, developing itself by mental hallucinations. He then again left him in the house of the respondent for some hours, and returned in the evening, and from this time until the morning of the 18th, it is asserted he was wholly incapacitated by this disease from doing any act whatever requiring the exercise of his faculties; and on the night of that day, the 18th, he died.

If Dr. Jamieson be correct as to the existence of *delirium tremens* and the consequent incapacity of Mr. Scott, although he does not expressly declare that it was impossible he should have been competent to exercise his faculties in a rational manner either on the afternoon of the 15th, or during an hour or more on the 16th, it is certainly to be inferred from the whole of his evidence, taken together, that no such intervals of capacity could have existed, and that it was only during the time necessary to answer one or two questions, or some other short period of tranquillity, that he can be said to have been capable of exercising his reason and understanding.

On the other hand we have the testimony of at least three witnesses of unimpeached character, and having no interest whatever in the perpetration of a fraud, or in the misrepresentation or suppression of the truth, who depose to a series of acts done by the deceased, which, if truly narrated and described, prove incontestably that Mr. Scott was during the space of an hour and more, within which the marriage was solemnized and the marriage contract prepared under his instructions and executed by himself, in a perfect state of capacity, memory and intelligence. We may pass by the communication between Ancy, the Roman Catholic priest, and Mr. Scott, on the afternoon of the 15th, merely observing that the deceased upon this occasion expressed himself rationally while informing the priest of his having had an altercation with his sister, that he was desirous that he should marry him to Mademoiselle Paquet, that he had sent to him for that purpose, and when told that a dispensation was necessary, he desired that a Bishop should be written to immediately, in order that it might be obtained. The following day, the 16th, upon the arrival of the dispensation, the priest proceeded again to the house of Mr. Scott, and found him, as he positively swears, in perfect possession of his understanding; and here begins a series of acts on the part of the deceased, which if really done prove to demonstration a state of perfect mental competency and capacity. He received the priest's explanation of the oath or engagement required that his wife should be left to the free exercise of her religion and that the children might be brought up in the Roman Catholic faith; he observed that at a former period (and in this statement he is confirmed by Mons. Père Martin, the priest) he was about to marry Mademoiselle Paquet, but objected to this engagement, on the ground that he was required to pledge himself that the children should be so brought up, and not merely that he would permit them to use their own free will as to their religion; he gave the necessary information

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as to the names of his relatives, and the ages of his children, in order that the usual registration should be made; he took the pen in his hand and wrote the name of one of his parents, because the priest was unable to spell it; he sent for a Notary and his clerk; he gave instructions for the marriage contract, informing the Notary that his wife was to be required to give up the *communauté de biens*, and that in consideration of this renunciation, he conferred upon her and her heirs all his immoveable or real estate, which he described as situated in the several parishes of St. Eustache and St. Martin; he gave also to his wife, but in trust only, in equal thirds for two of his sisters, Anne Scott and Jane Scott, and his daughter, by Paquet, Caroline Scott, a large sum of compensation money to which he was entitled by reason of losses sustained in the rebellion of 1837; and besides disposing of the remainder of his property under this marriage contract, it is sworn upon the evidence of Archambault the Notary, that upon a suggestion that he should dispose of his property, by will, he himself declared that he had determined to do so by a marriage contract; and the contract was drawn up and executed accordingly. All this, together with the celebration of the marriage itself, is confirmed by the independent testimony of M. Féré, a friend of the deceased residing at St. Eustache. It is impossible, unless these witnesses are guilty of deliberate perjury, that the deceased was at this time otherwise than in perfect possession of his mind, memory, and understanding, and of perfect capacity to contract a lawful marriage. It is true that during this proceeding, upon a noise being heard from the agitation of the shutters by the wind, he is proved to have cried out, "they are coming! they are coming!" If this were, as suggested by the respondents, an expression uttered under an idea that the intelligence of the result of his election had arrived, it requires no comment. But if it were, as insisted by the plaintiff, the manifestation of a delusion created by *delirium tremens*, it appears to have been dispelled and to have ceased upon his being convinced, a few moments afterwards, that the noise was occasioned by the wind.

We think, therefore, on the whole, that whatever degree of suspicion may naturally arise from the very cogent and circumstantial evidence of Doctor Jamieson, coupled with the testimony of the witnesses who spoke to the wildness and excitement of his demeanour during certain portions of the three days in question, that all this together is insufficient to outweigh the positive and distinct evidence of so many witnesses to the whole scene of the solemnization of the marriage, and the preparation and execution of the marriage contract, or to warrant us in setting aside the united decisions of the Superior Court, and the Court of Queen's Bench in Lower Canada, by which the judgment in favour of the respondents and now under appeal has been pronounced.

Their Lordships will, therefore, humbly report to Her Majesty as their opinion that the judgments of the Court of Queen's Bench of Lower Canada and of the Superior Court ought to be affirmed, and this appeal dismissed; but under all the circumstances of the case, without costs of this appeal on either side.

Judgment confirmed.

Wilde, Rees, Humphry & Wilde, solicitors for respondents.

Ashurst, Morris & Co., solicitors for appellant.

(F. W. T.)

QUEBEC, 25TH OCTOBER, 1867.

Coram BLACK, C. B. J.

"SECRET," *Davison*, master.

Held:—That to entitle the owner of a ship, having by compulsion of law a pilot on board, to the benefit of exemption from liability for damage, the fault must be exclusively that of the pilot.

Where the accident was attributable to a deficiency of look-out and management on board the vessel doing the damage, and not solely to fault or neglect on the pilot's part, the owner was held liable for the damage.

This was a cause promoted by the owner of the steam-tug *Lake St. Peter*, against the steamer *Secret* for damage caused by the sinking of the *Lake St. Peter* in the night of the 8th August last. The following judgment was this day pronounced in the case:

THE COURT (*Hon. Henry Black. C. B.*)—In this case the suit is brought by Edouard Gingras, sole owner and master of the steamer *Lake St. Peter*, of the burthen of sixty-two tons, a tug steamer used for the purpose of towing vessels and rafts in the river St. Lawrence, against the steamer *Secret*, of the burthen of two hundred and ninety-four tons, owned by Michael Connolly, and whereof William Davison was master, to recover damages sustained by the *Lake St. Peter*, by a collision which occurred in the night of the eighth of August last on that part of the river St. Lawrence known as Lake St. Peter. The steamer *Lake St. Peter* left Quebec in the forenoon of that day on a voyage to the Rivière des Prairies behind Montreal, for the purpose of towing a raft from thence to Etchemin near Quebec, and arrived opposite Port St. Francis at ten o'clock at night; and having passed light ship at the lower bar of the Lake, she had proceeded up the lake a few miles when the two vessels came in sight of each other. The *Secret* had left Montreal the same day, about six o'clock in the afternoon, with part of a general cargo on board, bound and cleared for Quebec, Gaspé, Dalhousie, Miramichi, Shediac and Pictou,—the four last ports being out of the limits of the late Province of Canada,—and having on board and being in charge of Félix Hamelin, of Montreal, a branch-pilot duly licensed for and above the harbour of Quebec, as by law required in respect of vessels over one hundred and twenty-five tons leaving the port of Montreal for a port out of the said Province. About eleven o'clock that night she was in Lake St. Peter, a short distance above the Pointe du Lac light, and steering towards it, when the persons on board her saw the lights of the steamer *Lake St. Peter* coming up the Lake. The night was clear, and both vessels had their proper lights up. So far the statements of the witnesses adduced on either side agree. The one vessel being bound down while the other was coming up the channel, they must have been going in opposite directions, and as they saw each other when a mile or two apart it would seem to have been the duty of each to obey the law in such cases, and to port her helm in order to pass on the other side, which the people of each allege that she did. It was also the duty of each to avoid proceeding at too swift a rate, and the people of the *Secret* allege that their vessel was not, and had not been for some time, proceeding at more than half speed. If these vessels actually meeting end on, or

nearly end on, as would seem probable, and each ported her helm in time, it would have been impossible that they could have come into collision; and the question is therefore whether they were so meeting, and whether one or both failed to obey the law; or whether in any other way either of them failed to observe the rules of good seamanship, and of the law under the circumstances. On these points the Court, availing itself of the practice adopted in England to call in the assistance of professional gentlemen as assessors, has requested the opinion of Captain Ashe, of the Royal Navy, and Captain Armstrong, the Harbour Master of Quebec, and one of the wardens of the Trinity House, two gentlemen whose long experience and professional skill are such as to give indisputable authority to their opinion, and having proposed to them the following questions:—

1. Whether the collision in question occurred from carelessness, mismanagement or want of proper skill on the part of either and which of the vessels? and,

2. If the collision occurred through the fault of those on board the *Secret*, then, whether the loss or damage was occasioned by the exclusive fault or incapacity of the pilot in charge of that vessel; or by the fault of the master, officers or crew, or any of them, either by the want of a proper look-out, or by failing to obey the pilot's orders or otherwise?

The Court has received from Captain Ashe and Captain Armstrong their answers in writing, and in the following terms:—

"In answer to the first question, after having well weighed the evidence on both sides, we are of opinion that the steamer *Lake St. Peter* carried out the regulations in exhibiting the lights required by law, and also in having put her helm a port on first seeing the *Secret's* lights, and in sufficient time, as is proved by the distance she ran from the channel (or out) to where she sunk, and therefore we do not consider her in fault.

"In answer to the second question, it appears that Félix Hamelin, pilot on board the steamer *Secret*, declares in his evidence that from the time they left Montreal he had charge of the steamer, and that all his orders were promptly executed. Therefore he was in error in not porting his helm immediately on seeing the lights of the steamer *Lake St. Peter* on his starboard bow, and bringing them on his port bow, but persisted in keeping them on the starboard bow until the period had arrived when it was utterly impossible for any movement of the helm to have prevented the collision; therefore we are of opinion that he disobeyed the principal rule laid down for the guidance of ships and vessels at night.

"On the important question of look-out. No doubt the pilot and helmsman, from their elevated position often see a light even before the look-out man, but this in no way exonerates the ship for not keeping a vigilant look-out, and immediately reporting all lights, &c., to the pilot. It appears that Lavoie was stationed forward as a look-out, but what he saw or did is not known, as he was not brought forward as a witness on the part of the defence; therefore we are at liberty to suppose Lavoie either did not keep a good look-out, or that he did not see what he might have seen, or if he did see the lights of the *Lake St. Peter* he did not report them. Therefore we are of opinion that there was not a proper look-out kept. And further, there was no proper communication between the deck and the engineroom, as the speaking trumpet was out of [illegible]; and there

was no one near the wheel that understood the telegraph. We therefore think the ship in fault in not having these necessary adjuncts to a ship's safety in working order and attended to.

" J. D. ARMSTRONG,
" E. D. ASHE,
" Commander R. N."

The common law of the Admiralty, before the passing of any Statute law on the subject, was that the taking on board a pilot, though he was duly authorised to act as pilot, did not exempt the owners from responsibility for his acts; and the decisions of this Court were in accordance with this rule until the employment of a pilot was made compulsory by law. And now by an act of the Legislature of Canada, (27-28 Vic., c. 13., s. 14.) adopting the provision contained in the Merchant Shipping Act, " No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any place where the employment of such pilot is compulsory by law." An act of the same Legislature, passed in the same Session, makes it compulsory on the master or person in charge of each vessel over 125 tons, leaving the port of Montreal for a port out of this Province, to take on board a branch pilot for and above the harbour of Quebec, to conduct such ship, under the penalty mentioned in the act. The *Secret* came within the operation of this act, as she was over the burthen of 125 tons; and cleared from Montreal for ports out of the late Province of Canada. But, in order to entitle the owner to the benefit of the exemption from liability, the fault must be exclusively that of the pilot; and it must be shewn that the order which caused the damage was actually given by the pilot, the owner being responsible to third persons for the obedience of the master and crew to the orders of the pilot in everything that concerned his duty, and their attention and good conduct in keeping a proper look-out, and informing the pilot of any danger ahead, and in every other respect. If they fail in performing their duty, and damage occurs in consequence, the owner is liable notwithstanding the vessel is in charge of a pilot. The nautical assessors give it as their opinion that the collision was not occasioned by any fault or neglect on the part of the people belonging to the *Lake St. Peter*, thus negativing one of the grounds of defence taken by the owner of the *Secret*, and the Court sees no reason to come to a different conclusion from the evidence in the cause. They are also of opinion that there was not a proper look-out on board the *Secret*. The want of a competent and vigilant look-out exacts in all cases from the vessel neglecting it clear and satisfactory proof that the misfortune encountered was in no way attributable to her misconduct in this particular; and this has not been proved. There can be no presumption made in favour of the owner, who could have removed any presumption one way or the other, by calling the look-out man to prove the fact, and failing to do so he cannot call upon the Court to presume that a proper look-out was kept on board the vessel. No doubt, as stated in a recent decision of the judicial Committee of the Privy Council, the pilot may and probably does see a craft ahead as soon as any one else on board, but his attention is necessarily directed from time to time to other matters relating to the navigation

of the vessel under his charge, besides keeping a look-out, and on that account it may happen that he does not see an object ahead as soon as he ought to have been made aware of it in order to enable him to take measures to avoid it. Hence arises the necessity of having a man stationed on the forecastle with the special and sole duty of keeping a vigilant look-out. The pilot is continually called to the discharge of duties inconsistent with the keeping of a constant and vigilant watch, and he ought not to be relied upon for that purpose. In such a vessel as the *Secret*, his proper duties would materially interfere with the additional duties of a look-out. For some time before the accident, the pilot of the *Secret* had seen the bright white light at the foremast head of *Lake St. Peter;* but he did not see either of her coloured lights during the time she continued to the south or on the starboard bow of the *Secret*. "Je ne pouvais pas voir la lumière rouge du petit steamer," he says, "pendant qu'il était au sud de nous; mais j'aurais pu voir sa lumière verte, cependant je ne l'ai pas vue. Je ne sais à quoi c'est du." If the look-out man had reported these lights, and the pilot had been earlier made aware of the position of either of them, he might have taken measures to avoid the accident, and we are bound to suppose he would have done so; the movements of a steamer are always under control, her course can be changed at will, and her motion may be checked or even reversed in an incredibly short space of time. Upon the whole case I am of opinion that the accident is attributable to neglect and deficiency of look-out and management on board the *Secret*, and not solely to fault or negligence on the pilot's part; and that the owner is not entitled to the exemption from liability which the Statute provides. I accordingly pronounce for the damages sued for, and with costs.

Judgment for *Gingras*.

Andrews, Caron & Andrews, for the *Lake St. Peter*.
Hearn, for the *Secret*.
(I. T. W.)

COURT OF QUEEN'S BENCH.

APPEAL SIDE.

FROM THE DISTRICT OF RICHELIEU,

MONTREAL, 9TH DECEMBER, 1867.

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

CHARLES H. BEAULIEU, APPELLANT;

AND

EDWARD J. CHARLTON, RESPONDENT.

APPEAL. REVISION.

HELD:—1st. That an appeal made within the period of eight days from the rendering of a judgment subject to revision, allowed by law (27 and 28 Vict. Ch. 39 Sec. 22, for the adoption of proceedings to have and obtain a revision, is premature.
2nd. That such an appeal shall, on motion, be dismissed with costs.

On the 10th July, 1866, the appellant Beaulieu served his petition in appeal from a judgment rendered on the 6th July, 1866, by the Judge residing at Sorel,

Beaulieu and Charlton.

in the District of Richelieu, in a matter of insolvency under the Insolvent Act of 1864, Sec. 7. No. 3. On the 14th of July, 1866, the respondent Charlton inscribed the cause for revision before the Judges in Montreal.

The petition in appeal was presented on the 3rd September, 1866. On that day the respondent appeared, and made the following motion:

"Motion on behalf of respondent that the present appeal be declared prema-"ture, and hence dismissed with costs, inasmuch as the same was taken within "the delay allowed for the revision of the judgment rendered by the Honourable "Mr. Justice Loranger, and inasmuch as the said Charlton had duly inscribed "the case for review before the Superior Court of Lower Canada, sitting in "Montreal, as Court of Review, and that the record in this cause be transmitted "to the Court below." This motion was supported by a certificate from the Prothonotary that the case had been duly inscribed for revision. The parties having been heard, the Court, dissentiens Aylwin, J., maintained the motion and dismissed the appeal with costs.

AYLWIN, J.—I am of opinion that the order should be, that the record be returned to the Court below, so that the case may be submitted to the Court of Review, and that upon such revision being had, the record be sent up to this Court of appeals.

BADGLEY, J.—This is a matter of procedure, and its revision may serve as a guide for future cases of a similar character. Proceedings in insolvency were taken in the District of Richelieu against Dame Trépanier and *et al.* Mr. Barthe was the assignee in the case. In due course he prepared a dividend sheet of the estate, which was contested by both the parties in this cause, Beaulieu & Charlton, who both appealed to the Judge of the District sitting as the Superior Court in insolvency against the allowance of the dividend sheet: a judgment was rendered by the Court on the 6th July, 1866, which appears to have been as little approved by these parties as was the sheet itself, and both, therefore, took measures to have the judgment reversed. On the day of the date of judgment, Beaulieu moved the Court to be allowed to appeal which was granted at once, and security was given on the 10th July, on which day his petition to this Court was dated, and subsequently on the 3rd of September, 1866, presented by him to this Court praying for the issue of a writ of appeal. In the mean time Charlton had also adopted proceedings against the judgment so rendered on the 6th July and on the 14th, fyled his inscription in the Prothonotary's office Richelieu, for revision of the judgment by the Court of Revision at Montreal, duly and tinely deposited the requisite fees. At the presentation of the by Beaulieu he was met by a motion by Charlton, supported by a certificate by the Prothonotary of Richelieu of the proceedings for revision, whereby Charlton moved this Court for the rejection of the petition as being premature.

The difficulty arises in the Legislation of 1864, which has provided for the judgment of the Judge sitting in insolvency, and has also established the Court of revision by which the judgments of the Superior Court in appealable cases may be reviewed. This case arising in insolvency being made subject to the same proceedings in review, of course all judgments of the Superior Court in appealable cases are directly subject to appeal to this Court, including likewise that in insol-

vency; but the act establishing the Court of Review, provides that its judgment should be the final judgment of the Court or judgment revised, and it would be useless therefore to have two appeals, one upon the original judgment and another upon the final judgment in review.

To prevent this objection, it is provided by the act establishing the review that pending the eight days from the date of the judgment rendered by the Superior Court or by the Judge or Court in insolvency, nor pending the proceedings for such review, it shall not be competent to any party to appeal to the Court of Queen's Bench, see 22 sec. of ch. 39 of 27 and 28 Vict. 1864. The language is plain and precise.

Beaulieu having adopted proceedings in appeal within the eight days, within which Charlton had taken proceedings for review, the former was premature and by our judgment rejecting his petition, this Court is merely following out the plain provisions of the Statute. The petition therefore is dismissed with costs.

The judgment is *motived* as follows:

The Court of our Lady the Queen, now here, having seen and examined the petition of the said Charles H. Beaulieu for an appeal to this Court from the judgment of the Superior Court for the district of Richelieu sitting in insolvency, upon the dividend sheet made and prepared by the estate of the said insolvent by the said assignee thereof.

Having also seen and examined the motion made and fyled in this Court with the certificate of the Prothonotary of the said Superior Court fyled therewith by the said Edward J. Charlton, for the rejection of the said petition by reason that the said mover had duly and timely taken the proceedings required by law for the revision of the said judgment by the Judges of the said Superior Court sitting at Montreal as Court of Review. Considering that by law the said judgment in insolvency is appealable to this Court, but is also subject to review by the said Court sitting in revision as other judgments of the Superior Court in appealable cases, considering that an appeal to this Court will not lie within the period of eight days from the rendering of such revisible judgments, allowed by law for the adoption of proceedings to have and obtain such revision, nor whilst proceedings in revision are pending and being had in and before the said Court in revision; considering, therefore, that the said petition of the said Charles H. Beaulieu to this Court is premature, doth grant the motion aforesaid of the said Edward J. Charlton, and doth in consequence reject the said petition with costs against the said Charles H. Beaulieu, reserving to him to appeal to this Court after the rendering of the judgment in review, if he shall be so advised.

Appeal dismissed with costs.

A. Germain, attorney for appellant.

James Armstrong, Q. C., attorney for respondent.

(P. R. L.)

COUR SUPERIEURE.

EN REVISION.

MONTREAL, 28 NOVEMBRE 1867.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 675.

McCONNELL vs. DIXON AND BROWNE, OPPOSANT;

AND

FOULDS *et al.*, CONTESTANTS.

HYPOTHEQUE—DECONFITURE.

JUGE :—Que l'hypothèque acquise sur les biens d'un individu *non-négociant* en état de déconfiture, est valable en loi s'il n'y a fraude.

Le trois de juin 1866, l'opposant Browne ayant obtenu un jugement contre la défenderesse Anne Smith, le fit enregistrer le 5 juin 1866 sur les biens immeubles de cette dernière alors en déconfiture.

Sur le produit des biens immeubles de la défenderesse, l'opposant Browne ayant été colloqué en déduction de ce jugement, les opposants Foulds et al. contestèrent sa collocation sur le principe que la défenderesse était en déconfiture le 3 juin 1866, et que conséquemment l'opposant Browne n'avait pu acquérir aucune hypothèque. Les contestants prétendaient de plus que la défenderesse Anne Smith avait été commerçante. L'opposant Browne répondit spécialement à cette contestation qu'elle n'avait jamais été commerçante, qu'elle avait vécu en bourgeoise, et que par les lois du pays, il avait acquis une hypothèque valable par l'enregistrement de son jugement sur les propriétés de la défenderesse, fut-elle en déconfiture; ce qu'il n'admettait pas néanmoins.

Après enquête et audition des parties, la Cour Supérieure siégeant Sorel, dans le District de Richelieu, Loranger, J., renvoya la contestation et déclara la constitution de l'hypothèque valable et motiva son jugement comme suit:

La Cour.....considérant qu'il ne paraît pas par la preuve faite en cette cause que lors de la constitution d'hypothèque en faveur de Browne sur les biens d'Anne Smith mentionnée aux pièces de la contestation, cette dernière fût commerçante et que partant, l'insolvabilité de cette dernière, existante alors ou survenue depuis, ne peut, s'il n'y a fraude et elle n'est pas prouvée dans l'espèce actuelle, affecter la dite hypothèque en vertu de laquelle la collocation contestée a été accordée à Browne; a rejeté et rejette la dite contestation de Foulds & Hodgson avec dépens. Les opposants Foulds et al. portèrent ce jugement en révision devant trois juges à Montréal. Dans leur factum ils ont demandé l'infirmation de ce jugement pour les raisons suivantes:

1°. Because the said contestants should have been collocated *au marc la livre* with the other opposants, inasmuch as at the time the said Philo D. Browne obtained his judgment the said Anne Smith was notoriously insolvent *en état de déconfiture* and as the said Philo D. Browne well knew.

2°. Because the said Philo D. Browne never had any *hypothèque* against the property of the said Anne Smith by which he could acquire any priority of hypothec or mortgage in perference to other creditors.

3°. Because the said Philo D. Browne does not show that he had at any time any duly registered mortgage against the property of the said Anne Smith.

4°. Because the said Anne Smith was a trader at the time of the rendering of the said judgment of the third of June, one thousand eight hundred and sixty five against her, and had been such trader since the death of her husband, Henry Dixon.

5°. Because the said James S. Dixon and Anne Smith continued the business which existed at the time of the death of the said Henry Dixon, between him, the said Henry Dixon, and the said James S. Dixon.

6°. Because the judgment obtained by the said P. D. Browne on the 3rd June, 1865 was never signified to the said Anne Smith, and because the said Anne Smith never had any notice thereof.

7°. Because under any circumstances, the said Philo D. Browne had no mortgage or hypothèque upon the property seized and sold in this cause as number Three.

8°. Because the said contestants lways had a lien upon the property of the said James S. Dixon and Anne Smith, as trading together during all the time and times mentioned in their, the said contestants, opposition and contestation and pleadings.

L'opposant Brown dans son factum prétendit que la déconfiture d'un individu non négociant n'empêche pas de prendre inscription sur ses biens.

3 Troplong., hyp., No. 662.

"Jamais dans l'ancienne jurisprudence il n'avait été défendu" dit Troplong No. 661 "d'acquérir privilège ou hypothèque sur les biens d'un individu non-négociant "en état de déconfiture."

Loyseau, off., liv. 3, ch. 8., Nos. 9 et 10: Ferrière, sur Cout. P., art. 179. 13. L. C. Reports, p., 374, Anderson vs Généreux.

La cour de Révision a confirmé le judgment sur les principes émis par la Cour de première instance.

Jugement confirmé.

James Armstrong, avocat des opposants Foulds *et al.*

Lafrenaye & Bruneau, avocats de l'opposant Browne.

P.R.L.

MONTREAL, 30 NOVEMBRE, 1866.

Coram BERTHELOT, J.

NO. 1815.

Méthot vs. *Lalonde dit Ganiwas.*

JUGE:—Qu'il est permis de poser à un témoin, une question tendant à établir une contradiction dans le témoignage d'un autre témoin de la partie adverse, nonobstant que ce dernier témoin n'ait pas été interrogé sur ce point.

Le demandeur ayant examiné entre autres témoins, un nommé Prévost et ayant clos son enquête, le défendeur examina comme son témoin le nommé Pierre Dorion dit Champagne et entre autres questions lui posa la suivante:

Question.—Continuez à rapporter ce que le dit Prévost vous a alors dit avoir répondu au demandeur, quand le dit demandeur, Monsieur Méthot, lui demandait des informations sur le feu qui avait consumé une partie de ses terres, et rapportez au long tout ce que le dit Xavier Prévost vous a dit avoir dit du

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demandeur concernant le dit feu soit sur son origine, ou sur la manière qu'il avait été allmé par lui, ou par d'autres sur la terre du défendeur, ou ailleurs, soit avec, ou sans la permission, consentement ou autorisation du défendeur?

Le demandeur s'objecta à cette question comme suit: "objecté à cette question comme tendant à prouver une conversation du témoin Prévost, sur laquelle ce dernier aurait dû être interrogé préalablement et comme étant illégale et tendant à faire une preuve par oui-dire."

Le juge présidant aux enquêtes a maintenu l'objection en ces termes "objection maintained in so far as relates to the declaration of Prévost made to Méthot to show a contradiction, Prévost has not been interrogated on that point and no further. J.S.

L'entrée suivante fut faite—savoir: "Le défendeur excipe de ce jugement, dont il entend demander la révision, et dont il demande la révision pour le dix-septième jour d'octobre prochain. La cause est en conséquence continuée au dix-sept octobre prochain pour audition sur l'objection et exception et le déposant ne dit rien de plus.

Le 17 octobre 1866 le défendeur fit la motion suivante, "motion de la part du défendeur que l'interlocutoire prononcé à l'Enquête en cette cause par l'Honorable Juge Smith le cinquième jour d'octobre courant, maintenant l'objection faite par le demandeur à la denière question posée au témoin du défendeur Pierre Dorion dit Champagne, quant à ce qui se rapporte à la déclaration faite par le témoin Prévost au demandeur dans le but d'établir une contradition dans le témoignage du dit Prévost vû que Prévost n'a pas été interrogé sur ce point soit, (le dit interlocutoire) revisé par cette Cour et mis au néant, pour entre autres raisons les suivantes: Parce que la question posée au dit Dorion dit Champagne est illégale et pertinente:

Parceque le défendeur a le droit d'établir tous aveux faits par le dit témoin Prévost à l'encontre de la prétendue permission ou autorisation qu'il a dit avoir obtenue du défendeur de mettre le feu sur la terre du défendeur; Parceque le défendeur a le droit de prouver à l'encontre de tous les faits amenés de l'avant par le témoin Prévost.

Parceque le défendeur n'était aucunement obligé en loi de poser à Prévost aucune question concernant les conversations qu'il a pu avoir avec le défendeur concernant le feu en question;

Parceque le dit interlocutoire est mal fondé en loi, et doit être rejeté et permission donnée de poser au dit témoin Dorion dit Champagne la question que lui fait le défendeur comme susdit. Le tout avec dépens contre qui de droit.

Après l'audition des parties; la Cour a infirmé l'interlocutoire, a permis au défendeur de poser la question au témoin, et a motivé son jugement comme suit. La Cour, après avoir entendu les parties sur la motion du défendeur du 17 octobre dernier aux fins que l'interlocutoire prononcé à l'Enquête en cette cause par l'Honorable Juge Smith le cinq du dit mois d'Octobre dernier maintenant l'objection faite par le demandeur à la dernière question posée au témoin du défendeur Pierre Dorion dit Champagne quant à ce qui se rapporte à la déclaration faite par le témoin Prévost au demandeur dans le but d'établir une contradiction dans le témoignage du dit Prévost, vû que Prévost n'a pas été

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i nterrogé sur ce point, soit le dit interlocutoire revisé par cette Cour, et mis au néant pour les raisons mentionnées dans la dite motion ; avoir examiné la procédure et délibéré :

Accorde la dite motion avec dépens et rejette et met de côté le dit interlocutoire du cinq Octobre dernier. En conséquence la Cour donne permission de poser au dit témoin Dorion dit Champagne la question que lui fait le défendeur.

Bondy & Fauteux, avocats du demandeur.

Moreau & Ouimet, avocats du défendeur.

(P. R. L.)

IN REVIEW.

MONTREAL, 28TH SEPTEMBER, 1867.

Coram BERTHELOT, J., MONK, J., LORANGER, J.

No. 889.

Walcott vs. *Rhionson* and *Johnson*, *Opposant*, and *Barnes*, *Intervening party*.

Held:—1st. That an intervention is in the nature of a demande, and the intervening party stands exactly in the same position as a plaintiff.

2nd. That on the reasons and grounds of intervention a new issue is raised and proceedings must be taken and followed as in ordinary action.

3rd. That an intervening party cannot foreclose a party already *en cause*, without a regular demand of plea, and a lapse of the delays allowed for similar pleadings in ordinary suits, and such foreclosure will be raised on motion.

4th. That an inscription on the *Rôle d'Enquete ou de droit* without having regularly demanded a plea or contestation to the intervention, and having allowed the legal days to elapse, will on motion to that effect be struck *rayé*.

This case was inscribed for the purpose of reviewing a final judgment rendered by Honourable Mr. Justice Sicotte on the 2nd July, 1866, in the Superior Court, St. Hyacinthe, and also for reviewing his ruling on two motions made by opposant on the 22nd June, 1866.

The plaintiff in this cause sued and obtained a judgment against defendant for $1560 interest and costs, at St. Hyacinthe, the 12th January, 1866, being for balance of *bailleur de fonds* claim transferred him, and on the 16th August, same year, caused an execution to issue and seized the real estate mentioned therein.

On the 16th December, 1866, the opposant on the grounds that plaintiff had been paid, and that there was collusion and fraud between the plaintiff and defendant, fyled an opposition *à fin d'annuller* to the said seizure.

On the 16th February 1867, George F. Barnes presented a petition to be permitted to intervene, and take up the *fait et cause* of plaintiff in virtue of a presumed transfer made to him of the said judgment against defendant ; the intervention was allowed on the 21st February, said intervening part fyled an intervention, several exhibits and a contestation of the opposition.

On the 3rd April, 1866, the opposant was foreclosed without any demand of plea to the intervention or answer to the contestation, and a certificate of the Prothonotary is granted to the effect that the same has not been fyled. Articulations of facts are fyled by intervening party and answered negatively by opposant. On the 2nd June the cause is inscribed on the rôle for enquête, and final hearing *ex parte* for the 22nd June. On said day opposant presented two mo-

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tions; the first to cause the foreclosure in date of 3rd April, and the certificaet thereof declared illegal and irregular for the following reasons:

1st. Because said proceedings are irregular, illegal, null and void inasmuch as no demand of plea, or answer to the intervention fyled by said intervenant, was ever served on, accepted by or copy delivered to the attorney of the opposant or to himself, or to any other person for him or on his behalf.

2nd. Because no sufficient legal, regular foreclosure was ever made. The other motion was to set aside and reject the inscription for proof, and merits as illegal and irregularly fyled for the following reasons:

1o. Because a direct cause of action and a distinct issue were raised by the intervention, and a plea should have been demanded from opposant.

2o. Because according to law and practice the intervening party should have demanded a plea or answer to his intervention.

3o. Because opposant could not be foreclosed from answering said intervention without a demand, or plea, or answer, as being called on to declare whether he admitted or contested the said intervention.

4o. Because all and every the proceedings on said intervention at every stage is and are illegal and irregular.

These two motions were dismissed with costs, opposant fyling exceptions to the judgment and a declaration that he proceeded under all legal reserves and objections; one witness was examined, on the 2nd July, 1866; judgment was rendered dismissing the opposition with costs.

The opposant in review contended:

1st. That Barnes did not show, nor had he any right to intervene in this cause. The transfer of the rights of Walcott, in the judgment firstly referred to, having been made by one Leckey, of Acton Vale, as agent of the plaintiff in virtue of a power of attorney *sous seing privé* executed before witnesses at Boston in Massachusetts, one of the United States, which said power of attorney had never been authenticated before a Mayor or other Magistrate, Judge of any Court of Record, British Consul or other public officer of the country where it bears date. That the deposit of this illegal power of attorney before Doucet, notary, was of no effect and vested no powers in Leckey and therefore the transfer by him as attorney for Walcott to Barnes was worthless under cap. 90 sect. 12, C., S.L.C., and no proof was of record, regarding the same.

2nd. That the intervention was illegally fyled, inasmuch as more than three days had elapsed from the time permission was granted up to the fyling of the same, to wit, five days (from the 16th to the 21st February,) vide cap. 83., S. 71, SS. 2, C., S.L.C.

3rd. That a demand of plea should have been made, and the foreclosure was illegal, vide same cap. and SS. as above, "when such service is fyled at the office "aforesaid; *proceedings shall be had as in an action of the same nature.*"

4th. That the inscription was premature, as no legal foreclosure was made or Johnson put *en demeure* to declare whether he admitted or contested the intervention of Barnes.

The Court was unanimous in reversing the judgment of the Superior Court at St. Hyacinthe, and the judgment was rendered in the following terms:

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La Cour Supérieure siégeant à Montréal, présentement en Cour de révision ayant entendu l'opposant et l'intervenant par leurs avocats respectifs sur le jugement interlocutoire rendu le 22 juin 1866, et le jugement final rendu le 4 juillet 1866, dans la Cour Supérieure siégeant dans et pour le district de St. Hyacinthe, ayant examiné le dossier et la procédure, et ayant pleinement délibéré, considérant que le dit opposant a été irrégulièrement forclos du droit de plaider à l'intervention du dit George F. Barnes et de répondre aux moyens de contestation de son opposition. Vû qu'il n'avait jamais été mis en demeure de faire tel plaidoyer et réponse, et que tous les procédés faits depuis telle forclusion icelle comprise, ont été entachés d'irrégularité et de nullité et qu'il y a erreur dans le dit jugement du 22 juin 1866, qui rejette la motion de l'opposant pour être relevé de telle forclusion et pour rayer l'inscription pour enquête et audition faite par le dit intervenant et que partant il y a également mal jugé dans le jugement final qui déboute l'opposant de son opposition. Vû que la cause n'avait jamais été valablement mise en état d'être jugée, a revisé et revise, cassé et infirmé, casse et infirme les dits deux jugements et annule et met au néant tous les procédés faits depuis la dite forclusion icelle comprise, et ordonne qu'il sera de nouveau procédé à l'instruction du procès, pour être ultérieurement jugé ce que de droit.

Et la Cour condamne l'intervenant aux dépens d'instance en révision et ordonne la remise du dossier à la dite Cour Supérieure à St. Hyacinthe.

S. B. Nagle, for opposant in Court below.
Chagaon, Sicotte & Lanctot, for intervening party in Court below.
Nagle & Pagnuelo, for opposant in review.
Doutre & Doutre, for intervening party in review.
(S. B. N.)

TROIS-RIVIERES, 23 MARS 1866.

Coram POLETTE, J.

NO. 54.

Sévère Vaillancourt vs. Rose de Lima Lafontaine.

MARIAGE.—EMPECHEMENT DIRIMANT.—CLANDESTINITÉ.

JUGE:—1o. Que dans une action en nullité de mariage entre deux catholiques, fondée sur un empêchement dirimant, le tribunal civil ne peut prononcer la nullité du mariage qu'après que le lien religieux ou sacramentel a été déclaré nul par l'autorité ecclésiastique;
2o. Qu'un mariage contracté devant un autre prêtre que le propre curé est nul;
3o. Qu'un mariage contracté malgré l'empêchement d'affinité au premier degré est nul;

Le demandeur, domicilié en la paroisse de Yamachiche, avait épousé en premières noces, le 19 avril 1858, Zoé Lafontaine, qui mourut le 27 février 1864. Après le décès de cette dernière, savoir en juin ou juillet 1865, Vaillancourt voulut épouser Rose de Lima Lafontaine, fille majeure, sœur germaine de sa première femme, et domiciliée comme lui en la dite paroisse de Yamachiche. Il communiqua son désir à son curé, M. l'abbé Dorion; celui-ci lui dit que ce mariage était impossible, parceque l'évêque des Trois-Rivières ne donnerait pas la dispense nécessaire pour lever l'empêchement d'affinité au premier degré qui existait entre Vaillancourt et Rose de Lima Lafontaine. A ces représentations de

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son curé, le demandeur répondit que s'il ne réussissait pas à obtenir cette dispense, il était décidé à se marier avec une autre personne de la paroisse des Trois-Rivières, et il demanda en conséquence à son curé un certificat de liberté pour établir sa capacité de contracter mariage avec cette fille, certificat que le curé lui accorda volontiers.

Muni de ce document, Vaillancourt se rendit à Trois-Rivières avec la défenderesse, et le 11 de juillet 1865, à 6 heures du matin, ils allèrent ensemble trouver M. l'abbé Baillargeon, curé de la paroisse des Trois-Rivières. Voici le récit que donne ce dernier témoin du demandeur, des faits qui se passèrent alors:

" J'ai trouvé le demandeur et la défenderesse à la sacristie de l'église cathédrale; le demandeur m'a présenté une lettre du R. Messire Dorion, curé de la paroisse d'Yamachiche, comportant que le demandeur, qui était porteur de la lettre, venait à Trois-Rivières pour se marier avec une personne des Trois-Rivières. Le demandeur m'a dit qu'il venait pour se marier avec la personne qui était avec lui et qui était la défenderesse. Je leur ai dit, comme ils désiraient obtenir dispense de trois bans, qu'ils devaient venir me trouver au presbytère, vers huit heures. Ils y sont venus. J'ai fait aux parties les questions ordinaires en ces cas-là. La demandeur me dit qu'il était de Yamachiche et la défenderesse m'a dit qu'elle était domiciliée à Trois-Rivières et qu'elle demeurait à la Banlieue depuis, au meilleur de ma connaissance, un an et demi. Après les interrogatoires que je leur ai faites et les réponses que j'en ai obtenues, j'ai constaté qu'il n'y avait aucun empêchement au dit mariage; alors j'ai conduit le demandeur seulement chez monseigneur, et je l'ai laissé seul avec Mgr. l'évêque des Trois-Rivières. Quelques minutes après, Mgr. vint me dire que toutes les choses étaient correctes et que je pouvais procéder à la célébration du dit mariage. Sur ce, je suis parti pour la sacristie de l'église paroissiale avec les dites parties et les témoins nécessaires à la célébration du mariage. Je leur ai demandé leurs noms à la sacristie de l'église paroissiale, mais je crois bien leur avoir aussi demandé au presbytère. Le demandeur m'a dit qu'il s'appelait Sévère Vaillancourt et qu'il était veuf de Zoé Lafontaine, et j'ai demandé aussi au demandeur comment s'appelait la défenderesse; il m'a répondu qu'elle s'appelait *Rose de Lima Lafond*. J'ai alors demandé à la défenderesse comment elle s'appelait. Elle m'a répondu qu'elle s'appelait *Rose de Lima Lafond*. Là-dessus j'ai procédé au mariage en présence de Léandre Cadieux et Thomas Gagnon. C'est moi qui ai reçu leur consentement de mariage et qui les ai marié dans l'église paroissiale."

Après ce prétendu mariage, le demandeur et la défenderesse retournèrent dans leur paroisse, à Yamachiche, et cohabitèrent ensemble. Le curé, M. l'abbé Dorion, l'ayant appris, fit venir le demandeur et lui dit qu'il n'était pas marié, que son mariage n'était pas valide et qu'il ne devait pas continuer de cohabiter avec la défenderesse. M. l'abbé Dorion lui suggéra aussi de demander de nouveau une dispense afin de faire revalider son mariage. Le demandeur et la défenderesse adoptèrent le conseil de leur curé, et ils adressèrent une supplique à l'évêque des Trois-Rivières, le 29 août 1865, à laquelle Sa Grandeur répondit par une lettre en date du 30 août, les informant que les règles canoniques, aussi bien que ses pouvoirs, ne lui permettaient pas d'accorder une telle dispense

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Ce n'est qu'après ces événements, savoir le 14 octobre 1865, que le demandeur a intenté son action en nullité de mariage, dans laquelle, après avoir allégué les faits que nous venons de rapporter, il conclut à ce que son mariage célébré avec la défenderesse soit mis de côté comme nul et de nul effet et qu'il soit déclaré que le dit mariage a toujours été nul et illégal; à ce que le dit demandeur soit déclaré être quant à la liberté de sa personne dans le même et semblable état qu'il était avant la célébration du dit prétendu mariage et à la même manière que si le dit prétendu mariage n'eut jamais été célébré.

A cette action, la défenderesse comparait par M. P. E. Panneton, et elle est ensuite forclose de plaider, ne l'ayant pas fait dans les délais prescrits par la loi.

A l'enquête la défenderesse interrogée sur faits et articles, admet les principaux faits allégués dans la déclaration; elle dit que ce n'est pas elle qui s'est donnée à M. l'abbé Baillargeon comme s'appelant Rose de Lima Lafond, mais que c'est le demandeur qui a dit que c'était là son nom. MM. les abbés Dorion et Baillargeon prouvent les faits que nous avons rapportés ci-dessus; M. l'abbé Lottinville, sécretaire de l'évêque des Trois-Rivières, produit la supplique présentée à Sa Grandeur le 29 août 1865 et la réponse négative de l'évêque.

L'enquête étant close, le 14 mars 1866, le tribunal renvoya les parties devant leur évêque par un jugement interlocutoire, dont voici le texte:

" La cour après avoir entendu les parties par leurs avocats au mérite de la demande du demandeur, la défenderesse ayant été forclose du droit de produire des défenses, à la dite demande, examiné la procédure, la preuve et les pièces produites, et on avoir délibéré: Considérant que le mariage contracté entre les parties et dont le demandeur poursuit la nullité pour cause d'empêchement dirimant, résultant de ce que la défenderesse était la sœur germaine de sa première épouse décédée, a été célébré en face de l'église catholique romaine par un prêtre de cette église; qu'il n'appartient qu'à l'autorité ecclésiastique compétente de connaître de la validité du dit mariage, et que cette cour n'est compétente que pour prononcer sur ses effets civils, s'il est déclaré nul par l'autorité ecclésiastique;

" Ordonne, avant faire droit, que les parties se retireront devant l'autorité ecclésiastique compétente pour y faire prononcer sur la validité de leur mariage, s'il n'a déjà été fait, et que la sentence rendue ou à être rendue sur la matière par la dite autorité sera apportée à cette cour par la partie la plus diligente, pour être ensuite fait droit entre les dites parties ainsi qu'il appartiendra; dépens réservés."

En conséquence de ce jugement, le décret suivant de l'évêque des Trois-Rivières daté du 12 mars, fut produit en cour et logé dans le dossier de la cause par le demandeur, ce dont notification fut donné à la défenderesse.

Voici le décret épiscopal:

" Province du Canada,
Diocèse des Trois-Rivières,

" Thomas Cooke, par la miséricorde de Dieu et la grâce du St. Siége Apostolique, évêque des Trois-Rivières.

" A tous ceux qui verront les présentes et personnellement à Sévère Vaillancourt, notre diocésain, cultivateur de la paroisse de Ste. Anne d'Yamachiche, et Rose de Lima Lafontaine, aussi notre diocésaine, fille majeure de Pierre Lafontaine, cultivateur du même lieu,

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" Signifions juridiquement :

" Qu'en vertu de notre autorité épiscopale et pour l'acquit des graves devoirs de notre charge ;

" Le neuvième jour du présent mois de mars 1866, dans notre palais épiscopal des Trois-Rivières, Sévère Vaillancourt, cultivateur de la paroisse de Ste. Anne d'Yamachiche, notre diocésain, et Rose de Lima Lafontaine, fille majeure de Pierre Lafontaine, cultivateur de la dite paroisse d'Yamachiche, aussi notre diocésaine, étant présents, sur la requête du dit Vaillancourt en nullité de mariage avec la dite Rose de Lima Lafontaine et portant la date du cinquième du dit présent mois de mars et à nous présentée la même jour, cinq de mars courant ;

" Nous avons procédé à une enquête juridique et canonique sur les faits et circonstances qui concernent le dit mariage et nous y avons constaté par plusieurs actes authentiques consignés dans les registres des paroisses de Ste. Anne d'Yamachiche et de l'Immaculée Conception des Trois-Rivières, par les dires et déclarations de témoins dûment assermentés et produits dans cette cause et par les libres admissions, aveux et déclarations de la dite Rose de Lima Lafontaine :

" Que le dit Sévère Vaillancourt, demandeur en la présente cause, cultivateur de la paroisse de Ste. Anne d'Yamachiche, a, le 10 d'août 1858, validement contracté mariage dans la dite paroisse avec Zoé Lafontaine, fille majeure de Pierre Lafontaine, cultivateur de la dite paroisse d'Yamachiche, et de Marie Lesieur Désauniers ;

" Que la dite Zoé Lafontaine et Rose de Lima Lafontaine, intimée dans la présente cause, étant toutes deux issues du légitime mariage du dit Pierre Lafontaine, cultivateur, et de Marie Lesieur Désauniers sont véritablement sœurs, l'une de l'autre ;

" Et que partant le dit Sévère Vaillancourt et la dite Rose de Lima Lafontaine sont dès lors devenus *affins* au premier degré d'affinité et conséquement inhabiles à contracter mariage ensemble ;

" Que la dite Zoé Lafontaine, première épouse du dit Sévère Vaillancourt, étant décédée à Yamachiche le 27 de février 1864, le dit Sévère Vaillancourt a convolé à d'autres noces et a, pour cet effet, le 11 de juillet dernier, dans l'église des Trois-Rivières, en présence de messire F. Baillargeon, prêtre, curé des Trois-Rivières, contracté ou prétendu contracter mariage avec la dite Rose de Lima Lafontaine, sa belle-sœur, agissant alors sous le pseudonyme de Rose de Lima Lafond, fille de Pierre Lafond et de Marie Désauniers ;

" Que la dite Rose de Lima Lafontaine a toujours été domiciliée à Ste. Anne d'Yamachiche y étant née et y ayant toujours demeuré ;

" D'où il suit que ce mariage ou prétendu mariage n'a pas été contracté en présence du propre curé des parties ; ce qui constitue l'empêchement de clandestinité établi par le saint concile de Trente.

" En conséquence, vu qu'il est constant qu'entre le dit Sévère Vaillancourt et la dite Rose de Lima Lafontaine, il existe un empêchement dirimant de mariage provenant d'une affinité au premier degré :

" Vu que l'absence du propre prêtre ou curé lors de la célébration du marisge entre les dites parties, constitue un second empêchement dirimant de mariage, celui de clandestinité.

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" Vu que les dites parties ont contracté ou prétendu contracter mariage sans avoir préalablement obtenu les dispenses de ces deux empêchements, nous déclarons radicalement nul le prétendu mariage que les dits Sévère Vaillancourt et Rose de Lima Lafontaine ont contracté aux Trois-Rivières le 11 de juillet dernier ;

" Déclarons de plus que les dits prétendus époux sont pleinement libres devant Dieu et devant l'Eglise vis-à-vis l'un de l'autre de tout lien conjugal ou quasi-conjugal ;

" Défendons aux dits prétendus époux, sous peine d'excommunication à encourir par le seul fait de cohabiter désormais maritalement ensemble.... Et vu la flagrante immoralité de leur conduite envers l'Eglise, en contractant mariage d'une pareille manière et dont aucune ignorance ne peut les excuser raisonnablement, leur interdisons pour deux ans, à dater de ce jourd'hui, 12 mars 1866, l'usage de la sainte eucharistie, excepté en viatique.

" Donné aux Trois-Rivières, 12 mars 1866.

(Signé) † THOMAS, Evêque des Trois-Rivières. "

Le 15 mars, la cause fut inscrite pour audition finale au mérite, et le 23 du même mois le jugement suivant fut rendu :

" La Cour....considérant :

" 1o. Que le mariage contracté entre les parties et dont le demandeur poursuit nullité, pour cause d'empêchement dirimant résultant de ce que la défenderesse était la sœur germaine de la première épouse décédée, a été célébré en face de l'église catholique romaine, en la paroisse des Trois-Rivières, le 11 de juillet dernier, par le révérend Flavien Baillargeon, prêtre de la dite église et curé de la dite paroisse des Trois-Rivières : qu'il n'appartient qu'à l'autorité ecclésiastique compétente de connaître de la validité du dit mariage, et que cette cour n'est compétente que pour prononcer sur les effets civils, s'il est déclaré nul par l'autorité ecclésiastique ;

" 2o. Que par un jugement rendu par cette cour, le 14 de mars courant, il a été ordonné, avant faire droit, que les parties se retirassent devant l'autorité ecclésiastique compétente, pour y faire prononcer sur la validité de leur mariage, s'il n'avait déjà été fait, et que la sentence rendu ou à être rendu sur la matière par la dite autorité, fut apportée à cette cour par la partie la plus diligente, pour, ensuite, être fait droit entre les dites parties ainsi qu'il appartient ;

" 3o. Qu'en conformité au dit jugement, le demandeur a apporté à cette cour et produit en cette cause, le 14 de mars courant, et en a alors donné avis à la défenderesse, une sentence rendue par Mgr. Thomas Cooke, évêque des Trois-Rivières, le 12 du présent mois de mars, entre les dites parties, par laquelle il appert qu'à la requête du demandeur et après enquête juridique et canonique en présence des dites parties, le dit seigneur évêque, qui est leur évêque diocésain et comme tel compétent pour connaître de la matière et en décider, a déclaré le mariage contracté ou prétendu contracté entre les parties, le 11 de juillet dernier, en l'église des Trois-Tivières, en présence du dit Révérend Flavien Baillargeon, prêtre, curé des Trois-Rivières, radicalement nul, pour cause de deux empêchements dirimants et dont les dites parties n'avaient pas préalablement obtenu de dispense, résultant 1o. de ce que la défenderesse était la sœur germaine de la pre-

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mière épouse du demandeur, et 2o, de ce que le dit mariage n'a pas été contracté en présence du propre curé des parties, la défenderesse ayant toujours été domiciliée en la paroisse de Ste. Anne d'Yamachiche où elle est née;

"4o. Que le demandeur a prouvé les allégués essentiels de sa déclaration et commémént la célébration de son mariage ou prétendu mariage avec la défenderesse, cette dernière agissant sous le nom de Rose de Lima Lafond, ainsi que les deux empêchements dirimants susmentionnés, sans en avoir au préalable obtenu des dispenses: Vû en outre la dite sentence du dit seigneur évêque, déclarant le dit mariage radicalement nul; déclare et adjuge que le mariage contracté entre le demandeur, Sévère Vaillancourt, et la défenderesse, Rose de Lima Lafontaine, sous le nom de Rose de Lima Lafond, et célébré en la paroisse de l'Immaculée Conception de la Sainte Vierge des Trois-Rivières, le 11 de juillet 1865, par et en présence du révérend Flavien Baillargeon, prêtre, curé de cette dernière paroisse, est nul et de nul effet civil, et remet les parties dans le même état civil qu'elles étaient avant ce mariage prétendu, le tout sans dépens."

Jugement pour le demandeur.

Malhiot & St. Pierre, pour demandeur.
P. E. Panneton, pour défenderesse.
(E. Lef. de B.)

IN REVIEW.

MONTREAL, 28TH NOVEMBER, 1867.

From the Circuit Court, District of Richelieu.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 4367.

Douglas vs. *Wright & Brown*, Assignee, Opposant.

VOLUNTARY ASSIGNMENT—OFFICIAL ASSIGNEE—DISTRICT FOREIGN TO THE DOMICILE OF THE INSOLVENT.

HELD:—That a voluntary assignment must be made to an official assignee resident in the District in which the insolvent resides and carries on his business; and the Amending Act, 1865, makes no change in this respect.

On the 18th day of December, 1866, the plaintiff issued a writ *de Bonis* against the goods and chattels of the defendant residing in Sorel in the District of Richelieu in the Province of Quebec.

On the tenth day of January, 1867, T. S. Brown, one of the official assignees of the District of Montreal, in the aforesaid Province, fyled an opposition to the seizure and sale of the goods and chattels of the defendant Wright in the following words:—

"That on the sixth day of September last, defendant having been a trader long previous thereto, and being then a person unable to meet his engagements, did, by deed executed at the city of Montreal, before Normandeau, Notary Public, make an assignment of his estate and effects, real and personal, under the provisions of "The Insolvent Act of 1864" to the opposant, residing in the city of Montreal, official assignee, present and accepting thereof."

"That he, the said defendant, as appears in and by the said deed of assignment did furnish to the said opposant a duplicate of the list of his creditors, the majority of whom both in number and value then resided, and still reside, in the said city of Montreal, and that the said city of Montreal was and is a more convenient locality for the said creditors to meet than the defendant's place of business at Sorel, and that the said plaintiff then was, and still is one of the said creditors; and that in fact the debt for which the present seizure of the effects herein before mentioned was made, is a debt which existed before the executing of the said deed of assignment, and which was and is proveable against the estate of the said insolvent."

"That on the said day of September last, Theodosia Coxhead, wife of the defendant, did also make an assignment under the provisions of "The Insolvent Act of 1864" by deed executed at Montreal before Normandeau, Notary Public, the same day, of all her estate and effects, real and personal, to the said Thomas Storrow Brown, the opposant, as appears by the said deed of assignment, copy of which is herewith produced."

"That the said Theodosia Coxhead, as appears in and by the said last deed of assignment, did furnish to the opposant a duplicate of the list of her creditors, the majority of whom then resided, and still reside, in the city of Montreal."

"That afterwards a deed of composition and discharge was executed by the majority in number of his defendants, said creditors, and who represented at least three-fourths in value of the liabilities of the defendant, as fully appears by an authentic copy of the said deed of composition and discharge herewith produced."

"That the said deed of composition and discharge was duly deposited with the said opposant, and that notice of such deposit was duly advertized, but that an opposition to such composition and discharge was made by the said plaintiff in this cause by means whereof the operation thereof was suspended."

"That the goods and effects seized in this cause formed part of the estate and effects of the defendant at the time of the execution of the said first mentioned deed, that they are of the value of two hundred dollars and upwards."

"That the estate and effects, real and personal, of the defendant at the time of his making the said assignment to opposant, was of the value of about eight thousand dollars."

"That by means of the premises, all the goods, estate and effects of the defendant which he had at the time of the said first mentioned assignment, and which he has since acquired and may acquire up to the time of his final discharge under the said Act, and specially the goods and effects seized in this cause, were conveyed to, were and are now vested in, and belong to the said opposant in his said quality of assignee, and, moreover, that by virtue of the statute in such cases made and provided, no seizure or sale under execution of the effects of the insolvent can take place, or be proceeded with, and the said seizure thereof is null and void."

The official assignee for the District of Richelieu being G. J. Barthe, Esquire, was appointed by the Board of Trade for the District of Montreal, and is an officer of the Court for that District. Sect. 4, No. 16.

The parties having been heard at Sorel before Loranger, J., the judgment of the Court dismissed the opposition of T. S. Brown, the assignee, and maintained the

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seizure on the ground that no voluntary assignment can be made to an official assignee appointed for a district other than the one in which the insolvent resides.

The judgment is motivé as follows:—

Considérant qu'en vertu des lois qui régissent la faillite et cession de bien en force en ce pays, pour être valable une cession de biens doit être faite au syndic nommé pour le District où réside le débiteur insolvable.

Considérant que le défendeur en la présente espèce était résident en la ville de Sorel lors de la cession par lui faite à l'opposant, qu'il y avait alors un syndic nommé et en exercice pour le District de Richelieu dans la circonscription duquel se trouve la dite ville de Sorel, et que cette cession faite au dit opposant est nulle, et de nul effet, qu'en vertu d'icelle il ne peut revendiquer les meubles et effets saisis sur le défendeur qui lors de la saisie en était encore en possession, a débouté et déboute le dit opposant de son opposition et moyens d'opposition avec dépens.

On the ninth day of May, 1867, the opposant inscribed the case for revision before three Judges in Montreal.

The parties were heard before the Court of Review. The opposant Brown in his factum demanded the revision of that judgment on the following grounds:

1st. Because the goods and chattels seized in this cause were the property of the opposants *ès qualité* the same having been duly assigned to him by defendant.

2nd. Because by law the said defendant had the right to and could legally assign all his property moveable and immoveable to the said opposant.

3rd. Because the judgment rendered in this cause is illegal and unfounded inasmuch as it declares that the said cession so made by defendant to opposant is null and void, the said cession not having been made to an assignee residing in the district within which the defendant resided.

The plaintiff stated his case in his factum as follows:

1o. La sous-section 4 de la section 2, de l'acte concernant la faillite 1864, pourvoit expressément à ce que les cessions *volontaires* soit faites à un syndic *résidant* dans le district où le failli a le siége de ses opérations.

2o. La sous-section 3 et la sous-section 10 et les suivantes établissent aussi bien clairement que dans le cas des cessions forcées tous les procédés doivent être faits dans le district où le failli a le siége de ses opérations.

3o. La sous-section 4 et la sous-section 2, de la section 4, pourvoient à la nomination, par le bureau de commerce, de syndics officiels pour chaque district, lesquels sont tenus de fournir un acte de cautionnement suffisant, lequel dit acte de cautionnement doit être déposé au bureau du protonotaire du district: Que le dit cautionnement ainsi fourni par le syndic n'est valide qu'en autant que le dit syndic exerce dans le district pour lequel il est nommé: Qu'en cela la loi avait l'intérêt des créanciers en assurant l'existence dans chaque district d'une classe d'hommes compétents pour la mise en opération du dit acte et que les clauses ci-dessus citées sont éminemment dans l'intérêt public bien entendu.

4o. La sous-section 16 de la section 4 pourvoit à la jurisdiction sommaire du juge sur le syndic ainsi nommé qui est considéré être un officier de la Cour pour les fins du dit acte, et que le juge pouvant exercer utilement sa juris-

diction étant le juge résidant dans le district où le *failli* a le siège de ses opérations, l'esprit du dit acte est en tout conforme au principe de décentralisation judiciaire établi dans le pays.

5°. L'allégué du dit opposant, qu'il était plus convenable pour les créanciers que le défendeur fit la cession de ses biens à Montréal, est insoutenable, en autant qu'il est contraire à la loi et que les créanciers sont tenus de se soumettre à la juridiction de cet officier, c'est-à-dire: du syndic officiel résidant dans le district pour lequel il est nommé; comme à celle de tout autre officier de la cour, que d'ailleurs, il est toujours de l'intérêt bien entendu des créanciers que le syndic soit le plus rapproché possible du failli et du siége d'opération des affaires de ce dernier.

The plaintiff cited the decision rendered in the Province of Ontario in the case of Kingston vs. Campbell, reported at page 299 of the Upper Canada Law Journal, Vol. 2, No. 11, N.S., and commented in the same Journal at page 253, Vol. 2, No. 10, N.S., *vide* p. 315.

The judgment was confirmed by the majority of the judges composing the Court of Review.

MONK, J., dissenting. I am of opinion that the assignment made in the present case by Wright, an insolvent resident in Sorel, to Mr. T. S. Brown of Montreal was legal and valid. By the act of 1864, the bankrupt could only assign to an assignee where the bankrupt had his domicile, but in the amending Act of 1865 this clause has been omitted, and I believe, after careful consideration, that the insolvent might assign to the official assignee of another district. Further, there is nothing in the record to show that there was an official assignee in the district of Richelieu. Apart from this, assignments similar to the present have been made in many cases, and these assignments have been followed by deeds of composition sanctioned by the Court.

MONDELET, J. The opposant is an official assignee appointed for the district of Montreal, under ch. 7 of the Insolvent Act of 1864. The defendant is a resident of the District of Richelieu. The moveables of the defendant have been seized at the town of Sorel, where he resides, in execution of a judgment obtained by plaintiff against him. The opposant, pretending that the defendant has made a legal cession of his estate to him as assignee, opposes the *saisie et exécution* above mentioned. The Circuit Court of the District of Richelieu has dismissed the opposition, on the principle, 1st. That Brown is not a *Syndic* or assignee for the District of Richelieu, but only for the District of Montreal. 2nd. That there is at the town of Sorel, and there was at the time of said cession, a *Syndic* or assignee. The judgment of course declares the cession to Brown null and of no effect. I entertain no doubt on this very plain point. By the Insolvent Act, the Chamber of Commerce of any locality may appoint any number of assignees in the county or district wherein is situated such Chamber of Commerce, *or* in the county or district adjacent where there is no Chamber of Commerce. Now Mr. Brown has been appointed for the District of Montreal and no more. If there be no Chamber of Commerce in the District of Richelieu, the Chamber of Commerce can appoint an assignee or any number of assignees for the District of Richelieu. If such *syndic* or assignee does exist, of course, the cession should have been made

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to him; if none has been appointed then no such cession could take place. In either case, the cession to Brown is null and void. In vain is the 2nd section of Chap. 18 of the Amending Act (1865) invoked; it merely enacts that a voluntary cession may be made to any official assignee appointed *under the authority* of said Act (1864). If under the authority of the Act of 1864, the Chamber of Commerce, or the Council thereof, could name only for the county or district wherein it is situate, *or* for the adjacent county or district, if therein there is no Chamber of Commerce, it is plain that a cession to a *syndic* not specially named for the county or district, where the insolvent resides, and in which the insolvent carries on his trade, is an utter nullity, and in this case very properly so declared by the Circuit Court of Richelieu (Loranger, J.) It matters not whether at Sorel there is or is not an official assignee. The sole question is as to whether Brown is or is not appointed for the District of Richelieu. He being an assignee only for the District of Montreal, he had no authority to receive the voluntary assignment of the defendant, though it has or may happen to have been made in the District of Montreal. If the contrary doctrine were maintained it would open the door to innumerable frauds. An insolvent from Rimouski or any distant part of the Province, might come up and make an assignment in Montreal, and thus out of sight of his creditors, carry on an operation unknown to them. And inasmuch as that assignee should and ought to be controlled by the Court within the jurisdiction of which is situate *le siége des opérations du failli* it is easy to apprehend at once *que le failli aurait ses coudées franches.* Wherefore, on the law first, on the consequences next, I frame my opinion, and conclude by saying that the judgment appealed from is strictly correct and should be confirmed.

The judgment of the Court of Review is as follows:

Le Cour Supérieure, siégeant à Montréal, présentement en Cour de Révision ayant entendu l'opposant et le demandeur contestant par leurs avocats respectifs sur le jugement rendu le quatre mai mil huit cent soixante sept, dans la Cour de Circuit du District de Richelieu, ayant examiné le dossier et la procédure dans cette cause et ayant pleinement délibéré; considérant qu'il n'y a point d'erreur dans le susdit jugement, confirme par les présentes le dit jugement en tous points, avec dépens contre le dit opposant en qualité, dont distraction accordée en faveur de Messieurs LaFrenaye et Armstrong procureurs du dit James Douglass sur la présente demande en révision, suivant leur motion à cet effet.

L'Honorable Juge Monk ne concourre pas dans ce jugement.

Et la Cour ordonne la remise du dossier à la Cour de Circuit du District de Richelieu.

BERTHELOT, J., concurred.

Judgment confirmed.

James Armstrong, Attorney for Opposant.
LaFrenaye & Armstrong, Attorneys for Plaintiff.
(P. R. L.)

UPPER CANADA.

COMMON LAW CHAMBERS.

(*Reported by* HENRY O'BRIEN, *Esq., Barrister-at-Law.*)

HINGSTON v. CAMPBELL.

Insolvent Acts of 1864, 1865—*Official assignee—List of creditors.*

[Chambers, August, 1866.]

A list of creditors of the insolvent need not be appended to an assignment made to an official assignee. A voluntary assignment must be made to an official assignee resident in the county in which the insolvent resides, and carries on his business; and the amending Act 1865, makes no change in this respect.

Osler obtained an interpleader summons calling on the plaintiff and Henry Charles Voigt, the claimant, their attorneys or agents, to shew cause why they should not appear and state the nature and particulars of the respective claims to the goods and chattels seized by the sheriff of the Counties of Lennox and Addington under the writ of *fieri facias*, issued by the plaintiff in this cause; and maintain or relinquish the same and abide by such order as might be made therein.

The summons was obtained upon the usual affidavit of the deputy sheriff, setting forth the seizure by him of the goods in question on the 19th July, 1866.

Kerr, for the claimant, filed affidavits, shewing that on the 26th July, 1866, the defendant executed a voluntary assignment of all his estate and effects to the claimant as official assignee under the provisions of the Insolvent Act of 1864 and the amendment thereto.

C. W. Patterson, for the execution creditor, objected that the assignment was irregular,

1. Because the requirements of the Insolvent Act of 1864 had not been complied with, in that a copy of the list of creditors or schedule of creditors of the assignor was not appended to the assignments as required by sec. 2, sub-sec 6. of that Act.

2. Because the assignment was not made to an official assignee resident within the County within which the insolvent had his place of business. He referred to the Insolvent Act of 1864, sec. 2. sub-sec. 4; and filed affidavits shewing that an official assignee has been properly appointed resident at Bath, in the County within which the insolvent had his place of business, and that the claimant is an official assignee, resident at Kingston, in another County.

Kerr, in reply as to the first objection, referred to the Insolvent Act of 1864, sec. 2, sub-secs. 1, 2, 3, 4, and 29 Vic., Cap. 18, (amending the same), sec. 2; and argued that as under the latter Act an assignment might be made without the performance of the formalities required by the above sub-sections of the insolvent Act of 1864, including amongst others, the production, at the first meeting of creditors, of a list of all his creditors; it follows that a copy of the list of creditors appended to the assignment was no longer necessary; for a copy could not be made of that which did not exist.

As to the second objection, he contended that under 29 Vic. Cap. 18. sec. 2, a voluntary assignment may be made to any official assignee in any County; arguing that the use of the word "any" shews an intention on the part of the Legislature no longer to limit the debtor to the particular official assignee, resident in his own County; but that he may select *any* official assignee provided he has been appointed under the Act of 1864. And that it is often more convenient to wind up the estate in a County, other than that in which the insolvent had his place of business. The majority of creditors and debtors may reside in another County. The bulk of his estate may be there, and as in the case when a creditor under the provisions of the old Act might be selected as assignee resident in any County whatever, so the intention was to enable any official assignee, wherever resident, to accept assignments. There are no words of limitation; the words "appointed under the said Act" are merely words of description, as is also the word "official." They were so used in the Insolvent Act of 1864, sec. 12, sub-sec. 6.

Hingston vs. Campbell.

DRAPER, C. J., overruled the first objection, holding that as the performance of the formalities, or the publication of any of the notices required by the Insolvent Act of 1864, sub-sections 1, 2, 3, and 4 of sec. 3, are no longer necessary under the Amendment Act, if the assignment be made to an official assignee, a copy of the list of creditors produced at the first meeting of creditors, need not be appended to the assignment, for in fact no such meeting may be held. After considering the second objection, his Lordship delivered the following judgment:—

I grant the interpleader with some doubt. The claimant must be plaintiff, and will have to prove title, and the question of his right as assignee can be raised and decided in the full court. If the matter is left to me, I shall decide against the claimant, for I cannot satisfy myself that the execution debtor could make an assignment to the official assignee of another County than that in which he resided and carried on business.

As the question had been, by consent, left to be summarily disposed of by the Chief Justice, he granted an order barring the claimant.

Order accordingly.

MONTREAL, 28TH SEPTEMBER, 1867.

Coram BERTHELOT, J.

No. 3169.

Dunlop et al. vs. *Jones.*

HELD:—That where an action brought by a foreign plaintiff has been dismissed in consequence of security for costs not having been given withing the delay fixed, and, a second action is afterwards brought by the same plaintiff for the same cause, the proceedings in the latter action will be ordered to be suspended until the costs of the former are paid.

The plaintiffs in this cause were foreigners, resident at Philadelphia, U. S. A former action brought by them for the same cause was dismissed on the 31st October, 1866, in consequence of security for costs not having been put in within the delay of ten days ordered by the judgment of the Court. The defendant now moved that all proceedings in the present action be ordered to be suspended untill the costs taxed in his favour in the former action, amounting to $19.22, be paid. He, at the same time, fyled as exhibits in support of his motion, copy of declaration, copy of judgment and a taxed bill of costs in the first case.

Motion to suspend proceedings granted.

B. Devlin, for plaintiffs.

R. & G. Laflamme, for defendant.

(A.H.L.)

SUPERIOR COURT, 1867.

MONTREAL, 30 NOVEMBRE, 1867.

EN REVISION.

Coram MONDELET, J., BERTHELOT, J., MONK, J.

No. 1727

Lovell vs. *Campbell* et al.

COMMETTANS—SOLIDARITÉ.

Plusieurs seigneurs s'associèrent dans le but de prendre des moyens de sauvegarder leurs intérêts tant devant les tribunaux que dans le parlement. Un comité qu'ils avaient nommé a fait imprimer plusieurs factums, documents, &c,

JUGE :—Que les membres du comité étaient responsables envers l'imprimeur conjointement et non solidairement pour le prix des impressions, &c.

Lorsqu'il s'est agi en 1854 d'abolir la tenure seigneuriale, plusieurs seigneurs s'associèrent dans le but de prendre les moyens de sauvegarder leurs intérêts, tant devant les tribunaux que dans le parlement. Ils formèrent à cette fin un comité dont faisaient partie les défendeurs en cette cause, savoir, les seigneurs Campbell, Pangman, Wurtele, et M. Louis Jos. Amédée Papineau; M. Wurtele était secrétaire du comité. Des circulaires ayant été envoyées à tous les seigneurs de la Province, la plupart se joignirent aux promoteurs de cette association. Un grand nombre d'impressions furent faites par M. Lovell, le demandeur, soit pour mémoires ou *factums* d'avocats, circulaires, documents, etc., depuis l'année 1854 à l'année 1857. Le demandeur a poursuivi les membres du comité, et le sécrétaire pour une somme de $1101.90, balance de son compte. Tous les défendeurs ont contesté, et furent condamnés conjointement, mais non pas solidairement, par la Cour Supérieure à Montréal, (Judge Monk, 31 October 1866.)

MONK, J.—It is unnecessary to say that this case has given me a good deal of trouble, but at length after an examination of all the pleadings and evidence, I have arrived at a final decision. It appears that the Seigniors of Lower Canada in 1854 or 1855, becoming very much alarmed about their rights, met in Montreal, and agreed to take defensive measures against the Legislature of the country, and afterwards against the probable decision of what are known in history as the Seigniorial Courts. For the purpose of concentrating their efforts, they selected four gentlemen of ability, Messrs. Campbell, Wurtele, Papineau, and Pangman, who called themselves, and were generally known as, the Seigniorial Committee. These gentlemen acted for all the Seigniors of Lower Canada, they had a representative capacity, but that capacity was not made known by any power of attorney. The precise nature of their powers, however, is pretty clearly defined by the circulars printed by Mr. Lovell, and distributed by the committee. One of their powers seems to have been the retaining of counsel. Messrs Dunkin, Cherrier, and Mackay, gentlemen of great ability, were retained by the committee. The factums prepared by counsel were printed, and for these factums, Mr. Lovell makes a charge in his account against the Seigniorial Committee. The account also contains a variety of other items. It is admitted on the part of the defendants that the work was done and that the charges

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are fair and reasonable. Two small sums have been paid on account, but a balance of $1100 remains due, and it is for this balance that the plaintiff brings the present action against the four gentlemen composing the Seigniorial Committee. The defendants pleaded separately. Mr. Campbell says that the Seigniorial Committee are not responsible. Mr. Wurtele alleges that he made certain payments on account. But Mr. Papineau has put in a special plea, saying that he had no interest in the matter; that he was not a Seignior, and he merely acted for his father. But it appears that he did not take the quality of an attorney of any one; he acted, like the others, as a Seigniorial representative.

Upon the issues just joined, the case comes up for adjudication. The evidence adduced is voluminous, and we have to consider the position in which these gentlemen stood with respect to the plaintiff. And I have already observed, there is no difficulty about the value of the work; the only question is whether the defendants are liable, or whether the plaintiff must bring his action against the Seigniors of Lower Canada. Now I find in the circulars printed by order of the Seigniorial Committee, that these gentlemen speak of their responsibility, and they seem to say that their authority extended to the retaining of counsel and expenses connected therewith. In fact, the gentlemen composing the Committee acted imprudently; they went on getting circulars and factums printed, and retained counsel, without taking the precaution of getting their constituents to advance the necessary funds. Mr. Wurtele was appointed Secretary, and in the circular letters issued by him, frequent appeals are made to the Seigniors to contribute, but they do not seem to have paid much attention to them.

(His Honour read two of these letters). While the work was being executed the members of the Committee were in constant communication with the plaintiff. Mr. Wurtele was frequently at his office and authorized him to incur the expense. It appears from the evidence that Messrs. Dunkin, Mackay, and Cherrier were ready with their factums and desired to have them printed, the plaintiff said he would like to have some authority to do the work, as counsel were not liable. Accordingly, on the 30th December, 1855, the following order was given to him, "Please print the factums of Messrs. Dunkin, Cherrier, and "Mackay, and charge the same to the Seigniorial Committee." This was signed for the four members of the Committee, Mr. Wurtele signing as Secretary. Here was a precise direction from the Seigniorial Committee to the plaintiff to print these factums and make up the bulk of the account. Mr. Dunkin being $490, Mr. Cherrier $262, and Mr. Mackay $44.80, and the charges are undoubtedly fair and reasonable. With respect to the circulars there can be no doubt that they were also printed at the request of the Seigniorial Committee. Now there is a principle of law that if an agent chooses to conceal the name of his principal and does the thing in his own name, he is responsible, and there is another principle that if a man assumes to act as the attorney of a party it is not sufficient for him to allege that he was acting as such attorney, but he is bound to show his authority to act; otherwise he is personally liable. The worst of the present case is that neither the one nor the other of these principles is

exactly applicable. But as a matter of fact the Committee did not disclose the names of their principals. The plaintiff is not supposed to know who all the Seigniors of Lower Canada are, nor in point of fact does any one know. If, on the other hand, the Committee assumed to act as representatives and were not authorized to act as such, they are personally liable. If I were to dismiss this action I would have to say they were not liable because they were acting under a power of attorney. Now there is no such power of attorney and I cannot do otherwise than hold them liable. But I cannot condemn them jointly and severally; they can only be condemned jointly. *Solidarité* is never to be presumed.

Now we have to consider whether Mr. Papineau was liable. Mr. Papineau pretends that he had no interest in the matter, that he was only acting for his father. But Mr. Papineau not only signed as Seignioral Commissioner, but he signed without any qualification. He represented himself to the plaintiff in the quality of Seignior. He never took his quality as representative of his father. On one occasion Mr. Cherrier wanted a number of copies of his factum. The plaintiff said he could not deliver them without an order from the Committee, and Mr. Papineau signed the order for 200 copies as one of the Seignioral Committee, without any qualification. So far as the plaintiff is concerned, Mr. Papineau has therefore put himself precisely in the same position as the others. It is a hard case for the defendants to have to pay this money now, but they ought to have taken precaution and secured themselves. The plaintiff exercised all the care that could be expected of him, and it was only reasonable for him to rely upon the Committee for payment. The defendants must be condemned jointly to pay the balance of the account, less five items for which they cannot be held responsible." *

Le jugement fut motivé suit:

"The Court having heard the parties by their respective counsel upon the merits of this cause, and having examined the pleadings and evidence, and duly deliberated: Considering that the defendants severally pleading to this action, have failed to establish by evidence the allegations of the exception pleaded by them, to this action, doth dismiss the said exceptions;

Considering further that the plaintiff hath established by evidence, the material allegations of his declaration in this cause, and that the work and labour done and performed and the material for the same supplied, set forth in the said declaration and in the plaintiff's account fyled as his Exhibit Number One at the dates specified in the said account, to wit between the eighth February, one thousand eight hundred and fifty-five, and the fifth January, one thousand eight hundred and fifty-seven, were so done and supplied at the instance and request and on behalf of the defendants who were the members of a certain Committee styling themselves the Montreal Seigniorial Committee, the said account amounting to sixteen hundred and one dollars and eighty cents, from which, however, is

* For the above report of the remarks of Mr. Justice Monk, the reporter is indebted to 2 L. C. Law journal, p 131

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to be deducted the sum of five hundred dollars and seventy-one cents, for which the plaintiff in his said account has given credit, and striking also from the said account the seventh, eighth, ninth, tenth, and eleventh items, amounting in all to forty-seven dollars and fifty cents, under the dates May fourth and seventh, one thousand eight hundred and fifty-five, which the plaintiff hath not proved to have been done and supplied for the defendants, and for which five items the defendants are not chargeable, which reduces the balance of the said account, for which the defendants are justly liable to the plaintiff, to the sum of one thousand and fifty-three dollars and fifty-nine cents; Considering further, that the defendants as members of the said Committee are jointly, but not *solidairement* or jointly and severally liable to the plaintiff, for the said work, labour and material.

The Court doth adjudge and condemn the said defendants, Thomas Edmund Campbell, John Pangman, Louis Joseph A. Papineau, and Jonathan S. C. Wurtele jointly to pay and satisfy to the plaintiff the said sum of one thousand and fifty-three dollars and fifty-nine cents, with interest thereon from the twelfth day of August, one thousand eight hundred and sixty-one, date of the service of process until paid, and costs of suit, &c.

Un seul appelle de ce jugement à la cour en revision, c'est M. Papineau, qui plaide qu'il n'a agi que comme le procureur de son père, l'hon. Louis Joseph Papineau, seigneur de la Petite Nation, qui était seul intéressé dans cette affaire, ce que savait bien M. Lovell. M. Wurtele était second secrétaire du comité pour rédiger leurs actes, mais il n'avait aucune autorité de contracter des dettes au nom du comité, et s'il en a fait, il en est seul responsable; il termine en disant que plusieurs articles du compte sont pour ouvrages étrangers aux fins du dit comité.

MONDELET, J.—The only question is as to whether the defendant Louis Joseph Amedée Papineau is indebted to plaintiff. The three other defendants who were *seigneurs*, and formed part of a committee, together with Papineau, for the protection of their rights as such *seigneurs* before the Seigniorial Court, have been condemned to pay a certain amount to plaintiff, for printing work, jointly, but not severally. They do not complain of the judgment of the Superior Court of Montreal, which is now appealed from, only by the defendant Papineau.

I have no hesitation in saying, that upon a careful examination of the case, including the evidence, I find that there is not a semblance of claim against the defendant Papineau.

It is clearly proved by the witnesses, Campbell, Pangman, Wurtele and Cherrier, that defendant Papineau was not a *seigneur*. Witness Beaudry Greffier of the Seigniorial Court, establishes that defendant Papineau never appeared before the Seigniorial Court, that it was his father, the Hon. Louis Joseph Papineau, who appeared by Mr. Cherrier his counsel.

Mr. Pangman proved that if the defendant Papineau who was not a *seigneur*, had not represented a *seigneur*, he would not have been admitted as a member of the seigniorial committee. It is proved that, at the outset, the defendant Papineau signed as representing the Hon. L. J. Papineau, and I do not see that being recognized, and it being a fact, as proved by witnesses

Campbell, Pangman and Wurtele, the three other members of the seigniorial committee, that he was generally known as the representative of his father, he should have taken the trouble of signing every time "for the Hon. L. J. Papineau." There was not the least necessity for that, since, as Mr. Pangman proved, he must have been representing some *seigneur* in the committee, he not being a *seigneur* himself.

It is proved by the plaintiff Lovell himself, that the defendant Papineau was never at his printing place of business, nor gave him any orders for printing *factums* or for printing anything whatever.

As to the order, to deliver a certain number of *factums* to Mr. Cherrier, it never can have the effect of making him responsible for the printing of documents by order of the committee, or of Mr. Wurtele, one of them, supposing, *bien entendu*, that Mr. Wurtele, who was the secretary of that committee, could bind the whole committee. And, in the latter case, he would have bound, not the defendant Papineau, but his father, the Hon. Louis Joseph Papineau, whose representative and agent Mr. Pangman has proved he was generally known, and acknowledged to be. It is, moreover, to be observed, that the defendant Papineau must be declared bound either from his own individual undertaking, or through the binding of him by Wurtele, and individually he never bound himself towards plaintiff; plaintiff says so himself, with respect to the printing. If it was Wurtele who made the committee responsible to plaintiff, how comes the judgment not to be a *condemnation solidaire* against the four members of that committee? The condemnation singly is of itself an admission that Wurtele could not and did not bind the committee.

The request or order of the 27th December, 1858, by defendant Papineau, to Lovell, to deliver to Mr. Cherrier a certain number of printed factums (200) implies of course no guarantee for the payment for the printing thereof, which took place a long time before, about three years before, and given *au surplus*, when the Seigniorial Committee had ceased to exist, the moment the Seigniorial Court had given its judgment on the 11th March, 1856. The only effect that order could have, if any, would be to render the defendant Papineau liable for the value of those *factums* delivered to Mr. Cherrier. But again, that cannot be sustained. Papineau in giving that request, if he could bind, and if he did bind any one, it was his father, but not himself. It was a mere friendly act towards Mr. Cherrier, and in this, no more than in any case whatever, is a guarantee to be presumed.

Upon the whole, I therefore come to the conclusion, that the plaintiff has, altogether, failed to prove his case; with great deference to the opinion of my brother Monk who gave the judgment appealed from I think that there is no evidence to justify a condemnation against the defendant Papineau.

I therefore come to the conclusion, that the judgment appealed from is wrong, in so far as respects the defendant Papineau, and should be reversed. Defendant Papineau should have all the costs against plaintiff both in the Superior Court and in the Court of Review, on the dismissal of the plaintiff's action *quant à lui*. But inasmuch as I am alone of that opinion, the judgment appealed from will be confirmed. My dissent therefore should be recorded.

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BERTHELOT, J.—Le demandeur poursuit les défendeurs comme Seigneurs ou autrement intéressés dans des seigneuries dans le Bas-Canada, et ayant tous quatre de 1854 à 1857, fait partie et été membres d'un comité ou s'étant associés et ayant agi comme tels pour promouvoir et soutenir les intérêts des Seigneuries dans le Bas-Canada tant devant la législature que devant les tribunaux, et en cette qualité il réclame d'eux la balance qui lui resterait due, $1101.9, pour impressions de différentes espèces faites sur les ordres de ce Comité et pour les intérêts que ce comité soutenait et promouvait.

La défense du défendeur M. Papineau, consiste dans une exception par laquelle après avoir dénié tous les allégués de la déclaration, il prétend qu'en 1854 et 1855, n'étant pas alors et n'ayant pas été depuis Seigneur ou propriétaire de Seigneuries, il avait comme représentant L'Hon. L. S. Papineau, son père, Seigneur et propiétaire de la Seigneurie de la Petite Nation, fait des pas et démarches avec d'autres seigneurs pour sauvegarder leurs intérêts: qu'il était vrai que M. Wurtele, un des dits défendeurs, avait agi comme leur secrétaire pour la rédaction de leurs procédés, mais qu'il n'avait jamais été leur agent ou mandataire aux fins de contracter pour eux ou de les obliger, encore moins, du défendeur Papineau en particulier.

Que dans les différentes circonstances en question le défendeur n'avait prétendu agir que comme le représentant de son père.

Que si le défendeur Wurtele avait commandé en aucun temps au demandeur des impressions à faire, il l'avait fait de son propre mouvement et sans une autorisation valable du défendeur ou des Seigneurs intéressés.

Enfin que plusieurs des charges et intérêts au compte du demandeur étaient pour des ouvrages faits pour des personnes étrangères à la présente contestation.

L'examen de la preuve testimoniale et écrite fera voir jusqu'à quel point le défendeur peut être bien fondé en son exception.

Nul doute ne peut exister que bien que M. le défendeur Papineau ne fut pas un Seigneur propriétaire de Seigneuries, il a néanmoins en son nom seul et personnel, et sans doute, comme pouvant être intéressé, étant fils d'un Seigneur, consenti d'agir et a agi conjointement avec trois autres Seigneurs, les trois autres défendeurs en cette cause, comme membre d'un comité composé des dits quatre défendeurs, qui par eux-mêmes ou par leur secrétaire, l'un d'eux M. Wurtele, ont employé le demandeur pour faire les impressions dont ils croyaient avoir besoin pour promouvoir les intérêts de Seigneurs du Bas-Canada tant devant la législature que devant les tribunaux de 1854 à 1857.

C'est en vain que le défendeur invoque le fait que lorsque l'on trouve sa signature à la souscription faite pour payer Messieurs Cherrier et Dunkin, avocats des Seigneurs, ce n'est que pour l'Hon. M. Papineau son père qu'il a signé en souscrivant $100.

Cette circonstance même, en regard des différentes circonstances dans lesquelles M. le défendeur Papineau a signé avec les autres membres de comité, fait voir que quand il s'est agi de payer ou de souscrire, il n'a pas voulu s'engager personnellement, mais bien engager M. son père qui était réellement et immédiatement intéressé; mais cela ne l'empêchait pas d'agir avec zèle pour soutenir comme membre du comité les intérêts de son père, de sa famille et de ses amis,

Messieurs les Seigneurs qui m'avaient fait *l'honneur* de le choisir et nommer sur ce comité chargé particulièrement par ces Messieurs de pourvoir et soutenir leurs intérêts.

Cette qualité de M. le défendeur Papineau est plus que comfirmée et est même manifestement prouvée par l'écrit qu'il a fait et signé de sa propre main et écriture en date du 27 décembre 1858, et adressé au demandeur—viz., " Will Mr. " Lovell please deliver to C. S. Cherrier, Esquire, Counsel of the Seigniors, 200- " copies of his factum before the Seigniorial Court.

Signed,

L. J. J. PAPINEAU, for the Seigniorial Committee.

Voici la preuve complète que M. Papineau se croyait et s'avouait un des membres du comité, mais assumant même que sur sa simple signature, il pouvait donner des ordres au nom du comité dont il était un des membres. Et il le pouvait suivant lui et suivant cet écrit jusqu'au 27 décembre 1858. Donc et à plus forte raison ses notes et sa signature comme un des membres du comté en 1854 et 1855, l'obligaient encore beaucoup plus certainement et plus efficament vis-à-vis du demandeur.

Il me semble que je pourrais arrêter ici pour imprimer à M. le défendeur Papineau la responsabilité personnelle vis-à-vis du demandeur pour les ouvrages que ce dernier a faits pour le comité, et qui sont réclamés par l'action. Mais je vais continuer à chercher et je trouverai cette responsabilité dans la preuve testimoniale afin de répondre plus satisfactoirement au dissentiment du savant président de la Cour.

Je vais citer quelques passages des dépositions de M. Wurtele, un des défendeurs entendu comme témoin, après avoir prouvé que les quatre défendeurs étaient membres du comité et fait la preuve de l'écrit filé le 4 mai 1864, marqué R. O. étant un ordre par écrit signé par lui comme Secrétaire du comité, il dépose comme suit: " To the best of my recollection the defendant " Papineau was a pretty regular attendant at the meetings of the Committe." Il était présent à une assemblée du comité à laquelle M. le défendeur Papineau avait prétendu, seul contre les autres défendeurs, que les avocats des Seigneurs, Messrs. Cherrier et Duskin, devaient payer eux mêmes leurs frais *des factums*, mais dit-il, " his *opinion* was *overruled by the majority*." Cela prouve que M. Papineau agissait scrupuleusement et qu'il voulait économiser les fonds du comité mais ça ne fait que confirmer qu'il agissait activement comme membre de ce comité.

Plus loin dans sa déposition, lorsqu'il a été transquestionné par M. Papineau sur le fait que ce dernier n'avait souscrit la liste de souscription que comme représentant son père pour $100, M. Wurtele s'exprime ainsi, " It was well known " that the defendant Papineau was not a Seignior and that he acted throughout " as representing his father, except on the committee of which he was a *personal* " member."

En effet, ceci se comprend et s'explique facilement comme je l'ai dit ci-dessus. M. Papineau le fils se faisait un plaisir et un devoir de soutenir comme membre du comité les intérêts de sa famille et de ses amis, mais quand il s'agissait de

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payer, n'étant pas encore alors personnellement intéressé, il ne souscrivait que pour son père dont l'intérêt était immédiat.

Cherrier a été entendu pour prouver les circonstances sous lesquelles il avait obtenu de M. Papineau un ordre à M. Lovell, pour avoir 200 copies de son factum lorsqu'il est transquestionné, il répond qu'il a demandé au défendeur Papineau l'ordre en question; et à la question qui lui est faite si le défendeur n'a agi pour ce comité que comme l'agent de son père, il répond: Je présume qu'il a agi comme agent de son père, mais je *ne puis dire* qu'il ait agi seulement pour *lui* ignorant ce qui s'est passé dans le comité. Plus loin, il repond " qu'il a compris que les *défendeurs qui étaient membres* du comité agissaient comme les agents des Seigneurs, ses clients. Nul doute donc que M. Papineau fut bien connu de M. Cherier comme un *des membres de ce* comité. Je vais maintenant citer de la déposition de M. Papineau pour y trouver la preuve et l'aveu qu'il était un des membres de ce comité, bien qu'il ne fut pas un des Seigneurs, et j'insiste à bien établir cela, parce que l'on ne semble vouloir sérieusement prétendre que n'étant pas alors Seigneur, il n'avait pu être membre de ce comité.

Il admet et reconnaît que c'est à la demande de M. Cherier, à son bureau, au greffe, qu'il a écrit et signé l'ordre du 27 décembre 1858, adressé à M. Lovell.

A la question—" Is it not true that you were a member of the said Seigniorial committee."

Il répond—" The Seigniorial committee" was a name assumed for convenience by a few gentlemen appointed at a convention of certain Seigniors who " wished to have their rights represented and defended before the Seigniorial " Court. These gentleman as agents of said Seigniors were to retain as counsel " before said Court, Messrs. Dunkin and Cherrier, and were to collect funds " and subscriptions to pay said counsel. *Such was their mission.* I was one of " those gentlemen agents of the said Seigniors." Avec cet aveu, il est inutile de chercher plus longtemps la preuve que M. Papineau fut membre de ce comité et comme nous avons d'ailleurs la preuve que ces quatre défendeurs, comme membres du comité et en cette qualité, ont employé le demandeur pour faire les impressions dont il réclame la balance—il faut nécessairement arriver à la conclusion que les quatre défendeurs doivent être condamnés.

Si les défendeurs membres de ce comité, ont exécuté leur mandat, ainsi que M. Papineau semble vouloir le dire ou le faire supposer dans sa réponse ci-dessus certes, ils n'en sont pas moins responsables pour la balance restant due au demandeur sur tous les ouvrages d'impressions qu'il a faits pour ce comité ou sous les ordres de ce comité ou du secrétaire du comité.

Jugement confirmé.

Torrance & Morris, pour le demandeur.
R. & G. Laflamme, pour Campbell et Pangman.
R. Roy, pour Papineau.
Lafrenaye, pour Wurtele.
(F. W. T.)

COURT OF QUEEN'S BENCH, 1867.

MONTREAL, 9th DECEMBER, 1867.

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

IN APPEAL,

FROM THE CIRCUIT COURT FOR THE DISTRICT OF ST. FRANCIS,

EDWARD ELLICE,

(*Plaintiff in the Court below,*)

APPELLANT;

AND

OCTAVE COURTEMANCHE.

(*Defendant in the Court below,*)

RESPONDENT.

SQUATTER—IMPENSES UTILES—BAD FAITH.

HELD, that the defendant being in possession of the plaintiff's land with the knowledge of his agents, having paid the taxes, and made the ameliorations, the value of which was claimed from the plaintiff, in view of and with the knowledge of the agents of the plaintiff, although the defendant did not possess the land with his consent, had a right to be paid the value of his ameliorations, and to retain the plaintiff's property till this value was paid to him.

Sanborn, for appellant, said:

This action was instituted in the Circuit Court for the District of St. Francis, on the 28th day of June, 1864, under what is commonly called "the Squatter's Act," Con. Stat. L. Ca. c. 45, for the recovery of possession of the south one-third of Lot. No. 13, in 9th Range of Clifton.

The defendant admits by his pleadings that plaintiff is the proprietor of the lot, but claims compensation for ameliorations, "betterments" made by him upon the portion of the land occupied by him. The improvements are claimed to be *impenses utiles*, and to be of a character permanently to enhance the value of the land. The plaintiff, in reply, says that defendant went upon the lot of land knowing it to be plaintiff's without any permission to do so, and was a squatter and trespasser in making the improvements which he made; that the clearing of the land the plaintiff did not require, the building of block house and barn he did not wish, that the land is no more valuable to him by reason of what defendant has done to it, and he has no right under any circumstances, to payment from him for "betterments" of this character so made, and further that he had derived from the use of the land enough to pay for the work done by him upon it. It appears by the evidence of Brady, Hurd and Cairns, that it was commonly known when defendant went upon this lot of land, that it belonged to the Right Honourable Edward Ellice, plaintiff's father, as well as a large tract of which this is part. It was assessed to him; the title had been enregistered for 30 years, and stood in the name of the Right Hon. Edward Ellice. He had a local agent who paid the Municipal rates. When Brady surveyed them in 1864, defendant told him he knew the land belonged to Ellice. He entered upon it in 1859. It is clear that he went there perfectly aware of what he was doing, and squat upon this

Ellice and Courtemanche.

land, knowing certainly that it was not his own, having every facility to know, had he chosen to inquire, to whom the land did actually belong. Witnesses were brought by defendant, who estimated the improvements as very valuable. Experts were named by order of the Court, to estimate the improvements, and the rents, issues and profits. Plaintiff named an expert, under protest that he was not bound to pay improvements, if any were found, under the circumstances. The experts reported the betterments as worth, above rents, issues, and profits, $300.00. For this sum Mr. Justice Short rendered judgment, in the terms following, on 15th December, 1866.

"The Court, having heard the parties by their respective Counsel, examined the proceedings of record, and deliberated, doth homologate the report of Robinson Oughtred and Eros Lebourveau, two of the experts herein, considering that plaintiff is the proprietor of the south one third, being the whole of the length of lot number thirteen, in the ninth range of the Township of Clifton, with one third of the width thereof, containing sixty-six and two-thirds acres, bounded on the south by lot number twelve, in the ninth range of said Township, occupied by one Robert Poison and the defendant, on the west by lot number thirteen in the tenth range of said township, on the north by another portion of the said lot in the occupation of Antoine Robin, and on the east by lot number thirteen, in the eighth range of Clifton, and that the defendant had expended three hundred and fifty dollars, in constructions and improvements on said land, and by his ameliorations on said land, increased the value of said land three hundred dollars, over and above fifty dollars, the value of the rents, issues and profits received by him, as by the defendant pleaded, doth maintain the defendant's plea, doth condemn the defendant to deliver up and restore the said land to the plaintiff on the payment by the plaintiff to the defendant of the sum of $300, and condemn the defendant to pay plaintiff his costs of suit up to contestation, distraction of which is awarded to Messrs. Sanborn & Brooks, the plaintiff's attorneys, and doth adjudge the plaintiff to pay the defendant his costs of and subsequent to contestation, distraction of which is awarded to H. C. Cabana, Esquire, the defendant's attorney."

From this judgment the plaintiff hath instituted an appeal, and the simple question involved in this appeal is, "Can a possessor in bad faith recover from the proprietor, compensation for improvements *impenses utiles* made by him, unasked, on the proprietor's land, and hold possession of the land until such compensation is paid." The only reported case where such compensation was allowed, was the case of Stuart vs. Enton, 8 L. C. Rep. 113, adjudicated by the same judge who rendered judgment in this cause. In that case there was no title in Enton, but he had occupied over thirty years, being prior to the issuing of the patent, and entering upon lands of the Crown where the right of pre-emption in the possessor is recognized as quite a different thing from entering upon the land of a proprietor in open defiance of his rights as in the present case. In the case of Lawrence vs. Stuart, 6 L. C. Rep. 294, where the defendant in the Court below was allowed compensation for "betterments" he possessed the rights of the lessee from the Crown under a 21 years lease, and was a possessor in good faith, and in consequence entitled to compensation for *impenses utiles*. The 417 Art.

of the Code settles the law upon this subject, if there were room for doubt before. Reference to the 3rd Report of the Codifiers, p. 371, will show that this article is not misinterpreted by us. The last part of the clause gives the possessor in bad faith the right to remove improvements if the proprietor does not choose to pay for them, if susceptible of removal, if not, the improvements belong to the owner without indemnification. "If, on the contrary, the possessor were in bad faith, the proprietor has the option of keeping them, upon paying what they cost, or their actual value, or of permitting such possessor, if the latter can do so with advantage to himself, and without deteriorating the land, to remove them at his own expense, *otherwise in each case, the improvements belong to the owner, without indemnification; the owner may in every case compel the possessor in bad faith to remove them.*" This text of the code is founded upon the law as laid down by most of the authors.

Lacombe Vol. 2, Mot. "*Impenses*" Sec. 3, "Le possesseur de mauvaise foi n'a "aucune répétition d'impenses si elles ne sont nécessaires."

Pothier, Traité de Propriété, No. 350. "A l'égard du possesseur de mauvaise "foi, les lois romaines paraissent lui avoir refusé le remboursement des impenses "par lui faites, qui n'étaient pas nécessaires, quoiqu'elles eussent fait devenir "plus précieuse la chose qui est revendiquée et lui avoir seulement permis d'empor- "ter de l'héritage revendiqué les choses qu'il y a mises, qui peuvent en être déta- "chées en rétablissant les choses en leur premier état." Pothier presents this as the law. Cujas alone is quoted as maintaining the ground that the possessor in bad faith may be indemnified for improvements to the extent to which he enhances the value of the property. Pothier does not admit Cujas' doctrine, but does say that special cases may be adjudicated upon by the prudence of the judge. In this, however, he has shown us clearly what he means by "the prudence of the judge." "Il y a une mauvaise foi caractérisée et criminelle, telle que celle d'un usurpateur qui a profité de la longue absence d'un propriétaire, &c——pour se mettre sans aucun titre en possession d'un héritage, *un tel possesseur de mauvaise foi doit être traité avec toute la rigueur du droit; il ne mérite aucune indulgence.*" Pothier then proceeds to inform us by an example what he means by a possessor in bad faith, who is excusable; one who purchases of a minor through his *gardien*, and when the minor becomes of age, he renounces the succession; the possessor under such a title, though, strictly speaking, a possessor in bad faith, deserves consideration.

The same doctrine is laid down in Toullier, Vol. 3. p.p. 83-4.

"Lorsque les plantations, constructions et ouvrages, ont été faits par un tiers "et avec ses matériaux sur le terrain d'autrui, il faut distinguer si ce tiers était "possesseur de mauvaise foi ou de bonne foi.

"Au premier cas, le propriétaire du fonds a l'option de retenir les plantations, "constructions et ouvrages ou d'obliger le tiers à les enlever.

"S'il demande qu'ils soient enlevés, la suppression est aux frais de celui qui "les avait faits, sans aucune indemnité pour lui; il peut même être condamné "à des dommages et intérêts, s'il y a lieu, pour le préjudice que peut avoir éprou- "vé le propriétaire du fonds.

"Si le propriétaire préfère conserver ses plantations et constructions, il doit le

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"remboursement de la valeur des matériaux et du prix de la main-d'œuvre, sans "égard à la plus ou moins grande augmentation de valeur que le fonds a pu "recevoir."

Code Napoléon, Art. 555: "When plantations, buildings and works have been made by a third person, and with his own materials, the proprietor of the soil has a right either to retain them or to oblige such third person to remove them. If the proprietor of the soil demand the demolition of the plantations, it must be done at his charge who made them, and without any indemnity."

Lane et al. vs. Deloge, 1 Jurist 3. Before Day, Smith & Badgley, justices. The pretensions of the present appellant are sustained. Day, J., giving judgment of the Court, said, "This issue raises the question in very naked terms as to the right of the possessor in bad faith to be paid for his improvements and to have a lien upon the land until such payment. We think the defendant has no such right. The current of decision is against his pretension, and the demurrer is maintained."

It is understood that in the case of Knowlton vs. Clark et vir., Court of Appeals, 9th June, 1864, the same doctrine was affirmed by this court in maintaining the right of appellant to compensation for improvements *because* he was held to be a possessor in good faith. There is a minor question involved in this case as to costs. The costs of contestation are awarded against the plaintiff. The defendant demanded $800 for improvements. The experts only awarded $300. A contest was rendered necessary by the exaggerated demand, even if defendant were entitled to compensation, and the costs of ascertaining the value of the ameliorations, and particularly the expertise should be divided, even upon the supposition that the principles of the judgment were correct.

Cabana, for defendant and respondent, said: "The defendant's evidence proved beyond doubt all the allegations of his plea and especially his peaceable possession of the land from the 14th February, 1860, his making the improvements upon the same and their value, his paying the taxes, the plaintiff's knowledge of the defendant's occupation, defendant's willingness to buy the same or to leave it on being paid for his improvements."

An attempt was made on the part of the plaintiff to show that the defendant had been paid for his labour and money expended in making those improvements by the rents, issues and profits of the land, but without success.

On the 15th day of May, 1866, the Court below *avant faire droit* ordered an expertise to estimate the value of the improvements and ameliorations made by defendant, and the rents, issues and profits; and on the 3rd day of December last, the experts reported the value of the improvements to be $350, and the value of the rents, issues and profits of the land, to be $50.

The report was homologated on defendant's motion, and on the 15th of December last the Court below (Short, J., presiding) rendered judgment awarding the land to plaintiff with costs up to the filing of plea, and awarding to defendant $300 with costs of contestation against the plaintiff.

The respondent respectfully submits that the judgment of the court below must be affirmed with costs against the appellant for the following reasons:—

1st. Because the defendant had been in quiet, peaceable and open possession

of the land from the 14th February, 1860, had made thereon large improvements and had paid all the dues and taxes imposed upon the same, the whole to the full knowledge of said plaintiff.

2nd. Because the plaintiff never notified defendant of his unwillingness to sell, or protested against his occupation or possession of the same although he knew the defendant was in possession of, and greatly improving the same.

3rd. Because the plaintiff, knowing the land to be occupied and improved by defendant, and his paying the taxes, gave a tacit consent to the defendant's proceedings.

4th. Because the law does not countenance the bad faith of an owner of land who knowingly permits an occupation by another with the intent to profit by valuable improvements made by the occupant contrary to the maxim *neminem æquum est cum alterius detrimento locupletari.*

5th. Because the value of plaintiff's land, $1.50 per acre, when the defendant took possession of the same, was increased by the improvements made by defendant to more than $10 per acre, besides the value of the buildings erected thereon by said defendant.

6th. Because it is clearly proved by the defendant's witnesses that the plaintiff paying the defendant $300, as he was condemned to do by the Court below, is still enriching himself to the detriment of the defendant.

7th. Because the improvements made by the defendant on the land are necessary improvements, without which the land could not be used for any purpose.

8th. Because the defendant was not in bad faith, and did not intend to deprive the plaintiff of the land.

9th. Because the necessary improvements made on a land by a third party must be paid by the owner thereof before putting him away.

10th. Because there was no bad faith in the defendant in possessing this land, inasmuch as he had every reason to believe that the proprietor thereof would sell him this land.

11th. Because by law the defendant is entitled to the value of the improvements made by him upon the land, according to equity and the rule *neminem æquum est cum alterius detrimento locupletari*, and particularly as the plaintiff knew that the defendant was in possession of his land and making large improvements thereon and paying all the taxes imposed upon the same.

BADGLEY, J.—This is a petitory action under the Squatter's Act, C. S. L. C., ch. 45, brought by the plaintiff against the defendant, for the recovery of 66 acres of lot 13, in the ninth range of Clifton, in the possession of the latter. The plaintiff prays the usual conclusions to be declared the proprietor of the land, that defendant be held to abandon and pay the rents, issues and profits of the land, and $100 besides for damages for his unjust possession. The defendant has pleaded his *impenses utiles*, improvements made during his detention, whereby an increased value has been given to the land, his payment of $7.03 of the municipal taxes, and his performance of road duty, to which the land was liable during his occupancy, the plaintiff's knowledge of these facts, and his sufferance of his possession; but he admits the property to be the plaintiff's, and is willing to abandon the land upon his being paid his *impenses*

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utiles. The plaintiff's replication denies the making of improvements; alleges that the defendant entered on the land without right or permission, and knowing that it was assessed as Ellice's land, and that being in bad faith, he was estopped from any claim for improvements or for his *droit de retention* of the land until their payment to him. Now from the record, the plaintiff's right of property in the land having been established as above, the making of the improvements, *impenses utiles*, by the expertise is reported under a judicial order made in the case, during the pendency of the action, and which established that increased value of $300 has been given to the land by the labour and work of the defendant, there remain, then, open for discussion, the only issues, namely, the bad faith charged against the defendant and its legal effect upon his claim for the increased value of the land, as given by the report of the experts. Without going into a particular detail of the evidence adduced, the substance of it is to the following effect: Mr. Ellice owned a number of lots of land in the Township of Clifton, which were in a wild state; they had all been properly surveyed, and numbered by lot and range; the posts and boundaries were easily known and visible, and the lots were all regularly entered as his property in the books and in the assessment rolls of the municipality, and upon which the taxes had actually been paid by him up to 1863. The lands were not for sale by parcels, but together, but in the meantime were allowed to be leased. In 1858, the defendant and some of his relations sought out good lots that would suit them, and amongst these selections, the defendant squatted upon the lot in question, and took possession of it without the knowledge or permission of the owner. He set to work to clear the land, fencing and ditching, and erecting buildings upon it for his own convenience, but at the same time, in effect, casting upon the owner, against his will or wish, an amount of expense which results, after six years' occupancy, in the $300 awarded by the expertise. Whether it is legally right or wrong in general, as a matter of abstract justice, that landowners should be subject to the inroads of squatters and in effect deprived of their property, is not the special subject of contention here, but it is quite plain, as the law is, that their lands may be improved against their wish, and their pockets depleted upon equitable and judicial considerations. With reference to the defendant, himself, he squatted on the land, without the owner's knowledge or permission, from 1858, and was in occupation of it at the institution of this action in 1864, and will still probably there be found. The Ellice lands were well known throughout that part of the country; they were on the assessment roll and municipal registers, by lot and range; every possible facility existed to ascertain the name of their owner and the number of the lot, and in fact the defendant knew both the one and other, because he alleges in his plea that from his entry in 1858 downwards, he paid the land and school taxes upon the land, which he could not have done without knowing from the assessment roll for what particular lot these taxes were payable; and further, he says that he did the road duty required of that particular land; he also was aware of the existence of a person living in the adjoining township known, to have charge of the Ellice lands, but he carefully and wilfully avoided using any of these means of information, and continued his possession. From all this evidence it is clear that the defendant

was in bad faith from first to last, that is, if bad faith is to be measured by acts of unlawful and unjust possession of property which the defendant knew did not belong to him, for which he had no pretence of a title, and over which he had no shadow of a right of property. Now it is this bad faith which the plaintiff has very forcibly urged upon the consideration of the Court, as the main and chief ground of his objection to the judgment appealed from, by which the plaintiff, the landowner, has, in fact, been ordered to pay this squatter, the defendant, the sum of $300 for land improvements made against his desire and without his knowledge. In urging this objection, the plaintiff has objected to it, as already stated, as an estoppel to the defendant's demand for the alleged *impenses utiles*, and has particularly referred the Court to the 417th article of our Provincial Code Civile, as having finally and definitively settled the law upon this contention. With reference to good faith and its converse, bad faith, it may be observed that the objection of bad faith is not one required to be proved by the landowner, and that in principle the onus of proof is necessarily cast upon the squatter, the occupant, who is bound to prove his good faith. This is why proof is adverted to here, merely as an introduction to the remarks, that the defendant has not proved a single fact or constituent of good faith. His evidence is almost exclusively upon the extent and value of his improvements, and apart from that, he proves that he paid the land taxes for three or four years, which of course he would do for his own advantage, and that the plaintiff had an agent for his lands; but he does not prove that the plaintiff or his agent knew of his possession until early in 1864, not long previous to the action, when the agent sent the surveyor to verify the fact and extent of the defendant's possession. The mere payment of taxes was no proof of good faith. I have no hesitation, therefore, in holding that defendant was a squatter to whom the squatter's act applies, and further, that he was in bad faith, which last qualification of his possession necessarily brings up the special article of our code No. 417, offered to us by the plaintiff, as the settling and regulating principle and guide upon this issue. It is the more necessary to examine the article carefully, because many of its provisions are governed by the terms good and bad faith, as applicable to the parties to be affected by its provisions. Now, no explanation or definition of these terms is to be found in the code in connection with occupancy, although the 412th article has declared the titular possessor to be in good faith until *les vices de son titre* have been made known to him, or until proceedings at law have been taken against him; but the 417th article is entirely without explanation or definition of good or bad faith, which must of course be sought in the common law and its commentators; I will not stay to collect them, the meanings will be found compendiously set out as follows: "*le possesseur de bonne foi est celui qui ignorait que le fonds appartenait à autrui,*" and the converse naturally shows the *possesseur de mauvaise foi* to be one who had *scientiam rei alienæ*, the application of which will now be made to the terms of the 417th article. Assuming that the defendant is in bad faith, does this 417th article rested upon by the plaintiff, apply at all to his claim for *impenses utiles?* Now the 416th article which precedes, and, as it were, introduces the 417th provides that the landowner who has constructed *buildings or works with materials* not his

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own, may pay their value, but the owner of the materials *cannot remove them*, whilst the first clause of the 417th article provides that when a possessor *makes improvements with his own materials*, the right of the landowner to them depends upon their nature and the good or bad faith of the possessor; the materials, is principal matter in both in connection with the *buildings or works* mentioned in the one and the *improvements* in the other, which may therefore be taken to be synonymous, as referring in both to constructions out of or from these materials, and therefore improvements constructed from these materials, are the improvements of the first clause of the 417th article which depend upon their nature. The two following clauses of the article, define this term *nature* by qualifying it under the words *necessary* or *not necessary improvements*, in both cases making them as to their value to be payable to the possessor or otherwise, according to his good or bad faith, which is the second qualification of the first clause, and as if to leave no doubt upon the matter, these improvements are spoken of as subject to *removal or not from off the land*, according to the provisions of these two clauses, and of the last or fourth clause which is the contrary of the third. The second clause provides that if these improvements were necessary, the landowner *may not remove* them without paying their value to the occupant, whose bad faith will, however, give the owner the right to set off against their value, the rents and issues of the land:—the third clause says, that the landowner must keep the improvements when made by an occupant in good faith, and also pay their value or the increased value of the land thereby; and the fourth clause, on the contrary, authorizes the landowner either to keep them if not necessary, and made by an occupant in bad faith, at their value, or to compel the occupant *to remove them at his own expense*. The provisions of the article, therefore, manifestly apply only to constructed removable improvements, but not to any other class of improvements whereby the land has been increased in value, such as clearing the land, converting it into arable from wild wooded land, fencing and ditching, and such other improvements which cannot be removed, all of which fall under the well-known legal term of *impenses utiles* which are not noticed by the code, and do not come within the provisions of the 417th article. It seems to be plain enough, therefore, that the language of the article cannot be applied to the *impenses utiles* claimed by the defendant without a perverted interpretation of its terms with reference to these *impenses utiles*. Now two or three references only need be made. In Lacombe Rec. de Juris., Vo. *impenses* after at section 1, speaking of *bâtiments*, buildings put up by an occupant in bad faith, he says at par. 3, as cited by the plaintiff's counsel, that "*suivant la loi 5 C. de rei vindi; le possesseur de mauvaise foi n'a aucune répétition d'impenses, si elles ne sont nécessaires,*" but he adds what the plaintiff has omitted, "*il peut seulement emporter les utiles, mais la loi 38 de petit: heredi: which is known as nemo debet locupletari ex alterius jactura, qui décide benignius ex æquitate, doit servir de règle, en cette matière, tant à l'égard du possesseur de bonne foi que de mauvaise foi,*" and then, after defining the three known kinds of impenses as, *les voluptueuses qui embellissent la chose ou le fonds mais qui n'en augmentent point le revenu ou la valeur, les nécessaires, sans lesquelles la chose ou le fonds aurait péri ou se serait détérioré, et les utiles qui augmentent le revenu et la valeur de la chose ou du fonds, quo fundus pretiosior factus est* he adds, *nous tenons pour maxime dans l'usage, que le possesseur de bonne foi a action pour les impenses*

nécessaires et pour les utiles, quoique dans la suite la chose ou le fonds soit venu à périr etc., mais le possesseur de mauvaise foi n'a d'action pour ces dépenses qu'en autant que la chose se trouve augmentée de valeur lors de l'éviction." In this case, the *impenses utiles* of the defendant, have, by the report of the experts, been found to have increased the value of the occupied land, $300, and, as that report appears to have been made with care and circumspection, the judgment appealed from which has adjudged the amount to the defendant and also given him the *droit de rétention* until its payment, must, I think, for the reasons stated above of the claimed improvements being *impenses utiles*, be confirmed.

CARON, J.—Action au pétitoire, par l'appelant pour se faire remettre par le défendeur, Intimé, un lot de terre que ce dernier possède sans droit ni titre, appartenant à l'opposant, qui le revendique avec les fruits et revenus.

Le défendeur admet le droit de propriété du demandeur, mais prétend que ce lot fait partie des terres incultes, qui appartiennent au demandeur dans cet endroit; lesquelles sont destinées, à être vendues et livrées à la culture, que sous l'impression que plus tard ce terrain lui serait vendu il s'est mis à le cultiver et à l'améliorer; en attendant qu'il put en obtenir un titre du demandeur que ces améliorations ont été faites aux vu et scu du demandeur, que le défendeur, pendant six ans de possession, a payé les taxes imposées sur la dite terre, à la connaissance des agents du demandeur: que cependant le demandeur a refusé de lui donner un titre, et s'est refusé, aux offres que lui a faites le défendeur, d'acheter ou de lui remettre le lot de terre en étant remboursé de ses améliorations: que ces offres ont été faites avant l'action par laquelle le demandeur insiste à avoir la terre avec les améliorations sans indemnité. Le défendeur ajoute dans ses défenses que les impenses et améliorations qu'il a faites sur le lot sont permanentes et utiles, augmentant de beaucoup la valeur de la propriété, et que partant il doit en être remboursé. Le demandeur s'y oppose, sous le prétexte que le défendeur était de mauvaise foi, puisqu'il savait que l'immeuble ne lui appartenait pas, et que partant il n'a pas droit à indemnité; que ces améliorations ne lui sont d'aucune utilité; qu'il ne les a pas demandées. Le demandeur nie que le défendeur ait payé les taxes municipales, et prétend que c'est lui, Ellice, ou son agent, qui les a payées.

Les témoins entendus par le défendeur ont prouvé la possession depuis le quatorze février mil huit cent soixante; ses améliorations: qu'il a payé les taxes, que sa possession était à la connaissance du demandeur, ses offres d'acheter ou de quitter en étant indemnisé, les fruits et revenus peu de chose comparés aux améliorations. La terre qui valait, quand le défendeur, y est entré, $150 à peu près, vaut à présent sept à huit cents piastres.

Après cette preuve faite de part et d'autre, la Cour a rendu un interlocutoire, ordonnant une expertise pour estimer la valeur des améliorations ainsi que celle des fruits et revenus produits par le terrain en question depuis l'occupation du défendeur. Le rapport de ces experts, dont l'un a été nommé de la part du demandeur, estiment les améliorations à $350, et les fruits et revenus à $50. Le rapport, à la demande du défendeur, a été homologué, le demandeur déclaré propriétaire, le défendeur tenu de déguerpir; mais le jugement condamne le demandeur à payer $300 et les frais de la contestation; c'est de ce jugement qu'est appel.

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Deux questions me paraissent surgir des faits exposés.

1. Le défendeur était-il de bonne foi en entrant sur la terre en question.

2. S'il n'était pas de bonne foi, dans l'acception légale du mot, est-il juste de le priver de toute indemnité dans les circonstances prouvées dans la cause.

Je pense qu'il était de bonne foi dans ce sens qu'il savait que ces terres étaient destinées à être vendues, et qu'il ne pouvait pas supposer qu'on aurait objection à vendre ce lot à lui plutôt qu'à tout autre; il était tellement sous cette impression qu'il a offert d'acheter; sous ce point de vue il était de bonne foi, quoi qu'en réalité il sût bien que le terrain était la propriété du demandeur.

Mais si l'on prétend que cette connaissance le constituait dans ce que l'on appelle en loi, mauvaise foi, il serait encore contraire à l'équité, sous les circonstances, de faire profiter le demandeur, les dépenses faites par le défendeur, de lui faire retirer un plus fort prix par suite des améliorations que le défendeur y avait faites. Le principe que personne ne doit s'enrichir aux dépens des autres a dans le cas actuel sa pleine application.

L'on remarquera que les améliorations en question sont d'une nature permanente, et ne pouvant s'enlever, il faudrait absolument que le demandeur en profite et que le défendeur en souffre, s'il ne lui est pas accordé d'indemnité. Le défendeur n'est pas dans cet état de mauvaise foi qui puisse le soumettre à la rigueur du dernier paragraphe de l'art 417 de notre Code.

Je suis donc d'avis que le défendeur n'est pas de mauvaise foi et peut se prévaloir des dispositions du 3me paragraphe de l'art 417; que le défendeur ayant payé les taxes, possédé aux vu et sçu des agents du demandeur et fait à leur connaissance les améliorations dont il demande le remboursement, doit être payé de ce qu'il a dépensé pour augmenter ainsi la valeur de la propriété du demandeur.

Les autorités citées au factum de l'appelant sont applicables au cas de vraie mauvaise foi, où il s'agit de punir le détenteur du méfait qu'il a commis en s'emparant sous des circonstances coupables, d'un immeuble sur lequel il ne pouvait avoir aucune prétention fondée, mais non au cas où, comme dans le nôtre, il avait toute raison de croire qu'en fesant, ce qu'il fesait non-seulement il ne causerait pas de tort au demandeur, mais qu'au contraire il faisait son avantage, tout en faisant le sien propre.

Je confirmerais le jugement.

Jugement confirmé.

Sanborn & Brooks, for Appellant.
H. C. Cabana, for Respondent.
(T. W. T.)

PRIVY COUNCIL.

JUNE, 1867.

Coram LORD CAIRNS (LORD JUSTICE), LORD JUSTICE TURNER, SIR EDWARD VAUGHAN WILLIAMS, AND SIR RICHARD TORIN KINDERSLEY.

IN APPEAL.

From the Court of Queen's Bench for Lower Canada.

JAMES MACDONALD.

(*Plaintiff in the Court below,*)

APPELLANT;

AND

JAMES LAMBE,

(*Defendant in the Court below*)

RESPONDENT;

AND

MARY NICKLE ET AL.,

RESPONDENTS.

Lower Canada, law of—Fief—Action to recover land, part of a Seigneurie—Grant—Title—Adverse possession—Prescription.

Action by Seigneur to recover possession of a piece of ungranted land forming part of his Seigneurie, against a party claiming under an informal deed from one who had no title deed, but who, with the defendant, had been in undisturbed possession for thirty years :—

Held (affirming the judgment of the Court of Queen's Bench for Lower Canada), that a plea of prescription of the thirty years' possession was a bar to the action as :—first, that it made no difference that during the time of such adverse possession the Seigneurie had under the Statute 6 Geo. 4., c. 59, for the extinction of Feudal and Seigniorial rights in the Province of Lower Canada, surrendered the Seigneurie to the Crown for the purpose of commuting the tenure into free and common soccage, the issuing of the letters Patent regranting the same being uno flatu with the surrender to the Crown, and that both by the ancient French Law in force in Lower Canada and by the English law, prescription ran in favour of a party in actual possession for thirty years; and secondly that such adverse possession enured in favour of a party deriving title to the land through his predecessor in possession :—

Held, further, that such junction of possession did not require a title in itself translatif de propriété from one possessor to the other; but that any kind of informal writing sous seing privé supported by verbal evidence, was sufficient to establish the transfer.

The appeals in these cases were from the decisions of the Court of Queen's Bench in Lower Canada* in two petitory actions brought by the appellant against the respondents to recover possession of certain lots of land described as severally containing 213 acres and 193 acres, and known as lot 16 in the 5th range of *Russeltown*, in the District of *Montreal*, and for mesne profits and damages. Both actions were brought in the District of *Montreal*. The facts and pleadings were the same in both cases.

The declaration in the first action alleged that on the 20th of October, 1832, the Hon. Edward Ellice was and for more than twenty years had been, in possession of the ungranted lands of the *Seigneurie* of Beauharnois, including the land claimed in the action, that on that date he surrendered them to the Crown, and that the Crown by letters Patent regranted them to him in free and common soccage. The declaration then alleged a title in the plaintiff to the land in question derived from *Ellice*, and averred that the defendant about the year 1850,

* *Vide* 9 L. C. Jur. 281.

MacDonald and Nickle, et al.

had taken possession of the land, and ever since kept it from the plaintiff, received the rents and profits, cut down the trees; and prayed that the plaintiff be declared owner, and the defendant adjudged to deliver up the land, and repay the rents and profits he had received, with £100 as damages.

The defendant pleaded in substance, first, a plea of *Chose jugée* alleging a previous action by one *Mary Ball* against the defendant to recover the same land, wherein judgment was given for the defendant and that the plaintiff was the representative of *Ball*. Second, that neither the plaintiff, nor any of those through whom he traced his title, had ever had possession of the land, or any delivery or tradition of *seisin* of it, but that the defendant and his predecessor had always had possession of the land adversely to them. Third, that the plaintiff's predecessor in estate, Silas Ball, had not received any *délivrance de legs* from the legal representatives of *Mary Ball*. Fourth, that the Letters Patent only granted lands which *Ellice* had been previously possessed of and was entitled to surrender; that the plaintiff had shewn no title in *Ellice* previous to the Letters Patent, and that the defendant had been in possession of the land for more than twenty years previous to 1832, and that *Ellice*, therefore, was not entitled to surrender them. Fifth, plea setting out the original grant by *Louis* xiv. of *France* of the *Seigneurie* of *Beauharnois* and alleging that the land in question did not come within the limits of the original grant, and concluding for a rule or judgment of *Experts* to determine whether the land in question did or did not come within such limits. Sixth, a plea traversing the title deeds alleged in the declaration and setting up a right by prescription of thirty years. Seventh, a denial that the plaintiff had ever had possession of the land or any tradition of it, "*réelle ou feinte.*" Eighth, a plea setting up "*impenses et améliorations*" made by himself and his *auteurs* and concluding that the plaintiff should be ordered to repay them before being put in possession of the land; and lastly, the general issue.

The plaintiff filed general answers to the first seven pleas, and to the eighth a special answer alleging that all the "*impenses et améliorations*" had been made in bad faith, and praying that the rents and profits received by the defendants might, if necessary, be set off against them, concluding for a rule or judgment of *Expertise*, and replied generally to the ninth plea.

From the evidence it appeared the *Seigneurie* or *Fief* of *Villechauve* or *Beauharnois* was originally granted by *Louis* XIV. of *France* to the Marquise *DeBeauharnois* and *De* Beaumont in the year 1709. Contradictory evidence was adduced by the plaintiff and defendant respectively, on the question whether *Russeltown*, of which the land claimed in the declaration formed part, was included within the limits of the Seigneurie so originally granted; but from the view taken by the judgment of the Court below and on appeal, this point was immaterial.

By the Imperial Stat. 6 G. 4 c. 59, for the extinction of Feudal and Seigniorial [illegible] in the Province of *Lower Canada*, it was enacted by section 1, that when[illegible] any person holding of the Crown, as proprietor, any Fief or Seigniory, and [illegible] legally the power of alienating the same, which Fief or Seigniory, lands had been granted and were held, "*à Titre de Fief*," or "*Arrière Fief*," or "*à Titre de Cens*" should by petition apply to the Crown for the commutation of and release from the *Droit de Quint* and other feudal burdens, and should surrender

into the hands of the Crown all such parts of the Fief as should remain in his possession ungranted; it should be lawful for the Crown to commute the said feudal burdens and to cause a fresh grant to be made to the person so applying of the lands, to be thenceforward holden in free and common soccage as lands are held in *England*. And by section 6 it was further provided that public notice should be given for three months before such grant, calling on all persons who might have or claim to have "any present or contingent right, interest, security, charge, or incumbrance, either by mortgage or under any other title, or by any other means whatever, in or upon the land "to signify in writing within three months, their assent to or dissent from the surrender, re-grant, and change of tenure of the lands."

Shortly after passing of this statute, *Ellice*, the *Seigneur* of the Fief, made application to the Crown for a commutation of its feudal burdens and a re-grant of such of the lands of the Fief as remained ungranted, to be held in free and common soccage, and on the 20th of October, 1832, surrendered to the Crown all the ungranted portions of the Fief. On the 10th of May, 1833, his then Majesty King William IV., by letters patent under the Great Seal, granted to *Ellice* the lands that had been surrendered, to be held by him in free and common soccage.

The plaintiff founded his title under a deed of sale dated September 25th, 1855, made between Silas Rozier Ball, Edward Ellice, and the plaintiff, by which Ball sold to the plaintiff a lot of land forming a part of lot No. 17 in the 5th range of *Russeltown*, and alleged by the Plaintiff to be one of the lots of land in dispute, and that *Ellice* confirmed such sale and conveyed to the plaintiff all and every the title and interest which he, *Ellice*, might have in and to the land. *Ellice's* title was traced back to the letters patent of 10th May, 1833.

The defendant relied on his right to the land by prescription, admitting that neither he nor his predecessors in estate had obtained, or even asked for any grant of the land, either from the proprietor of the *Seigneurie* of *Villechauve* or *Beauharnois*, or from the Crown. In support of this title by prescription, the defendant gave evidence showing that in the year 1807 one *Levy Petty* was in possession of Lot No. 16, in the 5th range of *Russeltown*, and continued in such possession till 1811, when he was succeeded in possession of it by one *David Goodwin*, who continued to occupy it till September 1833, being a few months subsequently to the surrender of the land by *Ellice* to the Crown, and the re-grant of it; that in September, 1833, *Goodwin* gave up possession of the land to the defendant, who had continued to occupy it up to the commencement of the action. It was admitted that no legal conveyance of the land by *Goodwin* to the defendant had been executed, but a certificate of sale in the following form was given in evidence:—

RUSSELTOWN, Sept. 21, 1833.

This may certifey that I do this day sell, convay, and give up all right, title and clame that I have or ever had to the lot of land I know, receide on to James Lamb, being lot No. seveneteneth in the third section.

David Goodwin,
James Richardson } Witness.
Patrick Mohan }

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In virtue of which certificate the defendant claimed to be entitled to join the possession of the land by *Goodwin* to his own possession of it, for the purposes of the plea of prescription. It was admitted that "No. seveneteneth," in the above mentioned certificate, was put in mistake for 16th, and the defendant called witnesses to prove that there never was a lot No. 17 in the fifth range of *Russeltown*, but that the land in question formed part of Lot 16, which was so occupied by the defendant and *David Goodwin*, and that the possession of the defendant and *David Goodwin* extended over the whole of the land in question. The plaintiff also admitted that previously to the year 1834 the land called Lot No. 17 formed part of Lots No. 15 and 16, which then extended to the boundary between *Russeltown* and the Township of *Hemmingford* and that the number had been altered by *Livingstone*, a surveyor employed by the Seigneur.

The case came on for hearing on the 27th of May, 1861, and on the 28th of June, 1862, the Judge of the Superior Court (The Hon. Mr. Justice Smith) gave judgment, dismissing the action with costs on the grounds, first, that *Edward Ellice* was not in possession of the land in question at the time of the alleged surrender of it, but that *David Goodwin* had been so for twenty years; and that therefore Ellice could not legally surrender it or obtain a re-grant of it from the Crown; secondly, that the grant by the Crown to that extent was null and void; thirdly, that by the law of *Lower Canada*, *Ellice* having allowed *Goodwin* to settle on the land, could not eject him from it, but only claim from him the accustomed dues; fourthly, that the plaintiff traced his title only to the Letters Patent which conferred no new title on him, and that the defendant had proved his plea of prescription; fifthly, that as the plaintiff claimed through Mary Ball, he was estopped by the judgment given against her as set out in the defendant's first plea.

A similar judgment was given in the other action.

From this judgment, as well as that in the other action, the plaintiff appealed to the Court of Queen's Bench at *Montreal*, and on the 6th of December, 1864, that Court, consisting of the Chief Justice *Duval* and the Judges, Aylwin, Meredith, Drummond, and Mondelet, gave judgment, affirming the judgment of the Court below on the single ground that the defendant had proved his plea of prescription. Mr. Justice *Meredith* dissenting from the majority of the Judges on the ground that the certificate of sale of the 21st of September, 1833, operated as a conveyance by the law of *Lower Canada*. As there was a difference of opinion on this point, the Court pronounced the following judgment:—"Considering that the defendant's plea of peremptory exception filed in the Superior Court, alleging that he, the defendant, hath held and possessed, publicly and in good faith, for more than thirty years immediately before the institution of this action of the said *James Macdonald* hath been proved by the evidence adduced in this cause, and that by reason of such possession the defendant, respondent in this Court, hath acquired a title by prescription to the said land, and that in the judgment pronounced by the Superior Court at *Montreal* on the 28th of June, 1862, dismissing the action of the plaintiff, appellant in this Court, with costs, there is no error, doth confirm the said judgment and doth condemn the appellant

to pay to the respondent the costs by him incurred in this Court, (the Honourable Mr. Justice *Meredith* dissenting)."

Against these judgments the present appeals were brought and were heard together.

Sir R. Palmer, Q. C., and *Mr. H. M. Bompas* for the appellant:—

First, as to the appellant's title. The Letters Patent of the 10th of May, 1833, are sufficient *primâ facie* evidence of the facts stated in them, and conclusive in all points, if not contradicted or bad on the face of them: *Jackson* vs. *Lawton* (1); *The People* vs. *Mauran* (2). The case of the Alton Hoods (3); Bullers N. P. p. 76; especially as in the recitals in the grant it is stated that the lands in question formed part of the Seigneurie of *Beauharnois* or *Villechauve*, and remained ungranted at the date of the surrender to the Crown by *Ellice*. In the answer of the Seigneurial Court to question No. 17, all the judges except Mr. Justice *Mondelet* adjudged that the *Seigneurs* "had full and entire property (*dominium plenum*) in the ungranted lands in their Seigneuries (4): *Ordonnance* of Louis XIV., 6th July, 1711; Edicts and *Ordonnances* of *Seigneurial* Tenure in *Canada* 272 (Quebec 1852). These facts not having been disproved by the defendant, the Crown must be held on the surrender to have been entitled to grant and to have granted an absolute title to the lands in dispute to *Ellice*. But an important question arises with respect to the governing law of prescription to be applied; we contend that the Court below miscarried in applying the ancient French law to the case. The law that governs it is the English law. The proclamation made on the cession of *Canada* in the year 1763 introduced the English law by right of conquest: Campbell vs. Hall (5). It is true the effect of the proclamation as to the full extent of the introduction of that law has been doubted, as it does not mention in express words "English law." The Statute 14 Geo. 3, c. 83, however, by implication makes the proclamation to this extent apply to English law, even if it had not been so before. The Statute 6 Geo. 4, c. 59, was to remove doubts as to certain matters, but section 8 does not abrogate the English law, being the governing law. So the preamble to the *Colonial Act* 9 and 10 Geo. 4, c. 77, implies the English law to be the rule. The Court of *Lower Canada* in the case of *Patterson* vs. *McCallum* (6) held upon an investigation of the proclamation of 1763, that the English law relating to mortgages applied to *Lower Canada*. The *Colonial* Act 20 Vict. c. 45 does not apply, as, first, it contravenes the Imperial Statute, and, secondly, it was subsequent to the date when these actions were brought. These points are fully discussed in Stuart vs. Bowman (7). Wilson vs. Wilson (8). That being so, the lands in dispute subsequently to the change of tenure must be held to have been subject to the English law of prescription as it existed at the time of the Act 6 Geo. 4, c. 54, and it is clear no prescriptive right could have been acquired by the respondent under that law. Under the English law there was no title in the respondent. Prescription must be proved or presumed immemorially by

(1) 10 Johns, Amer. Rep. 23. (2) 5 Denio's Rep. 388. (3) Co. Rep. Pt. 1 pp. 51, 3.
(4) Low. Can. Rep. Seign. Ques. Vol. A. p. 62a. (5) Cowp. 204.
(6) Stuart's Low. Can. Rep. 429. (7) 3 Low. Can. Rep. 310. (8) 8 Ibid. 34.

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holding or a lost grant, but the right would not be barred under sixty years: *Shelford* R. P. Stat. p. 145. Here the alleged adverse possession was not continuous as required by the English *Statute of Limitations*, 3 and 4 Will. 4, c. 27 secs. 2, 7, 34. *Doe d. Carter* vs. *Barnard* (1) *Dixon* vs. *Gayfere* (2) and the prescription was broken by the grant of the Letters Patent. So by the French law prescription must be continuous and uninterrupted. *Troplong, Traité de la Pres.* Tom I, p. 568, Nos. 900, &c. *Duranton*, Tom xxi, No. 240, p. 563; *Pothier, Traité de la Pres.* No. 111; *Dunod, Traité de la Pres.* pp. 19, 20; *Marcadé, Traité de la Pres.* p. 100, Nos. 435, 119, 123, 124, *Code Civil* B. iii. tit. xx. Art. 2242; *Coutume de Paris*, Tom ii, p. 299; *Herrick* vs. *Sixby* (4).

Second, assuming the French law to apply, what is the effect of the plea of prescription? The mere possession of waste land forming part of a Fief without a grant for less than thirty years, the time acquired by the old French law by prescription, does not by the law of *Lower Canada* give any right to the land or against the *Seigneur*, but as in this case, was a mere holding for him, *Goodwin* not having received any grant of the land in question or held it for the time required by the law of prescription. *Ellice* lawfully surrendered it to the Crown, and by the Letters Patent the Crown regranted it to *Ellice* free from any right of *Goodwin*. Neither the defendant nor *Goodwin* entered on the land under a just title or held it *bonâ fide*; and a possession of thirty years was therefore necessary to give them a title to the land, which neither *Goodwin* nor the defendant held for that time.

Next, the defendant is not entitled to join the possession of *Goodwin* to his own for the purpose of prescription without proving a good legal conveyance of the land to him by *Goodwin*. The certificate of sale produced by the defendant being *sous seing privé*, has no date as to third parties, and there is therefore no proof that the date referred to therein took place at the time the defendant entered on the land, or that during his possession he was the successor "*à titre particulier*" of *Goodwin*. Again, the surrender of the *Seigneurie* to the Crown, and the holding of it by the Crown for seven months, prevented the defendant being entitled to join the possession of *Goodwin* before that surrender to the possession of *Goodwin*, and the defendant subsequent to the surrender, so as to make up the thirty years' prescription required. So again, previous to the change of tenure, Goodwin can only prescribe for the "*domaine utile*" over the land, the land itself being inalienable; and after the change of tenure into common soccage, Goodwin can only prescribe for the absolute ownership of the land; subinfeudation being unlawful, and possession in two different rights cannot be united to form the period required by the law of prescription. Now, the defendant's plea of prescription alleges a right acquired by prescription to the absolute ownership to the land and a right to hold it of the *Seigneur*. No such prescriptive right has been proved, or could be, the land having been inalienable till within the thirty years at the commencement of the actions.

Mr. Manisty, Q.C., and Mr. *Wills*, for the respondent:—Although the lands formed part of the *Seigneurie of Beauharnois*, yet the appellant has failed to

(1) 13 Q. B. Rep. 945. (2) 17 Beav. 421, 429. (4) Ante p. 129.

establish a title to the lands in question, or possession of the lots in Ellice, anterior to or since *Goodwin's* possession, which was necessary to maintain the action: *Pothier Propriété* No. 317. On the other hand, the evidence of uninterrupted possession by *Goodwin* and the respondent is conclusive. He must, by the French law, be presumed proprietor: *Code civil*, B. iii. tit. xx. Art. 2230; and can join possession. ib: Art. 2235 *Code civil du Bas-Canada* tit. "Prescription." Art. 2195 p. 599. By the English law a purchaser must show seisin within thirty years. No writ of right applies; Statute, 32 Hen. 8. c. 2. It was proved that *Lambe* was entitled at the time the actions were commenced.

No serious doubts can be entertained that the law to govern the case is the old French law prevailing in *Lower Canada*. Such a point was never before taken in the numerous appeals to this Tribunal from Lower Canada where the rights of the parties have always been regulated by the old French law. As prescription was established according to the principles of the ancient French law the plaintiff's right to recover the land, if he or those through whom he claims, ever had a right to it, was barred by lapse of time and [illegible] enjoyment by *Goodwin* and the respondent, which was continuous for upwards of thirty years next before the commencement of the present actions. As to prescription the law is clearly stated in *Ferrière* Art. 118; *Coût.* p. 425; 1 *Duplessis*, p. 500; *Troplong* "*Priviléges*" Tom. 1, p. 919, Nos. 119, 187; *Vazeille, Pres.* p. 42 as relied upon in the Court below. *Herrick* vs. *Sixby* (1) is in point and was decided by this Court upon the French law.

LORD CAIRNS, giving judgment, said:

The actions in which these appeals are brought were petitory actions to recover possession of two pieces of ground in the 5th range of *Russeltown* in the *Seigneurie of Beauharnois*.

These pieces of ground have been stated in the proceedings and in the arguments as lots 16 and 17; but it is clear that the whole formerly went by the description of lot 16, and that the division into two lots did not take place until some time about the year 1834, at which time the division was made by *Livingstone*, the agent of the *Seigneur*, in his own plans.

It was admitted in the argument before us on behalf of the respondent that the land in question formed part of the *Seigneurie of Beauharnois*, as originally granted in 1729 by the French King, *Louis* XIV.; and one of the points in dispute in the Court below has thus been removed.

The judgment made in the preliminary Court of Lower Canada by Mr. Justice *Smith*, in favour of the respondents proceeds upon the principle that the respondent and *Goodwin*, his predecessor, had been in possession of this land from 807 and that this possession must be taken to have been by permission of the *Seigneur*, and that therefore the *Seigneur* could not eject the respondent, but only claim from him rights and dues such as a tenant should render to his *Seigneur*. This view of the case was again pressed in argument upon these appeals, but their Lordships are of opinion that, although there may be some facts appearing in the evidence which would form a ground for such an argument, the pleadings between

(1) Ante p. 129.

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the parties render the argument inadmissible. The appellant in both the appeals alleges in his declaration that the respondent wrongfully and without any title took and obtained possession of the land, has kept illegal possession of it, and pray delivery of the land. The respondent, on the other hand, after certain objections to the plaintiff's title, which are now out of the case, alleges a *seisin* of the land in 1807 by *Goodwin*, a transfer in 1833 from *Goodwin*, to the respondent, and that the land had been peaceably, openly, and uninterruptedly possessed and enjoyed by *Goodwin* and the respondent, from 1807 to the present date, and that the respondent has a right to be declared proprietor and owner of the land.

Their Lordships are of opinion, with the Court of Queen's Bench for *Lower Canada*, that the case, as thus put on both sides, is one of adverse possession, and that what the respondent has undertaken to prove is not a tenure, expressed or implied, under *Seigneur*, but a title by prescription, for thirty years and upwards, against the *Seigneur*.

The first question therefore, is one of fact: in whom has the possession of the land—meaning thereby lots 16 and 17 (formerly styled lot 16)—been for thirty years prior to 1855? If possession had been *de facto in Goodwin* and the respondent, that possession is admitted to be an adverse possession.

The piece of land which, before the year 1834 has been known as lot 16, had on the north and east, or more accurately on the north-west and north-east, the natural boundry of the *Black River* and *English River*. On the west or south-west it was bounded by lot 15, and on the south it extended, according to the evidence, to the line called the *Hemmingford Line*. Taking the parol evidence in the case, and more particularly that of the witnesses *Stafford*, *Allard* and *Porcheron*, it appears that one *Levy Petty* was in possession of the lot in 1807, in which year Goodwin took possession of it, that a house was built upon it in *Petty's* time, which *Goodwin* at first occupied, but afterwards built a house for himself; that there was a pretty large clearing when *Goodwin* came; that *Goodwin* laboured and cropped the land, and was a married man living with his family; that *Goodwin* paid the bridge-tax for the lot; that when the road crossing lot 16 was projected by the inhabitants, *Goodwin* was asked, and upon certain conditions consented, to give the land required for it; and that the whole of the lot from the north end of it to the *Hemmingford Line* was known as number 16 and as the *Goodwin Lot*.

The possession of the whole by the respondent from 1833 is still more clearly proved and was in fact little, if at all, disputed.

There is, however, a piece of evidence coming from the *Seigneur* himself or his agents, which their Lordships look upon as still more conclusive on the fact of possession. It appears in the year 1828, steps were taken, upon the death of *Mr. George Ellice*, the former *Seigneur*, to require from the persons then holding the lands an exhibition of the titles under which they were held. A list is given of the persons then found in possession of the lots in *Russeltown*, on whom circular notices from the agents of the Seigneur were served, and the name of *David Goodwin* is there entered as the person in possession of lot 16 of the third section; service being stated to have been made by delivery of the circular

to his wife and speaking to him afterwards. His possession is treated as a possession of the whole lot, for a distinction is made in other cases where a lot is possessed in halves by different persons; and the proceedings in 1838 are upon the footing of the persons mentioned in the list having been in possession for some time. The result of the proceeding is for this purpose immaterial; but what has been stated is evidence of the most satisfactory description that the agents of the Seigneur in the year 1828 found *Goodwin* in possession of the whole lot (then known as lot 16) and this evidence coupled with the testimony in the case, establishes to the entire satisfaction of their Lordships, possession by *Goodwin* and the respondent of the whole lot for upwards of thirty years.

The other questions in the case are questions of law. Goodwin gave up possession to the respondent in 1833 making over his title by the document dated the 21st of September, 1833:—[His Lordship read it.]

It is admitted on both sides that it must be taken that the word "seveneteneth" is in this document to be read as "sixteenth," but it was contended that the document was insufficient to connect the possession of *Goodwin* with that of the respondent: First, because it was a document *sous seing privé*, and therefore without date as regards third parties; and, secondly, because it was not an instrument amounting to a conveyance and *translatif de propriété*. Both these objections were overruled by the Court of Queen's Bench and, as their Lordships think, rightly. The first of the objections, viz., that the document is *sous seing privé* was little argued by the appellant; and they do not think it necessary to add anything to the reasons for disallowing it given by *Mr. Justice Meredith*.

As to the objection that the paper is not a conveyance *translatif de propriété*, it would, their Lordships think, be somewhat remarkable if where the real object is to show that an incoming occupier claims under and by way of direct continuation of the occupation of an outgoer, and where at the time there is no real title to be conveyed, an instrument adapted to pass a real title should be required. Their Lordships think, however, as did the Court below, that there is no foundation for this objection in any of the authorities which have been cited. The authorities speak of a predecessor and a successor, of the successor claiming by contract or by will, and of a legitimate continuation of possession; and they are careful to negative as a sufficient connection the mere fact that one possession has immediately preceded the other, and they do no more than this. There is in the present case ample proof from the paper and from the parol testimony, of a *bona fide* sale from *Goodwin* to the respondent, and of possession taken and continued under that sale; and this, in their Lordships' opinion, is sufficient.

The appellants contended, however, that inasmuch as under the Statute 6 Geo. 4, c. 59, Mr. *Edward Ellice* the *Seigneur*, had, by the surrender of the 20th of October, 1832, vested the *Seigneurie* and the ungranted lands thereof, including, as was said, those now in question in the Crown to be regranted in common soccage, there was an interruption in the prescription, since no prescription would run against the Crown. Their Lordships do not think it necessary to consider how far, under any circumstances, this argument could be maintained, inasmuch as in the present case they find that no acceptance of the surrender by the Crown was made until the grant of the 10th of May, 1833, so that the land was surrendered

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and regranted *uno flatu* and merely as a mode of converting the tenure, and there never was any possession or ownership of the land by the Crown.

Their Lordships have assumed, as was ultimately conceded by the Counsel for the appellant, that the case falls to be decided, so far as any question of law is concerned, by French law. But if principles of English law were to be applied, the prescriptive title of the respondent would not, in their Lordships' opinion, be less strong.

Their Lordships will humbly advise Her Majesty that both these appeals should be dismissed with costs.

Appeal dismissed.

Bischoff, Coxe & Bompas, for Appellant.
Ashurt, Morris & Co., for Respondents.
(F. W. T.)

LISTE

DES JUGEMENTS RENDUS PAR LA COUR DU BANC DE LA REINE, (EN APPEL), POUR L'AN 1867.

TERME DE MARS 1867.

MONTREAL.

NOS.	APPELANTS.	INTIMÉS.	DATE	JUGES.	JUGEMENTS.
5	Dubois	Tremblay	1 Mars.	Juges Aylwin, Drummond, Mondelet, Johnson	Re-audition ordonnée.
98	Brigham	Hall	" " " " "	Badgley, Mondelet	Motion on behalf of Respondent that in as much as the said Appellant has failed and neglected to return the Writ of Appeal in this cause issued on the twenty-second day of August last past, or the Writ of Appeal issued in the said cause on the nineteenth day of October last past, or the Record of and from the Superior Court for Lower Canada, in the cause between the parties, and that the Return day of each of said Writs has past, and the said Appellant made no diligence or proceedings in this cause, that both appeals on the above Writs mentioned be declared abandoned and deserted and be hence dismissed with costs—Rejected.
51	Leamy	McCready	" "	Juge en Chef, Aylwin, Drummond, Mondelet	Motion de l'Intimé pour Substitution de Procureur—Accordée de consentement.
64	Muir	Sinclair *et al*	" " " " "	Badgley, Mondelet	Do. Do. Do.
29	Macfarlane	Dewy	" " " " "	" "	Motion de l'Appelant pour Substitution de Procureur—Accordée de consentement.
36	Ætna Insurance Co.	Metcht's Exchange	" " " " "	" "	Motion des intimés pour substitution de Procureur—Accordée de consentement.
87	Taylor	Molleur, fils	2 " " " "	" "	Motion de l'Intimé pour faire rejetter, débouter, renvoyer et déclarer non avenu le dit Appel: 1o. Parceque le dit Appelant n'é s'est pas conformé à la loi pour être reçu dans son présent Appel et notamment parceque le dit Appelant n'a point, pour les fins du dit Appel, fourni le cautionnement requis par la loi, savoir un cautionnement comme quoi il satisfera à la condamnation rendue et prononcée en cette cause contre lui, et aussi comme

NOS.	APPELANTS.	INTIMÉS.	DATE	JUGES.	JUGEMENTS.
					quoi il paiera tels dépens et dommages qui seront adjugés en cas que le jugement de la Cour Supérieure dont est Appel serait confirmé, &c., et qu'il n'a point déclaré par écrit au Greffe de la Cour Supérieure du Bas-Canada dans le District d'Iberville où a été rendu le dit Jugement dont est Appel qu'il ne s'opposait point et ne s'oppose point à ce que le dit Jugement rendu contre lui eût et ait son effet et soit exécuté suivant la loi —Accordée quant aux frais seulement.
87	Taylor.....	Molleur, fils.....	2 Mars.	Juge en Chef, Aylwin, Drummond, Badgley, Mondelet.	Motion de l'Appelant pour permis d'amender son cautionnement en ajoutant et insérant les mots suivants, savoir: "And shall answer the condemnation and pay "such damages as may be adjudged against the said "Abel Lewis Taylor," après le mot "Judgment" à la seizième ligne du dit acte de cautionnement, et ce avec l'approbation, reconnaissance et signature des cautions mentionnées et nommées au dit acte—Accordée en payant les frais de cette motion—Amendement à être fait dans 4 jours.
56	Clément.....	Corporation de Farnham.....	4 "	Juges Aylwin, Drummond, Mondelet, Johnson.....	Re-audition ordonnée—La Cour également partagée.
	Mullin.....	Taylor.....	" "	Juge en Chef, Aylwin, Drummond, Badgley, Mondelet.	Motion pour Appel de Jugement interlocutoire—Rejettée avec dépens.
	Mullins.....	Lees.....	" "	" " " " " "	Motion pour Appel de Jugement interlocutoire—Retirée.
65	Ireland.....	Duchesnay & Cie...	5 "	Juges " " " "	Conf. *in partibus.*
40	Sache.....	Courville.....	" "	" " " " "	" avec dépens.
12	Catlin.....	Clark.....	" "	" " " " "	Inf.
17	O'Connor.....	Raphael.....	" "	" " " " "	Conf.
96	Laprade.....	Gaultjer.....	" "	" " " " "	Inf.
79	Wilson.....	Demers.....	" "	" " " " "	"
14	Morgan.....	Gauvreau.....	" "	" " " " "	"
71	Champagne.....	Armstrong.....	" "	" " Mondelet, Johnson	"
1	Archambault & *vir*.....	Blumhart.....	" "	" " " " "	Motion de l'Intimée pour faire rejeter du dossier et déclarer n'en pas faire partie la pièce No. 7 de ce Dossier étant la renonciation par Dame Marie Mélanie Archambault à la communauté de biens existant entre elle et son époux Calixte Durocher, en date du quatre Septembre mil-huit cent soixante et deux reçu devant J. H. Marcotte et son confrère, notaires, en autant que la dite pièce a été mise et ajoutée au dit Dossier irrégulièrement et illégalement et aussi parceque le dite pièce a été falsifiée depuis qu'elle fait partie du dit dossier en ce que depuis que le dit dossier a été fait et rapporté devant ce tribunal il a été écrit en marge de la dite pièce un certificat du Protonotaire de la

et son épouse Carlite Durocher, en date du quatre Septembre mil-huit cent soixante et deux reçu devant J. H. Marcotte et son confrère, notaires, en autant que la dite pièce a été mise et ajoutée au dit Dossier irrégulièrement et illégalement et aussi parceque le dite pièce a été falsifiée depuis qu'elle fait partie du dit dossier en ce que depuis que le dit dossier a été fait et rapporté devant ce tribunal il a été écrit en marge de la dite pièce un certificat du Protonotaire de la cour Supérieure du Bas-Canada dans et pour le District de Montréal établissant l'insinuation de la dite pièce ès Registres des Insinuations—Motion accordée—Pièce rejettée du dossier.

	The Queen	Grant	6	"	Juge en Chef, Aylwin, Drummond, Badgley, Mondelet.	Ordonné que le Dossier soit remis.
1	Beaulieu	Charlton	"	"	"	"	"	"	"	"	"	Continuée au terme prochain de consentement.
Ex parte		Fourquin	7	"	"	"	"	"	"	"	"	Requête pour Bref d'*Habeas Corpus*—Rejettée vu l'insuffisance d'avis de Requête pour Bref d'*Habeas Corpus*.
55	Ramsay	The Queen	"	"	"	"	"	"	"	/	"	Motion to recuse the Hon. L. T. Drummond, one of the Justices of this Court, objecting to his sitting in hearing and trying the issue joined between the said Plaintiff and Lady the Queen, 1o. because of his having sitten as Judge in this cause at the rendering of the final Judgment therein and himself rendered Judgment therein. 2o. Because of the said Judge being a party as complainant and witness in the said case in the Court below—Recusation overruled.
"	"	.....	"	"	"	"	"	"	"	"	"	Exception to Judgment.
64	Jones	Lemoine	"	"	"	"	"	Justice Mondelet	*diss.*	"	"	Motion by and with consent of the Defendant in Error to appeal to H. M in Her Privy Council—Refused.
								Badgley, Mondelet.				Ordonné que l'audition sur la motion de l'Intimé soit continuée au 1er jour juridique du Terme prochain.
36	Mullins	Archambault	"	"	"	"	"	"	"	"	"	Motion pour fair renvoyer l'Appel vu le non-rapport du Bref d'Appel en cette cause ni celui du dossier et transcript, et l'irrégularité de la production des Griefs ou Moyens d'Appel—Rejettée sans frais.
55	Ramsay	The Queen	"	"	"	"	"	"	"	"	"	Motion of the Plaintiff in Error by and with the consent of the Defendant in Error to discharge Inscription—Rejected.
"	"	.....	"	"	"	"	"	Justice Mondelet	*diss.*	"	"	Exception fyled to Judgment.
"	"	.....	"	"	"	"	"	Badgley, Mondelet.				Motion by and with the consent in writing of the Defendant in Error to appeal to H. M. in Her Privy Council—Rejected.
3	Samuels	Rodier	"	"	"	"	"	Justice Mondelet	*diss.*	"	"	Inf.
55	Ramsay	The Queen	9	"	"	"	"	Badgley, Mondelet.				Writ of Error quashed—Record ordered to be remitted to the Clerk of the Crown.
52	Smith	Hagar	"	"	"	"	"	Justice Mondelet	*diss.*	"	"	Motion by and with the consent of the appellant and appellant *par Reprise d'Instance* to dismiss appeal for
								Badgley, Mondelet.				

NOS.	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
					want of proceedings with the said appeal, the argument and adjudication thereof, but without costs—Granted.
80	Vandal	Egglefield	" " "	" "	Inf. chaque partie payant ses frais.
				Juge Drummond, Mondelet, quant aux frais, Badgley, Mondelet	} *diss.*
72	Miller	Bankhage	" " "	" "	Requête rejettée.
11	Cartier, Hon. G. E.	Grand Trunk R. W. Co.	" " "	" "	Ordonné que l'audition en cette cause soit continuée au [illegible] prochain et soit la première cause sur le rôle.

QUEBEC.

25	Aylwin	Venner	13 Mars.	Juge en Chef, Drummond, Badgley, Mondelet	Sur motion, permis à l'Appelant et à l'Intimé de produire certains papiers.
26	"	"	" " "	" " "	Do Do
37	Venner	Aylwin	" " "	" " "	Do Do
34	Bourassa	Bourassa	" " "	Aylwin, Drummond, Badgley, Mondelet	Motion pour reprise d'instance au lieu et place de l'Appelant Jean Bourrassa—Accordée.
		Gugy	" " "	" " "	Requête de l'Intimé que, vû la décision du Conseil Privé dans cette cause entre les mêmes parties, cette Cour ordonne les frais qu'elle lui a refusés par son Jugement—Requête rejettée et remise au Requérant par ordre de la Cour.
	Nothern Railway Co.	Patton	" " "	" " "	Motion pour appel d'un Jugement Interlocutoire—Accordée.
24	McArthur	Hart	16 " "	" " "	Motion pour faire rejetter le cautionnement—Refusée.
21	Murphy	McClaren	" " "	" " "	Re-audition ordonnée.
9	McClaren	Connolly	" " "	" " "	Do Do
22	Pacaud	Corporation d'Arthabaska	18 "	Juges Aylwin, Drummond, Badgley, Loranger	Inf.
3	Corporation de Levis	Hanrahan	" "	Juge en Chef, Drummond, Loranger	Conf.
14	Evanturel	Evanturel	" " "	" " Badgley, Mondelet	"
7	de Gaspé	Coté	18 Mars.	Juge en Chef, Aylwin, Drummond, Mondelet	Re-audition ordonnée.
19	Sewell	Gault	" " "	" Drummond, Mondelet, Loranger	Do Do
33	Wight	Daly	" " "	" " "	Do Do
		Bossé	19 " "	" Aylwin, Drummond, Badgley, Mondelet	} Conf.
		Monaghan	" " "	" " "	Inf.
		Picard	" " "	" " "	Conf.
		Coté	" " "	" " "	

	Ex parte	Chateauvert	" " "	" " "	Motion pour *Habeas Corpus*—Refusée.
	Brown	Gugy	" " "	Juge Drummond, Badgley, Mondelet	} *diss.* Motion pour appel d'un Jugement [illegible]

	Monaghan	Picard	"	"	"	"	"	"	"	Inf. Conf.
Ex parte	Chateauvert		"	"	"	"	"	"	"	Motion pour *Habeas Corpus*—Refusée.
Brown	Gugy		"	"	"	"	"	Juge Drummond, Badgley, Mondelet.		*diss.* Motion pour appel d'un Jugement [illegible]—Accordée.
24 McArthur	Hart		"	"	"	"	"	"	"	Appel renvoyé faute de Juridi[illegible] cette cour.
83 Robertson	Symes		"	"	"	"	"	"	"	Motion pour reprise d'instance au lieu de l'Intimé—Accordée.
59 Picard	Picard		"	"	"	"	"	"	"	Jugement revisant un mémoire de frais de l'Intimé taxé par le Greffier de cette Cour.

TERME DE JUIN 1857.

MONTREAL.

Ex parte	Knight		1 Juin.	Juge en Chef, Aylwin, Badgley, Mondelet						Requête pour être admis huissier—Accordée.
51 Ellice	The Queen		"	"	"	"	"	"	"	Motion pour faire déclarer Appel à Sa Majesté abandonné, vû la non-production du certificat du Greffier du Conseil Privé—Accordée de consentement.
33 Lemoine	Gauthier *et al*		"	"	"	"	"	"	"	Motion de l'Intimé pour le renvoi de l'Appel vu la non-production du Factum de l'Appelant—Accordée quant aux frais vû la production du Factum depuis la signification de la dite motion.
Perry	de Gaspé		3	"	"	"	"	"	"	Motion pour appel de Jugement Interlocutoire—Accordée—Bref devant émaner le ou avant le 15 courant.
36 Mullins	Archambault *et al*		"	"	"	"	"	"	"	Conf.
56 Duntney	Prel[illegible] *et al*		3	"	"	"	"	"	"	Requête de Eusèbe Asselin, intervenant, demandant à reprendre l'Instance au lieu et place de Joseph Brouillet l'un des Intimés en cette cause—Accordée, vû le consentement écrit des avocats de l'Appelant au bas de la dite Requête.
Pollard	Irving		"	"	"	"	"	"	"	Motion pour Appel de Jugement Interlocutoire—Accordée de consentement—Bref devant émaner immédiatement.
43 Morrison *et al*	Dambourgès *et al*		4	"	"	"	"	"	"	Motion pour renvoi de l'Appel 1° vu la non-signature du Greffier des appels ou de son Député, certifiant telle copie du Bref d'Appel à lui signifié. 2° Parceque les cautions nommées dans le dit acte de cautionnement et le dit cautionnement d'appel, ne s'y sont pas obligées ni engagées à satisfaire à la condamnation en cette Cour en cas que le Jugement de la Cour Supérieure soit confirmé et parceque caution n'a pas été dûment donnée par les dits appelants qu'ils pour-

NOS.	APPELLANTS.	INTIMÉS.							JUGES.	JUGEMENTS.
										suivront effectivement le dit appel et satisferont à la condamnation et aussi qu'ils paieront tels dépens et dommages qui seront adjugés en cas que le dit Jugement soit confirmé—Motion rejettée.
75	Boucher & *al*.....	Jacques Duhaut.....	"	"	"	"	"	"	"	Motion pour renvoi de l'Appel 1°, vû la non-signature du Greffier des appels ou de son Député certifiant telle copie du Bref d'Appel à lui signifiée, 2° parceque les cautions, nommées dans le dit acte de cautionnement d'appel ne s'y sont pas obligées ni engagées à satisfaire à la condamnation en cette Cour en cas que le jugement de la Cour Supérieure soit confirmé et parceque caution n'a pas été dûment donnée par les dits appelants qu'ils poursuivront effectivement le dit appel et satisferont à la condamnation et aussi qu'ils paieront tels dépens et dommages qui seront adjugés en cas que le dit jugement soit confirmé—Motion rejettée.
45	Charlebois & *al*..	Bertrand.....	"	"	"	"	"	"	"	Motion de l'Intimé pour renvoi de l'appel avec dépens, vû la non-signature du Greffier des appels ou de son Député au bas du Bref certifiant telle copie du Bref d'appel à lui signifiée—Motion rejettée.
55	Dunlop.....	The Queen.....	"	"	"	"	"	"	"	Bref d'Erreur anéanti.
68	Cushing.....	Davis.....	"	"	"	"	"	"	Juge Mondelet *diss.* Mondelet.....	Suggestion de l'Avocat de l'Intimé pour acte de la déclaration qu'il fait du décès de l'Intimé—Acte accordé.
	Cushing.....	Davis & Dunkin.....	"	"	"	"	"	"	"	Motion de l'appelant pour Règle *nisi* rapportable le 2 Sept. prochain pour contraindre Mathilda Dunkin, veuve de feu Wm. H. A. Davies, décédé, Intimé, exécutrice du testament de feu son mari, et John William Dawson, tuteur aux enfants mineurs issus du mariage des dits feus Wm. H. A. Davies avec Jane Anderson sa première femme décédée, à reprendre l'instance au lieu et place du dit feu Wm. H. A. Davies, l'Intimé décédé—Accordée.
64	Jones & *al*.....	Lemoine.....	6	"	"	"	Drummond, Badgley, Mondelet.....			Motion de P. G. Lemoine qu'en autant que le Jugement permettant l'appel au Conseil Privé en cette cause a été rendu le 9 mars dernier, et que le délai pour filer le certificat voulu par la loi pour constater l'institution de l'appel et que des procédures avaient eu lieu sur le dit appel devant le Conseil Privé a expiré le 10 sept. dernier, qu'aucun certificat n'a été filé dans le dit délai, que le dit Jugement du 9 mars dernier soit remis

à la cour inférieure avec ordre de l'exécuter provisoirement, que le mémoire de frais devant cette Cour soit taxé et que pour taxer le mémoire de frais en Cour

de l'appel et que des procédures avaient eu lieu sur le dit appel devant le Conseil Privé a expiré le 10 sept. dernier, qu'aucun certificat n'a été filé dans le dit délai, que le dit Jugement du 9 mars dernier soit remis

à la cour Inférieure avec ordre de l'exécuter provisoirement, que le mémoire de frais devant cette Cour soit taxé et que pour taxer le mémoire de frais en Cour Inferieure il soit permis au Greffier de la dite Cour Inférieure d'inspecter le dossier maintenant, devant cette Cour—Rejettée avec dépens.
Délibéré décharge et ré-audition ordonnée.

Ex-parte	Narcisse Fourquin	7	"	"	"	"	"		
Bélanger	Le Maire &c., de Montreal	"	"	"	"	"	"	Badgley, Mondelet	Motion des Intimés pour Appel de Jugement Interlocutoire—Accordée—Bref à émaner de ou avant le 20 juin courant.
59 Corporation of William Henry	Guevremont	8	"	"	"	Meredith, Drummond, Mondelet			Délibéré déchargé—Ré-audition ordonnée.
21 Dufaux *& al*	Herse *et vir*	"	"	"	"	"	"		Inf.
14 Poitevin	Morgan	"	"	"	"	Drummond, Mondelet, Meredith		Juge Drummond *diss.*	Conf.
95 Mont. & N. Y. R. W. Co.	Ferres	"	"	Juges		"	"	Johnson	"
95 [illegible]erford	Ferres	"	"	"		"	"	Juge en Chef *liss.* Johnson Juge en Chef *diss.*	"

Exparte Fourquin 8 Juin. Juge en Chef, Drummond, Badgley, Mondelet... Motion pour Bref *d'Habeas Corpus*, que le Warrant ou pluries Bref de contrainte par corps soit déclaré illégal et nul pour entr'autres raisons les suivantes: 1° Parceque le dit warrant a été causé par l'insuffisance des produits d'une folle enchère faite sur le prisonnier dans une cause devant la Cour Supérieure du District de Richelieu où il était demandeur et Louis Hébert, fils de Pierre, défendeur, et que la dite contrainte par corps a été émanée pour toute la différence du prix à la requisition du Défendeur sans donner au prisonnier crédit pour le montant de son jugement, les frais et les intérêts: 2°. Parceque le dit warrant n'a pas été émané au nom du Shérif du dit District, mais au nom de Bruneau B. Monjeon, Député Shérif du District de Richelieu, dans la Province du Canada, tandis qu'il apparait que le Shérif du District avait résigné: 3o. Parceque le dit warrant mentionne les frais d'exécution sur icelui avant qu'ils aient été encourus, et par conséquent avant qu'ils aient pu être fixés; 4o. Parceque

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					la contrainte par corps susdite a été émané non seulement pour la difference du prix des deux ventes, mais aussi pour certains frais qui ne peuvent y entrer sous les statuts : 5o. Parceque le dit warrant est illégal. Qu'enfin, avant les procédés pris pour obtenir la dite contrainte et avant le jugement qui l'a prononcée, le prisonnier a été dûment interdit en justice ainsi qu'il appert par l'acte de Tutelle dont copie enregistrée est ci-annexée. Que la procédure pour obtenir la dite contrainte a été prise contre l'interdit seul et non contre le curateur, l'autre des Requérants, qui n'a pas été mis en cause ainsi qu'il apparait sur la face du dit warrant. Qu'une application au Juge de la Cour Supérieure du dit District de Richelieu, demandant l'octroi d'un Bref *d'Habeas Corpus* pour l'élargissement du prisonnier pour les raisons plus haut mentionnées, a été renvoyée et le tout refusé—Brefs pour contrainte par corps jugés illégalement émanés, et prisonnier élargi.
83	Leprohon.....ar....Vallée.....	" " " " " " " "			Inf.
76	Burland.....Larocque.....	" " " " " " " "			Motion on behalf of the appellant for [illegible] the deposit which he now makes of an authe[illegible] of a deed of assignment made under the provi[illegible] the Insolvent Act of 186[illegible] before a Notary Pu[illegible] by the respondent to the Official Assignee and duly deposited in the Prothonotary's Office of the Superior Court for the district of Montreal, and that it be declared and ordered that no proceedings be had in the present cause until the same [illegible]or *Instance* be duly continued by the Assignee to the Insolvent Estate of the said respondent—Gran[illegible]
61	Grimard.....Burroughs.....	" " " " " " " "			Inf.
42	Dorion.....Doutre.....	" " " " " " " "		Juge Drummond *liss.* Badgley, Mondelet.....	"
53	Woodman.....Genier.....	" " " " " " " "			Conf.
61	Harold.....Mayer *et al.* of Montreal.....	" " " " " " " "			Inf.
43	Morrison.....Dambourgès *et al.*...	" " " " " " " "			Requête pour faire condamner les Appelants à payer aux Intimées et ce pendant 3 ans à compter du 29e jour d'Août prochain (1867) à titre de pension ou provision alimentaire, mais sans diminution dans le cas de mi-

42	Dorion	Doutre	"	"	"	"	"	Badgley, Mondelet	"	
53	Woodman	Genier	"	"	"	"	"	"	Conf.	
61	Harold	Mayor *et al.*, of Montreal	"	"	"	"	"	"	Inf.	

43	Morrison	Dambourgès *et al.*	"	"	"	"	"	"	"	Requête pour faire condamner les Appelants à payer aux Intimées et ce pendant 3 ans à compter du 29e jour d'Août prochain (1867) à titre de pension ou provision alimentaire, mais sans diminution dans le cas de prédécès de l'une d'elles, une somme de $120 courant par chacune des dites deux années dont la première sera payer d'avance à l'une ou à l'autre des dites Dames Requérantes, le 29e jour d'août 1867, et pareille somme le 29e jour d'août 1868, avec intérêt du jour de l'échéance de chaque telle somme jusqu'au parfait paiement d'icelle, le tout avec dépens et sous la *réserve spéciale* par les Requérantes de demander le séquestre de tous les biens de la succession de feu F. X. Boucher, Ecr. et sous la réserve de toutes autres demandes, application, *conclusions* nouvelles et de tous pourvois et recours quelconques—Rejettée.
64	Jones *et al.*	Lemoine	"	"	"	"	"	"	"	Motion de l'intimé pour appel à Sa Majesté en son Conseil Privé du Jugement ou ordre sur sa motion en date du —Rejettée.
74	The Queen	Paxton	"	"	"	"	"	"	"	Ordered; that Judgment be rendered at Quebec on the 19th inst., and that the Clerk give notice as required by law.
16	Nagle	Felton	"	"	"	"	"	"	"	Délibéré discharged.
36	Mullins	Archambault *et al.*	"	"	"	"	"	"	"	Motion pour appel à Sa Majesté en son Conseil Privé—Rejettée.
	Tessier	McCready	"	"	"	"	"	"	"	Motion pour appel de Jugement Interlocutoire—Accordée de consentement—Bref devant émaner sous dix jours.

QUEBEC.

14	Evanturel	Evanturel	17	Juin.	Juge en Chef, Drummond, Badgley, Mondelet					Motion de l'Appelant pour permis d'appeler à Sa Majesté en Son Conseil Privé—Accordée.
36	Coté	Bertrand	"	"	"	"	"	"	"	Motion de l'Intimé pour renvoi d'appel faute par l'appelant d'avoir entre son factum—Accordée quant aux frais, vu la production du Factum depuis la signification de l'avis de motion.
17	Gelinas	Lemai	"	"	"	"	"	Mondelet, Loranger	Conf.	
20	Harbour Comrs.	Gibb	19	"	"	"	"	Badgley, Mondelet	Conf. Appel à Sa Majesté accordé.	
35	Lancashire Insurance Co.	Campbell	"	"	"	"	"	"	Inf.	" " " "
38	Lambly	Quesnel	"	"	"	"	"	"	"	"

NOS.	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
4	Bastien	Hoffman	" "	" " "	Conf.
31	Millar	Milne	" "	" " " Juge Mondelet, *diss.*	Inf. Dépens distraits tant des frais de la Cour Supérieure que ceux de cette Cour.
				Juge Mondelet, *diss.* quant au droit d'accorder distraction des dépens de la Cour Supérieure.	
34	Bourassa	Bourassa	" "	" " " Badgley, Mondelet	Conf. Appel à Sa Majesté accordé.
23	Angers	Coté	" "	" " " " "	"
30	Demers	Bourgault	" "	" " " " "	"
27	Augér	Forsyth	" "	" " " " "	"
50	The Queen	Marceau	" "	" " " " "	Cause reservée de la Beauce—Conviction confirmée.

MONTREAL.

JUGEMENT RENDU A QUEBEC.

74	The Queen	Paxton	12 Juin.	Juge en Chef, Drummond, Badgley, Mondelet,	Conviction confirmée.

TERME DE SEPTEMBRE 1867.

MONTREAL.

69	Joubert & *vir*	Manrault	2 Sept.	Juge en Chef, Drummond, Badgley	Délibéré décharge.
70	Joubert & *vir*	Rascony	" "	" " " " "	" "
48	Frothingham	Smith	" "	" " " " "	" "
1	Beaulieu	Charlton	" "	" " " " "	" "
5	Dubois	Tremblay	" "	" " " " "	" "
11	Cartier hon. G.E	Grand Trunk R. W. Co	" "	" " " " "	" "
71	McGillivray	Brady	" "	" " " " "	" "
28	Delisle	Ryland	7 "	" " Caron, "	" "
27	Brunet Létang	Brunet Létang	9 "	" " Drummond, Mondelet, Johnson	Inf.
29	Gravelle	Bélanger	" "	" " " " "	"
26	Lavoie	Deguire Laroue	" "	" " " " "	Conf.
23	Gault & *al*	Donnelly	" "	" " " " "	"
6	Compagnie d'Assurance Mutuelle	Lorain	" "	" " " Juge en Chef, *diss.* Mondelet, Johnson	Inf.

12	L'Heureux	Brunel	" "	" " " " "	Conf.
61	Harold	Mayor *et al* of Montreal	" "	" " Caron, Drummond, Badgley	Motion des Intimés que vû que le 20 juillet dernier ils ont, dans les délais requis, donné avis que le 24 juillet

23	Gault & al.	Donnelly	"	"	"	"	"	"	"	Conf.
6	Compagnie d'Assurance Mutuelle	Lorain	"	"	"	"	"	Juge en Chef, Mondelet, Johnson, Jdes.		Inf.
12	L'Heureux	Brunel	"	"	"	"	"	"	"	Conf.
61	Harold	Mayor *et al* of Montreal	"	"	"	"	Caron, Drummond, Badgley			Motion des Intimés que vû que le 20 juillet dernier ils ont, dans les délais requis, donné avis que le 24 juillet dernier ils fourniraient bonne et suffisante caution pour leur appel au Conseil Privé, que le dit 24 juillet dernier, ils se sont présentés pour fournir les dites cautions, que sur l'objection de l'Avocat de l'appelant que les Intimés n'étaient plus dans les délais, le juge auquel s'étaient adressés les dites parties, maintint la dite objection et refusa de recevoir le dit cautionnement sans en référer au Tribunal, que les retards et délais qui sont nécessairement encourus pour obtenir d'un corps public les informations et les pouvoirs nécessaires pour agir en son nom, et les formalités requises pour la réunir en séance régulière ont empêché les Intimés de pouvoir fournir cautions avant le 24 juillet dernier et vû le désir des Intimés de procéder sur le dit appel avec toute la diligence possible, il leur soit permis de fournir le dit cautionnement sous le plus court délai qu'il plairait à la Cour de fixer —Refusée.
61	Harold	Mayor *et al*, of Montreal	9	"	"	"	"	"	"	Motion on the part of the appellant inasmuch as the respondents have failed to comply with the conditions of the order of the Court made on the 8th June last, permitting them to appeal from the judgment of this Court provided that they give security within six weeks from the said date, that the said order of this Court be rescinded and set aside, and the Record in this cause be remitted to the Court below with costs against the respondents—Granted.
44	Messier	Davignon	"	"	"	"	"	"	"	Inf.
90	McGee	Labelle	"	"	"	"	"	"	"	Conf.
13	Rimmer	McGibbon	"	"	"	"	"	"	"	"
75	Leger Parisien	Leger Parisien	"	"	"	"	"	"	"	Motion de l'Appelant pour permis de produire les affidavits et commencements de dépositions en réponse aux deux affidavits de Frédéric Lefebvre, écr., Avocat, et

NOS.	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
					Charles Léger Parisien, produits en cette cause en Cour Inférieure par l'Intimé avec sa motion du 17 Octobre dernier vû que le dit appellant n'a eu en Cour Inférieure aucun avis de la dite Motion et aucune communication des dits affidavits et n'a connu leur existence qu'après que le Jugement dont est appel eut été rendu—Acte donné de la production des documents.
75	"	"	" "	" " " " "	Inf.
55	Dunlop	The Queen	" "	" " " " "	"
	Ex parte	John Clauson	" "	" " Juge en Chef, *dis.* Drummond, Badgley	Requête pour être admis huissier de cette Cour pour le district d'Ottawa—Accordée.

QUEBEC.

27	Anger	Forsyth	12 Sept.	Juge en Chef, Caron, Drummond, Badgley	Motion pour faire décheoir l'Appelant du droit d'appel à Sa Majesté faute de cautionnement—Accordée.
20	Quebec Harbour Commissioners	Gibb	" "	" " " " "	Do do do
48	Pederson	Gibb	" "	" " " " "	Motion pour faire renvoyer l'appel faute de rapport du Bref—Accordée.
50	Cress	Baby	" "	" " " " "	Motion pour fair déclarer l'appelant déchu de son droit d'appel à Sa Majesté faute d'avoir procédé dans les délais voulus par la loi—Accordée.
34	Bourassa	Bourassa	" "	" " " " "	Motion pour faire déclarer l'Appelant déchu de son droit d'appel à Sa Majesté faute de cautionnement—Accordée.
84	Corporation	Vachon	16 "	" " " Mondelet	Ré-audition ordonnée.
60	Miller	Corporation Episcopale des Trois-Rivières	" "	" Drummond, Badgley, Mondelet	Do do
95	St. Cyr	McKenzie	" "	" " " "	Do do
53	Caron	Thibaudeau	18 "	" Caron, Drummond, Badgley	Motion pour faire renvoyer l'Appel faute d'avoir signifié le Bref à Sa Majesté faute de cautionnement—Accordée.
25	Aylwin	Venner	19 "	" Drummond, Badgley, Mondelet, Lorauger	Ré-audition ordonnée.
26	"	"	" "	" " " "	Do do
37	Venner	Aylwin	" "	" " " "	Do do
	Brown	Gugy	20 "	" " " " Inf.	
				Juge Mondelet, *dis.*	

42	Hébert	Corporation de Megantic	2 Déc.	Juge en Chef, Drummond, Badgley, Mondelet	Inf.
32	Carrier	Beaumont	" "	" " " " "	"
43	Patton	Northern Railway	" "	" " " " "	Couf.
28	Pacaud	Gagné	" "	Juges " " " "	"

26	"	"	"	"	"	"	"	"	Loranger	Re-audition ordonnée.
37	Venner	Aylwin	"	"	"	"	"	"	"	Do do
	Brown	Gugy	20	"	"	"	"	"	"	Do do
									Inf.	

Juge Mondelet, *diss.*

42	Hébert	Corporation de Megantic	2	Déc.	Juge en Chef, Drummond, Badgley, Mondelet					Inf.
32	Carrier	Beaumont	"	"	"	"	"	"	"	"
43	Patton	Northern Railway	"	"	"	"	"	"	"	Conf.
28	Pacand	Gagné	"	"	Juges				"	Inf.
									Loranger	

TERME DE DECEMBRE, 1867.

MONTREAL.

15	Curlin	Mahoney			Juge en Chef, Aylwin, Caron, Drummond, Badgley					Motion de l'Intimé pour substitution de Procureur—Accordée.
11	Gravelle	Bélanger	"	"	"	"	"	"	"	Do Do Do
25	Glassford	Farrell	"	"	"	"	"	"	"	Cause arrangée—Ordonnée qu'elle soit rayée du Rôle.
73	Duchesneau	Turgeon	3	"	"	"	"	"	"	Rayé du Délibéré—Nouvelles audition ordonnée.
71	McGillivray	Brady	6	"	"	"	"	"	Loranger	Motion on the part of the said respondent that inasmuch as the said respondent hath since the rendering of the judgment from which this appeal is brought found a receipt for the sum of £50 currency paid before the institution of the appellant's action to the said appellant on account off the instalments of the obligation alleged by the plaintiff's declaration in this cause fyled to be due to the Plaintiff by which said sum of fifty pounds together with the other sums paid to the plaintiff before the institution of the said action, the whole amount so alleged to be due to the Plaintiff is paid and extinguished: that this court do by the Judgment to be by this Honorable Court rendered in case the said judgment should be in favour of the said appellant; expressly reserve the right of the Respondent to set up the amount of the said receipt in compensation of instalments of the said obligation accrued since the institution of this action and further that for the reasons aforesaid the deliberé in this cause be discharged to allow the said Respondent to fyle this motion and the said receipt and accompanying affidavit—Rejected with costs.
53	Chapleau	Debien	"	"	"	"	"	"	"	Motion de la part de l'Intimé pour substitution d'avocat et procureur—Accordée de consentement.
12	Brunet Létang	Brunet Létang	"	"	"	"	"	"	"	Motion pour faire décheoir les Intimés de leur appel au

NOS.	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS.
					Conseil Privé et renvoyer le dossier à la Cour Inférieure avec dépens, vû qu'ils n'ont pas, dans le délai prescrit par cette Cour, fourni le cautionnement requis pour l'appel au Conseil Privé de Sa Majesté suivant l'ordonnance de cette Cour en date du 9 septembre dernier—Accordée de consentement écrit.
76	Burland	Larocque & Sauvageau	" " " " " " " "		Requête de Tancrède Sauvageau, écr., en sa qualité de syndic à la faillite du dit Hector Larocque, Intimé, concluant à ce qu'il lui soit permis de prendre et continuer l'instance au lieu et place du dit Intimé Larocque d'après les derniers erremens avec dépens des présentes contre qui de droit—Accordée de consentement.
	Mackay	Cook	" " " " " " " "		Motion pour appel de jugement Interlocutoire—Accordée —Bref à émaner d'aujourd'hui en 20 du courant.
70	Daley	Coffey	7 " " " " " " "		Cause rayée du rôle à la demande de l'appelant.
68	Cushing	Davis	" " " " " " " "		Rule discharged by and with the consent of the parties.
"	"	" & Dunkin	" " " " " " " "		Petition of Mathilda Dunkin, widow of the late Wm. H. A. Davis and sole acting Trustee and Executrix of the said Wm. H. A. Davis under and by virtue of his last will and testament to be permitted to intervene and in her said capacity to take up the instance in this cause according to the *derniers erremens* and proceed there in due cause—Granted by a written consent.
89	Hamelin	Stewart	" " " " " " " "		Motion de la part de l'appelante pour substitution d'avocats et Procureurs—Accordée du consentement de toutes les parties.
51	Leamy	McCready	" " " " " " " "		Motion for *acte* on behalf of the Respondents that they desist from the judgment of the Superior Court. —Granted by consent.
51	Leamy	McCready	7 " " " " " "		Motion for *acte* on behalf of the Appellant of full settlement of debt and claim and to be allowed to witbdraw the present appeal without costs, and that Record be remitted—Granted by consent.
16	Nagle	Felton	9 " " "	Caron, Loranger, Johnson	Conf.
12	Holyoke	King	" " " "	" Badgley, "	"
1	Archambault	Blumhart	" " " "	" Drummond, "	"
40	British Amer. Land Co.	Montreal Fire Ins. Co.	" " " "	" Caron, Drummond "	Nouvelle audition ordonnée
31	Curran	O'Connor & Lennon	" " " "	" " "	Conf.

47	Joslyn	Baxter	" " " " " " " "		" Appel à Sa Majesté accordé de consentement—Cautionnement sous 6 semaines.
93	Ellice	Courtemanche	" " " " " " " "		
92	Eastty	Fabrique St. Nom		Badgley	Conf.

40	British Amer. Land Co.....	Montreal Fire Ins. Co.....	"	"	"	"	Drummond,	"		Nouvelle audition ordonnée
31	Curran.....	O'Connor & Lennon	"	"	"	"	Caron, Drummond	"		Conf.
47	Joslyn.....	Baxter.....	"	"	"	"	"	"		" Appel à Sa Majesté accordé de consentement—Cautionnement sous 6 semaines.
43	Ellice.....	Courtemanche.....	"	"	"	"	"	"	Badgley	Conf.
92	Eastty.....	Fabrique St. Nom	"	"	"	"	"	"		Inf.
46	Fabrique Varennes.....	de Marie, Mon.. Jodoin.....	"	"	"	"	"	"		"
91	Stevenson & *al.*	Hingston.....	"	"	"	"	"	"		Conf.
71	McGillivray.....	Brady.....	"	"	"	"	"	"		Réformé.
33	Lemoine.....	Gauthier.....	"	"	"	"	"	"		Ré-audition ordonnée.
78	de Tonnancour..	Salvas.....	"	"	"	"	"	"		"
6	Beaudry.....	Le Maire, *et al* de Montréal.....	"	"	"	"	"	"		"
	Exparte.....	Meunier Lapierre...	"	"	"	"	Aylwin, Caron, Drummond, Badgley			Inf.
45	Charlebois & *al.*	Bertrand.....	"	"	"	"	"	"		Motion pour Bref d'*Habeas Corpus*—Rejettée.

Motion de la part de l'Intimé que les Appelants soient tenus sous tel délai qu'il plaira à cette Cour de fixer, de fournir une nouvelle caution bonne et solvable et qui justifie sa solvabilité, en remplacement de Germain Desève, caution fourni à l'acte de cautionnement du 5 avril 1867, et qu'à défaut par eux de ce faire le présent appel soit renvoyé avec frais contre les appelants pour entr'autres raisons les suivantes:—1. Parceque la dite caution Germain Desève est notoirement insolvable, qu'elle est en banqueronte et sous l'effet de l'acte de faillite de 1864. 2o. Parceque A. B Stewart, Syndic officiel a été nommé Syndic aux biens du dit Desève. 3o. Parceque par la banqueroute et l'insolvabilité du dit Desève, l'Intimé ne se trouve plus à avoir de la part des appelants, la garantie voulue au désir de la loi, de poursuivre le présent appel effectivement, et pour le paiement des dépens et dommages, qui pourraient être adjugés en faveur de l'Intimé, dans le cas où le Jugement de la Cour Inférieure serait confirmé. 4o. Parceque sans une nouvelle caution bonne et valable, donné dans le présent appel pour remplacer le dit Germain Desève, l'Intimé pourra être lésé. 5o. Parceque le dit cautionnement fourni le 5 Avril dernier, est devenu et est insuffisant, le tout avec dépens —Accordée—Cautionnement à être donné dans six semaines.

73	Herrick.....	Sixby.....	"	"	"	"	"	"	Sic. Juge en Chef, Aylwin, Caron, Drummond, Badgley	Motion as to taxing certain costs of Appeal to Privy Council—Discharged without costs.

NOS.	APPELANTS.	INTIMÉS.	JUGES.	JUGEMENTS.
53	Chapleau.....	Dubien	" " " " " " " "	Requête sommaire de l'Intimé, sous forme d'Exception péremptoire à la forme contre avis de cautionnement annexé au Bref d'Appel, contre le cautionnement formé par l'appelant, l'insuffisance de ce cautionnement, contre le Bref d'Appel contre la signification du Bref d'Appel et le rapport du dit Bref en Cour et des Record et papiers en cette cause: exposant: 1o. Que l'avis de cautionnement annexé au Bref d'Appel ne contient les noms d'aucune des personnes que l'Appelant voulait présenter pour ses cautions, ce qui mettait l'Intimé dans l'impossibilité de connaître ou pouvoir prendre des renseignements sur la solvabilité des cautions; que la loi et la pratique ont toujours obligé ceux qui étaient appelés à fournir caution, à en donner les noms, prénoms, qualité et résidence, ce qui n'a pas eu lieu dans le cas actuel. 2o. Que le cautionnement tel que fait est insuffisant, attendu qu'il ne contient la description d'aucuns biens immeubles et qu'un cautionnement légal de cette espèce doit reposer sur des propriétés foncières, ce qui n'a pas eu lieu sous le cas actuel. 3o. Que le dit Bref d'appel émané en cette cause n'a pas été signifié à l'Intimé ni à ses procureurs *ad. litem* et la Cour ni les parties ne peuvent prendre connaissance du dit bref et de sa prétendue signification vû que l'huissier qui fait un retour n'est pas et n'était pas alors immatriculé de cette Cour, son nom n'est pas inscrit au tableau des huissiers de cette Cour, et que le dit huissier se dit et signe huissier de la Cour Supérieure, et comme tel il n'aurait pas qualité ni pouvoir de faire la signification du dit Bref et avis de cautionnement, qu'ainsi la signification du dit Bref et avis de cautionnement et le retour au rapport du dit Huissier, sont nuls, informes, irréguliers et sans effet. 4o. Et que le rapport du dit Bref, record et papiers en cette cause sont et doivent être déclarés nuls et sans effet et concluant à la nullité de l'avis de cautionnement, du cautionnement, retour ou rapport de l'huissier, la signification du bref, le bref et le rapport en Cour du dit et autres procédures, et partant l'Intimé déchargé de l'obligation de répondre au dit appel et au ren-
	McDonald & *al*.....Grand Trunk R. Co..... Larose.....Beigne[illegible]ref	" " " " " " " " "		voi et débouté du dit appel avec dépens contre l'Appelant—Renvoyé avec dépens.— Motion pour appel de Jugement Interlocutoire—Rejettée

McDonald & *al*.....	Grand Trunk R. Co.....	"	"	"	"	"	"	"	
Larose.....	Seigneurs du fief Laganetière..	"	"	"	"	"	"	"	

voi et débouté du dit appel avec dépens contre l'Appelant—Renvoyé avec dépens.—Motion pour appel de Jugement Interlocutoire—Rejettée.

Motion des Intimés que le bref d'appel émané de cette le 26e jour de Novembre dernier à la demande de l'appelant dans une matière ou instance où les dits Seigneurs du fief Laganchetière étaient requérants et le dit Augustin Larose était propriétaire et interressé, soit cassé, mis de côté et soit déclaré avoir été émané illégalement et le dit appel renvoyé avec dépens pour les raisons suivants : Parceque l'ordre confirmant le Rapport des Arbitres en cette matière ou instance dont ce plaint l'appelant et donné par la Cour Supérieur siégant en la cité de Montréal le 25 Septembre dernier n'est pas un Jugement qui donne lieu à un appel devant cette Cour :—Parcequ'il n'y a pas et ne peut y avoir d'appel, devant cette Cour, d'un tel ordre. Parceque le dit bref d'appel a été émané illégalement et sans droit.—Rejetté avec dépens.

1. Beaulieu.....	Charlton.....	9	"	Juge en Chef, Caron, Drummond, Badgley, Justice Aylwin,	*diss.*		

Motion on behalf of Respondents that the present appeal be declared premature and hence dismissed with costs in as much as the same was taken within the delays allowed for the Revision of the judgment rendered by the Honourable M. Justice Loranger and in as much as the said Charlton had duly inscribed the cause for Revision before the Superior Court sitting in Montreal as Court of Review and that the Record in this cause be committed to the court below.—Granted.

Raymond.....	Durocher.....	"	"	"	"	"	
				Juge Aylwin, Juge Drummond,	*diss.*	Badgely.....	Motion du défendeur pour permis d'appel d'un jugement Interlocutoire—Rejettée.
55 Spelman.....	The Queen.....	"	"	"	"	"	
31 Curran.....	O'Connor & Lennon	"	"	"	"	Aylwin, Caron, Drummond, Badgley.	Judgment quashing the Return.
						Johnson.	Appel au conseil Privé—Accordé—Cautionnement sous six semaines.
Carlise & *al*.....	McGibbon.....	"	"	"	"	"	

Badgely. Motion on behalf of the Respondent that whereas the said Appellants have failed and neglected to make and present their Petition in appeal before this Court within the delay prescribed by law, that the appellants and the present appeal be deemed to be deserted and be declared so, and be dismissed with costs—Granted by written consent.

NOS.	APPELANTS.	INTIMÉS.	DATE.	JUGES.	JUGEMENTS
	Exparte	Sevigny	" " "	" " " " "	[illegible] pour être admis huissier—Accordée.
	Exparte	Boucher	" " "	" " " " "	Do Do Do
16	Nagle	Felton	" " "	" " Johnson	Appel à Sa Majesté—Accordé—Cautionnement sous six [illegible]

QUEBEC.

25	Alywin	Venner	14 Dec.	Juge en Chef, Drummond, Bedgley, Loranger	Ordonné que cette cause soit rayée du rôle des Inscriptions
26	Aylwin	Venner	" " "	" " " " "	Do Do Do
37	Venner	Aylwin	" " "	" " " " "	Do Do Do
29	Tetu	McKenzie	16 " "	" Caron, Drummond, Badgley	Motion pour faire décheoir l'Intimé de son droit d'appel à Sa Majesté faute par lui d'avoir abandonné son appel —Accordé.
91	Murphy	McClaren	17 " "	" Aylwin, Caron, Drummond, Loranger.	Permis à Campbell, écr., d'être substitué à Gugy, écr., Procureur de McLaren.
91	"	"	18 " "	" " " "	Motion par Gugy écr., pour Sa Majesté—Renvoyée.
41	Brown	Gugy	" "	Juges " Badgley	Motion de l'Intimé pour appel à Sa Majesté—Renvoyée.
				Juge en Chef, Juge Drummond, } *diss.*	
28	Pacaud	Gagné	19 Dec.	Juges Drummond, Mondelet, Badgley, Loranger	Motion de l'Intimé pour appel à Sa Majesté—Renvoyée.
89	McLaren	Connoly	" " "	Juges en Chef, Aylwin, Caron, Drummond	Permis à Campbell écr., d'être substitué à Gugy, écr. procureur de McLaren.
46	Corporation Quai St Jean	Plante	" " "	" " Caron, Drummond, Loranger	Inf.
51	Dupont	Simard	" " "	" " " Badgley	"
59	Corporation de Victoriaville	Richard	" " "	" " " "	Conf.
52	Denis	Glass	" " "	" " " " Juge Badgley, } *diss.*	Inf.
83	Robertson	Symes	" " "	" " " " Badgley	Conf.
47	Demers	Walker	" " "	" " " " "	"
54	Reid	Warner	" " "	" " " " "	"
57	Pacaud	Mercure	" " "	Juges Caron, Drummond, Badgley, Loranger	"
55	Pacaud	Duperron	" " "	" " " " "	"
32	Carrier	Beaumont	20 "	Juge en Chef, Aylwin, Caron, Drummond, Badgley	Motion de l'appelant pour faire émaner un Bref de *Certiorari*—Accordée.
52	Deniss	Glass	" " "	" " " " "	Motion de l'Intimé pour appel à Sa Majesté—Refusée.
				Juge Aylwin, Badgley, } *diss.*	

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TO THE PRINCIPAL MATTERS IN THE ELEVENTH VOLUME

OF THE

LOWER CANADA JURIST.

COMPILED BY

STRACHAN BETHUNE, Q. C.

ACTION, (*cause of*)—*Vide* CAPIAS AD RESPONDENDUM.

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ADMIRALTY:—When a collision occurs, in consequence of deficiency of look-out and management on board, and not solely from any fault or neglect of the Pilot in charge, the owner of the vessel in fault cannot claim exemption from liability for the damage caused by the collision, on the ground that he was compelled to have a Pilot on board. (The 'Secret,' V. A. C.)..... 8

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DOUAIRE COUTUMIER :—In action for, by the children, it is unnecessary to prove that there were not other properties in the succession subject to the dower sufficient in value to meet it ; the *onus probandi* of the fact being on the party prosecuted. (Lepage et al. vs. Chartier, S. C.)..... 29

" :—The share of the children renouncing does not accrue to the other *donairiers*, but falls into the succession of the father. (Do.)..... 29

ERROR, *Writ of* :—*Vide* CONTEMPT.

" " " CRIMINAL PRACTICE.

EVIDENCE :—*Vide* PRACTICE.

" :—In an action against the Corporation of Montreal, for damages caused by negligence in the performance of works which they are authorized

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by law to make, declarations made by them in protests against their contractors will be taken as evidence against them. (Harold, appellant, and the Mayor, &c., of Montreal, respondents, Q. B.)..... 169

EVIDENCE :—*Vide* INSOLVENT ACT OF 1864.

" :— " MARRIAGE.

" :—The evidence of a witness may be contradicted, by proving by another witness certain statements made by him in a conversation with respect to which conversation he himself had not been interrogated. (Méthot vs. Lalonde dit Ganiwas, S. C.)..... 301

EXCEPTION DECLINATOIRE :—*Vide* PRACTICE.

" DE DISCUSSION :— " "

EXECUTOR :—An, cannot be sued for the recovery of a specific sum alleged to have been collected by him as executor and to belong to the estate of the Testator, but must be sued to render an account. (McPhee, appellant, and Woodbridge, respondent, Q. B.)..... 100

FAITS ET ARTICLES :—A rule for, on the plaintiffs, who by the declaration and writ appeared to be residents in a foreign country, cannot be legally served at the Prothonotary's office. (Tarratt et al. vs. Foley & al., S. C.)..... 139

HABEAS CORPUS :—A conviction by a court martial, of having fraudulently embezzled *or* misapplied a quantity of cord wood, is null and void (the 17th section of the Mutiny Act making embezzlement, *fraudulent* misapplication, &c., crimes) and a commitment to the common jail under such conviction will be quashed and the prisoner released from custody. (*Exparte* Robert Moor[illegible] *Habeas Corpus*, Q. B.)..... 94

HYPOTHEQUE :—A, acquired on t[illegible]ty of a non-trading debtor, whilst *en état de décomfiture* is v[illegible] absence of fraud. (McConnell vs. Dixon, and Browne, appl[illegible]ould et al., contesting, S. C.)..... 300

INSOLVENT ACT OF 1864 :—A discharge will be confirmed, unless positive proof be adduced of "fraud or fraudulent preference" on the part of the insolvent. (Exparte Thurber, and Law, Young et al., creditors opposing, S.C.) 35

" :—*Vide* CAPIAS AD RESPONDENDUM.

" :—A party buying goods on credit and knowing his affairs to be in a bad state, although without intending to defraud the vendor, and subsequently declaring himself insolvent, is not entitled to his discharge under the Act. (Exparte Tempest, and Duchesnay et vir, opposants, S. C.)..... 57

" :—An assignee, under the, cannot be sued for the recovery of the price of real estate sold to the Insolvent. (Kuper vs. Stewart, S. C.)..... 85

" :—The *onus probandi* is on the petitioner, under sub-section 3 of section 3 of the Insolvent Act of 1864, to establish that his stoppage is only temporary, and that his assets are sufficient to meet his liabilities. (McCready et al., appellants, and Leamy, respondent, S. C.)..... 193

" :—A dividend sheet, unpublished according to the requirements of the Act, is null and void. (Re Larivière, insolvent, and Whyte, assignee, and McEvilla, contestant, and Angers, appellant, S. C.)..... 265

" :—A decision of an assignee is final, if not appealed from in three days. (Do. Do.)..... 265

:—A voluntary assignment made to an official assignee who does not reside in the district where the Insolvent resides and carries on his business, is null. (Douglas vs. Wright, and Brown, opposant, S. C.)... 310

:—Do. (Hingston vs. Campbell, C. L. C. U. C.)..... 315

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INSURANCE:—In the case of a fire policy on buildings described as dwellings, endorsed to the effect that any change of occupation by which the risk is increased must be notified in writing to the Insurance Company, and endorsed on the policy, and that in default thereof the Insurance shall be null and void; the change of occupation into a tavern, without notice to or consent of the Company, renders the policy [illegible] withstanding an intermediate change of occupation in [illegible] tory may have been sanctioned by the Company, and [illegible] may have found that the risk of the tavern was not gre[illegible] of the vinegar factory. (Campbell vs. the Liverpool and [illegible] and Life Insurance Company, S. C.)..... .....

INTERVENTION:—*Vide* PRACTICE.

JOINT PROPRIETORS:—Where one of many, interferes with the enjoyment of one o[illegible] co-proprietors, the latter has a right of action *en complainte*. (De Bel[illegible] feuille et al., appellants, and Globensky et al., respondents, Q. B.)..... 75

LEASE:—Where a, has been continued for one year, by *tacite réconduction* no notice is necessary to terminate the lease thus continued, and the same legally expires at the end of the year. (Lafl[illegible]mme vs. Fennell, C. C.)..... 286

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MARRIAGE:—A, between two Roman Catholics, will not be annulled, for cause of *impuissance*, until after the sacrament of marriage has been annulled by ecclesiastical authority. (Lussier vs. Archambault, Q. B.)..... 53

" :—*Vide* PRESCRIPTION.

" :—A, contracted at Rat River in the North West Territory, between a Christian and a Cree Squaw, according to the custom of the Cree Indians, is valid, notwithstanding the existence of polygamy and divorce or repudiation at will amongst such Cree Indians, if such marriage be followed by constant cohabitation and repute and the bringing up of a numerous family, during a series of years, and the right of divorce or repudiation be not exercised whilst the parties reside in the Territory in question. (Connolly vs. Woolrich, and Johnson et al., defendants *par reprise d'instance*, S. C.)..... 197

" :—A, solemnized in due form, *in facie ecclesiæ*, will be treated as null and void, by proof, by oral evidence, of a prior existing marriage contracted as above stated. (Do. vs. Do. and Do.)..... 197

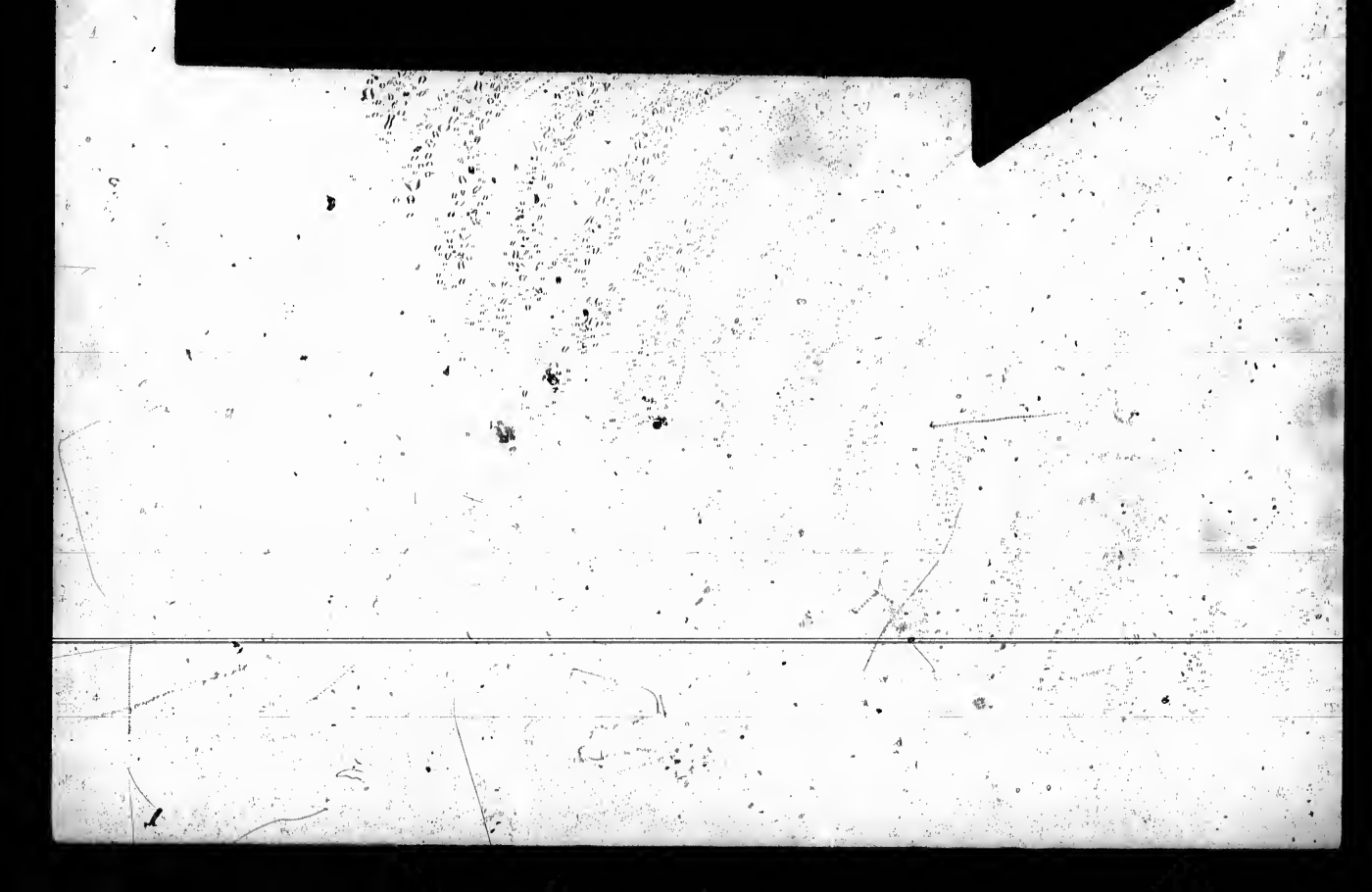
" :—A, solemnized within two days of the death of one of the contracting parties, will not be held to be a marriage *in extremis*, unless the party was aware at the time that he was in his last illness and in immediate danger of dying. (Scott, appellant, and Paquet et al., respondents, P. C.)..... 289

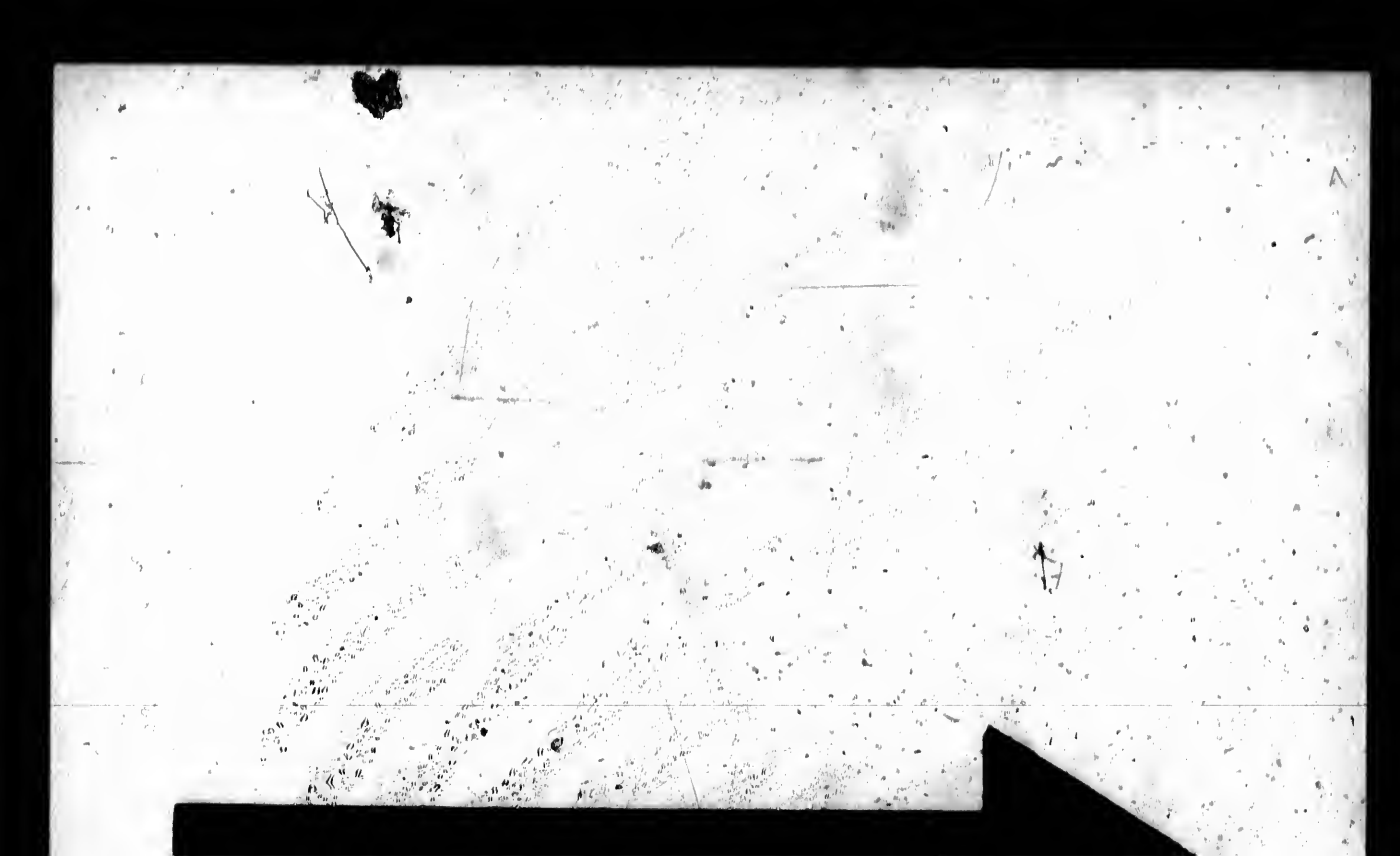
" :—A, between two Roman Catholics, will not be annulled, until after the sacrament of marriage has been annulled by Ecclesiastical authority. (Vaillancourt vs. Lafontaine, S. C.)..... 305

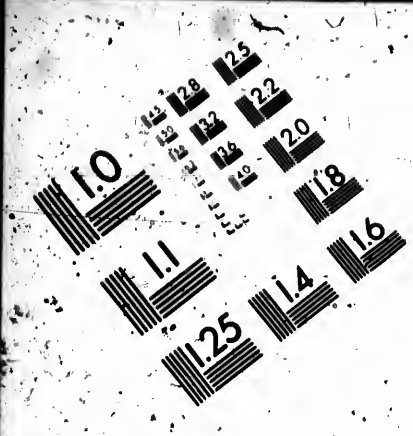
" :—A, celebrated by a Priest who is not the *curé propre* of the parties, is null, (Do)..... 305

" :—A, celebrated with a deceased wife's sister is null. (Do.)..... 305

MARRIED WOMAN:—A, sued by her husband, does not require to be authorized to appear *en jugement*. (Lussier vs. Archambault, Q. B.)..... 53







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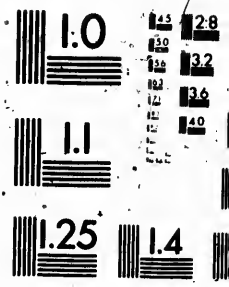

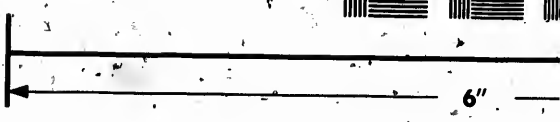

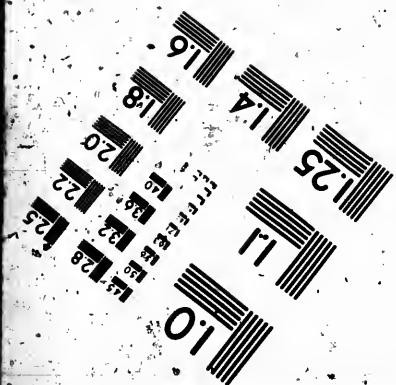

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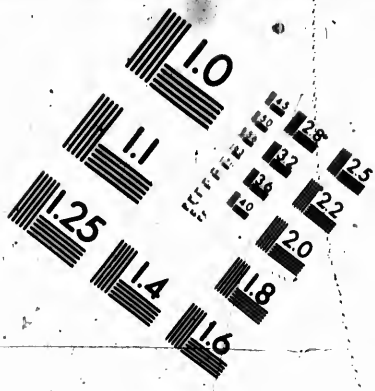

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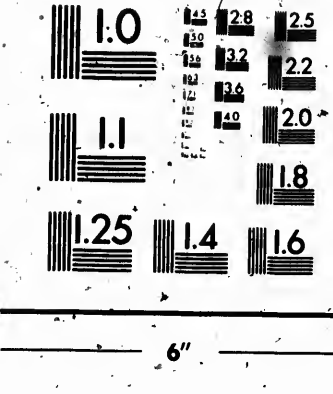

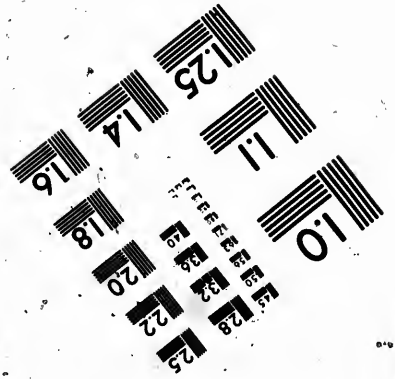

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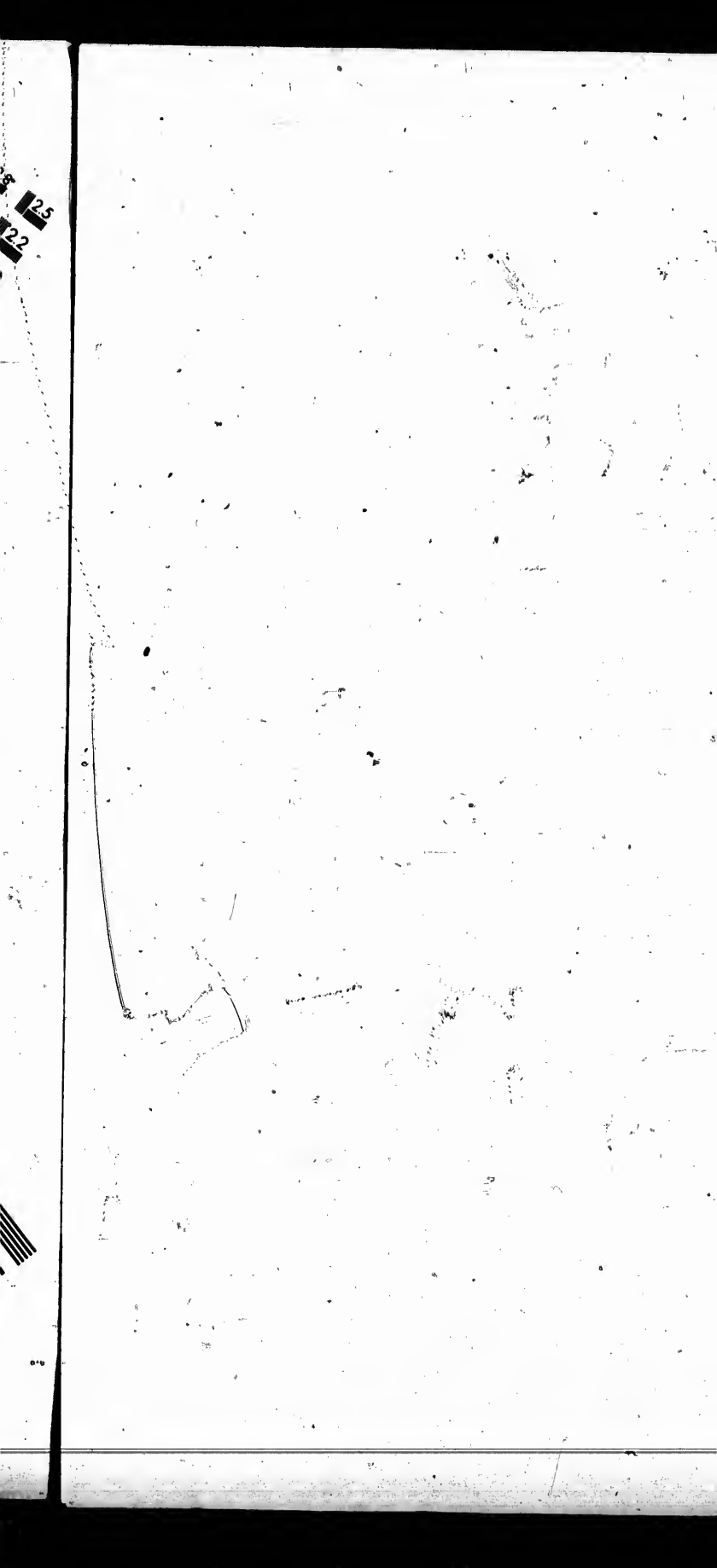

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MONTREAL, (*Corporation of*):—If the, in the excavation and construction of works which they are authorized by law to make, or their contractors, are guilty of negligence which causes damage, the corporation are liable for such damage. (Harold, appellant, and the Mayor, &c., of Montreal, respondents, Q. B.)..... 169

NUISANCE:—A person convicted of keeping an excessive quantity of gunpowder in a building, is guilty of a nuisance, for which he may be condemned to pay a fine of £50 and be imprisoned until the fine be paid; and in such a case the Court may order the Sheriff to prostrate the nuisance, by the immediate destruction of the powder. (Regina vs. Dunlop, Q. B.) 186

POSSESSOR IN GOOD FAITH:—*Vide* RENTS, ISSUES AND PROFITS.

PRACTICE:—*Vide* COSTS.

" :—*Vide* APPEAL.

" :—When a party has been cross-examined on an affidavit made by a party in a suit, in support of an application to re-plead, his answers cannot be taken advantage of, on the hearing of the case on the merits. (Lepage et al. vs. Chartier, S. C.)..... 29

" :—*Vide* COURT OF REVIEW.

" :—*Vide* WITNESS.

" :—A plea of prescription need not be pleaded before a *défense au fond*. (Beaudry vs. Brouillet et *vir*, S. C.)..... 50

" :—*Vide* MARRIED WOMAN.

" :—An action brought by husband and wife conjointly as plaintiffs (the husband being really a party only to authorize his wife) in which they pray that the defendant be condemned to pay *them*, will be dismissed on demurrer. (Leford et *vir*, vs. Desmarais et al., Q. B.)..... 122

" :—When a consignee in Montreal, of goods consigned to him from U. C., accepts a draft drawn by the consignor in U. C., in anticipation of product of sale, which subsequently proves to be less than the acceptance, the cause of action, to recover back the excess of the amount paid under the acceptance over the net produce of sale, arises in Montreal. (O'Connor, appellant, and Raphael, respondent, Q. B.)..... 123

" :—*Vide* FAITS ET ARTICLES.

" :—*Vide* COMMISSION ROGATOIRE.

" :—*Vide* ERROR, *writ of*.

" :—An exception of discussion which fails to indicate the property to be discussed, or to allege even the existence of property liable to discussion, and which also fails to contain an offer to defray the expense of discussion, and to be accompanied by the actual deposit of the necessary funds to that end, is bad in law, and will be dismissed on demurrer. (Panton et al. vs. Woods et al., S. C.)..... 168

" :—Where a female has been sued as widow, but is in reality the wife of the other defendant who has been sued in his quality of executor of a will, and the return of service establishes that the copy of the writ and declaration for the female defendant was left with the male defendant personally, the plaintiff may amend the writ and declaration, so as to describe the female defendant correctly. (Connolly vs. Bonville et al., S. C.)..... 192

" :—*Vide* DISTRIBUTION.

" :—*Vide* LITISPENDENCE.

" :—An intervening party cannot foreclose an original party to the cause without a preliminary demand of plea to the intervention, and such

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foreclosure will be set aside on motion. (Walcott vs. Robinson, and Johnson, opposant, and Barnes, intervening party, S. C.)..... 303

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" :—A marriage may be annulled, for cause of *impuissance* even after a lapse of 21 years from the date of the marriage. (Lussier vs. Archambault, Q. B.)..... 53

" :—*Vide* PROMISSORY NOTE.

" :—The junction of possession, to sustain a plea of 30 years prescription, does not require a title, in itself *translatif de propriété* from the one possessor to the other, but any kind of informal title, *sous seing privé*, supported by verbal evidence, will suffice. (MacDonald, appellant, and Nickle et al., respondents, P. C.)..... 335

" :— A surrender to the crown by a Seignior, under the Canada Tenures Act, for the purposes of commutation, would not interrupt prescription running at the time in favour of a party occupying a lot in the Seigniory thus surrendered. (Do.)..... 335

PROMISSORY NOTE:—The prescription of 5, made in a foreign country and payable there, cannot be tested by a demurrer to the declaration. (Wilson, appellant, and Demers, respondent, Q. B.)..... 105

RAILWAY:—A passenger holding a ticket entitling him to return within a specified period, and attempting to return after the expiration of such period, may be lawfully ejected from the train, on refusing to pay full fare. (The Grand Trunk R. W. Co., appellant, and Cunningham, respondent, Q. B.) 107

RENTS, ISSUES AND PROFITS:—A possessor in good faith, at the time he acquires, may make *les fruits siens*, although he may subsequently become aware of the vicious character of his title. (Lepage et al. vs. Chartier, S. C.)... 29

REPAIRS may be legally exacted from the actual proprietor of a property leased by a former proprietor. (Sachs, appellant, and Courville et al., respondents, Q. B.)..... 119

SQUATTER'S ACT:—In an action under the, if the defendant prove that his possession of the plaintiff's land was with the knowledge of the plaintiff's agents, and that he had paid the taxes and made ameliorations, also to the knowledge of such agents, he is entitled to recover the value of his ameliorations, and to retain possession of the land till he is paid the value of such ameliorations. (Ellice, appellant, and Courtemanche, respondent, Q. B.)..... 325

WILL:—A, made in solemn form, by a person who could not write or sign his name, and who was wholly ignorant of any other language than Gaelic, before a Notary who only spoke and understood the French language, and two witnesses, one of whom was wholly ignorant of the French language (in which the will was written) and the other spoke English, French and Gaelic, and acted as interpreter all round, is valid. (Dowar vs. McLennan, and McLennan, plaintiff *en faux* vs. Dewar, defendant *en faux*, S. C.)..... 196

WITNESS:—A, may sue out a *saisie arrêt en main tierce*, from the recovery of his taxation, under Sec. 153 of Ch. 83 of the Cons. Stat. of L. C. (De Beaumont vs. Gauthier, and Gauthier, plaintiff as taxed wits., & Pratt, T. S., S. C.) 49

" :—A husband of a party in the cause, summoned for the mere purpose of authorizing his wife, cannot be examined as a witness in the cause, either for or against his wife, even though she is a *marchande publique* and carrying on business through her husband as her duly authorized agent. (Ireland, appellant, and Duchesnay et *vir*, respondents, Q. B.) 51